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# Delaware Register of Regulations

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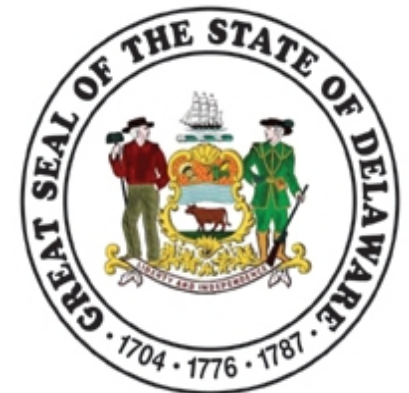
Volume 19 - Issue 8, Pages 688 - 787

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Proposed  
Final

Calendar of Events &  
Hearing Notices



Pursuant to 29 **Del.C.** Chapter 11, Subchapter III, this issue of the *Register* contains all documents required to be published, and received, on or before January 15, 2016.

*Snowy Pine at Killens Pond*  
by  
Dolores Michels



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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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## DELAWARE REGISTER OF REGULATIONS

The *Delaware Register of Regulations* is an official State publication established by authority of 69 *Del. Laws*, c. 107 and is published on the first of each month throughout the year.

The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.

The *Register* will also publish some or all of the following information:

- Governor's Executive Orders
- Governor's Appointments
- Agency Hearing and Meeting Notices
- Other documents considered to be in the public interest.

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## CITATION TO THE DELAWARE REGISTER

The *Delaware Register of Regulations* is cited by volume, issue, page number and date. An example would be:

16 **DE Reg.** 1227 - 1230 (06/01/13)

Refers to Volume 16, pages 1227 - 1130 of the *Delaware Register* issued on June 1, 2013.

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## SUBSCRIPTION INFORMATION

The cost of a yearly subscription (12 issues) for the *Delaware Register of Regulations* is \$135.00. Single copies are available at a cost of \$12.00 per issue, including postage. For more information contact the Division of Research at 302-744-4114 or 1-800-282-8545 in Delaware.

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## CITIZEN PARTICIPATION IN THE REGULATORY PROCESS

Delaware citizens and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.

Under 29 **Del.C.** §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the *Register of Regulations* pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the *Register of Regulations*. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation. The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the *Register of Regulations*. At the conclusion of all hearings and after receipt, within the time allowed, of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the *Register of Regulations*, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief.

No action of an agency with respect to the making or consideration of a proposed adoption, amendment or repeal of a regulation shall be subject to review until final agency action on the proposal has been taken. When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.

Except as provided in the preceding section, no judicial review of a regulation is available unless a complaint therefor is filed in the Court within 30 days of the day the agency order with respect to the regulation was published in the *Register of Regulations*.

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## CLOSING DATES AND ISSUE DATES FOR THE DELAWARE REGISTER OF REGULATIONS

ISSUE DATE	CLOSING DATE	CLOSING TIME
March 1	February 16	4:30 p.m.
April 1	March 15	4:30 p.m.
May 1	April 15	4:30 p.m.
June 1	May 16	4:30 p.m.
July 1	June 15	4:30 p.m.

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The regulations are listed alphabetically by the promulgating agency, followed by a citation to that issue of the *Register* in which the regulation was published. Proposed regulations are designated with (Prop.); Final regulations are designated with (Final); Emergency regulations are designated with (Emer.); and regulations that have been repealed are designated with (Rep.).

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## Symbol Key

Arial type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text. Language which is ~~stricken~~ through indicates text being deleted.

## Proposed Regulations

Under 29 **Del.C.** §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the *Register of Regulations* pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the *Register of Regulations*. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation. The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

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## DEPARTMENT OF EDUCATION

### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 745

### PUBLIC NOTICE

#### Education Impact Analysis Pursuant to 14 Del.C. Section 122(d)

#### **745 Criminal Background Check for Public School Related Employment**

#### **A. Type of Regulatory Action Required**

Amendment to Existing Regulation

#### **B. Synopsis of Subject Matter of the Regulation**

The Secretary of Education intends to amend 14 **DE Admin. Code** 745 Criminal Background Check for Public School Related Employment. This regulation is being amended to update regulation language due to changes in Titles 11, 16, and 31 of the Delaware Code related to Background Checks for Child Serving Entities.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before March 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the Register of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office, located at the address listed above.

#### **C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is intended to help improve student achievement by helping to ensure that public school employees have sufficient Criminal Background Checks.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to continue to help ensure all students receive an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected?

The amended regulation is intended to continue to help ensure that all students' health and safety are adequately protected.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to help ensure that all student's legal rights are respected.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amended regulations does not change the decision making at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject to be regulated do not change because of the amendment.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The amendment is consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is no expected cost to implementing this amended regulation.

## 745 Criminal Background Check for Public School Related Employment

### 1.0 Purpose

This regulation shall apply to all individuals seeking ~~public school~~ related employment in a Delaware ~~public school~~. ~~Refer to 14 DE Admin. Code 746 Criminal Background Check for Student Teaching for the requirements and procedures related to criminal background checks for a Student Teaching Assignments in a Delaware public school. A Criminal Background Check shall be completed for Employee, Contractors or Volunteers of a Child Serving Entity. It shall consist of a fingerprinted Delaware and national background check completed by the State Bureau of Identification (SBI) and the Federal Bureau of Investigation (FBI). Additionally, a Child Protection Registry Check shall be completed by the Department of Services for Children, Youth and Their Families (DSCYF). Refer to 14 DE Admin. Code 746 Criminal Background Check for Student Teaching for the requirements and procedures related to Criminal Background Checks for a Student Teaching Placement in a Delaware Public School.~~

### 42.0 Definitions

For purposes of this regulation, the following definitions apply:

**"Child Protection Registry Check"** means a computer search of the Child Protection Registry to determine if a person is a perpetrator in any substantiated cases of child abuse or neglect.

**"Child Serving Entity"** means Public Schools, including Employees of the Department of Education.

**"Continuously Employed"** means having worked in the same ~~public school~~ district or charter school for at least ninety one (91) working days in the prior school year. Substitute teachers shall be considered Continuously Employed when they have worked forty five (45) days in the prior school year in any combination of Delaware ~~school districts or charter schools~~ Public Schools. Persons who have participated in a Student Teaching ~~Assignment~~ Placement and who have fulfilled the requirements of 14 DE Admin. Code 746 shall be considered Continuously Employed if they participated for forty five (45) days in the prior school year in the school district or charter school where they are seeking ~~public school~~ related employment.

**"Contractor"** means a person, not an Employee, providing services within a Child Serving Entity and who has Direct Access to children.

**“Covered Personnel”** means the following: an “Employee,” “Contractor,” “Volunteer,” as defined herein, or any person who is assigned to an extra duty position (also called Extra Pay for Extra Responsibility (EPER) position) in Public Schools whether the person receives compensation or not.

- ~~All final candidates for public school related employment for compensation;~~
- ~~All those persons who supply contracted services directly to students of a public school, or those who supply contracted services to a public school which results in regular direct access to children in or through a public school; and~~
- ~~All those persons who have regular direct access to children in or through an extra duty position (also called Extra Pay for Extra Responsibility (EPER) position) in public schools whether the person receives compensation or not.~~

~~Notwithstanding the above definition of Covered Personnel the following persons are not subject to these regulations:~~

- ~~Instructors in adult corrections institutions;~~
- ~~Instructors in adult education programs involving Apprenticeship, Trade Extension, or a vocational general interest programs, or instructors in Adult Basic Education and GED programs who do not service students under age 18;~~
- ~~Directly supervised professional artists sponsored by the Division of the Arts, Arts in Education Program, Very Special Arts and the Delaware Institute for the Arts in Education; and~~
- ~~Substitute food service workers.~~

**“Criminal Background Check”** means a fingerprinted Delaware and national background check completed by the SBI and the FBI. Additionally, a Child Protection Registry Check shall be completed by DSCYF.

**“Direct Access”** means, pursuant to this regulation, the opportunity to have personal contact with students receiving care or education during the course of one’s assigned duties.

**“Employee”** means any person seeking employment for compensation with a Child Serving Entity, or any person who for any reason has Direct Access to students at a Child Serving Entity. This definition also includes any person seeking a Student Teaching Placement in a Public School.

**“Public School”** means any Public School and includes any board of education, school district, reorganized school district, special school district, charter school or charter school board and any person acting as an agent thereof.

**“Student Teaching Placement”** means a structured, supervised learning experience for a student in a teacher education program in which the student teacher practices the skills being learned in the teacher education program and gradually assumes increased responsibility for instruction, classroom management, and other related duties for a class of students in a local school district or charter school. These skills are practiced under the direct supervision of the certified teacher who has official responsibility for the class.

**“Superintendent”** means the chief school officer of any public school district or charter school, or the equivalent of a superintendent, or the superintendent’s designee.

**“Volunteer”** means a person providing volunteer services within a Child Serving Entity and who has Direct Access to students.

### **23.0 Procedures for Candidates for Employment, Contractors or ~~for Persons Providing Services Under a Contract~~ Volunteers to Obtain a Criminal Background Check**

23.1 A final candidate for a Covered Personnel position, as defined in 42.0, in a ~~p~~Public ~~s~~School shall be subject to the following procedures:

23.1.1 After notification by a ~~school district or charter school~~ Public School that he/she is a final candidate for a Covered Personnel position, the individual shall present him/herself to ~~State Bureau of Identification~~ SBI personnel at one of the Delaware State Police Troops that processes such ~~e~~Criminal ~~b~~Background ~~e~~Checks or at an on site appointment arranged by the ~~school district or charter school~~ Public School. ~~School districts and charter schools~~ Public Schools at their option

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- may require an applicant to submit a eCriminal bBackground eCheck prior to becoming a final candidate.
- ~~23.1.2~~ The candidate shall cooperate in all respects with this eCriminal bBackground eCheck process, or his/her application cannot be accepted. On completion of the procedure, the candidate will be given a Verification Form of Processing by the ~~State Bureau of Identification SBI~~, which may be shown to the prospective placing districts and charter schools Public School as proof that the candidate has completed the procedure. The candidate should retain the Verification Form of Processing for his/her records.
- ~~2.1.3~~ The candidate shall have an original of the completed criminal background check sent to one school district or charter school. An original of all information sent to the school district or charter school shall be sent by the State Bureau of Identification to the candidate.
- ~~3.1.3~~ The candidate shall have an original of the completed Criminal Background Check sent to one Public School. An original of all information sent to the Public School shall be sent by SBI to the candidate.
- ~~23.1.4~~ As a part of the application for pPublic sSchool related employment, ~~or as a part of the contract for services, or the Volunteer agreement~~, the candidate shall sign a Release for Criminal Background Check Information form approved by the Department of Education. The release will allow the ~~school district or charter school~~ Public School that was sent the original of the completed eCriminal bBackground eCheck to do the following:
- ~~23.1.4.1~~ Confirm the receipt of that original and disclose its contents to the ~~district sSuperintendents or charter school director or district or charter school chief personnel officer~~ of other Delaware ~~school districts or charter schools~~ Public Schools considering the person as a candidate.
- ~~23.1.4.2~~ Send the original eCriminal bBackground eCheck to the placing Public sSchool ~~district or charter school~~ if the candidate is hired, ~~or placed under contract~~ in another Delaware ~~school district or charter~~ Public sSchool.
- ~~2.1.4.3~~ Send any subsequent criminal history information to the person's employing or contracting ~~school district(s) or charter school(s)~~.
- ~~3.1.4.3~~ Send any subsequent criminal history information to the person's employing or contracting Public School(s).
- ~~23.1.5~~ Each final candidate shall have a determination of suitability made by the ~~school district or charter school~~ Public School and forwarded to him/her. If a determination is made to deny a candidate employment based upon the criminal history, he/she shall have an opportunity to appeal as set forth in ~~56.0~~.
- ~~2.1.6~~ Final candidates for employment or entering into a contract for services may have criminal background checks from other states accepted, if all of the following conditions are met;
- ~~3.1.6~~ Final candidates for employment or entering into a contract for services may have Criminal Background Checks from other states accepted, if all of the following conditions are met:
- ~~23.1.6.1~~ The eCriminal bBackground eCheck shall have been conducted within the previous twelve (12) months and include a federal eCriminal bBackground eCheck.
- ~~23.1.6.2~~ The eCriminal bBackground eCheck shall be sent directly from the eCriminal bBackground eCheck agency in the other state to a Delaware ~~school district or charter school~~ Public School.
- ~~23.1.6.3~~ A verification from the candidate's most recent employer(s) covering the previous twelve (12) months, stating that the employer knows of no offenses committed by the candidate during that time, shall be sent directly from the candidate's most recent employer(s) to the Delaware ~~school district or charter school~~ Public School which was sent the original background check.
- ~~23.1.6.4~~ The out of state candidate shall sign a release to allow the ~~school district or charter school~~ Public School receiving the out of state eCriminal bBackground eCheck and the reference

to confirm their receipt, disclose their contents and forward them, subject to the same disclosure regulations that apply to Delaware ~~e~~Criminal ~~b~~Background ~~e~~Checks.

~~23.1.7~~ Except as described herein, all costs associated with obtaining a ~~e~~Criminal ~~b~~Background ~~e~~Check shall be paid for by the person seeking a Covered Personnel position. ~~School districts or charter schools~~ Public Schools may use funds other than state funds to pay for ~~e~~Criminal ~~b~~Background ~~e~~Check costs and may enter into consortia to pay such costs for persons covered by the law who work in more than one ~~school district or charter school~~ Public School during the course of the school year.

**34.0 Procedures for ~~School Districts and Charter~~ Public Schools for Criminal Background Checks on Candidates for Employment, Contractors or Volunteers ~~or for Persons Providing Services Under a Contract~~**

~~3.1~~ ~~School districts and charter schools shall require all persons subject to the law and these regulations to complete a release as a part of the application or contract submissions process and, if they become a final candidate for a Covered Personnel position, to initiate the criminal background check process prior to entering into the Covered Personnel position.~~

4.1 Public Schools shall require all persons subject to the law and these regulations to complete a release as a part of the application process for employment, volunteering or to provide contracting services, and if they become a final candidate for a Covered Personnel position, to initiate the Criminal Background Check process prior to entering into the Covered Personnel position.

~~34.2~~ ~~The school district or charter school~~ Public School ~~sent~~ sending the original of a completed ~~e~~Criminal ~~b~~Background ~~e~~Check shall keep the information received in a confidential manner and shall:

~~34.2.1~~ ~~If requested by another Delaware school district~~ Public School ~~s~~Superintendent ~~or charter school director or school district or charter school chief personnel officer~~ and assured that a signed release is on file in the requesting ~~district or charter school~~ Public School, confirm the receipt of that original and disclose its contents to the ~~s~~Superintendent ~~or director or the chief personnel officer~~ of the requesting Delaware ~~school district or charter school~~ Public School considering the person for hire, ~~a contract, or a volunteer opportunity~~;

~~34.2.2~~ ~~If requested by another Delaware school district~~ Public School ~~s~~Superintendent ~~or charter school director or school district or charter school chief personnel officer~~ and ~~sent~~ a copy of the signed release on file in the requesting ~~district or charter school~~ Public School, ~~send~~ the original ~~e~~Criminal ~~b~~Background ~~e~~Check to the requesting Delaware ~~school district or charter school~~ Public School if the candidate is placed in a Covered Personnel position; and

~~3.2.3~~ ~~If sent any subsequent criminal history information on the person hired, placed under contract or assuming an extra duty position in another district or charter school, forward such information to the school district or charter school.~~

4.2.3 If sent any subsequent criminal history information on the person hired, placed under contract, or assuming an extra duty (EPER) or Volunteer position in another Public School, forward such information to the Public School.

~~34.2.4~~ ~~School districts or charter schools~~ Public Schools may also share and forward the above information with the Delaware Department of Education under the same conditions applicable to ~~school districts or charter schools~~ Public Schools. The provision shall apply only when the Department of Education is acting in its capacity as an employer, a party to a contract for services or taking on a person in an extra duty position (EPER).

~~34.3~~ ~~The school district or charter school~~ Public School, in accordance with ~~11 Del.C. §8571(b), (d) and (e),~~ 31 Del.C. §309(e), shall make a determination of suitability ~~for employment as an Employee, Contractor or Volunteer~~ on each person it requested to initiate the ~~e~~Criminal ~~b~~Background ~~e~~Check process. That determination shall be communicated to the person in writing. If a determination is made to deny a candidate employment based upon the criminal history, he/she shall have an opportunity to appeal for reconsideration as set forth in ~~56.0~~.



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- ~~34.4~~ When a candidate is finally placed in a Covered Personnel position the ~~district or charter school~~ Public School shall do the following if the original of the completed ~~e~~Criminal ~~b~~Background ~~e~~Check is not yet in its possession:
- ~~3.4.1~~ Make a written request to the ~~school district or charter school~~ that received the original of the completed criminal background check to forward the original copy to the placing ~~district or charter school~~ for placement in the employee's or contractor's file. As a part of the request, the placing ~~district or charter school~~ shall forward a copy of the release signed by the candidate.
- ~~4.4.1~~ Make a written request to the Public School that received the original of the completed Criminal Background Check to forward the original copy to the placing Public School for placement in the Employee's, Contractor's, or Volunteer's file. As a part of the request, the placing Public School shall forward a copy of the release signed by the candidate.
- ~~34.4.2~~ Notify the ~~State Bureau of Identification~~ SBI that the candidate has become Covered Personnel in the ~~district or charter school~~ Public School and is no longer associated with the ~~school district or charter school~~ Public School that received the original of the completed ~~e~~Criminal ~~b~~Background ~~e~~Check.
- ~~34.5~~ A ~~school district or charter school~~ Public School may place the candidate in a Covered Personnel position provisionally in accordance with ~~11 Del.C. §8571(f)~~ 31 Del.C. §309(c)(7); however, the ~~school district or charter school~~ Public School shall require the candidate to comply with the provisions described in these regulations, including the requirement to initiate the ~~e~~Criminal ~~b~~Background ~~e~~Check prior to being ~~hired~~ placed provisionally as an Employee, Contractor, or Volunteer.

## **45.0 Length of Validity of Criminal Background Check and Exemption for "Continuous Employment"**

- ~~45.1~~ A ~~e~~Criminal ~~b~~Background ~~e~~Check obtained under these regulations shall only be valid for twelve (12) months. If a person is not Continuously Employed by a Delaware ~~school district or charter school~~ Public School within that period, the ~~district or charter school~~ Public School receiving the original ~~e~~Criminal ~~b~~Background ~~e~~Check need not retain it beyond that time. If the person becomes Continuously Employed by a Delaware ~~school district or charter school~~ Public School, the original ~~e~~Criminal ~~b~~Background ~~e~~Check shall be kept on file for a minimum of five (5) years.
- ~~45.2~~ Each person who has been Continuously Employed in a ~~p~~Public ~~s~~School ~~district or charter school~~ shall be exempt from the screening provisions of ~~11 Del.C. §8571~~ obtaining a Criminal Background Check.
- ~~4.3~~ A person who transfers between Delaware public school districts or charter schools and is placed in a Covered Personnel position shall comply with ~~11 Del.C. §8570, et seq., and these regulations~~ before being hired or providing contracted services. A criminal background check performed within the previous twelve (12) months and held by another school district, charter school or out of state school, and supplied under 2.0 and 3.0 of these regulations is one means of complying with ~~11 Del.C. §8570, et seq., and these regulations~~.
- ~~5.3~~ A person who transfers between Delaware Public Schools and is placed in a Covered Personnel position shall comply with 31 Del.C. §309 and these regulations before becoming an Employee, Contractor, or Volunteer. A Criminal Background Check performed within the previous twelve (12) months and held by another Public School or out of state school, and supplied under 3.0 and 4.0 of these regulations is one means of complying with 31 Del.C. §309, et seq., and these regulations.

## **56.0 Determination of Suitability and Appeal Process**

- ~~56.1~~ A person covered by ~~11 Del.C. §8570, et seq., 31 Del.C. §309,~~ and these regulations, shall have the opportunity to respond to a ~~school district or charter school~~ Public School regarding any criminal history information obtained prior to a determination of suitability for ~~employment as an Employee, Contractor, or Volunteer~~ being made. See ~~11 Del.C. §8571(d)~~ 31 Del.C. §309(e)(1)(b). Such a response shall be made within ten (10) working days of the person's receipt of the ~~e~~Criminal ~~b~~Background ~~e~~Check information from the ~~State Bureau of Identification~~ SBI.
- ~~6.1.1~~ The determination of suitability for ~~employment as an Employee, Contractor, or Volunteer~~ shall be made by the ~~school district or charter school~~ Public School pursuant to the factors listed in ~~11 Del.C. §8571(d)~~ 31 Del.C. §309(d) and any other criteria the Public School may establish.

