

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 6/17/2024

Re: June 2024 Policy and Law Memo

Please find below, per your request, an analysis of pertinent proposed regulations and bills identified by councils as being of interest.

I. PROPOSED STATE REGULATIONS

➤ **PROPOSED DELAWARE DEPARTMENT OF EDUCATION (DOE) REGULATION RELATED TO PROFESSIONAL DEVELOPMENT STANDARDS AND STANDARDS FOR PROFESSIONAL LEARNING, 27 DEL. REG. 927 AND 945 (JUNE 1, 2024).**

DOE is proposing to repeal 14 Del. Admin. Code § 1598 Delaware Professional Development Standards, via the rulemaking at 27 Del. Reg. 945, and adopt instead a new regulation, 14 Del. Admin. Code § 288, Standards for Professional Learning, 27 Del. Reg. 927. These regulations set forth the professional learning standards for educators in Delaware public schools, how the standards are applied, and how the standards are enforced. These rulemakings should be considered in tandem. Senate Substitute 1 for Senate Bill 304, discussed below in section III, also addresses educator training.

Section one, Content, is a briefer and consolidated description of the content for professional learning. It continues to be based on Learning Forward’s Standards for Professional Learning.

Section 2.0. Definitions, of the proposed new regulation adds a definitions section, defining the terms Educator, Department, and Professional Learning.

Section 3.0, Prerequisites for Professional Learning, is substantively very similar to the prerequisites section in the current (and proposed to be stricken) regulation, but with references to the frames elaborated on in section 5.0. Both versions contain a statement acknowledging that “[l]ike all learners, educators learn in different ways and at different rates” which is supportive of educators with disabilities.

From here, the two regulations are organized differently. The proposed new regulation continues with **Section 4.0, Framework of the Standards for Professional Learning,** which gives an overview of the three frames: rigorous content, transformational process, and conditions for success.

Section 5.0, Frames, details the standards that are the core constructs that outline the professional learning objective educators are required to attain within the content. Of note, throughout this section equity is discussed.

5.1.1 Equity practices. Educators understand students' historical, cultural, and societal contexts, embrace student assets through instruction, and foster relationships with students, families, and communities.

...

5.2.1 Equity drivers. Educators prioritize equity in professional learning practices, identify and address their own biases and beliefs, and collaborate with diverse colleagues.

...

5.3.1 Equity foundation. Educators establish expectations for equity, create structures to ensure equitable access to learning, and sustain a culture of support for all staff.

5.3.2 Culture of collaborative inquiry. Educators engage in continuous improvement, build collaboration skills and capacity, and share responsibility for improving learning for all students.

*5.3.3 Leadership. Educators establish a compelling and **inclusive** vision for professional learning, sustain coherent support to build educator capacity, and advocate for professional learning by sharing the importance and evidence of impact of professional learning.*

*5.3.4 Resources. Educators allocate resources for professional learning, **prioritize equity in their resource decisions, and monitor the use and impact of resource investments.***

This section of the proposed new regulation reframes the current regulations discussion of leadership, resources, data, and learning into the framework and into an equity lens. The need to train educators on equity, and to include an equity lens when conducting professional development, is sorely needed. According to Delaware's Every Student Succeeds Act ("ESSA") Plan¹, 64% of low-income students, 85% of English language learners and 86% of students with disabilities did not meet the state standards in grades three through eight for English Language Arts established by the state; similarly 74% of low income students, 81% of English language learners and 89% of students with disabilities did not meet the state's math standards in those grades. Statistics based on race and ethnicity are similarly concerning - data compiled by Propublica shows significant racial disparities in our state's education: Black students are 3.5 times as likely to be suspended than white students and Hispanic 1.5 times as likely as White students, whereas white students are 2.1 times more likely to be enrolled in at least one or more

¹ Available at <https://education.delaware.gov/community/funding-contracts/federal-and-state-programs/essa/>.

AP class and 2.5 times more likely than Hispanic students.² In Delaware, where 31% of our students are Black and 46% are white, 57% of our out-of-school suspensions are for Black students, compared to 24% for White Students; expulsion rates are similar (56% vs. 30%).³ In at least one Delaware district discipline rates were reported as 5.1 times higher for Black students, compared to white students, coupled with an achievement gap of as much as 2.8 grades (Brandywine School District).⁴

Section 6.0 and 7.0 of the proposed new regulation address applicability and enforcement of the standards.

