Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 5/13/2024

Re: May 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 (DDOE)/ DELAWARE INTERSCHOLASTIC ATHLETIC ASSOCIATION (DIAA) BOARD REGULATIONS REGARDING STUDENT ATHLETE ELIGIBILITY: TRANSFERS, 27 DEL. REGISTER OF REGULATIONS 812 (MAY 1, 2024).

DDOE seeks to amend regulations related to eligibility for interscholastic athletics for students who transfer from one school to another. It proposes to strike current section 2.4 of 1009 DIAA High School Interscholastic Athletics and add a new 1029 Student Athlete Eligibility: Transfers. Per the Impact Statement, the new regulation is a result of deliberations of the DIAA Task Force, which sought to address issues related to transfers driven by athletic motivations, inappropriate pressure on student athletes and unauthorized recruitment of athletes by other schools.

The new regulation imposes an immediate period of ineligibility for most students who transfer from one school to another who have participated in competitive sports within the previous 180 days. There is a one-time exemption from this rule if: "the student transfers prior to the start of the earliest allowable start date of the fall sport's season of the student's third year of eligibility and the student does not participate in a contest in the same sport for different schools during the same school year." (New 4.2) The ineligibility periods are listed in new 4.3, which are generally 30 days or half of the maximum number of regular season contests, whichever is less.

There are several enumerated exceptions to the immediate ineligibility rule listed in New 5.0:

1. McKinney-Vento Act transfers for students who have become homeless;
2. Transfer Due to Court Action;
3. Relative Caregivers School Authorization;
4. Unsafe School Choice Policy (student attends persistently dangerous school or is victim of violent felony at school);
5. HIB Transfer (student a victim of bullying or intimidation);
6. Sending School has dropped the sport;
7. Military Assignment; and
8. Bona Fide Change of Residence.

The new regulation removes the Financial Hardship exception found in the existing transfer regulation.

This regulation does not address the circumstance in which a student with disabilities transfers schools for educational reasons, pursuant to an IEP or because the school offers the needed educational services or supports.

There are specific rules related to students who participate in the School Choice Program who then transfer to another school outside of the student's feeder pattern. Students ineligible under these provisions can submit a waiver request although they would still be subject to the ineligibility periods listed in new 4.3.

The new regulation is otherwise silent on the issue of waivers. However, the current administrative rules of the DIAA Board, 14 Del. Admin. Code 1020, Section 9.0 allows the Board to waive any rule or regulation:

> ***9.0 Waiver of DIAA Rules and Regulations***
>
> *9.1 General Hearing Procedures and Rules*
>
> *9.1.1 The Board has the authority to set aside the effect of any athletic rule or regulation, subject to any limitations set forth in the specific rule or regulation, when the affected party establishes by the preponderance of the evidence, all of the following conditions:*
>
> *9.1.1.1 In the case of eligibility waiver requests, there exists a hardship as defined by subsection 9.2.1;*
>
> *9.1.1.2 Strict enforcement of the rule in the particular case will not serve to accomplish the purpose of the rule;*
>
> *9.1.1.3 The spirit of the rule being waived will not be offended or compromised;*
>
> *9.1.1.4 The principle of educational balance over athletics will not be offended or compromised; and*
>
> *9.1.1.5 The waiver will not result in a safety risk to teammates or competitors.*

So arguably, any student could file a waiver request with the Board regarding transfer ineligibility; however, there is no expedited process, and the season could well be over before a final disposition on the waiver takes place.

However, Senate Bill 281 ("SB 281"), which is out of committee, reiterates most of the proposed regulation related to transfers, but also adds provisions related to the waiver

process. The Synopsis indicates that the Task Force discussed the waiver process in its deliberations. The Task Force concluded that moving the waiver process out of regulation and into the Code would help streamline the process. The full DIAA Board will not have jurisdiction over transfer waiver requests. In the bill, the Executive Director of the DIAA Board makes the disposition on the waiver request, which is subject to review by a three-person panel made up of Board members. The Executive Director has 15 days to make a disposition. The appeal to the panel is on the record only (meaning it is restricted to reviewing whatever documents or record that the Executive Director relied upon). The standard of review is whether the Executive Director's decision was supported by substantial evidence or is arbitrary or capricious.