~~56.2~~ The ~~school district or charter school~~ Public School shall communicate the results of the determination of suitability to the person, in writing, within five (5) working days of the receipt of the person's response to the criminal history information. If a determination is made to deny a person ~~placement in a Covered Personnel position~~ employment, based upon the criminal history, the person shall have an opportunity to appeal for reconsideration as set forth in ~~5.3.1 through 5.3.3~~ 6.3.

~~56.3~~ Appeal for Reconsideration

~~56.3.1~~ An appeal for reconsideration shall be initiated by a person notified that he/she is being denied or being terminated from ~~placement in a Covered Personnel position~~ employment, pursuant to ~~44 Del.C. §8574~~ 31 Del.C. §309(e)(1)(b), by submitting a letter of appeal to the ~~district~~ Public School ~~sSuperintendent or charter school director~~ within ten (10) working days of the receipt of written notice.

~~56.3.2~~ The appeal shall be reviewed by the ~~district~~ Public School ~~sSuperintendent or charter school director~~ and the appellant shall have the right to be heard by the ~~district~~ Public School ~~sSuperintendent or charter school director~~ within ten (10) working days of the receipt of the letter of appeal.

~~56.3.2.1~~ ~~Local school districts and charter schools~~ Public Schools shall develop procedures for appeals for reconsideration. The process shall be as informal and accessible as possible, but shall allow for impartial and complete review.

~~56.3.3~~ A written decision shall be rendered by the ~~district~~ Public School ~~sSuperintendent or charter school director~~ within ten (10) working days of the hearing. A decision made by the ~~district~~ Public School ~~sSuperintendent or charter school director~~ under this appeal procedure is final, unless the ~~district or charter school~~ Public School has made specific provisions for appeal to another entity within the ~~district or charter school~~ Public School. The decision shall not be appealable to the State Board of Education or to the Department of Education.

~~67.0~~ Confidentiality

~~67.1~~ All information and records pertaining to ~~eCriminal bBackground eChecks~~, pursuant to ~~44 Del.C. §8570~~ 31 Del.C. §309, et seq., and these regulations, shall be maintained in a confidential manner including, but not limited to, the following:

~~67.1.1~~ Access to ~~eCriminal bBackground eCheck~~ records, and letters of reference accompanying out of state ~~eCriminal bBackground eChecks~~, and determination of suitability shall be limited to the ~~district~~ Public School ~~sSuperintendent or charter school director~~ and the ~~district or charter school chief personnel office~~ and one person designated to assist in the processing of ~~eCriminal bBackground eChecks~~, who will receive training in confidentiality, be required to sign an agreement to keep such information confidential and employ proper precautions to ~~insure~~ that interoffice communications remain confidential.

~~67.1.2~~ All such records shall be kept in locked, fireproof cabinets;

~~67.1.3~~ No information from such records shall be released without the signed approval of and the appropriate signed release of the candidate or person placed in a Covered Personnel position.

~~78.0~~ Penalties

The ~~district~~ Public School ~~sSuperintendent or charter school director~~ or the ~~district or charter school chief personnel officer~~ shall report to the appropriate police authorities evidence of any person who knowingly provides false, incomplete or inaccurate criminal history information or who otherwise knowingly violates the provisions of ~~44 Del.C. §8574~~ 31 Del.C. §311.

~~89.0~~ Subsequent Criminal History Information

~~89.1~~ Subsequent criminal history on a person in a Covered Personnel position may be sent by the ~~State Bureau of Identification SBI~~ to the ~~district~~ Public School ~~sSuperintendent or charter school director~~ or ~~district or charter school chief personnel office~~ and shall be used by ~~district or charter school~~ the Public

# PROPOSED REGULATIONS

School in making a determination about the person's continued suitability for placement in a Public School environment.

89.2 If subsequent criminal history information is mistakenly directed to a ~~district or charter school~~ Public School other than the current ~~district or charter school~~ Public School of Covered Personnel, the information shall be forwarded immediately to the employing ~~district or charter school~~ Public School by the receiving ~~district~~ Public School ~~s~~Superintendent, ~~charter school director or district or charter school chief personnel officer~~.

89.3 If a person is known to be in a Covered Personnel position in more than one ~~district or charter school~~ Public School, the ~~s~~Superintendent, ~~director or chief personnel officer~~ of the ~~district or charter school~~ Public School receiving the subsequent criminal history information on that person shall share the information received immediately with the ~~district~~ Public School ~~s~~Superintendent, ~~charter school director or district or charter school chief personnel officer~~ of the other ~~school-district or charter school~~ Public School(s).

## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 746

### PUBLIC NOTICE

#### Education Impact Analysis Pursuant to 14 Del.C. Section 122(d)

#### 746 Criminal Background Check for Student Teaching

##### A. Type of Regulatory Action Required

Amendment to Existing Regulation

##### B. Synopsis of Subject Matter of the Regulation

The Secretary of Education intends to amend 14 **DE Admin. Code** 746 Criminal Background Check for Student Teaching. This regulation is being amended due to changes in Titles 11, 16, and 31 of the Delaware Code related to Background Checks for Child Serving Entities.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before March 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the Register of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office located at the address listed above.

##### C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is intended to help improve student achievement as measured against state achievement standards by clarifying that appropriate criminal background checks have occurred for those child serving entities such as student teachers.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to continue to help ensure all students receive an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amendments do not address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to help ensure that all student's legal rights are respected.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amended regulations does not change the decision making at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates

upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject to be regulated does not change because of the amendment.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The amendment is consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is no expected cost to implementing this amended regulation.

### **746 Criminal Background Check for Student Teaching**

#### **1.0 Purpose**

This regulation shall apply to candidates for a Student Teaching Assignment Placement in a Delaware public school. A Criminal Background Check shall be completed for Student Teaching Placements at Child Serving Entities. It shall consist of a fingerprinted Delaware and national background check completed by the State Bureau of Identification (SBI) and the Federal Bureau of Investigation (FBI). Additionally, a Child Protection Registry Check shall be completed by the Department of Services for Children, Youth and Their Families (DSCYF). Refer to 14 DE Admin. Code 745 Criminal Background Check for Public School Related Employment for the requirements and procedures related to criminal background checks for pPublic sSchool related employment in a Delaware pPublic sSchool.

#### **2.0 Definitions**

For purposes of this regulation, the following definitions apply:

**“Administrator of Educator Preparation Program”** means the individual identified by the Higher Education Institution as being responsible for overseeing the placement of candidates into a Student Teaching Placement in a Delaware Public School.

**“Higher Education Institution” or “Institution(s) of Higher Education”** means the Delaware college or university that has a teacher preparation program that places candidates into Student Teaching Positions Placement in a Delaware pPublic sSchool-district or charter school.

**“Public School”** means any public school and includes any board of education, school district, reorganized school district, special school district, charter school or charter school board and any person or entity acting as an agent thereof.

**“Student Teacher”** means an individual participating in a Student Teaching Placement.

**“Student Teaching Position Placement”** means a structured, supervised learning experience for a student in a teacher education program in which the student teacher practices the skills being learned in the teacher education program and gradually assumes increased responsibility for instruction, classroom management, and other related duties for a class of students in a local school district or charter school. These skills are practiced under the direct supervision of the certified teacher who has official responsibility for the class.

**“Superintendent”** means the chief school officer of any public school district or charter school, or the equivalent of a Superintendent or the Superintendent’s designee.

#### **23.0 Criminal Background Check Requirements and Procedures for Student Teaching Position Candidates**

23.1 Effective ~~January 1, 2014~~ April 7, 2016, any candidate for a Student Teaching Position Placement in a pPublic sSchool district or charter school shall be required to have a criminal background check as prescribed through this regulation.

# PROPOSED REGULATIONS

- ~~23.2~~ The higher education institution where candidates for Student Teaching Positions are enrolled shall require all candidates to complete a Release for Criminal Background Check Information form approved by the Department of Education as a part of the assignment process for a Student Teaching Position in a Delaware public school district or charter school. The State Bureau of Identification (SBI) shall provide the criminal background information and the Department of Services for Children, Youth and Their Families (DSCYF) shall provide the Child Protection Registry check information to the individual and to the Higher Education Institution identified by the individual, through the Administrator of Educator Preparation Program. The Higher Education Institution shall determine whether the individual is prohibited from being placed per the provisions of 31 Del.C. §309(d) and shall send a copy of the complete criminal background check and Child Protection Registry check information to the head of the Public School considering the person as a candidate for a Student Teaching Placement. If the individual is not prohibited from placement per the provisions of 31 Del.C. §309(d), but the individual has a criminal conviction or is or has been on the Child Protection Registry, the Public School shall make a determination regarding suitability for placement using the factors in stated in statute. Information obtained under this subsection is confidential and may only be disclosed to the chief school officer, head of the Public School, the chief personnel officer of the school, and one person in each school who shall be designated to assist in the processing of criminal background checks, receive training in confidentiality and be required to sign an agreement to keep such information confidential.
- 23.3 The candidate for a Student Teaching Position Placement in a Delaware pPublic sSchool district or charter school shall be subject to the following procedures:
- 23.3.1 After notification by the hHigher eEducation iInstitution that he/she is a candidate for a Student Teaching Position Placement, the candidate shall present him/herself to State Bureau of Identification SBI personnel at one of the Delaware State Police Troops that processes such criminal background checks or at an on site appointment arranged by the hHigher eEducation iInstitution.
- 23.3.2 The candidate shall cooperate in all respects with this criminal background check process, or his/her application cannot be accepted. On completion of the procedure, the candidate will be given a Verification Form of Processing by the State Bureau of Identification SBI, which may be shown to the candidate's placing hHigher eEducation iInstitution as proof that the candidate has completed the procedure. The candidate should retain the Verification Form of Processing for his/her records.
- 23.3.3 The candidate shall request the State Bureau of Identification that SBI send original versions of the criminal background check to both the candidate and hHigher eEducation iInstitution.
- 23.3.3.1 Provided further, a candidate attending a private Delaware Higher Education Institution shall provide a copy of his/her state and federal criminal history record, certified by the State Bureau of Identification SBI, to the designated person at the placing private Delaware Higher Education Institution.
- 23.4 All costs associated with obtaining a criminal background check shall be paid for by the person seeking a sStudent tTeaching position pPlacement.

## ~~34.0~~ Procedures for Higher Education Institutions ~~and~~, Public School Districts and Charter Schools for the Determination of Suitability for Candidates in Student Teaching Positions.

- 34.1 The hHigher eEducation iInstitution where the candidate is enrolled and that was sent an original copy of the completed criminal background check shall make the initial determination for suitability for sStudent tTeaching pPlacement. The criteria for determining the suitability for sStudent tTeaching pPlacement shall be at the discretion of the hHigher eEducation iInstitution and may vary among the various hHigher eEducation iInstitutions in Delaware.
- 34.1.1 If a determination is made to deny a candidate placement into a sStudent tTeaching position pPlacement based upon the hHigher eEducation iInstitution's review of the criminal history, the hHigher eEducation iInstitution may provide for an appeal process.
- 34.2 Upon the initial determination for suitability for the candidate to be placed in a pPublic sSchool, the hHigher eEducation iInstitution liaison responsible for overseeing Student Teaching Position

~~p~~Placements shall confirm the receipt of the original complete criminal background check and send a copy of such to the ~~district Public School s~~Superintendent or ~~charter school director of the Delaware school district or charter school~~ considering the person as a candidate for a Student Teaching ~~Position Placement~~.

- ~~34.3~~ Each ~~school district and charter school~~ Public School shall make the final determination of suitability for placement of a candidate in a Student Teaching ~~Position Placement~~ in its school.
- ~~34.3.1~~ Each ~~school district and charter school~~ Public School shall establish the process and criteria for determining suitability for placement of a candidate in a Student Teaching ~~Position Placement~~ in its school(s).
- ~~34.3.2~~ The criteria for determining the suitability and subsequent placement of a candidate in a ~~s~~Student ~~t~~Teaching ~~position Placement~~ may vary among the ~~districts and charter~~ Public sSchools. In addition, a ~~school district or charter~~ Public sSchool may have criteria for ~~s~~Student ~~t~~Teaching ~~p~~Placement that differs from the criteria for ~~p~~Public ~~s~~School employment.
- ~~34.3.3~~ The ~~school district or charter school~~ Public School shall provide the candidate's ~~h~~Higher ~~e~~Education ~~i~~nstitution the decision to place or deny a candidate in a Student Teaching ~~Position Placement~~ in writing.
- ~~34.4~~ Candidates for student teaching may have criminal background checks from other states accepted, if all of the following conditions are met;
- ~~34.4.1~~ The criminal background check shall have been conducted within the previous twelve (12) months and include a federal criminal background check;
- ~~34.4.2~~ The criminal background check shall be sent directly from the criminal background check agency in the other state to the ~~h~~Higher ~~e~~Education ~~i~~nstitution;
- ~~34.4.3~~ The out of state candidate shall sign a release to allow the ~~h~~Higher ~~e~~Education ~~i~~nstitution receiving the out of state criminal background check and the reference to confirm their receipt, disclose their contents and forward them, subject to the same disclosure regulations that apply to Delaware criminal background checks.

## **45.0 Procedures for Maintaining Criminal Background Check Information**

- ~~45.1~~ All information and records pertaining to criminal background checks and this regulation shall be maintained in a confidential manner including, but not limited to, the following:
- ~~45.1.1~~ Access to criminal background check records, letters of reference accompanying out of state criminal background checks, and determination of suitability shall be limited to the ~~h~~Higher ~~e~~Education ~~i~~nstitution officer responsible for student teacher assignments and one person designated to assist in the processing of criminal background checks; and the ~~district Public School s~~Superintendent or ~~charter school director and the district or charter school chief personnel officer~~ responsible for the determination of suitability in the placing ~~district or charter school~~ Public School. These persons shall be required to sign an agreement to keep such information confidential and employ proper precautions to insure that interoffice communications remain confidential;
- ~~45.1.2~~ All such records shall be kept in locked, fireproof cabinets;
- ~~45.1.3~~ No information from such records shall be released without the signed approval of and the appropriate signed release of the candidate or person placed in a Student Teaching ~~Position Placement~~.
- ~~45.2~~ The ~~h~~Higher ~~e~~Education ~~i~~nstitution may dispose of the criminal background check in a secure manner no earlier than six (6) months after the student graduates from the ~~h~~Higher ~~e~~Education ~~i~~nstitution.

## **56.0 Penalties**

The ~~h~~Higher ~~e~~Education ~~i~~nstitution officer responsible for student teacher assignments shall report to the appropriate police authorities evidence of any person who knowingly provides false, incomplete or inaccurate criminal history information or who otherwise knowingly violates this regulation.

## 67.0 Subsequent Criminal History Information

- 67.1 Subsequent criminal history on a person in a Student Teaching ~~Position~~ Placement may be sent by the ~~State Bureau of Identification SBI~~ to the ~~hHigher eEducation iInstitution~~.
- 67.2 The ~~hHigher eEducation iInstitution~~ where the candidate is enrolled shall be required to send any subsequent criminal history information received to the ~~school district or charter school~~ Public School where the candidate is engaged in student teaching activities.
- 67.3 The ~~district or charter school~~ Public School where the person is in a Student Teaching ~~Position~~ Placement may consider any subsequent criminal history received for the person's continued suitability for the Student Teaching ~~Position~~ Placement.

### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))

### PUBLIC NOTICE

#### Education Impact Analysis Pursuant to 14 Del.C. Section 122(d)

#### 747 Criminal Background Check for Private School and Youth Camp Related Employment

#### A. Type of Regulatory Action Required

New Regulation

#### B. Synopsis of Subject Matter of the Regulation

The Secretary of Education intends to create 14 **DE Admin. Code** 747 Criminal Background Check for Private School and Youth Camp Related Employment. This regulation is being created due to changes in Titles 11, 16, and 31 of the Delaware Code related to Background Checks for Private Schools.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before March 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the Register of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office, located at the address listed above.

#### C. Impact Criteria

1. Will the new regulation help improve student achievement as measured against state achievement standards? The new regulation is intended to improve student achievement by helping to ensure that Private School Employees, Volunteers and Contractors have sufficient Criminal Background Checks.
2. Will the new regulation help ensure that all students receive an equitable education? The new regulation is intended to help ensure all students receive an equitable education.
3. Will the new regulation help to ensure that all students' health and safety are adequately protected? The new regulation is intended to help ensure that all students' health and safety are adequately protected.
4. Will the new regulation help to ensure that all students' legal rights are respected? The new regulation is intended to help ensure that all students' legal rights are respected.
5. Will the new regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The new regulation does not change the decision making at the local board and school level.
6. Will the new regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The new regulation does not place any unnecessary reporting or administrative requirements on decision makers.
7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject to be regulated does not change because of the new regulation.
8. Will the new regulation be consistent with and not an impediment to the implementation of other state

educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The new regulation is consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is no expected cost to implementing this new regulation.

## **747 Criminal Background Check for Private School and Youth Camp Related Employment**

### **1.0 Purpose**

This regulation shall apply to all individuals seeking Private School related employment in a Delaware Private School. A Criminal Background Check shall be completed for Employees, Contractors, or Volunteers of a Child Serving Entity. It shall consist of a fingerprinted Delaware and national background check completed by the State Bureau of Identification (SBI) and the Federal Bureau of Investigation (FBI). Additionally, a Child Protection Registry Check shall be completed by the Department of Services for Children, Youth and Their Families (DSCYF).

### **2.0 Definitions**

For purposes of this regulation, the following definitions apply:

**“Child Protection Registry Check”** means a computer search of the Child Protection Registry to determine if a person is a perpetrator in any substantiated cases of child abuse or neglect.

**“Child Serving Entity”** means a Private School or Youth Camp.

**“Contractor”** means a person, not an Employee, providing services within a Private School and who has Direct Access to children.

**“Covered Personnel”** means an “Employee”, “Contractor”, “Volunteer” or all those persons who have Direct Access to children in or through an extra duty position (also called Extra Pay for Extra Responsibility Position) in Private Schools whether the person receives compensation or not.

**“Criminal Background Check”** means a fingerprinted Delaware and national background check completed by the SBI and the FBI. Additionally, a Child Protection Registry Check shall be completed by DSCYF.

**“Direct Access”** means, pursuant to this regulation, the opportunity to have personal contact with students receiving care of education during the course of one’s assigned duties.

**“Employee”** mean, pursuant to this regulation, any person seeking employment for compensation with a Child Serving Entity, or any person who for any reason has Direct Access to children at a Child Serving Entity.

**“Private School”** means a school having any or all of grades kindergarten through twelve, operating under a board of trustees and maintaining a faculty and plant which are properly supervised.

**“Volunteer”** means a person providing volunteer services within a Child Serving Entity and who has Direct Access to children.

**“Youth Camp”** means a Child Serving Entity having custody or control of one or more school-age children, unattended by parent or guardian, for the purpose of providing a program of recreational, athletic, education and religious instruction or guidance. The camp operates for up to 12 weeks for three or more hours per day, during the months of May through September or some portion thereof, or during holiday breaks in the course of a school year; and is operated in a space or location other than one subject to licensing pursuant to 31 **Del.C.** §344.

### **3.0 Criminal Background Checks for Private School Prospective Employees, Volunteers, and Contractors**

3.1 A Criminal Background Check shall be completed for Employees, Contractors, or Volunteers of a Private School, including Youth Camps directly operated by a Private School, in accordance with the procedures in 14 DE Admin. Code 745 and 31 Del.C. §309(c)(1) and (2).



# PROPOSED REGULATIONS

3.2 Notwithstanding 3.1 above, Private Schools, including Youth Camps directly operated by a Private School, may choose to perform a name-based Delaware Criminal Background Check for prospective Employees, Volunteers, and Contractors through the Delaware Justice Information System and an out-of-state criminal record check using private, third party providers of such checks, provided that any out-of-state criminal record check shall include a social security trace search and county-based criminal record search in the counties in which the individual has resided within the past ten (10) years.