Recommendations:

- 1) **Councils may wish to commend DOE for incorporating equity principles into the standards for professional learning.**
 - 2) **Councils may wish to suggest that disability and ableism be explicitly included such as:**

5.1.1 Equity practices. Educators understand students' historical, cultural, and societal contexts, including ablism, embrace student assets through instruction, and foster relationships with students, families, and communities.
 - 3) **Councils may wish to further suggest that DOE work with Councils to develop best practices curriculum addressing ablism in schools and society, and that the voices of individuals with disabilities should be prominent in any such trainings.**
- **PROPOSED DELAWARE HEALTH AND SOCIAL SERVICES (DHSS) PROPOSED STATE PLAN AMENDMENT RELATED TO IMPORTED DRUGS, 27 DEL. REGISTER OF REGULATIONS 950 (JUNE 1, 2024).**

DHSS seeks to amend the Delaware Medicaid State Plan to allow access to the federal Medicaid financial match for FDA unapproved drugs that have been as determined by the FDA or the American Society of Health System Pharmacies (ASHP) to be in shortage. By amending the State Plan, Delaware can receive the federal Medicaid payment match when recipients are prescribed these drugs.

The United States is currently experiencing shortages in important outpatient drugs, particularly biologics, and cancer medications.⁵ Even some common medications, such as albuterol and Adderall, have been in short supply. There has been much debate regarding the importation of

² <https://projects.propublica.org/miseducation/state/DE>

³ *Id.*

⁴ *Id.* See also: <https://www.delawareonline.com/story/news/education/2023/06/07/delaware-schools-suspension-rates-student-behavior-discipline-restorative-practices/70247312007/>

⁵ FDA Report to Congress on Drug Shortages, 2023, <https://www.fda.gov/media/179156/download>

FDA- unapproved drugs to help resolve these shortages.⁶ It is already the case that the US relies heavily on overseas manufacture of approved medications, or their components.⁷

There have long been very tight controls and restrictions on the importation of medications that have not been approved by the FDA. The FDA, under the Federal Food, Drug and Cosmetic Act (FFDCA) regulates all prescription medications in this country. The importation of unapproved drugs, including foreign-made versions of FDA approved drugs, is generally prohibited. The two exceptions to this rule are 1) as authorized by U.S. Department of Health and Human Services (DHHS) pursuant to a drug shortage, and 2) Pursuant to Section 804 of the FFDCA, which relates to imports from Canada, provided there is no additional risk to public safety and there would be significant reduction in cost, all as approved by the Secretary of DHHS.⁸ Until recently, this had never been done, despite public demand for access to these medications, and clear indicia of cost savings and safety.

However, in 2019, the FDA announced two pathways to facilitate importation of unapproved drugs. First, the FDA authorized states to request approval of plans to import drugs from Canada under Section 804 of the FFDCA, with the creation of time-limited Section 804 Importation Programs (SIPs). Second, the FDA authorized importation of certain drugs under their existing approvals in the US. Several states have filed for permission to operate a SIP, and Florida's request was granted in January 2024.⁹ Florida's program is limited, and there are many administrative hurdles as part of the approval. The drugs will only be available to participants in publicly funded health care (not private insured) and exclude certain medications, including biologics, infused drugs or controlled substances. Moreover, the pharmaceutical industry is threatening to sue to prevent implementation. Canada may choose to prioritize its own citizens if there is a supply crunch. It is unclear whether Delaware's DHSS intends to apply to import medications under Section 804's SIP processes. The language used (unapproved drugs) suggests that they are.

Additionally, the FDA has exercised "temporary regulatory flexibility and discretion" to authorize importation of medically necessary drugs when other methods of addressing shortages have been attempted.¹⁰

Delaware will want to be able to take advantage of the federal Medicaid match should purchase of these medications be needed for Medicaid recipients, whatever the program.

⁶ <https://aspe.hhs.gov/reports/preventing-shortages-supply-chain-vulnerabilities> (April 2024)

⁷ The geography of prescription pharmaceuticals supplied to the USA: levels, trends, and implications, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8109232>

⁸ Prescription Drug Importation, In Focus Brief, Congressional Research Service, January 22, 2024. <https://crsreports.congress.gov/product/pdf/IF/IF11056>

⁹ <https://www.kff.org/policy-watch/what-to-know-about-the-fdas-recent-decision-to-allow-florida-to-import-prescription-drugs-from-canada/#:~:text=Imported%20drugs%20will%20only%20be,residing%20in%20certain%20state%20facilities>

¹⁰ FDA Report, Supra at 12.