The bill also indicates that students who meet one of the eight exceptions do not have to file for a waiver but must document how they meet the exception. It adds language that any student placed in a school by the Department of Services for Children, Youth and Families (DSCYF) has immediate eligibility. It also adds language that no exception applies "if the student transferred for athletic advantage." [1] This language is not in the draft regulation.

The bill sets out the criteria that the Executive Director must use in evaluating waiver requests and eliminates hardship as a basis for a waiver. [2] The Executive Director must base the decision on the following:

> *§ 315. Waivers of ineligibility.*
> *(a) Waiver. The Executive Director shall waive ineligibility under § 313 of this title if the Executive Director*
> *determines that all of the following criteria have been established:*
> *(1) Strict enforcement of ineligibility does not serve to accomplish the purpose of this chapter.*
> *(2) The spirit of ineligibility under this chapter is not offended or compromised by waiving ineligibility.*
> *(3) The principle of educational balance over athletics is not offended or compromised by waiving*
> *ineligibility.*
> *(4) Waiving ineligibility does not result in a safety risk to a teammate or competitor.*

The statute places the burden of proof on the student and lists specific required documentation, including official transcripts, attendance records, a letter from the principal of the old school, among others, as well as a letter from the old school certifying that the student's transfer is not motivated by athletic advantage. If the student cannot obtain such a certification, then the student must explain why they cannot get the certification. **This appears to place unnecessary and somewhat absurd obstacles in the way of a student athlete who has a legitimate need or**

[1]This vague, overbroad language undercuts having exceptions and can lead to arbitrary enforcement of these rules.
[2] The definition of hardship for the waiver context is currently found in Section 9 .2.1 of 1020 and is "a situation peculiar to the student caused by unforeseen events." The current transfer regulation 2.4.5 specifically talks about financial hardship as an actual exception to the transfer rules. Both of these "hardship" provisions are being eliminated. The Synopsis for SB 281 suggests that the hardship requirement was "too difficult" for students to meet, that there were too many hardship requests, and that it somehow did not meet the purpose of discouraging transfers for athletic reasons. It indicates that the remaining four reasons would allow waiver in cases of hardship.

desire to transfer schools. The documentation requirements are pretty onerous for any family and particularly one with financial or communication limitations.

So, taking SB 281 and the proposed regulation in tandem, there is no exception or consideration for a student who transfers for academic reasons, and more importantly no exception for students with disabilities who transfer schools as a change in placement under an IEP or in order to obtain necessary services and supports.

The benefits of participation in athletics and sports for students with disabilities are well documented. "The benefits of sports participation are significant for people with disabilities. Physical activity improves academic success, builds self-esteem, and prevents health problems."[3] The United States Department of Education has directed districts to ensure that students with disabilities have equal access to such programs. [4] Students with IEPs must be afforded an equal opportunity to participate in extracurriculars, including with supplementary aids and services deemed appropriate and necessary by their IEP team. 34 CFR § 300.107 Moreover, inflexible eligibility criteria may have discriminatory impact against students whose reason for transfer related to disability services or a placement through an IEP.

There is some interesting case law around this issue, some of it favorable. In Washington v. Indiana High School Athletic Association , 181 F. 3rd 840 (7th Cir. 1999) a student with disabilities had a disruption in his education due to his learning disabilities. When he returned to school, he was ineligible to play sports due to age. The court found a nexus between the application of the age out rule and the student's disability, and ordered the school district to allow him to play his sport. In another case with a wild procedural history, Crocker v. Tennessee Secondary School Athletic Assn, 735 F.Supp. 753 (M.D. Tenn. 1990), the court enjoined the TSSAA from applying a transfer rule to a student athlete with disabilities, as his transfer was found to be motivated by disability-related educational needs, which had been included in his IEP.