## **4.0 Exemption**

Any Private School, including Youth Camps directly operated by a Private School, may choose not to perform the Criminal Background Check and Child Protection Registry checks described in 31 Del.C. §309(c)(1) and (c)(2), provided that the Private School or youth camp that is directly operated by the private school, informs parents or guardians of the youth in attendance that the school or youth camp is not meeting minimum background check safety requirements for its staff members. The school or camp must obtain and retain for at least 1 year a signed acknowledgement of same from the parents or guardians.

## **5.0 Determination of Suitability**

The determination of suitability for employment shall be made by the Private School pursuant to the factors listed in 31 Del.C. §309(d), procedures in 31 Del.C. §309(e)(1) and any other criteria the Private School may establish.

## **6.0 Confidentiality**

6.1 All information and records pertaining to Criminal Background Checks, pursuant to 31 Del.C. §309, and these regulations, shall be maintained in a confidential manner including, but not limited to, the following:

6.1.1 Access to Criminal Background Check records, and letters of reference accompanying out of state Criminal Background Checks, and determination of suitability shall be limited to the Private School head of school or chief personnel officer and one person designated to assist in the processing of Criminal Background Checks, who will receive training in confidentiality, be required to sign an agreement to keep such information confidential and employ proper precautions to ensure that interoffice communications remain confidential.

6.1.2 All such records shall be kept in locked, fireproof cabinets;

6.1.3 No information from such records shall be released without the signed approval of and the appropriate signed release of the candidate or person placed in a Covered Personnel position.

## **7.0 Penalties**

The Private School head of school or chief personnel officer shall report to the appropriate police authorities evidence of any person who knowingly provides false, incomplete, or inaccurate criminal history information or who otherwise knowingly violates the provisions of 31 Del.C. §311.

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### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))  
14 DE Admin. Code 775

### PUBLIC NOTICE

Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)

### 775 New Teacher Hiring Date Reporting

#### A. Type of Regulatory Action Required

## Amendment to Existing Regulation

**B. Synopsis of Subject Matter of the Regulation**

The Secretary of Education intends to amend 14 **DE Admin. Code** 775 New Teacher Hiring Date Reporting. This regulation is being amended to align teacher hiring date collection with annual reporting done within the Teacher and Leader Effectiveness branch of the Department of Education and as required by 14 **Del.C.** §1725. This regulation was published in the November *Register of Regulations* and because of comments received is being republished.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before March 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the *Register of Regulation's* website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office located at the address listed above.

**C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation does not address student achievement as measured against state achievement standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to continue to help ensure all students receive an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amendments do not address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to help ensure that all student's legal rights are respected.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amended regulation does not change the decision making at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject to be regulated does not change because of the amendment.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The amendment is consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is no expected cost to implementing this amended regulation.

**775 New Teacher Hiring Date Reporting****1.0 Purpose**

The purpose of this regulation is to outline the criteria and process related to new teacher hiring data collection and reporting by school districts as required by 14 **Del.C.** §1725 and align such with annual reporting done within the Teacher and Leader Effectiveness Branch of the Department of Education.

**2.0 Definitions**

"**Contract Offer Date**" shall mean the date an authorized agent or representative of the district notifies the successful candidate of the intent to hire.

# PROPOSED REGULATIONS

~~"Critical Curricular Area" shall mean an area identified as a critical area by the Department of Education and approved by the State Board of Education.~~

"District" shall mean a reorganized school district or vocational technical school district established pursuant to Chapter 10 of Title 14 of the Delaware Code.

"Department" means the Delaware Department of Education.

"Hard to Staff Position" means a position for which school districts have the fewest qualified applicants.

"New Teacher Hiring Date" shall mean, for purposes of this regulation, the Contract Offer Date as defined herein.

"Position Availability Date" shall mean the date the district Human Resources Office knows the available position is released for a new full-time teacher hire.

~~"Position Title" shall mean the appropriate teaching position as offered to the teacher from the list of teacher position titles as provided in the Delaware Educator Data System (DEEDs).~~

"Position Type" shall mean the appropriate instructional level of the teacher or whether the teacher is in a ~~critical curricular area~~ Hard to Staff Position.

### 3.0 New Teacher Hiring Data Report

On or before December 1st of each year, each District shall annually submit a ~~New Teacher Hiring Date Report~~ an Educator Hiring Practices and Needs Report to the Department ~~or in~~ in a format approved by the Department that includes, but is not limited to, Contract Offer Date, Position Availability Date, ~~and Position Title~~ Position Type, number of positions available and filled, information on Hard To Staff Positions, information on recruitment and selection processes, and information on staffing practices during the most recent hiring season(s). The Department may also require each District to enter such information on an ongoing basis into an electronic statewide information system. ~~The report~~ Department shall reflect the district new teacher hiring activity from the "estimated unit count" as that term is defined pursuant to 14 Del.C. §1704 until November 15th of that same calendar year review and provide information on educator hiring practices and needs, including hiring activity related to the "estimated unit count" as that term is defined pursuant to 14 Del.C. §1704, in the annual Delaware Talent Practices Report (Report). The Report is to be provided no later than March 31st of the following year.

## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))  
14 DE Admin. Code 923

### PUBLIC NOTICE

Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)

### 923 Children with Disabilities Subpart B, General Duties and Eligibility of Agencies

#### A. Type of Regulatory Action Required

Amendment to Existing Regulation

#### B. Synopsis of Subject Matter of the Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies. The amendments are being made to align the regulation with 14 Del.C. §3125 related to the establishment and procedures for the creation and maintenance of a parent council for the parents of students with disabilities. The Department of Education has met and received preliminary input from the Governor's Advisory Council for Exceptional Citizens regarding the

amendments to this regulation.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before April 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the Register of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office located at the address listed above. Note this is a 60 day comment period.

### **C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is intended to help improve student achievement as measured against state achievement standards by ensuring that students with disabilities are adequately represented via parent councils.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to help ensure all students receive an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amendments do not address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to help ensure that all student's legal rights are respected.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amendments do not change decision making at the local or school levels.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject of the regulation does not change because of the amendments.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The amendments are consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing this subject matter.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is not an expected cost to implementing this regulation with the amendments.

## **923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies**

**Non-regulatory note:** Some sections of this regulation are shown in *italics*. Federal law requires that the Delaware Department of Education identify in writing any Delaware rule, regulation or policy that is a state-imposed requirement rather than a federal requirement (see 20 USC §14079(a)(2)). The *italicized portions* of this regulation are Delaware-imposed requirements for the education of children with disabilities and are not specifically required by federal special education law and regulations.

### ***(Break in Continuity of Sections)***

#### **25.0 Parent Councils**

25.1 Each school district and charter school enrolling any child with disabilities shall, on an annual basis, contact the parents of each such child to attempt to facilitate the creation and maintenance of a Parent Council for the parents of students with disabilities.

25.2 Parent Councils will advocate generally for students with disabilities and provide person-to-person support with individual parents and children.

25.3 Each school district and charter school shall collaborate and coordinate with existing parent groups and other information and support groups to facilitate creation, maintenance, and effectiveness of the Parent Councils.

**256.0 to 28.0** Reserved

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies**

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**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 924

**PUBLIC NOTICE**

**Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)**

**924 Children with Disabilities Subpart C Local Educational Agency Eligibility**

**A. Type of Regulatory Action Required**

Amendment to Existing Regulation

**B. Synopsis of Subject Matter of the Regulation**

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 924 Children with Disabilities Subpart C Local Educational Agency (LEA) Eligibility. The amendments are being made to align with changes made to 14 **Del. Code** §3125A regarding training in the legal responsibility of preparing Individualized Education Programs for students with disabilities who attend charter schools.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before April 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the Register of Regulation's website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office located at the address listed above. Note this is a 60 day comment period.

**C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is intended to help improve student achievement as measured against state achievement standards by helping to ensure that students with disabilities who attend charter schools are appropriately identified and receiving services.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to help ensure all students receive an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amendments do not address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to help ensure that all student's legal rights are respected.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amendments do not change decision making at the local or school levels.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability does not change because of the amendments.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic

subjects of mathematics, science, language arts and social studies? The amendments are consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing this subject matter.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is not an expected cost to implementing this regulation with the amendments.

### **924 Children with Disabilities Subpart C Local Educational Agency (LEA) Eligibility**

**Non-regulatory note:** Some sections of this regulation are shown in *italics*. Federal law requires that the Delaware Department of Education identify in writing any Delaware rule, regulation or policy that is a state-imposed requirement rather than a federal requirement (see 20 USC §14079a)(2)). The *italicized portions* of this regulation are Delaware-imposed requirements for the education of children with disabilities and are not specifically required by federal special education law and regulations.

#### ***(Break in Continuity of Sections)***

### **9.0 Treatment of Charter Schools and their Students.**

#### ***(Break in Continuity Within Section)***

9.4 *No later than September 1 of each school year each charter school shall identify at least one professional staff member who holds a current certification in any area of special education in Delaware. Training shall be completed by September 30 of the current school year. The designee shall complete annual training approved by DOE regarding the legal responsibilities of charter schools with respect to preparation of Individual Education Programs for students with disabilities and resources available to charter schools to assist in preparation of such programs.*

9.4.1 *Each charter school shall notify DOE of any changes in staff appointed as designee(s) within seven (7) business days of the staff change.*

9.4.2 *The initial and refresher training shall be the annual training in special education regulations, policies, procedures, and procedural safeguards as outlined in IDEA and Delaware Administrative Code as it relates to special education. DOE shall annually publish date(s) for this training.*

9.45 Reserved

(Authority: 20 U.S.C. 1413(a)(5); 14 Del.C. §§505 and 3110)

#### ***(Break in Continuity of Sections)***

### **28.0 State Agency Eligibility**

28.1 Any State agency that desires to receive a sub grant for any fiscal year under 14 DE Admin. Code 928.5.0 shall demonstrate to the satisfaction of the DOE that:

28.1.1 All children with disabilities who are participating in programs and projects funded under Part B of the Act receive FAPE, and that those children and their parents are provided all the rights and procedural safeguards described in these regulations; and

28.1.2 The agency meets the other conditions of this subpart that apply to LEAs.

(Authority: 20 U.S.C. 1413(h); 14 Del.C. §3110)

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**924 Children with Disabilities Subpart C Local Educational Agency Eligibility**

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# PROPOSED REGULATIONS

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## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 925

### PUBLIC NOTICE

#### Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)

#### **925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs**

##### **A. Type of Regulatory Action Required**

Amendment to Existing Regulation

##### **B. Synopsis of Subject Matter of the Regulation**

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs. The amendments are being made to align with changes made to 14 **Del.C.** Ch. 31 which includes progress on transition goals and conduct of Individualized Education Program (IEP) meetings, notice of such meetings and parent input prior to IEP meetings. The amendments also include notice that the DOE, in response to the Department of Justice, shall survey annually parents who have children with IEPs to ensure compliance with state and federal laws and this regulation.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before April 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the *Register of Regulation's* website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office located at the address listed above. Note this is a 60 day comment period.

##### **C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is intended to help improve student achievement as measured against state achievement standards by ensuring that IEP meetings are conducted properly, that parents are adequately notified regarding the student's IEP and that transition goals are clear.
2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to help ensure all students receive an equitable education.
3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amendments do not address students' health and safety.
4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to help ensure that all student's legal rights are respected.
5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amendments do not change decision making at the local or school levels.
6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.
7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability does not change because of the amendments.
8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The amendments are consistent with and not an impediment to the implementation of other state educational policies.
9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing this subject matter.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is not an expected cost to implementing this regulation as amended.

### **925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs**

**Non-regulatory note:** Some sections of this regulation are shown in *italics*. Federal law requires that the Delaware Department of Education identify in writing any Delaware rule, regulation or policy that is a state-imposed requirement rather than a federal requirement (see 20 USC §14079(a)(2)). The *italicized portions* of this regulation are Delaware-imposed requirements for the education of children with disabilities and are not specifically required by federal special education law and regulations.

#### ***(Break in Continuity of Sections)***

### **20.0 Definition of Individualized Education Program**

#### ***(Break in Continuity Within Section)***

20.2 Transition services: *Beginning with the earlier of the first IEP to be in effect when the child turns fourteen (14) or enters the eighth (8th) grade, or younger if determined appropriate by the IEP Team, and updated annually thereafter, the IEP must include:*

20.2.1 Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

20.2.2 The transition services *and activities* (including courses of study) needed to assist the child in reaching those goals.

20.2.2.1 *The IEP team shall discuss employment options with children and parents consistent with Delaware's Employment First Policy articulated by 19 Del.C. §743.*

20.2.2.2 *Progress made on activities and services that reasonably enable the child to reach their postsecondary goals in transition IEPs shall be reported with the same frequency as academic goals.*

#### ***(Break in Continuity Within Section)***

### **21.0 IEP Team**

#### ***(Break in Continuity Within Section)***

21.7 *No public agency, or any person acting under the authority of a public agency, shall discriminate or take any adverse employment or contract action against any person based upon statements that person makes while advocating for a student in connection with an IEP, including statements made in preparation for or at a meeting, review, or conference concerning a child with a disability's free and appropriate public education.*

21.7.1 *Entities or persons who violate this subsection shall be subject to the same sanctions as persons or entities that engage in unlawful employment practices under 19 Del.C. Ch. 7.*

### **22.0 Parent Participation**

#### ***(Break in Continuity Within Section)***

22.2 Information provided to parents: The notice required under 22.1 shall:

22.2.1 Indicate the purpose, time, and location of the meeting and who will be in attendance; and

22.2.2 Inform the parents of the provisions in 21.1.6 and 21.3 (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and 21.6 (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).

22.2.2.1 *The IEP Team shall provide notice to the parent, and if appropriate, the child, that they may request the presence of any teacher, paraprofessional, and any additional staff members at an IEP meeting.*



## PROPOSED REGULATIONS

- 22.2.3 *A full copy of the procedural safeguards under state and federal law and regulations shall be offered to the parents at the IEP meeting.*
- 22.2.4 *The IEP Team shall provide notice to the parent, and if appropriate, the child, that they may request any data (e.g. classroom assessments, formative assessments, behavior data, related service reports, Response to Intervention data) in the agency's possession relevant to the child's needs or disability prior to the IEP meeting.*
- 22.3 *The IEP team will ensure parent input by:*
- 22.3.1 *The IEP team shall provide a questionnaire requesting the input of a child's parent, and where appropriate, the input of the child, with respect to the child's progress to date and additional proposed steps that should be taken to adjust the child's goals, curriculum, services, aids, modifications, and/or other elements of the child's Individualized Education Program.*
- 22.3.1.1 *The questionnaire shall be sent with or prior to the written meeting notice inviting the parent to attend the IEP meeting.*
- 22.3.2 *If the IEP Team prepares a draft of the IEP prior to the date of the IEP meeting, the IEP Team shall provide the parent, and if appropriate, the child, with a copy of the draft IEP accompanied by a letter clearly indicating that the document is a draft for discussion purposes only and is therefore subject to revisions.*
- 22.3.3 *The Department in collaboration with the Governor's Advisory Council for Exceptional Citizens shall create and provide a draft letter and associated guidance to assist public agencies with the content and application of the letter referred to in subsection 22.3.2.*
- 22.2.34 *For a child with a disability beginning with the earlier of the first IEP to be in effect when the child turns fourteen (14) or enters the eighth (8th) grade, or younger if determined appropriate by the IEP Team, the notice shall also indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with 20.2 and that the agency will invite the student; and identify any other agency that will be invited to send a representative. The invitation to the child shall be in writing.*
- 22.35 Other methods to ensure parent participation: If neither parent can attend an IEP Team meeting, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls, consistent with 28.0 (related to alternative means of meeting participation).
- 22.46 Conducting an IEP Team meeting without a parent in attendance: A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency shall keep a record of its attempts to arrange a mutually agreed on time and place, such as:
- 22.46.1 Detailed records of telephone calls made or attempted and the results of those calls;
- 22.46.2 Copies of correspondence sent to the parents and any responses received; and
- 22.46.3 Detailed records of visits made to the parent's home or place of employment and the results of those visits.
- 22.46.4 Use of interpreters or other action, as appropriate. The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.
- 22.57 Parent copy of child's IEP: The public agency shall give the parent a copy of the child's IEP at no cost to the parent.  
(Authority: 20 U.S.C. 1414(d)(1)(B)(i); 14 Del.C. §3110)
- 22.8 *The Department of Education, in conjunction with the Department of Justice, shall annually survey a random and representative sample of parents and their children who have Individualized Education Programs with respect to the parents' and children's satisfaction with the IEP process. Information gathered through this survey shall be used by the Department of Education and Department of Justice to conduct follow-up examinations with school districts and charter schools as to their good faith compliance with state and federal laws and regulations.*

22.8.1 Information gathered through this survey shall also be used by the Department of Education in carrying out monitoring duties as outlined in 14 DE Admin. Code 927 to ensure compliance with state and federal laws and regulations.

22.8.2 A summary of the survey results will be made available on the Department of Education's website.

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs**

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## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))  
14 DE Admin. Code 926

### PUBLIC NOTICE

#### Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)

#### **926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children**

#### **A. Type of Regulatory Action Required**

Amendment to Existing Regulation

#### **B. Synopsis of Subject Matter of the Regulation**

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children. The amendments are being made to align with changes made to 14 Del.C. §3131(b) regarding IEP meeting minutes being digitally provided by the public agency if initiated, as well as prior written notice for proposed changes.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before April 7, 2016 to Tina Shockley, Education Associate, Department of Education, Regulatory Review, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the *Register of Regulation's* website, [http://regulations.delaware.gov/services/current\\_issue.shtml](http://regulations.delaware.gov/services/current_issue.shtml), or obtained at the Department of Education, Finance Office located at the address listed above. Note this is a 60 day comment period.

#### **C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation is intended to help improve student achievement as measured against state achievement standards by ensuring meeting minutes of IEP meetings are provided electronically.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to help ensure all students receive an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amendments do not address students' health and safety.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to ensure that all student's legal rights are respected.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amendments do not change decision making at the local or school levels.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability does not change because of the amendments.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The amendments are consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing this subject matter.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is not an expected cost to implementing this regulation with the amendments.

## 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children

**Non-regulatory note:** Some sections of this regulation are shown in *italics*. Federal law requires that the Delaware Department of Education identify in writing any Delaware rule, regulation or policy that is a state-imposed requirement rather than a federal requirement (see 20 USC §14079(a)(2)). The *italicized portions* of this regulation are Delaware-imposed requirements for the education of children with disabilities and are not specifically required by federal special education law and regulations.

### 1.0 General Procedural Safeguards and Opportunity to Examine Records and Educational Programs

#### *(Break in Continuity Within Section)*

- 1.5 *Minutes of Meetings. A parent, a parent's authorized representative, or any public agency conducting a meeting, review or conference may take minutes of the meeting, review or conference concerning a child with a disability's free and appropriate public education. Minutes may be taken by a disclosed recording device or by a stenographer. The cost of recording the minutes is the responsibility of the person or agency electing to take minutes. Once taken, public agency minutes shall be maintained subject to the confidentiality requirements of these regulations and any other applicable Delaware or federal law. If initiated by the public agency, parents must be offered a digital copy.*

(Authority: 20 U.S.C. 1414(e), 1415(b)(1); 14 Del. C. §§3110, 3130 and 3131)

#### *(Break in Continuity of Sections)*

### 3.0 Prior Notice by the Public Agency: Content of Notice

#### *(Break in Continuity Within Section)*

- 3.2 Content of notice: The notice required in 3.1 shall include:
- 3.2.1 A written description of the action proposed or refused by the agency; and
- 3.2.2 A written explanation of why the agency proposes or refuses to take the action; and
- 3.2.3 A written description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and
- 3.2.4 A written statement that the parents of a child with a disability have protection under the procedural safeguards of these state and federal regulations and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
- 3.2.5 Sources for parents to contact to obtain assistance in understanding the provisions of these regulations, including contact information for parent assistance programs, legal assistance programs, and the Delaware State Bar Association; and
- 3.2.6 A written description of any other options the IEP Team considered and the reasons why those options were rejected; and
- 3.2.7 A written description of other factors which are relevant to the agency's proposal or refusal; and
- 3.2.8 A full explanation of all the procedural safeguards available to the parents. A written summary of procedural safeguards must be available to the parents under state and federal law and regulations.
- 3.2.8.1 A full copy of the procedural safeguards under state and federal law and regulations shall be provided to the parents at the IEP meeting.