Recommendation: Councils may wish to endorse this State Plan amendment to allow access to the federal match for these medications, perhaps inquiring how DMMA plans to act once it has the regulatory authority to do so.

II. Final Regulations

- **DELAWARE HEALTH AND SOCIAL SERVICES (DHSS) RELATED TO FAIR HEARINGS, 27 DEL. REGISTER OF REGULATIONS 975 (JUNE 1, 2024)** – made changes per council’s requests.
- **DELAWARE DEPARTMENT OF EDUCATION, RELATED TO GUN FREE SCHOOLS, 27 DEL. REGISTER OF REGULATIONS 968 (JUNE 1, 2024)** – acknowledged Councils’ comments with no changes made.

III. PROPOSED BILLS

➤ **SENATE JOINT RESOLUTION 6**

Senate Joint Resolution 6¹¹ attempts to address inappropriate and unnecessary questions and inquiries regarding behavioral health made by state professional licensure boards. These questions may be discriminatory under the ADA, and also discourage health care professionals from either disclosing behavioral health issues or seeking treatment. This resolution is a follow up to SB 300, passed in 2022, that updated mandatory standards for reporting and disqualifying a physician due to a physical or mental health condition, linking them to current capacity and the possibility of improvement and/or treatment. These changes were made specifically to bring the statute into alignment with the ADA and to help remove the stigma (and the negative professional consequences) of seeking treatment.

This resolution asks that professional licensing boards under Title 24 “review all existing licensure, certification, and registration applications to revise any existing questions pertaining to mental health conditions that are not necessary to assess the current state of an applicant’s functional impairment to ensure that they are compliant with the requirements of the Americans with Disabilities Act no later than January 31, 2024.” The Resolution requires a report to be filed by February 2025, which includes certification that any forms or tools in use are ADA compliant. The professions listed include Podiatry, Chiropractic, Dentistry, Medical Licensure, Nursing, Occupational Therapy, Optometry, Pharmacy, Physical Therapy, Mental Health and Chemical Dependency, Psychologists, Speech-Language Pathologists and Audiologists, and Dietitians.

It has been clear for some time that broad questions about mental or physical health history by state licensing authorities are widely used, and also are generally illegal and violative of the

¹¹ <https://legis.delaware.gov/BillDetail/141014>

ADA.¹² The issue has come up repeatedly in the context of licensing for attorneys,¹³ and has been noted as a pervasive issue for medical professions, including dentistry.¹⁴ Any screening questions or inquiries must be narrowly tailored to solicit information about a person's *current* ability to perform the functions of the profession. The Resolution has passed the Senate and is in committee in the House.

Recommendation:

1) Councils may wish to endorse the Resolution as it seeks to ensure that inquiries are narrowly tailored both to avoid discrimination but also to reduce stigma and encourage health care professionals to seek treatment.

2) Councils also recommend that the sponsors update the dates by which the updates must be made, as currently it reads Jan. 2024 which has passed.

➤ **SENATE SUBSTITUTE 1 for SENATE BILL 304**

SS1 for SB 304¹⁵ reduces mandatory nonacademic training requirements for school personnel in several key areas of concern.

The decreases are as follows:

1. School bullying prevention and criminal youth gang detection training hours are reduced from 3 hours every 3 years to 1 hour every 3 years, and new employees must complete 1 hour of training within 1 year of employment.
2. Suicide prevention training hours are reduced from 4½ hours every 3 years to 3 hours every 3 years, and new employees must complete 1 hour of training within 1 year of employment.
3. Teen dating violence and sexual assault training hours for school administrators, nurses, and counselors serving students in grades 7 through 12 are reduced from 2 hours every 3 years to 1 hour every 3 years, and new employees must complete 1 hour of training within 1 year of employment.

The rationale given is that “school personnel have expressed concerns related to the time burden and relevance of required trainings.” (emphasis added). The bill does generally require the Department of Education in consultation with Child Protection Accountability Commission and the Division of Family Services of the Department of Services for Children, Youth, and Their Families, to review its trainings every three years and update them as needed.