Logically, if a student transfers for disability-related reasons, then the transfer ineligibility rule should be waived so as not to allow DIAA to prevent the student's participation solely because of his disability. This argument is particularly compelling when the transfer rule has several other exceptions for students whose reason for transferring clearly is unrelated to athletic advantage, including being a crime victim, homeless, or in the custody of DCYF.

RECOMMENDATIONS:

- **Councils may wish to ask that an additional exception be enumerated in the regulation and in SB 281 for students with disabilities who transfer either under an IEP or to obtain educational or vocational services and supports.**
    - **Alternatively, language could be added to SB 281 clearly indicating that students who transfer under an IEP or to obtain educational services should**

[3] Lawowksi, Advancing Equity for Students with Disabilities in School Sports, Journal of Intercollegiate Sport, 2011, 4, 95-100 (https://journals.ku.edu/jis/article/view/10047/9477).
[4] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf

be granted a waiver (expressly stating that a transfer for a disability-related reason can be the basis of a waiver).

- **Another approach is having language either in the regulation or the bill that DIAA must consider and grant requests from students with disabilities for exceptions from eligibility rules as a reasonable accommodation.**

- **Councils may wish to further note that the documentation requirements are pretty onerous for any family and particularly one with financial or communication limitations. This appears to place unnecessary and somewhat absurd obstacles in the way of a student athlete who has a legitimate need or desire to transfer schools for academic reasons.**

➢ PROPOSED DDOE REGULATION REGARDING MENTAL HEALTH SERVICES SCHOLARSHIPS, 27 DEL. REGISTER OF REGULATIONS 822 (MAY 1, 2024).

With this proposed regulation, DDOE proposes to amend an existing regulation. The only substantive change is removing provisions requiring application to "Free Application for Federal Student Aid" or "FAFSA" as part of an applicant's eligibility for an award. This change may enable more individuals to make use of this program, which in turn could help Delaware address mental health work force shortages. Further analysis is not necessary.

Recommendation: Councils may wish to support this proposed revision as it will potentially increase the pool of individuals seeking mental health professions.

➢ PROPOSED DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS)/ DIVISION OF SOCIAL SERVICES (DSS) REGULATION REGARDING CONTINUOUS ELIGIBILITY AND REMOVAL OF PREMIUMS FOR CHILDREN'S HEALTH INSURANCE PROGRAM (CHIP), 27 DEL. REGISTER OF REGULATIONS 843 (MAY 1, 2024).

DHSS/DMMA proposes to amend regulations and the State Medicaid Plan regarding Delaware's CHIP program continuous eligibility and premiums. These changes were triggered by the Consolidated Appropriations Act (CAA) of 2023, which required states to provide 12-months continuous eligibility to children under the age of 19 in Medicaid and Childrens Healthy Insurance Program (CHIP), regardless of nonpayment of premiums. Delaware is revising CHIP provisions to ensure compliance with the CAA.

Most notably, Delaware is proposing to remove premiums for children enrolled in CHIP, which is laudable and will promote family financial stability.

In addition, the regulation addresses continuity of CHIP and Medicaid coverage and rewrites related provisions. This language is fairly similar to the DHHS, DMMA Continuous Coverage for Children Enrolled in Medicaid, proposed at 27 Del. Register of Regulations 486 (January 1, 2024), and thus due to time and resources, will not be reviewed in full here.