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*(Break in Continuity Within Section)*

**\*Please Note:** As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:

**926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children**

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## DEPARTMENT OF FINANCE

### OFFICE OF UNCLAIMED PROPERTY, STATE ESCHEATOR

Statutory Authority: 12 Delaware Code, Section 1154 (12 Del.C. §1154)

#### PUBLIC NOTICE

#### **Voluntary Disclosure Agreement and Escheat Examination Manual**

In compliance with the State's Administrative Procedures Act (Title 29, Chapter 101 of the Delaware Code) and under the authority of 12 Del.C. §1154, the Delaware Department of Finance's Office of Unclaimed Property, State Escheator, proposes to revise and replace its regulations related to its Voluntary Disclosure Agreements and Escheat Examinations.

In accordance with 29 Del.C. §10116, persons wishing to submit written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed regulations should direct them to the following address:

David Gregor  
State Escheator  
Department of Finance  
820 N. French Street  
Wilmington, DE 19801

Notice may also be directed via electronic mail to [david.gregor@state.de.us](mailto:david.gregor@state.de.us). Any written submission in response to this notice and relevant to the proposed regulations must be received by the Department of Finance no later than **4:30 p.m. EST, Friday, April 1, 2016**.

The action concerning determination of whether to adopt the proposed regulations will be based upon the results of Department analysis and the consideration of the comments and written materials filed by other interested persons.

#### SUMMARY OF PROPOSAL

The purpose of this notice is to advise the public that the Delaware Department of Finance's Office of Unclaimed Property, State Escheator, proposes to promulgate a manual to create a framework to ensure greater transparency and predictability in the process. The goal is for holders of unclaimed property to have a basic understanding of the processes available to them as well as the State's expectations. The standards contained in this "Voluntary Disclosure Agreement and Escheat Examination Manual" are to be implemented consistently, so as to ensure fair and uniform treatment of holders of unclaimed property.

#### Statutory Authority

Delaware Code, Title 12, §1154

#### Background

On January 29, 2015, the Governor of Delaware signed into law Senate Bill 11 of the 148<sup>th</sup> General Assembly, which directed the Delaware Secretary of Finance to complete the development of a detailed manual containing procedural guidelines for the conduct of Delaware unclaimed property examinations.

**\*Please Note:** Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:

**Voluntary Disclosure Agreement and Escheat Examination Manual**

## DEPARTMENT OF STATE DIVISION OF PROFESSIONAL REGULATION

### 1100 BOARD OF DENTISTRY AND DENTAL HYGIENE

Statutory Authority: 24 Delaware Code, Section 1106(a)(1) (24 Del.C. §1106(a)(1))  
24 DE Admin. Code 1100

#### PUBLIC NOTICE

#### 1100 Board of Dentistry and Dental Hygiene

The Delaware Board of Dentistry and Dental Hygiene, pursuant to 24 **Del.C.** §1106(a)(1), proposes to revise its regulations. The proposed amendments to subsections 4.0 and 4.1 seek to clarify that the statutory requirement set forth at 24 **Del.C.** §1122(a)(1) requiring dental candidates to have "received a degree in dentistry from an accredited dental college or university accredited by the Commission on Dental Accreditation of the American Dental Association" may obtain such a degree through either a pre-doctoral dental education program or a post-doctoral dental program of at least 24 months in any specialty that includes a clinical component. The proposed changes at subsection 12.2.28 seek to clarify that fee-splitting is a basis for discipline of a Delaware dentist or dental hygienist.

The Board will hold a public hearing on the proposed rule change on March 17, 2016 at 3:00 PM, Second Floor Conference Room A, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments should be sent to Jennifer Witte, Administrator of the Delaware Board of Dentistry and Dental Hygiene, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments will be accepted until April 1, 2016.

#### 1100 Board of Dentistry and Dental Hygiene (*Break in Continuity of Sections*)

#### 4.0 Qualifications of Applicant; Education and Residency Requirements [24 Del.C. §1122(a)(3)]

- 4.1 An applicant for licensure as a dentist, whether by examination or endorsement, shall have received a degree in dentistry from an accredited dental college or university accredited by the Commission on Dental Accreditation of the American Dental Association. Such a degree may consist of either a pre-doctoral dental education program or a post-doctoral dental program of at least 24 months in any specialty that includes a clinical component.
- 4.42 An applicant for licensure as a dentist must have completed 1 year as a dental intern within a general practice residency accredited by the Commission on Dental Accreditation (CODA).
- 4.23 An applicant who has completed a CODA approved specialty residency of 4 years or more will be deemed to have satisfied the general practice residency requirement.
- 4.34 An applicant who has completed a CODA approved specialty residency of less than 4 years must demonstrate that the specialty residency program meets the following criteria:
- 4.34.1 The program must meet the goals, objectives, proficiencies and competencies set forth in Standard 2.4 of the CODA Accreditation Standards for Advanced Education Programs in General Practice Residency, ©2007.
- 4.34.2 The program must include a rotation of at least 70 hours in anesthesia and a rotation of at least 70 hours in medicine.
- 4.45 An applicant for licensure as a dentist by reciprocity who has had at least 3 years of active dental practice in another state or territory of the United States is not required to provide evidence of a general practice or specialty residency.

4.45.1 Active practice shall be defined as an average of at least 1000 hours of direct patient care per year. Satisfactory evidence of active practice may include, but is not limited to, W-2 forms, 1099 forms, tax returns, and/or written verification of hours from the dental practice administrator. The Board reserves the right to request supplemental verification and to reject incomplete documentation.

4.56 An applicant for licensure as a dental hygienist by reciprocity must demonstrate active practice during 3 of the 5 years immediately preceding the application in the state in which the applicant currently is or has been licensed.

4.56.1 Active practice shall be defined as an average of at least 350 hours of direct patient care per year. Satisfactory evidence of active practice may include, but is not limited to, W-2 forms, 1099 forms, tax returns, and/or written verification of hours from the dental practice administrator. The Board reserves the right to request supplemental verification and to reject incomplete documentation.

*(Break in Continuity of Sections)*

## 12.0 Unprofessional Conduct Defined

*(Break in Continuity Within Section)*

12.2 Unprofessional conduct shall include but is not limited to the following:

*(Break in Continuity Within Section)*

12.2.28 Engaging directly or indirectly in the provision or receipt of anything of value for recommending a dentist or hygienist's services. Quarterly office gifts with a total annual value of \$1000 or less unrelated to a specific referral are acceptable.

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**1100 Board of Dentistry and Dental Hygiene**

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## DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 1799I(c) (24 **Del.C.** §1799I(c))  
24 **DE Admin. Code** 1799

### PUBLIC NOTICE

#### 1799 Genetic Counselor Advisory Council

Pursuant to 24 **Del.C.** §1799I(c), the Genetic Counselor Advisory Council ("the Council") of the Delaware Board of Medical Licensure and Discipline has proposed revisions to its rules and regulations pertaining to license renewal and continuing education requirements.

A public hearing will be held on March 4, 2016 at 3:30 p.m. in the second floor conference room B of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware, where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Genetic Counselor Advisory Council, 861 Silver Lake Boulevard, Dover, Delaware 19904. Persons wishing to submit written comments may forward these to the Council at the above address. Pursuant to 29 **Del.C.** §10118(a), the final date to receive written comments will be March 19, 2016, which is 15 days following the public hearing.

#### 1799 Genetic Counselor Advisory Council

*(Break in Continuity of Sections)*

## 4.0 Renewal of License

4.1 Each license shall be renewed biennially. The failure of the Council and/or Board to notify a licensee of his/her expiration date and subsequent renewals does not, in any way, relieve the licensee of the

# PROPOSED REGULATIONS

requirement to renew his/her certificate pursuant to the regulations of the Council and 24 **Del.C.** Ch. 17, Subchapter 11.

- 4.2 ~~Renewal may be effected by:~~ License renewal shall be accomplished online at [www.dpr.delaware.gov](http://www.dpr.delaware.gov) and shall include:
- 4.2.1 ~~filing a renewal application on the prescribed online application approved by the Council and provided by the Division of Professional Regulation. License renewal may be accomplished online at [www.dpr.delaware.gov](http://www.dpr.delaware.gov);~~
  - 4.2.2 ~~providing other information as may be required by the Council to ascertain the licensee's good standing;~~
  - 4.2.31 ~~attesting on the renewal application to having completed~~ attestation of completion of the continuing education required by Rule 5.0; and
  - 4.2.42 ~~payment of fees as determined by the Division of Professional Regulation.~~
- 4.3 As a condition of renewal, each licensee shall maintain his/her certification with the American Board of Genetic Counseling, the American Board of Medical Genetics, or an organization that is recognized as equivalent.
- 4.4 As a condition of renewal, the licensee shall provide the Council with any other information as may be required by the Council to ascertain the licensee's good standing.
- 4.35 Failure of a licensee to renew his/her license shall cause his/her license to expire. A licensee whose license has expired may renew his/her license within one (1) year after the expiration date upon fulfilling items 4.2.1 ~~–4.2.4~~ and 4.2.2 above, certifying that he/she has not practiced genetic counseling in Delaware while his/her license has expired, and paying the renewal fee and a late fee as determined by the Division of Professional Regulation.
- 4.46 No licensee will be permitted to renew his/her license once the one (1) year period has expired.
- 4.47 The former licensee may re-apply under the same conditions that govern applicants for new licensure under 24 **Del.C.** Ch. 17, Subchapter 11.
- 4.48 No genetic counselor shall practice in the State of Delaware during the period of time that his/her Delaware license has expired.

## 5.0 Continuing Education

- 5.1 Continuing Education Credit Hours Required for Renewal
- 5.1.1 Licensees are required to complete ~~five (5)~~ three (3) Continuing Education Units (CEU) biennially. A continuing education unit is equivalent to ten contact hours (a contact hour is 60 minutes). Licensees shall retain all certificates and other documented evidence of participation in an approved/accredited continuing education program for a period of at least (5) five years.
  - 5.1.2 Proof of continuing education is satisfied with an attestation by the licensee that he or she has satisfied the Requirements of Rule 5.0.
  - 5.1.3 Attestation must be completed electronically at the time of renewal.
  - 5.1.4 Licensees selected for random audit pursuant to Rule 6.0 will be required to supplement the attestation with attendance verification.
  - 5.1.5 CEU hours shall be prorated for new licensees. A licensee for renewal shall follow the following schedule of reporting CEUs: if, at the time of renewal, you have been licensed for less than one year, NO continuing education is required; licensed for more than one year, but less than two years, half of the continuing education (2~~1.5~~ CEUs) is required, all of which shall be Category 1 CEUs pursuant to Rule 5.3.2; licensed for two or more years, the full amount (5~~3~~ CEUs) is required.

### *(Break in Continuity Within Section)*

- 5.3 Acceptable Activities /Continuing Education Program Offerings
- 5.3.1 The overriding consideration in determining whether a specific activity/program qualifies as acceptable continuing education shall be that it is a planned program of learning which contributes directly to professional competence in the practice of Genetic Counseling

5.3.2 Licensees shall demonstrate that they have obtained CEUs in the categories and according to the criteria established by the American Board of Genetic Counselors (ABGC) for recertification, as may be amended from time to time.

5.3.2.1 CEUs must be completed during the biennial renewal cycle.

5.3.2.2 ~~The percentage of CEUs obtained in each category should be scaled to fit the biennial renewal period. The breakdown of CEUs should shall be as follows: ABGC guidelines for recertification and be scaled for the renewal period. For example current guidelines state: at least 60% 2 Category 1 CEUs, and up to but no more than 40% 1 Category 2 CEUs, PACs may substitute for up to .06 Category 1 CEUs for up to 20% of the total CEUs. Therefore, for a full 2 year renewal cycle the CEU breakdown should be comprised of at least 3.0 Category 1 CEUs, up to but no more than 2.0 Category 2 CEUs. If using PACs the breakdown would be as follows: at least 2.0 Category 1 CEUs, up to but no more than 2.0 Category 2 CEUs and up to but no more than 1.0 PACs.~~

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**1799 Genetic Counselor Advisory Council**

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## DIVISION OF PROFESSIONAL REGULATION

Statutory Authority: 24 Delaware Code, Section 2906(a)(1) (24 Del.C. §2906(a)(1))  
24 DE Admin. Code 2925

### PUBLIC NOTICE

#### 2925 Real Estate Commission Education Committee

Pursuant to 24 Del.C. §2906(a)(1), the Delaware Real Estate Commission has proposed revisions to the Real Estate Commission Education Guidelines (the "Guidelines").

A public hearing will be held on March 10, 2016 at 9:00 a.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware, where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Real Estate Commission, 861 Silver Lake Boulevard, Dover, Delaware 19904. Persons wishing to submit written comments may forward these to the Commission at the above address. Pursuant to 29 Del.C. §10118(a), the final date to receive written comments will be March 25, 2016, which is 15 days following the public hearing. The Commission will deliberate on all of the public comments at its regularly scheduled meeting on April 14, 2016, at which time the Commission will decide whether to adopt the revisions as proposed.

The Commission has proposed a new Rule 4.0 to address distance education. Rule 4.0 provides that prelicensing education, for both salespeople and brokers, and continuing education, may be accomplished through distance education. The proposed rule establishes standards for distance education courses, providers and instructors to ensure that applicants and licensees receive appropriate training. Other rules are revised to accommodate the new Rule 4.0.

**\*Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

**2925 Real Estate Commission Education Committee**



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# PROPOSED REGULATIONS

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## DEPARTMENT OF TRANSPORTATION DIVISION OF MAINTENANCE AND OPERATIONS

Statutory Authority: 17 Delaware Code, Section 1103 (17 Del.C. §1103)  
2 DE Admin. Code 2601

### PUBLIC NOTICE

#### 2601 Outdoor Advertising

#### Background

The Department of Transportation has developed a general revision of its Outdoor Advertising regulations. Among other changes, the regulations clarify standards for public service signs as well as decorative residential subdivision signs. It also changes the time period for agri-produce signs to reflect seasonal products outside of the typical growing season.

#### Public Comment Period

The Department will take written comments on the proposed Outdoor Advertising Regulations from February 1, 2016 through March 2, 2016. The proposed Regulations appear below.

Any request for copies of the proposed Regulations, or any questions or comments regarding this document should be directed to:

Jeff Leonard  
Outdoor Advertising and Roadside Control Manager  
Division of Maintenance and Operations  
Delaware Department of Transportation  
250 Bear-Christiana Road  
Bear, DE 19701  
(302) 326-4585 (telephone)  
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jeff.leonard@state.de.us

#### 2601 Outdoor Advertising (Break in Continuity of Sections)

### 12.0 Standards for Public Service Signs

#### 12.1 General

12.1.1 No public service sign shall be erected or maintained without first securing a permit from the Department as required by these regulations. Applications for permits shall be processed in accord with procedures promulgated by the Department. A certification by the Department of ~~Public Instruction~~ Education (DOE) that each shelter on which signs are or are to be erected is needed to provide shelter for students at that location shall accompany each application. Applications and approval shall be processed in accord with procedures promulgated by the Department.

12.1.2 Shelters shall bear an identifying tag indicating the name and contact information of the party responsible for the shelter and any signs affixed to it. Such identification tags shall be placed within the interior of the shelter and cannot exceed 2 square feet.

12.1.3 Shelters located within the right-of-way of any public highway shall not display any type of advertising sign except an identification tag as defined in subsection 12.1.2.

12.1.4 At such time a shelter is no longer deemed necessary by the DOE, or is no longer being occupied by students, any and all signs affixed to such shelter shall be removed immediately. This paragraph does not apply to identification tags as defined in subsection 12.1.2.

*(Break in Continuity Within Section)*

12.5 Spacing

12.5.1 Only two public service signs shall be permitted at any one location. Signs will only be approved for a shelter provided it does not in any way obscure or otherwise interfere with the effectiveness of an official ~~traffic sign, signal, or device~~ TCD, or which obstructs or interferes with the driver's view of approaching, merging, or intersection traffic, or which interferes with the safe and free flow of traffic in any way.

**13.0 Standards for On Premise Signs**

*(Break in Continuity Within Section)*

13.10 Decorative Residential Subdivision Signs

13.10.1 Decorative residential subdivision signs which basically indicate the name of the individual suburban community are, for the purposes of these rules and regulations, considered a type of on premise signs and are allowable provided:

13.10.1.1 They are erected within the subdivision limits,

13.10.1.2 The prime intent is identification of the subdivision,

13.10.1.3 They have received prior approval from the Division and

13.10.1.4 They meet all eligibility tests specified in this paragraph.

13.10.1.5 The ~~above~~ provisions in this section apply to decorative residential subdivision signs erected adjacent to any state maintained roadway within this State.

13.10.2 The following signs are expressly prohibited:

13.10.2.1 Signs located in such a manner as to obscure or otherwise interfere with the effectiveness of an official TCD, or obstruct or interfere with the driver's view of approaching, merging, or intersecting traffic.

13.10.2.2 Signs which are erected or maintained upon trees or utility poles or painted or drawn upon rocks or other natural features.

13.10.2.3 Obsolete signs.

13.10.2.4 Signs which are structurally unsafe or in disrepair.

13.10.2.5 Signs which move or have any animated or moving parts.

13.10.2.6 Signs located in rest areas or parklands.

13.10.2.7 Signs containing the names of builders or developers.

13.10.3 Placement

13.10.3.1 New signs shall be placed on an established easement, or private property at the entrance to the subdivision. In areas where no easement is available due to limited site frontage, or placement on private property is not possible, provisions may be made to locate the sign within the right-of-way provided that:

13.10.3.1.1 Signs shall be compliant with the standards as set forth under the National Cooperative Highway Research Program 350 (NCHRP 350), the Manual for Assessing Safety Hardware (MASH), or the most current version in effect at the time.

13.10.3.1.2 Signs do not present a sight distance or safety hazard.

13.10.3.1.3 A right-of-way use agreement is executed with the Department.

13.10.4 Lighting

13.10.4.1 Signs may be illuminated subject to the following:

13.10.4.1.1 Signs which contain, include, or are illuminated by any flashing, intermittent, or moving light or lights are prohibited. The use of a variable message sign (VMS) as

defined in Section 4.0 of these regulations shall be prohibited for decorative residential subdivision signs.

13.10.4.1.2 Signs which are not effectively shielded so as to prevent beams or rays of light from being directed at any portion of the traveled way of any highway or which are of such intensity or brilliance as to impair the vision of the driver of any motor vehicle, or which otherwise interfere with any driver's operation of a motor vehicle are prohibited.

13.10.4.1.3 No sign may be so illuminated as to interfere with the effectiveness of or obscure an official TCD.

## 14.0 Standards for Agri-Produce Signs

### 14.1 General

14.1.1 Agri-produce signs shall not be allowed to be erected on the Interstate system unless they fully meet the requirements for "on premise" signs as set out in Section 13.0 of these regulations.

14.1.2 On other systems, agri-produce signs shall be considered as "on premise" signs and shall be subject to the same requirements and conditions as described for "on premise" signs in Section 13.0 of these regulations with the following exceptions:

14.1.2.1 Free standing agri-produce signs shall be allowed to remain erected only during the seasonal period ~~from May 1 through September 30~~ of the item being advertised. During the off season signs of this type shall be removed.

***(Break in Continuity Within Section)***

### 14.3 Lighting

14.3.1 Signs may be illuminated, subject to the following:

***(Break in Continuity Within Section)***

14.3.1.4 VMS signs shall follow guidelines as defined in subsection 13.8.1.4.

***(Break in Continuity Within Section)***

## 15.0 Standards for Outdoor Advertising Signs, Displays, and Devices in Areas Zoned Industrial or Commercial Within the Controlled Area

### 15.1 General

***(Break in Continuity Within Section)***

15.1.3 On-premise signs, displays, and devices which do not meet criteria set forth in Section 13.0 shall be considered "off-premise" advertising and shall be subject to the following conditions and requirements.

***(Break in Continuity Within Section)***

### 15.5 Spacing

15.5.1 For Interstate and controlled access highways, the structure for outdoor advertising sign shall be at least 500 feet from any similar structure.

15.5.2 For non-controlled access highways, outside incorporated areas, the structure for any sign shall be at least 300 feet from any similar structure. For non-controlled access highways within incorporated areas, the structure for any sign shall be at least 100 feet from any similar structure.

15.5.3 When structures are separated by building or other artificial obstructions in such a manner that only one sign facing located within the above spacing distances is visible from the highway at one time, variances may upon application be granted by the Department.