¹² Medical Licensure Questions About Mental Illness and Compliance with the American with Disabilities Act, Journal of the American Academy of Psychiatry and the Law Online, December 2018, <https://jaapl.org/content/46/4/458>;

¹³ <https://www.justice.gov/opa/pr/departement-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates>

¹⁴ <https://adanews.ada.org/ada-news/2024/february/preventing-professional-discrimination/>

¹⁵ <https://legis.delaware.gov/BillDetail/141397>

It is worth noting that per the DOE Bullying Report for 2023¹⁶, LEAs reported 1,344 alleged bullying and cyberbullying incidents. This is undoubtedly an undercount of bullying events, as about 40% of bullying goes unreported.¹⁷ Nevertheless, this is a 7% increase from the prior year, when 1,257 incidents were reported.

Suicide was the third leading cause of death in people aged 10-24 in Delaware in 2021.¹⁸ The American Society for Suicide Prevention strongly encourages regular training for all school personnel in suicide prevention. It notes that “training for teachers and others who interact with students daily are in a prime position to recognize the signs of suicide risk and to make appropriate referrals.”¹⁹

Per the Department of Education 2023 Annual Report on Teen Dating Violence and Sexual Assault, assaults were up almost 40% between 2019-2020 and 2022-2023.²⁰ This report notes that in January 2024, the Domestic Violence Coordinating Council also began to partner with representatives from CPAC and DDOE to update its non-academic training on teen dating violence and sexual assault. This new training will be available for the 2024-2025 school year.

The Government Accounting Office issued a report in 2021 highlighting the increase in hostile behaviors in schools.²¹ It noted:

Exposure to such harassment and victimization can have lifelong consequences for students’ overall well-being if left unaddressed. These may include: depression, anxiety, involvement in interpersonal violence or sexual violence, substance abuse, poor social functioning, and poor school performance, including lower grade point averages, standardized test scores, and poor attendance.

Given the data that demonstrates increased incidences in bullying, suicides and teen dating violence and sexual assault in Delaware schools, the fact that such behaviors are under-reported, and that these issues are acknowledged to be pervasive and widespread across the country,²² it seems odd that the legislature would be allowing the Department of Education to reduce staff awareness and education on these matters. One wonders how these trainings could possibly be “irrelevant” given the prevalence of these issues in our schools. Moreover, the current required hours are hardly onerous.

Recommendation:

- 1) Councils may wish to consider opposing this bill and inquiring which school personnel have alleged such trainings are irrelevant and with what data support.**

¹⁶ <https://education.delaware.gov/wp-content/uploads/2024/02/2022-2023-Annual-Bullying-Report.pdf>;

¹⁷ <https://www.wested.org/wested-bulletin/insights-impact/current-trends-promising-practices-in-bullying-prevention/>

¹⁸ https://www.datocms-assets.com/12810/1707241399-delaware_2023_state_fact_sheet.jpg

¹⁹ <https://afsp.org/suicide-prevention-in-k-12-schools/>;

²⁰ <https://education.delaware.gov/wp-content/uploads/2024/02/TDV-2022-2023-Final.pdf>, Page 6.

²¹ GAO, Students Experiences with Bullying,,Hate Speech, Hate Crimes and Victimization In Schools, <https://www.gao.gov/assets/gao-22-104341.pdf>

²² Schools can face a host of liability issues for failure to identify and address these concerns. The GAO report highlights a number of enforcement actions against schools by federal authorities.

2) Any future training should provide data supporting why the training is relevant and necessary.

➤ **SENATE BILL 321**

Guardianship bill of rights.

Recommendation: Councils may wish to support this bill but encourage the addition of the Protection and Advocacy System to paragraph 11 (along with reports to APS).

➤ **SENATE BILL 330**

Misdemeanors related to school transportation interference.

Recommendation: Councils may wish to oppose the bill unless the following changes are made:

1) The exemption should refer only to paragraph (a) rather than (a)(3) to fully exempt students.

2) Add as noted in red: (c) A student or passenger who is, or who the student, parent, or guardian believes they are, otherwise authorized to be on the school bus in the ordinary course of business may not be guilty of disorderly conduct for a violation of paragraph (a)(3) of this section.

3) Add: (d) A parent or guardian who believes they are reporting a legitimate safety concern, or who are reporting a violation of a student with a disability's Individualized Education Program or Section 504 plan may not be guilty of disorderly conduct for a violation of paragraph (a) of this section.