However, we do note that in subsection 18800.1 it describes exceptions to continuous eligibility which are not clear because of missing comma that changes the interpretation of exception #4. Without the comma exception 4 reads: "[t]he agency determines that eligibility was erroneously granted at the most recent determination, or renewal of eligibility because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative" (proposed DSSM § 18800.1). This indicates that termination may occur when 1) eligibility was erroneously granted; or 2) renewal was because of agency error, fraud, abuse or perjury. Councils commented similarly on the DHHS, DMMA Continuous Coverage for Children Enrolled in Medicaid, proposed at 27 Del. Register of Regulations 486. DMMA, in publishing the final rulemaking for DMMA Continuous Coverage for Children Enrolled in Medicaid 27 Del. Register of Regulations 680 (March 1, 2024), agreed that this change was required in DMMA's response to Council's comments. A similar change is required here (the insertion of a comma following "eligibility": "(4) The agency determines that eligibility was erroneously granted at the most recent determination, or renewal of eligibility, because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative").

Recommendation:

1) **Councils may wish to comment DMMA for proposing to remove CHIP premiums and to support that proposal.**
2) **Councils may also wish to ask DMMA to insert a comma following "eligibility" in exception 4 to continuous eligibility in subsection 18800.1: "(4) The agency determines that eligibility was erroneously granted at the most recent determination, or renewal of eligibility, because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative."**

- **PROPOSED DHSS/ DIVISION OF MEDICAID AND MEDICAL ASSISTANCE (DMMA) REGULATION REGARDING MEDICAID WORKERS WITH DISABILITY PREMIUMS, 27 DEL. REGISTER OF REGULATIONS 848 (MAY 1, 2024).**

DHSS/DMMA proposes to amend regulations and the State Medicaid Plan regarding Medicaid for Workers with Disabilities (MWD). These changes were triggered by the Consolidated Appropriations Act (CAA) of 2023, which required states to provide 12-months continuous eligibility to children under the age of 19 in Medicaid and Childrens Healthy Insurance Program (CHIP), regardless of nonpayment of premiums. Because MWD may include individuals under the age of 19 (and up to 65), Delaware is revising MWD provisions to ensure compliance with the CAA.

MWD is a program that enables people with disabilities to maintain or obtain medical assistance while working with income under certain limits. Under Delaware's current MWD program, individuals are required to pay a monthly premium, which is scaled based on their income. Here, Delaware has opted in this proposed rulemaking to remove the requirement of premiums for participation in the MWD Program so as to comply with the CAA in removing the premium payment eligibility for individuals under 19. DHSS/DMMA went a step further and has removed the premium payments for all MWD participants, including those over the age of 19.

This is a tremendous boon for MWD participants and furthers Delaware's Employment First commitment to create opportunities for employment for people with disabilities.

Another change proposed in this rulemaking includes: extending retroactive eligibility to the Medicare during Transition to Medicaid program.

Turning back to MWD, Delaware proposes to make some changes to unearned income exclusions and financial eligibility. To be financially eligible for MWD in Delaware, an applicant must show: 1) that the individual (not the individual + spouse, if applicable) has unearned income below a certain threshold; and 2) that the family's total countable income is below a certain level based on family size. Delaware proposes to modify the unearned income exclusion/limit in section 17908 from a set amount to the standard established by DMMA, which was $956 in 2009 (and which is increased annually using the Cost of Living Adjustment in the Federal Register). The proposed regulation also adds to the unearned income exclusion section that "[t]here is no unearned income exclusion for a spouse who is not applying for MWD." **This is somewhat confusing since a spouse's unearned income is not factored in for the unearned income step of a MWD applicant's eligibility, but rather only in the total countable income. It would help if there was clarifying language either in 17908 (e.g.: There is no unearned income exclusion for a spouse who is not applying for MWD; this is because a nonapplying spouse's unearned income is not considered in the first test of Section 17911, Financial Eligibility Determination), or similar language in Section 17911.**