***(Break in Continuity Within Section)***

## 20.0 Certification of Political Subdivisions

### 20.1 General

20.1.1 Subsection (a) of Section ~~4403~~ 1110, Subchapter 1, Chapter 11, Title 17 of the **Delaware Code** provides for the Department to certify a political subdivision as having effective control when such

political subdivision has established and is enforcing regulations as to the size, spacing, and lighting of outdoor advertising signs, displays and devices in zoned commercial and industrial areas within its zoning jurisdiction.

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**2601 Outdoor Advertising**

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## **DIVISION OF MOTOR VEHICLES**

Statutory Authority: 21 Delaware Code, Section 302 (21 **Del.C.** §302)

### **PUBLIC NOTICE**

#### **2289 Transportation Network Companies**

The Delaware Division of Motor Vehicles (DMV) gives notice of intent to create a new regulation Title 2 Transportation Regulation 2289 Transportation Network Companies. This regulation sets forth regulations and procedures to clearly identify the roles and responsibilities of each party as they relate to Transportation Network Companies (TNC) and the safe movement of persons using a TNC service for transportation via a TNC digital network in the State of Delaware.

#### **Public Comment Period**

The DMV will take written comments on the proposed new Regulation 2289 of Title 2, Delaware Administrative Code, from February 1, 2016 through March 2, 2016.

The public may submit their comments to Ken Shock, Chief of Compliance and Investigations, Delaware Division of Motor Vehicles, P.O. Box 698, Dover, Delaware 19903, or by fax to (302) 736-7993 Attn: Ken Shock.

#### **2289 Transportation Network Companies**

##### **1.0 Authority**

The authority to promulgate this regulation is 21 **Del.C.** §302.

##### **2.0 Purpose**

This administrative rule sets forth regulations and procedures to clearly identify the roles and responsibilities of each party as they relate to Transportation Network Companies (TNC) and the safe movement of persons using a TNC service for transportation via a TNC digital network in the State of Delaware.

##### **3.0 Definitions**

For purposes of this regulation:

"Department" means the Delaware Department of Transportation.

"Digital Network" means any online-enabled application, software, website or system offered or utilized by a transportation network company that enables the prearrangement of rides with transportation network company drivers.

"Director" means the Director or Chief Executive Officer of the Delaware Transit Corporation of the Department of Transportation.

"Division" means the Delaware Transit Corporation.

"Highway" means any road, lane, or street maintained by the State, or any municipality or county thereof, for use by the traveling public.

# PROPOSED REGULATIONS

**"Permit"** means a formal authorization granted to a transportation network company, issued by the Delaware Department of Transportation, to operate a transportation network company's digital network or software application. The permit does not limit the number of transportation network company drivers and vehicles vetted by the transportation network company to operate on the digital network or software application.

**"Permit Holder"** means a transportation network company approved by the Delaware Department of Transportation to operate in State of Delaware.

**"Personal Vehicle"** means a motor vehicle that has been approved to be used by a transportation network company driver to perform rides arranged through a transportation network company digital network.

**"Prearranged Ride"** means the period of time that begins when a transportation network company driver accepts a requested ride through a digital network, continues while the transportation network company driver transports the rider in a personal vehicle, and ends when the rider departs from the personal vehicle.

**"Rider"** means an individual or persons who use a transportation network company's digital network to connect with a transportation network driver who provides prearranged rides to the rider in the transportation network company driver's personal vehicle between points chosen by the rider.

**"Transportation Network Company (TNC) Driver"** means an individual who uses a personal vehicle for hire, displaying the emblem or logo of the TNC they are operating for, to provide transportation services for passengers that are matched to that individual through a TNC's digital network, regardless of whether the individual is an employee or independent contractor for the TNC.

**"Transportation Network Company (TNC) Services"** means transportation of a rider between points chosen by the passenger and prearranged through the use of a TNC digital network or software application. TNC Services shall begin when a TNC driver accepts a request for transportation received through the approved TNC's digital network, continue while the TNC driver transports riders in the TNC driver's vehicle, and end when the rider exits the TNC driver's vehicle.

**"Transportation Network Company (TNC) Vehicle"** shall mean a personal vehicle that is used by a TNC Driver to provide transportation services requested through TNC's digital network or software application.

## 4.0 TNC responsibilities

4.1 To operate within the State of Delaware, a TNC must:

- 4.1.1 File with the Delaware Secretary of State Articles of Incorporation or Foreign Articles of Incorporation.
- 4.1.2 Meet all applicable business licensure requirements under the Delaware Code and Delaware Department of Revenue's regulations.
- 4.1.3 Obtain a permit authorizing the operation of TNC services in the State of Delaware.
- 4.1.4 Verify that every TNC driver authorized to operate on the TNC's digital network has the insurance coverage in accordance with Section 6.0 of this regulation.
- 4.1.5 Verify that each TNC driver is at least 18 years of age and has a valid driver license.
- 4.1.6 Advise each TNC driver that they are responsible for complying with applicable law, including Delaware's hands free cell phone law.
- 4.1.7 Advise each TNC driver that any person conducting business in the State of Delaware is required to obtain a Delaware business license from the Delaware Division of Revenue. In addition, each TNC driver may also be required to obtain a business license within each municipality the TNC driver provides TNC services in.
- 4.1.8 Undertake the necessary steps as described in Section 5.0 to ensure the safety of its riders.
- 4.1.9 Maintain the following information about each TNC driver:
  - 4.1.9.1 The TNC driver's driver license number and state of licensure;
  - 4.1.9.2 Documentation showing the TNC driver is authorized to operate in accordance with this regulation;

- 4.1.9.3 The vehicle registration number, license plate number, and state of vehicle registration for each personal vehicle that the TNC driver uses for TNC Services; and
- 4.1.9.4 Documentation showing that the vehicle has been inspected in accordance with this regulation.
- 4.1.10 Provide a customer support telephone number, email address, or hyperlink on its digital application or website for rider inquiries.
- 4.1.11 Prior to a rider entering a TNC driver's personal vehicle, make available to the rider the method by which the TNC calculates fares, the applicable rate being charged, and the option to receive an estimated fare.
- 4.1.12 Within 24 hours following the completion of a trip, cause to be transmitted an electronic receipt to the passenger that lists:
  - 4.1.12.1 The origin and destination of the trip;
  - 4.1.12.2 The total time and distance of the trip; and
  - 4.1.12.3 An itemization of the total fare paid, if any.
- 4.1.13 Comply with all applicable laws relating to accommodation of service animals.
- 4.1.14 Require all TNC drivers to display, at all times, while logged into the TNC's digital network, a sign, emblem, or logo that can sufficiently identify the vehicle as being associated with the TNC or its associated digital network.
- 4.1.15 Submit to the Division at the time of application and each year thereafter,
  - 4.1.15.1 An attestation that the requirements set forth in this regulation have been met, and
  - 4.1.15.2 Within 30 days of submitting its initial and annual attestation, the TNC shall also submit a permit fee of \$5000.00.

## **5.0 Rider and TNC Vehicle Safety**

- 5.1 A TNC must obtain and review a driving history research report for each prospective TNC driver.
  - 5.1.1 A TNC must check, at least annually, the driving record of every TNC driver in order to verify that the TNC driver has not accrued any disqualifying moving violations as described in this regulation.
- 5.2 Prior to approving a TNC driver to provide TNC services, a TNC must conduct, or have a third party conduct, a local, state and national criminal background check for each prospective TNC driver that includes:
  - 5.2.1 Multi-State/Multi-Jurisdiction Criminal Records Locator or other similar commercial nationwide database with validation (primary source search); and
  - 5.2.2 National Sex Offender Registry database.
- 5.3 A TNC must disqualify any prospective TNC driver whose background check or driving history reveals that:
  - 5.3.1 The individual is a match in the National Sex Offender Registry database;
  - 5.3.2 Within the last three years, the prospective TNC driver has been convicted of or has pled guilty to any of the following offenses, either under Delaware law or a substantially similar law of another state or of the United States:
    - 5.3.2.1 More than three moving violations;
    - 5.3.2.2 Driving while license is suspended or revoked under 21 Del.C. §2756;
    - 5.3.2.3 Attempting to flee or elude a police officer under 21 Del.C. §4103;
    - 5.3.2.4 Speeding 20 miles per hour or more over the posted speed limit;
  - 5.3.3 The prospective TNC driver has had his or her license suspended, revoked, or disqualified in this State or any other jurisdiction for moving violations during the preceding 3 years;
  - 5.3.4 The prospective TNC driver has ever been convicted of or has pled guilty to any of the following offenses, either under Delaware law or a substantially similar law of another state or of the United States:
    - 5.3.4.1 An offense classified as a Class A or violent Class B felony;

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- 5.3.4.2 Any crime against a child;
  - 5.3.4.3 Any crime constituting a felony sexual offense;
  - 5.3.4.4 Any crime constituting a felony homicide, including, but not limited to, murder, manslaughter and vehicular homicide;
- 5.3.5 Within the last seven years, the prospective TNC driver has been convicted of or has pled guilty to any of the following offenses, either under Delaware law or a substantially similar law of another state or of the United States:
  - 5.3.5.1 Driving under the influence under 21 **Del.C.** §§4177, 4177J, 4177L, or 4177M;
  - 5.3.5.2 Any crime constituting a felony offense, including any crime constituting a felony offense against public administration involving bribery, improper influence or abuse of office;
  - 5.3.5.3 A hit and run offense under 21 **Del.C.**, Ch. 42;
  - 5.3.5.4 Driving over 100 mph; or
  - 5.3.5.5 Reckless driving under 21 **Del.C.** §4175.
- 5.4 The indefinite review period described in subsection 5.3.4 shall only apply to prospective TNC drivers who reside in a state where a consumer reporting agency may disclose criminal offense convictions rendered at any time. For all other prospective TNC drivers, the review period for the offenses described in subsection 5.3.4 shall be equivalent to the maximum time period for which convictions may be reviewed under applicable state law.
- 5.5 A TNC must on an annual basis verify that:
  - 5.5.1 Each TNC driver's personal vehicle, authorized for providing TNC services, is registered in Delaware, and it required to pass a safety inspection for said registration; has a valid safety inspection certificate or sticker issued by the Delaware Division of Motor Vehicles; and
  - 5.5.2 Each TNC driver's personal vehicle with over 10,000 miles, authorized for providing TNC services, and that is registered in another state; has passed a motor vehicle safety inspection authorized or approved by a state governmental agency for personal vehicles; provided that, the initial safety inspection for a personal vehicle used by a new TNC driver may be conducted within 90 days of beginning TNC services.
    - 5.5.2.1 A copy of a TNC driver's personal vehicle safety inspection shall be kept in the vehicle at all times.
    - 5.5.2.2 At a minimum the TNC driver is responsible for maintaining his or her personal vehicle in accordance with safety inspection requirements set forth in 21 **Del.C.** §2143.
- 5.6 A TNC must implement a zero tolerance policy regarding a TNC driver's activities while accessing the TNC's digital network and/or providing TNC services.
  - 5.6.1 The zero tolerance policy shall address the use of drugs or alcohol while a TNC driver is providing TNC services or is logged into the TNC's digital network but is not providing TNC Services, and the TNC shall provide notice of this policy on its website, as well as procedures to report a complaint about a TNC driver with whom a rider was matched and whom the rider reasonably suspects was under the influence of drugs or alcohol during the course of the trip.
  - 5.6.2 Upon receipt of such rider complaint alleging a violation of the zero tolerance policy, the TNC shall immediately suspend such TNC driver's access to the TNC's digital platform, and shall conduct an investigation into the reported incident. The suspension shall last, at a minimum, the duration of the investigation.
- 5.7 No personal vehicle shall be driven recklessly, or so as to endanger life, limb, or property. Extreme caution in the operation of motor vehicles shall be exercised under hazardous conditions, such as snow, ice, sleet, fog, mist, rain, dust, smoke, or any other condition, which adversely affects visibility or traction.
- 5.8 No personal vehicle shall be driven by a TNC driver while his/her ability or alertness is so impaired through fatigue, illness, or any other cause, as to make it unsafe for him/her to drive or to continue to drive a motor vehicle; nor shall he/she be required or knowingly be permitted to drive while in such condition, except in case of grave emergency where the hazard to passengers would be increased by observance of the foregoing regulation.

- 5.9 No TNC driver provide TNC services while under the influence of intoxicating liquor or narcotic or habit producing drugs, use drugs or drink while on duty any alcoholic liquor or beverage, nor shall he/she knowingly be permitted to do so.
- 5.10 No TNC or TNC driver shall knowingly permit the transportation of high explosives, acids, inflammable liquids, loaded guns or any other article which will endanger life or limb, in any personal vehicle used for providing TNC services. This provision shall not apply to firearms carried by police officers or by members of the armed forces while on duty or while en route to or from duty.
- 5.11 No TNC or TNC driver shall permit the transportation of express or parcel freight to such an extent as will interfere with the safety or reasonable comfort of riders.

## **6.0 Insurance Requirements**

- 6.1 All TNCs, TNC drivers, and personal vehicles must be covered with insurance as specified in the regulation. It shall be unlawful and a violation of this regulation to lease or operate a personal vehicle that is not insured to the extent required herein.
- 6.2 The insurance coverage required by this regulation may be placed with an insurer licensed under Delaware law or with a surplus lines insurer eligible under Delaware law.
- 6.3 The insurance coverage required by this regulation may be satisfied by any combination of policies maintained by either a TNC or TNC driver.
- 6.4 The insurance requirements must be disclosed on each TNC's digital network and website.
- 6.5 Each TNC must file its insurance policies under seal with the Department as part of applying for a permit. The permit for the TNC will automatically expire upon expiration of the insurance policy, unless and until the TNC provides an updated insurance policy and applies to renew the permit.
- 6.6 A TNC's insurance shall provide coverage in the event a TNC driver maintains an insurance policy as described in this regulation and the TNC driver's policy has declined coverage, ceased to exist or has been cancelled.
- 6.7 TNC insurance requirements are defined by three service periods:
  - Period 1: Software Application open - waiting for a match.
  - Period 2: Match accepted - but passenger not yet picked up (i.e. driver is on his/her way to pick up the passenger).
  - Period 3: Passenger in the vehicle and until the passenger exits the vehicle.
- 6.7.1 Period 1 - TNCs shall provide primary insurance in the amount of at least fifty thousand dollars (\$50,000) for death and personal bodily injury per person, one hundred thousand dollars (\$100,000) for death and personal injury per incident, and twenty-five thousand dollars (\$25,000) for property damage. TNCs may satisfy this requirement through: (a) TNC insurance maintained by the driver; (b) TNC insurance maintained by the TNC that provides coverage if a driver does not maintain the required TNC insurance, or if the driver's TNC insurance ceases to exist or is cancelled; or (c) a combination of (a) and (b).
- 6.7.2 Periods 2 and 3 - TNCs must provide primary commercial liability insurance in the amount of one million dollars (\$1,000,000) per accident. TNCs may satisfy this requirement through: (a) TNC insurance maintained by the driver, if the TNC verifies that the driver's TNC insurance covers the driver's use of a vehicle for TNC services; (b) TNC insurance maintained by the TNC; or (c) a combination of (a) and (b).
- 6.7.3 Period 2 and 3 - TNCs shall also provide uninsured motorist coverage and underinsured motorist coverage in the minimum amount required under 18 Del.C. §3902. TNCs may satisfy this requirement through: (a) TNC insurance maintained by the driver, if the TNC verifies that the driver's TNC insurance covers the driver's use of a vehicle for TNC services; (b) TNC insurance maintained by the TNC; or (c) a combination of (a) and (b). The policy may also provide this coverage during any other time period, if requested by a participating driver relative to insurance maintained by the driver.
- 6.8 If involved in an accident while providing TNC Services:



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- 6.8.1 The TNC and/or a TNC driver must provide proof of insurance information to the other party involved in the accident.
- 6.8.2 Notify the TNC and the Division of the accident within 30 days.

## **7.0 Additional Requirements**

- 7.1 A TNC driver shall not solicit riders or service through a street hail or pick up, nor shall a TNC driver discharge a rider at a designated taxicab stand, no stopping or standing zone, or other area where a personal vehicle may not enter.
- 7.2 No TNC driver shall operate a personal vehicle within the State of Delaware, without first complying with all applicable business licensing requirements as determined by the Delaware Division of Revenue.
- 7.3 No TNC driver shall operate a vehicle that has not been approved for TNC services or is unaffiliated with a TNC while on the TNC's digital network.
- 7.4 Payment for TNC services shall only be made electronically via the TNC digital network. Cash payment shall not be accepted by the TNC driver.
- 7.5 Smoking is not permitted in a personal vehicle while providing TNC services.
- 7.6 The rider area of a TNC vehicle shall be clean, sanitary, and free of debris at all times.

## **8.0 Audit and Compliance**

- 8.1 To maintain sufficient recordation of TNC operations in Delaware, the Division shall:
- 8.1.1 Maintain a file which includes, at a minimum:
- 8.1.1.1 A copy of the TNC's business license filed with the Delaware Division of Revenue if the TNC is required to obtain a business license.
- 8.1.1.2 A copy of the TNC's Certificate of Insurance for the policy required to be maintained under this regulation which identifies the Office of Public Carrier Regulation as a Certificate Holder.
- 8.1.1.3 A copy of the attestation provided by the TNC in accordance with Section 4.0.
- 8.2 To ensure a TNC's compliance with this regulation, the Division or its employees or duly authorized agents:
- 8.2.1 In response to a specific complaint or accident, may inspect those records held by the TNC whose review is specifically necessary for the investigation and resolution of the complaint or accident.
- 8.2.2 No more than quarterly, request that the TNC transmit to the Division records and information that the TNC is required to maintain in accordance with this regulation for up to fifty (50) TNC drivers; provided that, the TNC shall undertake best efforts not to share records and information about the same TNC driver during consecutive reporting periods.
- 8.2.2.1 Within ten (10) business days of receiving a request, the TNC shall transmit the records to the Division via a secure delivery method, which may include use of encryption security. If, after this initial review, the Division has a reasonable basis to conclude that the TNC is not in compliance with this regulation, the Division may, upon reasonable notice, conduct a supplemental audit of records and information for an additional selection of TNC drivers at a mutually agreed location.
- 8.3 Any records or information that the TNC discloses to the Division pursuant to this regulation are deemed to be confidential, regardless of whether the records or information are marked as such, and shall not be disclosed by the Division to a third party or another governmental entity without the TNC's express written permission, unless required to be disclosed by applicable law or court order.
- 8.3.1 In the event that a third party submits a request to the Division for a TNC's confidential information under the Delaware Freedom of Information Act, 29 Del.C. §10001, et seq. or any other law or a lawsuit is filed seeking the disclosure of the TNC's confidential information, the Division shall: (i) assert applicable exemptions to the request as set forth in the Delaware Freedom of Information Act, 29 Del.C. §10001, et seq., or other applicable law; and (ii) promptly notify the TNC that it has

received a request and inform the TNC of whether it will release the requested record(s) so that the TNC has an opportunity to prevent disclosure.

- 8.4 The Division shall destroy any records it receives from the TNC pursuant to subsection 9.2.2 within one hundred and eighty (180) days of receiving such records unless required by law to retain the records for a longer period or the record relates to a TNC driver who the Division has a reasonable basis to believe is not properly authorized to operate in Delaware.
- 8.5 The Division shall review the status of the TNC to ensure the TNC remains in good standing with the Delaware Division of Corporations.
- 8.6 A TNC shall keep and make available to the division, when required, records in accordance with this regulation for a period of at least four years.
- 8.7 Per 21 Del.C. §2144, at any time and notwithstanding the possession of current registration plates, as provided by this title, the Secretary, or any authorized agent of the Department or any police officer may, upon reasonable cause, require the owner or operator of a vehicle to stop and submit such vehicle and the equipment to such further inspection and test with reference thereto as may be appropriate. In the event such vehicle is found to be in an unsafe condition or lacking the required equipment or is not in proper repair and adjustment, the officer shall give a written notice to the driver and shall send a copy thereof to the Department. The notice shall require that such vehicle and its equipment be placed in safe condition and in proper repair and adjustment and/or that proper equipment be obtained, and that a certificate of inspection and approval for such vehicle be obtained within 5 days thereafter.
- 8.8 Within sixty (60) days of notification of audit results, the TNC may file with the Division a petition for redetermination of such assessments. Petitions for redetermination shall not be considered after sixty (60) days. Every petition for redetermination shall state specifically the reason(s) which the petitioner believes entitles the petitioner to such determination. It shall be the duty of the Director, within ninety (90) days after the receipt of the petition, to provide in writing to the petitioner, a determination affirming the original audit results or any changes that resulted from the petitioner's request for redetermination.

## **9.0 Fines and Permit Revocation**

The Division may impose a fine or revoke a permit consistent with Delaware law, after providing to the TNC thirty (30) days' notice and the opportunity for a hearing, if a TNC fails to comply with the requirements of this regulation. Revocation of a permit would terminate a TNC's ability to operate its digital network within the State of Delaware.

## **10.0 Severability**

If any part of this rule is held to be unconstitutional or otherwise contrary to law by the court of competent jurisdiction, said portions shall be severed and the remaining portions of this rule shall remain in full force and effect under Delaware law.

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### **DIVISION OF PLANNING AND POLICY**

Statutory Authority: 17 Delaware Code, Sections 132(e), 507, 508 and 29 Delaware Code, Section 8404(8)  
(17 Del.C. §§132(e), 507 & 508; 29 Del.C. §8404(8))  
2 DE Admin. Code 2309

### **PUBLIC NOTICE**

### **2309 Development Coordination Manual**

Pursuant to the authority provided by 17 Del.C. §§132(e), 507, and 508, as well as 29 Del.C. §8404(8), the Delaware Department of Transportation (DelDOT) adopted the Development Coordination Manual.

The Department, through its Division of Planning and Public Policy, seeks to adopt general revisions to its existing regulations, the Development Coordination Manual, to address procedural changes, add or modify technical requirements, clarify and amend design criteria, and generally clarify the role of external technical references and guidance materials (as supporting documentation for design firms that are implementing the regulations). These collective changes are both technical and administrative in nature and serve in part to clarify the intent of the Department as enacted through these regulations.

**Public Comment Period**

DelDOT will take written comments on these proposed general revisions to Section 2309 of Title 2, Delaware Administrative Code, from February 1, 2016 through March 2, 2016. The public may submit their comments to:

Marc Coté, P.E., Assistant Director, Planning Development Coordination via email

(Marc.Cote@state.de.us) or in writing to his attention,

Division of Planning

Delaware Department of Transportation

P.O. Box 778

Dover, DE 19903

**Please Note: Due to the size of the proposed regulation it is not being published here. The following links to the proposed regulation are provided below:**

Preface (<http://regulations.delaware.gov/register/february2016/proposed/Preface.pdf>)

Chapter 1 Access Standards (<http://regulations.delaware.gov/register/february2016/proposed/Chap1.pdf>)

Chapter 2 Traffic Analysis and Improvements (<http://regulations.delaware.gov/register/february2016/proposed/Chap2.pdf>)

Chapter 3 Record Plan Design (<http://regulations.delaware.gov/register/february2016/proposed/Chap3.pdf>)

Chapter 4 Construction Plans (<http://regulations.delaware.gov/register/february2016/proposed/Chap4.pdf>)

Chapter 5 Design Elements (<http://regulations.delaware.gov/register/february2016/proposed/Chap5.pdf>)

Chapter 6 Construction Administration (<http://regulations.delaware.gov/register/february2016/proposed/Chap6.pdf>)

Chapter 7 Residential Access (<http://regulations.delaware.gov/register/february2016/proposed/Chap7.pdf>)

Chapter 8 Miscellaneous Access Guidelines (<http://regulations.delaware.gov/register/february2016/proposed/Chap8.pdf>)

Chapter 9 Manual Updates (<http://regulations.delaware.gov/register/february2016/proposed/Chap9.pdf>)

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## Symbol Key

Arial type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text added at the time of the proposed action. Language which is ~~stricken~~ through indicates text being deleted. **[Bracketed Bold language]** indicates text added at the time the final order was issued. ~~**[Bracketed bold stricken through]**~~ indicates language deleted at the time the final order was issued.

## Final Regulations

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the **Register of Regulations**. At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the **Register of Regulations**, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

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## DEPARTMENT OF EDUCATION OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 503

### REGULATORY IMPLEMENTING ORDER

### 503 Instructional Program Requirements

#### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 503 Instructional Program Requirements. This regulation is being amended to: (1) remove outdated references to previous school years regarding occurrence of physical fitness assessments, (2) include instructional requirements for World Languages and (3) clarify instructional requirements for Career and Technical Education.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on December 1, 2015, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities generally endorsing the regulation, but with one comment regarding the use of the term "licensed medical provider" being the appropriate term to us. In order to align with similar regulations, the Department changed the term to "Licensed Healthcare Provider" and defined it in subsection 5.4.

#### II. FINDINGS OF FACTS

The Secretary finds that it is appropriate to amend 4 **DE Admin. Code** 503 Instructional Program Requirements in order to remove outdated references to previous school years regarding occurrence of physical fitness assessments, include instructional requirements for World Languages and to clarify instructional requirements for Career and Technical Education.

### III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 503 Instructional Program Requirements. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 503 Instructional Program Requirements attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 503 Instructional Program Requirements hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

### IV. TEXT AND CITATION

The text of 4 **DE Admin. Code** 503 Instructional Program Requirements amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 4 **DE Admin. Code** 503 Instructional Program Requirements in the *Administrative Code of Regulations* for the Department of Education.

### V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on January 21, 2016. The effective date of this Order shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*.

**IT IS SO ORDERED** the 21<sup>st</sup> day of January 2016.

**Department of Education**

Steven Godowsky, Secretary of Education

Approved this 21<sup>st</sup> day of January 2016

**State Board of Education**

Teri Quinn Gray, Ph.D., President

Jorge L. Melendez, Vice President (absent)

G. Patrick Heffernan

Barbara B. Rutt

Gregory B. Coverdale, Jr.

Terry M. Whittaker, Ed.D.

Nina L. Bunting

### 503 Instructional Program Requirements

#### 1.0 English Language Arts

- 1.1 Local school districts and each charter schools shall provide instructional programs in English Language Arts for each grade K to 12.
- 1.2 All public school students in each grade K to 8 shall be enrolled in an English language arts program.
- 1.3 All public school students in grades 9 to 12 shall complete the credits in English language arts necessary to graduate from high school.

#### 2.0 Mathematics

- 2.1 Local school districts and each charter schools shall provide instructional programs in mathematics for each grade K to 12.
- 2.2 All public school students in each grade K to 8 shall be enrolled in a mathematics program.
- 2.3 All public school students in grades 9 to 12 shall complete the credits in mathematics necessary to graduate from high school.

#### 3.0 Science

- 3.1 Local school districts and each charter schools shall provide instructional programs in science for each grade K to 12.
- 3.2 All public school students in each grade K to 8 shall be enrolled in a science program.

- 3.3 All public school students in grades 9 to 12 shall complete the credits in science necessary to graduate from high school.

## 4.0 Social Studies

- 4.1 Local school districts and ~~each~~ charter schools shall provide instructional programs in social studies for each grade K to 12.
- 4.2 All public school students in each grade K to 8 shall be enrolled in a social studies program.
- 4.3 All public school students in grades 9 to 12 shall complete the credits in social studies necessary to graduate from high school.

## 5.0 Physical Education

- 5.1 Local school districts and ~~each~~ charter schools shall provide instructional programs in physical education for each grade K to 12 with the exception of the James H. Groves High School program.
- 5.2 All public school students in each grade 1 to 8 shall be enrolled in a physical education program.
- 5.3 All public school students in grades 9 to 12 shall complete the credit in physical education necessary to graduate from high school.
- 5.3.1 In addition to the one credit required for high school graduation, only one additional elective credit in physical education may be used to fulfill the graduation requirements.
- 5.4 The physical education requirements may be waived only for students who have an excuse from a qualified ~~physician~~ licensed **[medical healthcare] provider**, **which is defined as anyone lawfully authorized to diagnose and prescribe medical treatment or restriction,** or objections based on religious beliefs. The local school district or charter school shall have the authority to grant such waivers. The local school district or charter school shall maintain records of the waivers granted and upon request, make them available for review consistent with Federal and state confidentiality laws.
- 5.5 Local school districts and charter schools shall annually assess the physical fitness of each student in grades 4 and 7, and in grade 9 or 10. ~~Beginning in the 2006-2007 school year and annually thereafter, all students in grade 4 will be assessed. Beginning in the 2007-2008 school year and annually thereafter all students in grade 7 and in grade 9 or 10 will be assessed.~~ The physical fitness assessment tool used by the districts and charter schools shall be one designated by the Delaware Department of Education.
- 5.5.1 The local school districts and charter schools shall provide the results of the physical fitness assessment to the parent(s) guardian(s) or Relative Caregiver of each student. The districts and charter schools shall also report this information to the Delaware Department of Education in a format determined by the Department.
- 5.5.1.1 The Delaware Department of Education shall annually report the statewide grade level results of the physical fitness assessment to the public.

## 6.0 Visual and Performing Arts

- 6.1 Local school districts and ~~each~~ charter schools shall provide instructional programs in the visual and performing arts for each grade K to 12 with the exception of the James H. Groves High School program.
- 6.2 All public school students in each grade 1 to 6 shall be enrolled in a visual and performing arts program.

## 7.0 Career and Technical Education

- 7.1 Local school districts and charter schools, when consistent with the charter school's approved program, shall provide instructional program(s) ~~in two or more vocational technical education areas in grades 7 and 8~~ that demonstrate alignment to career and technical education programs of study within the high school feeder pattern(s).

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# FINAL REGULATIONS

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7.1.1 No later than the 2017-2018 school year, career and technical instructional program(s) in grades 7 and 8 shall be aligned to career and technical education programs of study at the high school level.

7.2 All public school students in grades 9 through 12 in local school districts, and charter schools when consistent with the charter school's approved program, shall be provided with the opportunity to enroll in and complete a career and technical education program of study.

## **8.0 World Language**

8.1 Local school districts and charter schools with any of grades 9 through 12 shall provide instructional programs in world languages for grades 9 through 12.

8.2 All public school students in grades 9 through 12 shall complete the credits in world languages required to graduate from high school.

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### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))

### REGULATORY IMPLEMENTING ORDER

#### 932 Military-Connected Youth

#### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The Secretary of Education seeks the consent of the State Board of Education to create 14 **DE Admin. Code** 932 Military-Connected Youth. This regulation is being created to align with 14 **Del.C.** §122(b)(28) which requires the development of a process for districts and charter schools to annually identify enrolled students who are "military-connected" youth. This is necessary to ensure school officials are aware of their military connection should they require any special services or supports.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on December 1, 2015, in the form hereto attached as *Exhibit "A"*. No comments were received for this regulation.

#### II. FINDINGS OF FACTS

The Secretary finds that it is appropriate to create 14 **DE Admin. Code** 932 Military-Connected Youth to align with 14 **Del.C.** §122(b)(28) which requires the development of a process for districts and charter schools to annually identify enrolled students who are "military-connected" youth. This is necessary to ensure school officials are aware of their military connection should they require any special services or supports.

#### III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to create 14 **DE Admin. Code** 932 Military-Connected Youth. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 932 Military-Connected Youth attached hereto as *Exhibit "B"* is hereby created. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 932 Military-Connected Youth hereby created shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

#### IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 932 Military-Connected Youth created hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 932 Military-Connected Youth in the *Administrative Code of Regulations* for the Department of Education.

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## V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on January 21, 2016. The effective date of this Order shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*.

**IT IS SO ORDERED** the 21<sup>st</sup> day of January 2016.

**Department of Education**

Steven Godowsky, Secretary of Education

Approved this 21<sup>st</sup> day of January 2016

**State Board of Education**

Teri Quinn Gray, Ph.D., President

Gregory B. Coverdale, Jr.

Jorge L. Melendez, Vice President (absent)

Terry M. Whittaker, Ed.D.

G. Patrick Heffernan

Nina Lou Bunting

Barbara B. Rutt

**\*Please note that no changes were made to the regulation as originally proposed and published in the December 2015 issue of the *Register* at page 459 (19 DE Reg. 459). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**932 Military-Connected Youth**

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## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 1008

## REGULATORY IMPLEMENTING ORDER

### 1008 DIAA Junior High and Middle School Interscholastic Athletics

#### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics. The amendments incorporate the ability for the DIAA Board to waive the age rule for students with physically or mentally limiting disabilities; update the middle school wrestling weight control program; bring practice regulations more in line with national best practice models; provide member schools with a policy to determine appropriate placement for transgendered students participating on interscholastic athletic teams; update coaches' regulation to mandate an approved concussion course; and make non-substantive changes to improve readability.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on December 1, 2015, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities and a thorough review was done by the DIAA Board of Directors. Comments received were: (1) the definition of "Student with a Disability" not being clear. The Department clarified the definition to include a "qualified person with a disability under" Section 504 of the Rehabilitation Act of 1973, and (2) various grammatical changes made throughout the regulation regarding the use of plural pronouns such as "they" and "their" which is relative to the "student". The Department appreciates this observation but did not change the terms as the usage does not impact the content of the regulation.

There was also several comments which were considered but did not result in changes to this regulation. These include: (1) the age waiver protocol for students with disabilities being limited to an IEP and not expanded to cover 504 Plans, and the involvement of the IEP team, (2) concerns with students with disabilities participating at



their special school only and not as part of a non-segregated team, (3) concerns with accommodations not being made for students with a disability under a Section 504 Plan, and (4) concerns with placing the "burden of proof" for hardship issues on the student. These are all very important issues which the DIAA Board of Directors wishes to carefully consider as part of the ongoing comprehensive review of all DIAA regulations.

Additionally, the State Board of Education expressed concerns that the regulation permits members schools to determine a policy about transgendered students participating in interscholastic sports, in accordance with the minimum standards designated by DIAA, rather than the Department of Education setting the policy. In support of the decision remaining at the local level, the Department received a letter from the Delaware Chief School Officers Association noting that the consensus among all 19 school district superintendents is that the decision regarding the participation of transgendered students in interscholastic sports should remain at the local level. Thus there was no change within the regulation regarding transgendered students.

## II. FINDINGS OF FACTS

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics in order to incorporated the ability for the DIAA Board to waive the age rule for students with physically or mentally limiting disabilities; update the middle school wrestling weight control program; bring practice regulations more in line with national best practice models; provide member schools with a policy to determine appropriate placement for transgendered students participating on interscholastic athletic teams; update coaches' regulation to mandate an approved concussion course; and make non-substantive changes to improve readability.

## III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

## IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 1008 DIAA Junior High and Middle School Interscholastic Athletics in the *Administrative Code of Regulations* for the Department of Education.

## V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on January 21, 2016. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

**IT IS SO ORDERED** the 21<sup>st</sup> day of January 2016.

**Department of Education**

Steven Godowsky, Secretary of Education

Approved this 21<sup>st</sup> day of January 2016

**State Board of Education**

Teri Quinn Gray, Ph.D., President

Jorge L. Melendez, Vice President (absent)

G. Patrick Heffernan

Gregory B. Coverdale, Jr.

Terry M. Whittaker, Ed.D.

Nina Lou Bunting

Barbara B. Rutt

## 1008 DIAA Junior High and Middle School Interscholastic Athletics

### 1.0 National Federation of State High Schools, Conferences, Contracts, Equivalency Rules and Definitions

#### 1.51 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

*(Break in Continuity Within Section)*

**"Student With a Disability"** means a "child with a disability" as that term is defined in 14 DE Admin. Code 922 or [a qualified person with a disability under] Section 504 of the Rehabilitation Act of 1973.

\*Please note that no additional changes were made to the regulation as originally proposed and published in the December 2015 issue of the *Register* at page 461 (19 DE Reg. 461). Therefore, the final regulation is not being republished here in its entirety. A copy of the final regulation is available at:

**1008 DIAA Junior High and Middle School Interscholastic Athletics**

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### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))  
14 DE Admin. Code 1009

### REGULATORY IMPLEMENTING ORDER

#### 1009 DIAA High School Interscholastic Athletics

### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 1009 High School Interscholastic Athletics. The proposed amendments which incorporated the ability for the DIAA Board to waive the age rule for students with disabilities; updated the transfer rule in choice schools; addressed schools that close or discontinue a sport; amended eighth grade participation regulations in order to limit eighth grade transfers for athletics; expand participation for international students; amended pre-participation medical examination requirements to provide parents a better opportunity to use insurance for the required examination; updated wrestling weight control protocol; better aligned practice regulations with national best practice models; provided member schools with a policy for transgendered students participating on interscholastic athletic teams; mandated an approved concussion course for coaches; and made other non-substantive changes to improve readability.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on December 1, 2015, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities and a thorough review was done by the DIAA Board of Directors. Comments received were: (1) the definition of "Student with a Disability" not being clear. The Department clarified the definition to include a "qualified person with a disability under" Section 504 of the Rehabilitation Act of 1973. (2) regarding age eligibility in Section 2.1.1. The Department believes the language is clear as it promotes equity of competition, and diminishes the inherent risk associated with sports participation and is also universally applied in interscholastic athletics. (3) concerns with the use of the word "eligible" in Section 2.3.4. The Department removed the word "eligible" and replaced it with "be legally enrolled" in the December 1 publication of the submitted regulation. We believe this was a publication error, and the regulation reads "be legally enrolled." (4) concerns with restrictions placed on F-1 and J-1 Visa students. The restrictions are in place to maintain competitive equity, guard against illegal recruitment and to ensure all students have an opportunity to participate. (5) various grammatical changes made throughout the regulation regarding the use of

plural pronouns such as "they" and "their" which is relative to the "student". The Department appreciates this observation but did not change the terms as the usage does not impact the content of the regulation.

There was also several comments which were considered but did not result in changes to this regulation. These include: (1) the age waiver protocol for students with disabilities being limited to an IEP and not expanded to cover 504 Plans, and the involvement of the IEP team, (2) concerns with students with disabilities participating at their special school only and not as part of a non-segregated team, (3) concerns with accommodations not being made for students with a disability under a Section 504 Plan, and (4) concerns with placing the "burden of proof" for hardship issues on students. These are all very important issues which the DIAA Board of Directors wishes to carefully consider as part of the ongoing comprehensive review of all DIAA regulations.

Additionally, the State Board of Education expressed concerns that the regulation permits members schools to determine a policy about transgendered students participating in interscholastic sports, in accordance with the minimum standards designated by DIAA, rather than the Department of Education setting the policy. In support of the decision remaining at the local level, the Department received a letter from the Delaware Chief School Officers Association noting that the consensus among all 19 school district superintendents is that the decision regarding the participation of transgendered students in interscholastic sports should remain at the local level. Thus there was no change within the regulation regarding transgendered students.

## II. FINDINGS OF FACTS

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 1009 High School Interscholastic Athletics in order to incorporated the ability for the DIAA Board to waive the age rule for students with physically or mentally limiting disabilities; update the middle school wrestling weight control program; bring practice regulations more in line with national best practice models; provide member schools with a policy to determine appropriate placement for transgendered students participating on interscholastic athletic teams; update coaches' regulation to mandate an approved concussion course; and make non-substantive changes to improve readability.

## III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 1009 High School Interscholastic Athletics. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 1009 High School Interscholastic Athletics attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 1009 High School Interscholastic Athletics hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

## IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 1009 High School Interscholastic Athletics amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 1009 High School Interscholastic Athletics in the *Administrative Code of Regulations* for the Department of Education.

## V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on January 21, 2016. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

**IT IS SO ORDERED** the 21<sup>st</sup> day of January 2016.

**Department of Education**

Steven Godowsky, Secretary of Education

Approved this 21<sup>st</sup> day of January 2016

**State Board of Education**

Teri Quinn Gray, Ph.D., President

Gregory B. Coverdale, Jr.

Jorge L. Melendez, Vice President (absent)  
G. Patrick Heffernan  
Barbara B. Rutt

Terry M. Whittaker, Ed.D.  
Nina Lou Bunting

## 1009 DIAA High School Interscholastic Athletics

### 1.0 National Federation of State High Schools, Conferences, Contracts, Equivalency Rules, and Definitions

#### 1.51 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

*(Break in Continuity Within Section)*

**“Student With a Disability”** means a “child with a disability” as that term is defined in 14 DE Admin. Code 922 or [a qualified person with a disability under] Section 504 of the Rehabilitation Act of 1973.