Of note, not all states have unearned income limits for their MWD programs and instead look at total countable income (earned and unearned together). See, e.g. Pennsylvania: https://www.dhs.pa.gov/Services/Assistance/Documents/INDIVIDUAL%20PAGES/MAWD/MAWD%20FAQ.pdf. This helps individuals who are receiving Social Security benefits to be found eligible for MWD. DLP has seen, particularly in the case of individuals with Developmental Disabilities, that individuals who are both working and receiving Social Security benefits (often off a parent's record) have unearned income that is above Delaware's limit, but their income all together would make them eligible for MWD. **Using a total countable limit as opposed to unearned and countable separately, would facilitate more individuals with disabilities to benefit from MWD.**

Finally, Delaware's MWD enrollment is appallingly small at just over 100 participants based upon report by DMMA to DLP. Clear information to promote this beneficial program is lacking (compare gain to Pennsylvania which has a MWD website with brochures, FAQs, and how to apply: https://www.dhs.pa.gov/Services/Assistance/Pages/MA-for-Disabled-Workers.aspx). **Delaware is lacking in clear public facing information, policies, and procedures to educate potential MWD eligible individuals about the program.**

Recommendations:

1) **Councils may wish to thank DMMA for dropping premiums for MWD beneficiaries and DMMA's commitment to Employment First for people with disabilities.**

2) **Councils could ask DMMA to further that commitment to Employment First by creating clear public facing information, policies, and procedures to educate potential MWD eligible individuals about the program.**
3) **Councils may also wish to recommend that DMMA clarify language either in 17908 (e.g.: There is no unearned income exclusion for a spouse who is not applying for MWD; this is because a nonapplying spouse's unearned income is not considered in the first test of Section 17911, Financial Eligibility Determination), or similar language in Section 17911.**
4) **Councils may wish to encourage DMMA to explore using a total countable limit as opposed to unearned and countable income limits as separate tests, as this would facilitate more individuals with disabilities to benefit from MWD.**
5) **Finally, Councils recommend that DHSS and DOL collaborate to further public understanding and knowledge of MWD and other social security work incentive programs.**
6) **Councils may wish to request DHSS provide information on how they communicate information about MWD to the public.**

II. PROPOSED BILLS

- **SENATE BILL 281**

Analysis and recommendations discussed above in discussion of proposed DDOE regulation on DIAA board regulations regarding student athlete eligibility: transfers (pages 1-5 of this memorandum).

- **Uniform health-care decisions – not yet introduced/no bill number.**

See memorandum attachment with DLP's analysis.

Recommendation: Committee agreed that DLP would pull out 3-4 of the most crucial recommendations that were not accepted and submit them to the SCPD Chair and Vice Chair for executive action.

- **SENATE BILL 292**

Senate Bill 292 seeks to modify existing Delaware law related to student records, 14 Del. C. §4111. Here, they are modifying that records can only be released/disclosed in accordance with the "rules and regulations of the Department of Education. the Family Educational Rights and Privacy Act ("FERPA") under 20 U.S.C. § 1232g and its implementing regulations set forth in 34 CFR Part 99, FERPA and its implementing regulations." Currently, this law says that records can be released/disclosed in accordance with rules and regulations of the Department of Education."

This is important for students with disabilities because FERPA does not guarantee a right for parents to obtain **copies** of such records, merely access. Delaware law and regulations, with respect to IDEA-eligible students, requires that **copies** of records be provided to parents or

eligible students upon request. 14 Del. C. § 3130(b); and 14 Del. Admin. C. §926.1.2.2. By changing the laws referenced in 14 Del. C. §4111, the bill may be creating a tension between Delaware's FERPA provisions and the access rights of parents of students with disabilities.

The balance of the bill was not analyzed due to time and resource constraints.

Recommendation: Councils may wish to recommend that the bill Sponsor amend the proposed bill by adding a separate paragraph or a clause along the lines of: " . . . only in accordance with the Family Educational Rights and Privacy Act ("FERPA") under 20 U.S.C. § 1232g and its implementing regulations set forth in 34 CFR Part 99 and in accordance with the rules and regulations of the Department of Education with respect to the disclosure of records for students with disabilities[.]". Councils demand that parents continue to have access to COPIES of educational records, and not be limited.