*(Break in Continuity Within Section)*

### 2.0 Eligibility: No Student Shall Represent a School in an Interscholastic Scrimmage or Contest if He/She the Student Does Not Meet the Following Requirements

*(Break in Continuity Within Section)*

#### 2.3 Eligibility, Enrollment and Attendance

*(Break in Continuity Within Section)*

##### 2.3.3 Students with disabilities who are placed in special schools or programs

##### 2.3.3.1 Definitions:

*(Break in Continuity Within Section)*

~~["Student With a Disability" means a "child with a disability" as that term is defined in 14 DE Admin. Code 922.]~~

*(Break in Continuity Within Section)*

2.3.4 A student who is participating in the Delaware School Choice Program, as authorized by 14 Del.C. Ch. 4, is obligated to attend the choice school for a minimum of two (2) years unless the students custodial parent(s), legal guardian(s) or Relative Caregiver relocate to a different school district or the student fails to meet the academic requirements of the choice school. If a student attends a choice school for less than two (2) years and subsequently returns to his/her their home school, the student must receive a release from the “choice district” in order to legally enroll at his/her their home school. Without a release, the student would not be **[eligible]** legally enrolled and consequently would be ineligible to participate in interscholastic athletics. Notwithstanding this section, the transfer regulation still applies to all students participating in the Delaware School Choice Program who transfer to another school regardless of whether they are released by the sending school or are not released.

\*Please note that no additional changes were made to the regulation as originally proposed and published in the December 2015 issue of the *Register* at page 462 (19 DE Reg. 462). Therefore, the final regulation is not being republished here in its entirety. A copy of the final regulation is available at:

**1009 DIAA High School Interscholastic Athletics**

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)**ORDER****Pharmaceutical Services Reimbursement – 340B Drug Products****NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Delaware Title XIX Medicaid State Plan regarding Pharmaceutical Services, specifically, *to clarify reimbursement methodology for entities that purchase 340B drug products*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Del.C.** §10114 and its authority as prescribed by 31 **Del.C.** §512.

The Department published its notice of proposed regulation changes pursuant to 29 **Del.C.** §10115 in the November 2015 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by November 30, 2015 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

**SUMMARY OF PROPOSAL:**

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Title XIX Medicaid State Plan regarding Pharmaceutical Services, specifically, *to clarify reimbursement methodology for entities that purchase 340B drug products*.

**Statutory Authority**

- Veterans Health Care Act of 1992, Public Law 102-585, Section 602, *limitations on prices of drugs purchased by certain clinics and hospitals*, as amended by the Patient Protection and Affordable Care Act (Pub. L. No. 111-148), Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152) and Medicare and Medicaid Extenders Act of 2010 (Public Law 111-309)
- 1927(a)(1) and 1927 (a)(4) of the Social Security Act, *authorizes state to enter directly into separate or supplemental rebate agreements with manufacturers*
- 1902(a)(19) of the Social Security Act, *care and services under a Medicaid state plan be provided in a manner consistent with simplicity of administration and the best interests of beneficiaries*
- Section 340 of the Public Health Service Act, 42 U.S.C. §256b, *imposes ceilings on prices drug manufacturers may charge for medications sold to specified health care facilities*
- 42 CFR Part 10, *340B Drug Pricing Program*
- 42 CFR §440.120, *Prescribed drugs*
- 42 CFR §447.201, *State plan requirements*
- 42 CFR §447.205, *Public notice of changes in Statewide methods and standards for setting payment rates*

**Background**

Under the Medicaid program, States may provide coverage of outpatient drugs as an optional service under section 1905(a)(12) of the Social Security Act (the Act). Section 1903(a) of the Act provides for Federal financial participation (FFP) in State expenditures for these drugs. In general, in order for payment to be made available under section 1903 for covered outpatient drugs, manufacturers must enter into a Medicaid drug rebate agreement as set forth in section 1927(a) of the Act. Section 1927 of the Act provides specific requirements for rebate agreements, drug pricing submission and confidentiality requirements, the formulas for calculating rebate payments, and requirements for States for covered outpatient drugs.

## *Medicaid Supplemental Drug Rebate Agreements*

The federal Omnibus Budget Reconciliation Act of 1990, section 4401 added §1927 to the Social Security Act. Section 1927 provides that States may enter separate or supplemental drug rebate agreements as long as such agreements achieve drug rebates equal to or greater than the drug rebates set forth in the Secretary's national rebate agreement with drug manufacturers, which is published at 56 F.R. 7049 (1991). Specifically, the drug rebate statute, at section 1927(a)(1) of the Social Security Act (Act), provides that "the Secretary may authorize a State to enter directly into agreements with a manufacturer." Also, section 1927(a)(4) of the Act provides that any drug rebate agreement between a State and drug manufacturers and in effect on November 5, 1990, may constitute a rebate agreement in compliance with the statute if the Centers for Medicare and Medicaid Services (CMS) determines that any such agreement "provides for rebates that are at least as large as the rebates otherwise required under this section." CMS accordingly believes that Congress intended that States that seek CMS approval under section 1927(a)(1) to enter directly into agreements with manufacturers must ensure that any such agreement will achieve drug rebates that are at least equal to the rebates set forth in the Secretary's rebate agreements with manufacturers. Currently, prescription drug manufacturers are required to enter into a rebate agreement.

## *Section 340B Drug Discount Program*

The drug rebate program was amended in November 1992 by Public Law 102-585, the Veterans' Health Care Act (VHCA) of 1992. Under VHCA, Congress created the 340B program which is administered by the Health Resources and Services Administration (HRSA), Office of Pharmacy Affairs (OPA). The 340B program requires manufacturers of drugs that are paid for by state Medicaid programs to enter into an agreement with HRSA to provide statutory discounts on drugs to "covered entities". This legislation was designed to establish price controls to limit the cost of drugs to Federal purchasers and to certain Federal grantees. It was a follow-up to the Medicaid Drug Rebate Program, enacted as part of the Omnibus Budget Reconciliation Act of 1990 (OBRA90). Title IV of the VHCA contains three sections—all of which deal with drug pricing issues:

- Section 601 is an introduction to general issues about drugs purchased by the Department of Veterans Affairs and other specific types of clinics and hospitals.
- Section 602 provides drug discounts to certain grantees and other eligible covered entities.
- Section 603 establishes limitations on prices that a manufacturer may charge for drugs purchased by the Department of Veterans Affairs and certain other Federal agencies.

Section 602 of the VHCA enacted Section 340B of the Public Health Service (PHS) Act.

Section 340B of the Public Health Service Act, 42 U.S.C. §256b, "imposes ceilings on prices drug manufacturers may charge for medications sold to specified health care facilities." The 340B program requires manufacturers to enter into a Pharmaceutical Pricing Agreement (PPA) with the Secretary of Health and Human Services. Under the 340B program and in accordance with the PPA, pharmaceutical manufacturers agree to charge at or below statutorily defined prices, known as the 340B ceiling prices, for sales to qualified 340B entities.

When reimbursing for 340B-purchased drugs, State Medicaid agencies have a responsibility to accurately reimburse covered entities and appropriately claim Medicaid rebates from drug manufacturers. State Medicaid agencies can use pre-pay edits and post-pay reviews to ensure accurate reimbursements. With respect to rebates, State Medicaid agencies should exclude claims for 340B-purchased drugs (340B claims) from Medicaid rebate requests to prevent subjecting drug manufacturers to duplicate discounts (i.e., selling 340B-purchased drugs to covered entities at the discounted ceiling prices and providing Medicaid rebates on the same drugs).

Participation in the 340B program is voluntary; eligible entities must notify HRSA of their intention to participate by completing appropriate registration forms. Upon receipt and approval of the forms, HRSA adds the entity to its covered entity database, which is available on HRSA's web site. The 340B entity is responsible for alerting wholesalers and manufacturers of its participation and referring them to the database for confirmation so it can purchase covered outpatient drugs at or below the ceiling prices. The Section 340B Drug Discount Program is a complex program. Utilization of this program requires an understanding of detailed concepts of drug pricing and procurement.

## **Summary of Proposal**

### *Rationale and Justification*

Among the services provided to recipients of services under the Delaware Medical Assistance Program (DMAP) are prescription drugs and related pharmacy services. Expenditures for pharmacy services are offset in

part by rebate agreements with suppliers of prescription drugs.

Drug manufacturers use the potential for a 340B discounted price to dispute rebate payment. Pharmacy providers enrolled with the Delaware Medical Assistance Program (DMAP) have declared that they do not use public health service products. This policy change will formalize this process and prevent incurring additional operational costs/resources to collect rebates due the state.

#### *Purpose*

To add language to the Medicaid State plan to clarify that providers of pharmaceutical services who have access to 340B medications are not dispensing nor administering them to treat Medicaid patients. This will allow claims from these entities to be included in the Federal and supplemental rebate programs.

#### *Summary of Proposed Changes*

This SPA action addresses the need to ensure the state is able to meet the full scope of responsibilities to manage the Delaware Medical Assistance Program's interactions with the 340B program.

If implemented as proposed, this reimbursement methodology plan amendment will accomplish the following, effective January 1, 2016:

The amendment is to specifically prohibit the use of 340B-purchased medications for Medicaid patients. This will simplify the rebate program and eliminate one area for provider audits. Public health service providers have the ability to purchase medications at severely discounted prices. These products are excluded from all rebate programs associated with Medicaid patients. Based on HRSA guidelines, these contracted entities have the ability to include or exclude Medicaid patients from using these medications. If contracted entities chose to use drugs purchased via the 340B discount, they must only charge the actual acquisition cost and a professional dispensing fee, when the medication is dispensed, and not administered.

To date, with few exceptions, every contracted entity listed on the 340B participating providers' file has responded in writing that they do not use these products for Delaware Medicaid patients. The Affordable Care Act has added another level of complexity to this process by excluding some drugs based on specific diagnoses. The 340B program has become increasingly difficult to manage based on retrospective changes to the HRSA website as there are no tools to gather 340B prices nor is there any accountability mechanism to monitor if the drug was purchased through a wholesaler or through the public health service process.

The agency's proposal involves no change in the definition of those eligible to receive pharmaceutical services, and the Medicaid prescribed drugs benefit available to eligible recipients remains the same.

#### *Public Notice*

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input to the methods and standards governing payment methodology for pharmaceutical services. All comments were to be received by 4:30 p.m. on November 30, 2015.

#### *CMS Review and Approval*

The provisions of this draft state plan amendment (SPA) are subject to the Centers for Medicare and Medicaid Services (CMS) review and approval. The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

#### *Provider Manual Update*

Also, upon CMS approval, the applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates.

## **Cost/Budgetary Impact**

The proposed amendment is being implemented to clarify current practices attested to by DMAP pharmacy providers. Therefore, there is no impact on the General Fund.

## **Summary of Comments Received with Agency Response And Explanation of Change(s)**

The Biotechnology Industry Organization (BIO) and, the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

### **BIO**

BIO represents an industry devoted to discovering new treatments and ensuring patient access to them. Accordingly, we support both the Medicaid and 340B programs as important mechanisms to improve access to therapies for indigent patients. We believe that compliance with applicable program requirements by all parties-including manufacturers-is an important part of ensuring the sustainability of both programs. We therefore applaud the state of Delaware for taking action to address the duplicate discount prohibition (i.e., the prohibition on obtaining both a Medicaid drug rebate and a 340B discount on the same unit of product), which is an issue that cuts across both programs. We submit these comments to recommend that the Division outline how the state will ensure compliance with the Proposed Amendment, if adopted, as well as issue accompanying guidance to assist stakeholders in operationalizing the proposed new requirement.

### *BIO Supports State Medicaid Policies that Build Upon Federal Efforts to Prevent Duplicate Discounts.*

The 340B and Medicaid programs overlap in a number of areas, which complicates efforts by federal regulators and others to ensure compliance with the respective program requirements. BIO is extremely concerned that, particularly over the last five years, manufacturers have been subject to a significant volume of duplicate discounts, in violation of the requirements of the 340B and Medicaid statutes. While we are supportive of recent steps taken by both HRSA and the Centers for Medicare & Medicaid Services (CMS) to prevent and identify duplicate discounts, we do not believe that these steps are sufficient. For this reason, we are extremely supportive of state policies that build upon federal efforts to minimize the potential for duplicate discounts. To the extent that the Proposed Amendment is adopted, we strongly urge the Division both to establish mechanisms to ensure compliance with the proposed policy and to issue further guidance to assist stakeholders in operationalizing it. We also urge the Division to adopt additional policies that reflect best practices in this area. Finally, we also recommend that the Division consider establishing an exceptions process whereby covered entities could seek permission to "carve in," provided that protections are in place to prevent duplicate discounts. We describe our specific recommendations in each of these areas in the balance of this letter.

### *The Division Should Articulate How It Intends to Oversee and Enforce Compliance with the proposed Amendment.*

In the Proposed Amendment, the Division has proposed to "clarify the reimbursement methodology for entities that purchase 340B drug products." We strongly support the state's efforts to require covered entities to adopt a uniform billing methodology for both Medicaid FFS and MCO utilization. However, BIO urges the Division to specify the mechanisms it will use to ensure that any 340B products these providers inadvertently furnish to Medicaid patients would be excluded from Medicaid rebate invoices submitted to manufacturers, resulting in duplicate discounts.

In addition, while we applaud the state for its efforts to ensure compliance with all 340B and MDRP requirements, we urge the Division to continue to play an active role in resolving those disputes that do arise regarding rebate invoices, including disputes pertaining to potential duplicate discounts. While we appreciate the state's efforts to minimize the potential for such disputes through the Proposed Amendment, these efforts do not eliminate the state's role and obligations related to the operation of the MDRP.

### *The Division Should Issue Further Guidance to Assist Stakeholders in Operationalizing Its Proposed Policy, If Finalized, as Well as Adopt Policies that Reflect Best Practices in this Area.*

In addition to establishing oversight and enforcement mechanisms to ensure compliance with the Proposed Amendment, if adopted, BIO also urges the Division to provide further guidance to stakeholders regarding how the proposed policy of mandatory carve-out should be operationalized, particularly in the contexts of managed care utilization, replenishment models, and contract pharmacy arrangements. We also urge the Division to adopt certain best practices to assist the state to both prevent and identify duplicate discounts moving forward.



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*The Division Should Provide Additional Guidance Regarding How the Proposed Policy of Mandatory "Carve Out" Should be Operationalized in the Managed Medicaid Context.*

As noted previously, covered entities that "carve out" (i.e., use only non-340B- priced drugs for Medicaid patients) must be able to identify who is a Medicaid patient so that the covered entity can ensure that it is not dispensing 340B-priced drugs to that patient. Otherwise, these entities will unquestionably be providing 340B-priced products to their Medicaid patients, which, as described above, would likely result in duplicate discounts. However, there are systemic limitations with respect to covered entities' ability to identify Medicaid patients, particularly for those beneficiaries enrolled in Medicaid MCOs. We therefore urge the Division to ensure that the state's two Medicaid MCOs have Medicaid-specific BIN/PCN combinations, so that each BIN/PCN combination denotes either Medicaid or commercial utilization. In addition, we urge the Division to establish mechanisms to assist entities in identifying Medicaid patients more effectively, such as, cross-checking Medicaid MCO utilization data against lists of 340B covered entities- a policy recommended by OIG.

*The Division Should Provide Additional Guidance Regarding How the Proposed Policy of Mandatory "Carve Out" Should be Operationalized in the Contexts of Replenishment Models and Contract Pharmacy Arrangements.*

The Division also should issue guidance as to how the proposed policy should be operationalized by those 340B-participating Medicaid providers that utilize a "replenishment model" to virtually manage their prescription drug inventories. We urge the Division to work with covered entities in the state to ensure that there is a mechanism for tracking Medicaid patients in the context of replenishment models. If this proves to be impractical or impossible, we would urge the Division to direct 340B-participating Medicaid providers to identify prescriptions as 340B at the point-of-sale.

A similar concern exists with respect to contract pharmacy arrangements. By way of background, HRSA has allowed covered entities to contract with outside pharmacies (aka "contract pharmacies") to dispense 340B-purchased drugs since 1996. Under these arrangements, the covered entity purchases the drug, but the product is shipped to and dispensed by the contract pharmacy-an arrangement referred to as "bill to, ship to"-and it is generally the pharmacy that then seeks reimbursement for the product. We urge the Division to specify requirements for contract pharmacies to identify patients as Medicaid (including managed Medicaid) at the point-of-sale, and to ensure that this information is consistently reported both directly to covered entities, as well as through the inventory management software utilized to manage the contract pharmacy arrangement to ensure 340B stock is not sued or reported for these prescriptions.

*The Division Should Adopt Certain Best Practices to Assist the State in Both Preventing and Identifying Duplicate Discounts Moving Forward.*

Because we understand that Delaware currently does not have comprehensive Medicaid billing policies related to the 340B Program, we believe that the Division also should take this opportunity to outline comprehensive policies on this topic to assist the state in both preventing and identifying duplicate discounts.

*The Division Should Consider Creating an Exceptions Process for Covered Entities to Elect to Carve-In, Provided that Protections are In Place to Prevent Duplicate Discounts.*

BIO supports Delaware's efforts to address the duplicate discount prohibition. We are particularly supportive of the state's proposal to require covered entities to adopt a uniform determination across both Medicaid FFS and managed care. However, we are concerned that requiring all covered entities to uniformly carve out (i.e., use non-340B products for Medicaid patients) could impose an undue administrative burden on some of the most vulnerable safety-net providers in the state. Accordingly, we urge the Division to consider creating an exceptions process for covered entities to elect to carve-in, provided that protections are in place to prevent duplicate discounts.

*Conclusion.*

BIO appreciates the opportunity to comment on the Division's Proposed Amendment. We very much support the state's efforts to prevent duplicate discounts and promote program integrity and hope that our comments will be a useful tool as the Division refines its proposed regulations.

**Agency Response:** DMMA thanks BIO for its support of the proposed changes to our outpatient drug reimbursement regulations. We are grateful for the insight and suggestions that you have shared with us. We will take your comments into consideration as we move forward with implementation of this regulation. No change was

made to the regulation as a result of these comments.

## SCPD

As background, federal law authorizes states to negotiate rebate agreements with drug manufacturers. Federal law (340B program) also requires drug manufacturers to enter into agreements with HRSA to provide discounts on drugs to covered entities. The interplay of these laws is complicated. However, State Medicaid agencies must exclude from State rebate requests drugs that have already been discounted under the 340B program.

In practice, drug manufacturers are contesting State rebate requests based on their perception that the drugs have already been discounted under the 340B program. DMMA has determined that its providers do not generally use 340B discounted drugs for Medicaid patients. To obviate drug manufacturer argument, DMMA is amending the State Plan to categorically bar providers from using 340B discounted drugs for Medicaid patients. SCPD endorses the proposed regulation since the proposed regulation should remove an impediment to drug manufacturer rebate payments to the State.

**Agency Response:** DMMA thanks the Council for its endorsement. No change was made to the regulation as a result of these comments.

## FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2015 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend Delaware Title XIX Medicaid State Plan regarding Pharmaceutical Services, specifically, *to clarify reimbursement methodology for entities that purchase 340B drug products*, is adopted and shall be final effective February 11, 2016.

January 19, 2016

Rita M. Landgraf, Secretary, DHSS

## DMMA FINAL ORDER REGULATION #16-001

### REVISION:

ATTACHMENT 4.19-B

Page 14

## STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

STATE: DELAWARE

### METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES – OTHER TYPES OF CARE

#### REIMBURSEMENT FOR PHARMACEUTICALS

#### Overview

The Delaware Medical Assistance Program (DMAP) will reimburse pharmaceuticals using the lower of:

- The usual and customary (U & C) charge to the general public for the product,
- National Average Drug Acquisition Cost (NADAC) or if a NADAC is not available the Average Wholesale Price (AWP) minus 19%,
- A State-specific maximum allowable cost (DMAC) when the purchase price is not appropriately represented by either the NADAC or the Average Wholesale Price (AWP) minus 19%,
- The Federal Upper Limit (FUL) will not be used since the NADAC reflects the actual acquisition cost.

**[Contracted] [Ee]**ntities that qualify for special purchasing under Section 602 of the Veterans Health Care Act of 1992, ~~Section 340 B of the Public Health Service Act covered entities, selected disproportionate share hospitals~~ and entities exempt from the Robinson-Patman Price Discrimination Act of 1936 must charge the DMAP no more

than their actual acquisition cost (AAC) plus a professional dispensing fee. The AAC must be supported by invoice and payment documentation.

**[Contracted]** Entities that purchase Section 340B of the Public Health Service Act products are prohibited from using their stock for DMAP patients either directly or through coverage of the Managed Care Organization.

#### Professional Dispensing Fee

The professional dispensing fee rate is ten dollars (\$10.00). There is one-time professional fee per thirty (30)-day period unless the class of drugs is routinely prescribed for a limited number of days.

#### Definitions

Delaware Maximum Allowable Cost (DMAC) - a maximum price set for reimbursement:

- when a single source product has Average Selling Prices provided by the manufacturer that indicates the AWP is exaggerated, or
- when the NADAC does not reflect the most current cost of a multiple source drug, or
- if a single provider agrees to a special price.

Any willing provider can dispense the product.

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### DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

#### ORDER

#### Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services - Mental Health Services

#### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Delaware Title XIX Medicaid State Plan regarding Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services, specifically, *coverage and reimbursement methodologies for rehabilitative mental health services*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Del.C.** §10114 and its authority as prescribed by 31 **Del.C.** §512.

The Department published its notice of proposed regulation changes pursuant to 29 **Del.C.** §10115 in the November 2015 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 1, 2015 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

#### SUMMARY OF PROPOSAL:

The purpose of this notice is to advise the public that Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Title XIX Medicaid State Plan regarding the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, specifically, *coverage and reimbursement methodologies for rehabilitative mental health services*.

#### **Statutory Authority**

- Section 1905(r) of the Social Security Act, *Early and Periodic Screening, Diagnostic, and Treatment Services*
- 42 CFR §441 Subpart B, *Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) of Individuals under Age 21*
- 42 CFR §440.60, *Medical or other remedial care provided by licensed practitioners*

- 42 CFR §440.130, *Diagnostic, screening, preventive, and rehabilitative services*
- 42 CFR §447.205, *Public notice of changes in statewide methods and standards for setting payment rates*
- State Medicaid Manual, Section 5010, *Early and Periodic Screening, Diagnostic, and Treatment Services*

## Background

### *Early and Periodic Screening, Diagnostic and Treatment Services*

The Medicaid program's benefit for children and adolescents is known as Early and Periodic Screening, Diagnostic and Treatment services, or EPSDT. Under federal Medicaid law at 42 U.S.C. § 1396d(r) [1905(r) of the Social Security Act], EPSDT provides a comprehensive array of prevention, diagnostic, and treatment services for low-income infants, children and adolescents under age 21, as specified in Section 1905(r) of the Social Security Act (the Act). The EPSDT benefit is more robust than the Medicaid benefit for adults and is designed to assure that children receive early detection and care, so that health problems are averted or diagnosed and treated as early as possible. The goal of EPSDT is to assure that individual children get the health care they need when they need it - the right care to the right child at the right time in the right setting.

Within the scope of EPSDT benefits under the federal Medicaid law, states are required to cover any service that is medically necessary "to correct or ameliorate a defect, physical or mental illness, or a condition identified by screening," whether or not the service is covered under the Delaware Medicaid State Plan. The services covered under EPSDT are limited to those within the scope of the category of services listed in the federal law at 42 U.S.C. § 1396d (a) [1905(a) of the Social Security Act].

States have an affirmative obligation to make sure that Medicaid-eligible children and their families are aware of EPSDT and have access to required screenings and necessary treatment services. States also have broad flexibility to determine how to best ensure such services are provided. In general, they either administer the benefit outright (through fee-for-service arrangements) or provide oversight to private entities with whom they have contracted to administer the benefit (e.g., managed care entities). States must arrange (directly or through delegations or contracts) for children to receive the physical, mental, vision, hearing, and dental services they need to treat health problems and conditions.

### *Medicaid Rehabilitative Services*

Treatment for mental health and substance use issues and conditions is available under a number of Medicaid service categories, including hospital and clinic services, physician services, and services provided by a licensed professional such as a psychologist. States should also make use of rehabilitative services. While rehabilitative services can meet a range of children's treatment needs, they can be particularly critical for children with mental health and substance use issues. Rehabilitative services are defined to include:

*any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.*

Like other services covered under EPSDT, rehabilitative services need not actually cure a disability or completely restore an individual to a previous functional level. Rather, such services are covered when they ameliorate a physical or mental disability, as discussed above. Moreover, determinations of whether a service is rehabilitative must take into consideration that a child may not have attained the ability to perform certain functions. That is, a child's rehabilitative services plan of care should reflect goals appropriate for the child's developmental stage.

Depending on the interventions that the individual child needs, services that can be covered as rehabilitative services include:

- Community-based crisis services, such as mobile crisis teams, and intensive outpatient services;
- Individualized mental health and substance use treatment services, including in non-traditional settings such as a school, a workplace or at home;
- Medication management;
- Counseling and therapy, including to eliminate psychological barriers that would impede development of community living skills; and
- Rehabilitative equipment, for instance daily living aids.

With respect to the provision of rehabilitative services, including those noted above, CMS requires more

specificity of providers and services due to the wide spectrum of rehabilitative services coverable under the broad definition. CMS would expect a state to include in their State Plan the services, and providers with their qualifications, as well as a reimbursement methodology for each service it provides.

### Summary of Proposal

*Note: This Mental Health Services state plan amendment (SPA) is second of three (3) proposed SPA actions related to Medicaid rehabilitative services for individuals under age 21 to clarify coverage and payment methodology under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program.*

#### *Purpose*

The purpose of this notice is to clarify service descriptions, reimbursement methodologies, and provider qualifications for rehabilitative mental health services under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) State Plan and to request comments from the public.

On February 23, 2011, the Centers for Medicare and Medicaid Services (CMS) sent a companion letter to the Division of Medicaid and Medical Assistance (DMMA) concerning a previously approved State Plan Amendment #08-004, School-Based Health Services. CMS performed a program analysis of corresponding coverage sections not originally submitted with this SPA. This analysis revealed concerns regarding the monthly bundled rates for rehabilitative child mental health and substance use disorder services under the EPSDT program. CMS determined that the service descriptions and reimbursement language for rehabilitative child mental health and substance use disorder services fails to comply with 42 CFR 430.10 and 42 CFR 447.252 which implement in part Section 1902(a)(30)(A) of the Social Security Act, to require collectively that States comprehensively describe the methodologies that they use to reimburse service providers. The methodologies must be understandable, clear, unambiguous and auditable.

#### *Proposal*

In order to comport with 42 CFR 430.10 and 42 CFR 447.252, DMMA proposes to clarify existing rehabilitative mental health services and reimbursement methodology language currently described at Attachment 3.1-A and Attachment 4.19-B in the Delaware Medicaid State Plan by:

- defining the reimbursable unit of service;
- describing payment limitations;
- providing a reference to the provider qualifications per the State Plan;
- publishing location to access State developed fee schedule rates.

The agency's proposal involves no change in the definition of those eligible to receive mental health services benefit under the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, and the mental health services benefit available to eligible recipients remains the same.

#### *Summary of Proposed Changes*

The proposed Medicaid Rehabilitative Mental Health Services SPA clarifies coverage for outpatient and residential mental health services for children under the Medicaid program including care by unlicensed practitioners and Evidence-Based Practices (EBPs). If implemented as proposed, the coverage and reimbursement methodology plan amendments will accomplish the following, effective July 1, 2016:

Crisis intervention for children, unlicensed mental health practitioners (including Community Psychiatric Support and Treatment, Psychosocial Rehabilitation, and family peer support services) and all residential programs providing children's mental health services to reflect the current rehabilitative services not covered under other Medicaid authorities. The rates for these services will be set using the same modeled rate methodology as the Division of Substance Abuse and Mental Health (DSAMH) PROMISE (*Promoting Optimal Mental Health for Individuals through Supports and Empowerment*) fee schedule for unlicensed practitioners and programs. The rates may vary from PROMISE depending upon the need for adaptations to the rates for accessibility of services by children and differences in service delivery.

#### *Public Notice*

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to

provide input to the methods and standards governing payment methodology for rehabilitative mental health services under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. Comments were to be received by 4:30 p.m. on December 1, 2015.

### *CMS Review and Approval*

The provisions of this draft state plan amendment (SPA) are subject to the Centers for Medicare and Medicaid Services (CMS) review and approval. The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

### *Provider Manual Update*

Also, upon CMS approval, the applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates.

### **Fiscal Impact Statement**

The purpose of this state plan amendment is to update and reorganize both the services (Attachment 3.1-A) and reimbursement (Attachment 4.19-B) sections of the Medicaid State Plan that primarily address rehabilitative services early and periodic screening, diagnostic, and treatment (EPSDT) program.

This amendment is not for the purpose of making program changes. Rather, this is part of DHSS/DMMA's continuing effort in working with CMS to assure the reimbursement pages clearly correspond to the service sections of the state plan and to implement the required wording regarding fee schedules and the dates for which reimbursement rates were set for these services. There are no intended content changes other than improved descriptions.

The proposed amendment imposes no increase in cost on the General Fund as the proposed services in this State plan amendment will be budget neutral.

Federal budget impact for federal fiscal years 2016 and 2017 is projected as follows:

Federal Fiscal Year 2016	Federal Fiscal Year 2017
\$195,802.39	\$837,865.32

### **SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES**

The State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

As background, the Division notes that Federal EPSDT standards require State Medicaid programs to offer a comprehensive array of services for individuals under age 21. In the mental health and substance abuse contexts, such services include "rehabilitative services." On February 23, 2011, CMS sent DMMA a letter sharing concerns with the Division's monthly bundled rates for rehabilitative child mental health and substance abuse services under the EPSDT program. In response, DMMA proposes to add clarifying language to the Medicaid State Plan in through the following: 1) defining the reimbursable unit of service; 2) describing payment limitations; 3) providing a reference to the provider qualifications; and 4) publishing the location if State fee scheduled rates.

For unlicensed providers, DMMA proposes to adopt the same rate methodology applied to the PROMISE program.

The Division anticipates "no increase in cost on the General Fund" but a significant federal budget impact, i.e., \$837,865.32 in FFY17. The logical inference is that the changes will result in drawing down considerable federal matching funds.

First in §4.b, Attachment 3.1-A, Page 2c Addendum, the text categorically requires school provided services to

be included in an IEP/IFSP. SCPD has the following two concerns in this context: A. Many students with disabilities have Section 504 plans, not an IEP or IFSP. If CMS standards do not categorically require Medicaid services in schools to be listed in an IEP/IFSP, it would be preferable to remove this limitation. B. There may be students with acute, but short-term disabilities (e.g., PTSD from child abuse) who will not qualify for classification under the IDEA. However, the school may wish to provide mental health services given the acute nature of the disability. It would be preferable to allow Medicaid billing under these circumstances.

**Agency Response:** Your comments raised issues that are outside the scope of this regulation. This regulation proposes to clarify existing rehabilitative mental health services and reimbursement methodology language; it involves no change in the definition of those eligible to receive mental health services benefit under the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, and the mental health services benefit available to eligible recipients remains the same. No change was made to the regulation as a result of this comment.

Second, in Attachment 3.1-A, Page 2d Addendum, DMMA proposes to strike an authorization to cover "any other medical or remedial care provided by licensed medical providers as authorized under 42 CFR 440.60..." No rationale is provided for striking the provision. SCPD recommends retention.

**Agency Response:** DMMA thanks the Council for its comment. The provision was struck because it is duplicative with another section of the State Plan. SPA TN 13-0018 includes services for Other Licensed Practitioners for all ages in a statewide and comparable manner. No change was made to the regulation as a result of this comment.

Third, several sections require a covered service to be "face-to-face". See, e.g., Attachment 3.1-A, Page 2e.5 Addendum, Psychosocial Rehabilitation; Attachment 3.1-A, Page 2.e.7 Addendum, Crisis Intervention; Attachment 3.1-A, Page 2.e.9 Addendum, Crisis Intervention and Family Peer Support. There is some "tension" between these categorical limitations and the DMMA State Plan Amendment authorizing any Medicaid-funded services to be provided via telemedicine. See 18 DE Reg. 227 (September 1, 2014).

**Agency Response:** DMMA agrees with your request to provide clarity on telemedicine usage and has amended the language to do so.

Attachment 3.1-A, Page 2e.2 Addendum has been amended to include the following language: "Any Rehabilitative service may be provided via telemedicine consistent with the specifications, conditions, and limitations set by the Department of Medical Assistance (DMAP)."

Fourth, there are multiple sections requiring a provider to be at least 21 years old. See, e.g., Attachment 3.1-A, Page 2e.6 Addendum, Psychosocial Rehabilitation; Attachment 3.1-A, Page 2e7 Addendum, Crisis Intervention; Attachment 3.1-A, Page 2e10 Addendum, Family Peer Support; Attachment 3.1-A, Page 2e16 Addendum, Direct Care Staff. This ostensibly violates the regulations to the federal Age Discrimination Act, 45 CFR Part 91, which limits age discrimination in federally funded programs. If an adult meets licensing, degree, or skill-set standards, age is not a sustainable basis to bar qualifying as a federally funded provider.

**Agency Response:** DMMA respectfully disagrees with the Council's comment. The proposed regulations are in accordance with the requirements of 45 CFR Part 91. Age considerations in the proposed regulation fall under the exceptions to 45 CFR Part 91 regarding the "Normal operation or statutory objective of any program or activity" and are thus permissible under Part 91.

The prohibition against age discrimination does not include an absolute prohibition against separate treatment on the basis of age. In the proposed regulation, age is used as a measure or approximation of maturity applied solely to individuals who will be approved for providing services (not those individuals receiving services). It is a factor essential to the effective provision of behavioral health services. Maturity, not age, is the basis separate treatment on the basis of age

The use of age as a standard of maturity is an established practice in Delaware (and other states) and is supported, for example, by existing standards including the State of Delaware Job Classifications and Minimum Requirements as listed by OMB (minimum age for Youth Care Worker is age 21) and Delacare Standards (3.16 - 3.20) that specify that workers within an RTC setting must be age 21 years or older.

No change was made to the regulation as a result of this comment.

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## FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2015 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend Delaware Title XIX Medicaid State Plan regarding Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services, specifically, *coverage and reimbursement methodologies for rehabilitative mental health services*, is adopted and shall be final effective February 11, 2016.

January 19, 2016

Rita M. Landgraf, Secretary, DHSS

**\*Please Note: Due to the size of the final regulation, it is not being published here. A copy of the regulation is available at:**

**Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services - Mental Health Services**

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## DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

### ORDER

**Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services - Substance Use Disorder Services**

### NATURE OF THE PROCEEDINGS

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Delaware Title XIX Medicaid State Plan regarding Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services, specifically, *coverage and reimbursement methodologies for Medicaid rehabilitative substance use disorder services*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Del.C.** §10114 and its authority as prescribed by 31 **Del.C.** §512.

The Department published its notice of proposed regulation changes pursuant to 29 **Del.C.** §10115 in the November 2015 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 1, 2015 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

### SUMMARY OF PROPOSAL

The purpose of this notice is to advise the public that Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Title XIX Medicaid State Plan regarding the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, specifically, *coverage and reimbursement methodologies for Medicaid rehabilitative substance use disorder services*.

#### Statutory Authority

- Section 1905(r) of the Social Security Act, Early and Periodic Screening, Diagnostic, and Treatment Services
- 42 CFR §441 Subpart B, Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) of Individuals under Age 21
- 42 CFR §440.60, Medical or other remedial care provided by licensed practitioners
- 42 CFR §440.130, Diagnostic, screening, preventive, and rehabilitative services
- 42 CFR §447.205, Public notice of changes in statewide methods and standards for setting payment rates



- State Medicaid Manual, Section 5010, Early and Periodic Screening, Diagnostic, and Treatment Services

### Background

#### *Early and Periodic Screening, Diagnostic and Treatment Services*

The Medicaid program's benefit for children and adolescents is known as Early and Periodic Screening, Diagnostic and Treatment services, or EPSDT. Under federal Medicaid law at 42 U.S.C. § 1396d(r) [1905(r) of the Social Security Act], EPSDT provides a comprehensive array of prevention, diagnostic, and treatment services for low-income infants, children and adolescents under age 21, as specified in Section 1905(r) of the Social Security Act (the Act). The EPSDT benefit is more robust than the Medicaid benefit for adults and is designed to assure that children receive early detection and care, so that health problems are averted or diagnosed and treated as early as possible. The goal of EPSDT is to assure that individual children get the health care they need when they need it - the right care to the right child at the right time in the right setting.

Within the scope of EPSDT benefits under the federal Medicaid law, states are required to cover any service that is medically necessary "to correct or ameliorate a defect, physical or mental illness, or a condition identified by screening," whether or not the service is covered under the Medicaid State Plan. The services covered under EPSDT are limited to those within the scope of the category of services listed in the federal law at 42 U.S.C. § 1396d (a) [1905(a) of the Social Security Act].

States have an affirmative obligation to make sure that Medicaid-eligible children and their families are aware of EPSDT and have access to required screenings and necessary treatment services. States also have broad flexibility to determine how to best ensure such services are provided. In general, they either administer the benefit outright (through fee-for-service arrangements) or provide oversight to private entities with whom they have contracted to administer the benefit (e.g., managed care entities). States must arrange (directly or through delegations or contracts) for children to receive the physical, mental, vision, hearing, and dental services they need to treat health problems and conditions.

#### *Medicaid Rehabilitative Services*

Treatment for mental health and substance use issues and conditions is available under a number of Medicaid service categories, including hospital and clinic services, physician services, and services provided by a licensed professional such as a psychologist. States also make use of rehabilitative services. While rehabilitative services can meet a range of children's treatment needs, they can be particularly critical for children with mental health and substance use issues. Rehabilitative services are defined to include:

*any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.*

Like other services covered under EPSDT, rehabilitative services need not actually cure a disability or completely restore an individual to a previous functional level. Rather, such services are covered when they ameliorate a physical or mental disability, as discussed above. Moreover, determinations of whether a service is rehabilitative must take into consideration that a child may not have attained the ability to perform certain functions. That is, a child's rehabilitative services plan of care should reflect goals appropriate for the child's developmental stage.

Depending on the interventions that the individual child needs, services that can be covered as rehabilitative services include:

- Community-based crisis services, such as mobile crisis teams, and intensive outpatient services;
- Individualized mental health and substance use treatment services, including in non-traditional settings such as a school, a workplace or at home;
- Medication management;
- Counseling and therapy, including to eliminate psychological barriers that would impede development of community living skills; and
- Rehabilitative equipment, for instance daily living aids.

With respect to the provision of rehabilitative services, including those noted above, CMS requires more specificity of providers and services due to the wide spectrum of rehabilitative services coverable under the broad

definition. CMS expects a state to include in their State Plan the services, and providers with their qualifications, as well as a reimbursement methodology for each service it provides.

## Summary of Proposal

*Note: This Substance Use Disorder Services (SUDs) state plan amendment (SPA) is first of three (3) proposed SPA actions related to Medicaid rehabilitative services for individuals under age 21 to clarify coverage and payment methodology under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program.*

### *Purpose*

The purpose of this notice is to clarify service descriptions, reimbursement methodologies, and provider qualifications for rehabilitative substance use disorder services under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) State Plan and to request comments from the public.

On February 23, 2011, the Centers for Medicare and Medicaid Services (CMS) sent a companion letter to the Division of Medicaid and Medical Assistance (DMMA) concerning a previously approved State Plan Amendment #08-004, School-Based Health Services. CMS performed a program analysis of corresponding coverage sections not originally submitted with this SPA. This analysis revealed concerns regarding the monthly bundled rates for rehabilitative child mental health and substance use disorder services under the EPSDT program. CMS determined that the service descriptions and reimbursement language for rehabilitative child mental health and substance use disorder services fails to comply with 42 CFR 430.10 and 42 CFR 447.252 which implement in part Section 1902(a)(30)(A) of the Social Security Act, to require collectively that States comprehensively describe the methodologies that they use to reimburse service providers. The methodologies must be understandable, clear, unambiguous and auditable.

### *Proposal*

In order to comport with 42 CFR 430.10 and 42 CFR 447.252, DMMA proposes to clarify existing rehabilitative substance use disorder services and reimbursement methodology language currently described at Attachment 3.1-A and Attachment 4.19-B in the Delaware Medicaid State Plan by:

- defining the reimbursable unit of service;
- describing payment limitations;
- providing a reference to the provider qualifications per the State Plan;
- publishing location to access State developed fee schedule rates.

The agency's proposal involves no change in the definition of those eligible to receive substance use disorder services benefit under the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, and the substance use disorder services benefit available to eligible recipients remains the same.

### *Summary of Proposed Changes*

The proposed Medicaid Rehabilitative Substance Use Disorder (SUD) Services SPA ensures that the already approved SUD state plan amendment for adults also provides coverage of SUD services for children under the Medicaid program. This SPA is a revised version of the Rehabilitative Services SPA recently approved for the State of Delaware for adults and authorizes SUD outpatient and residential services. If implemented as proposed, the coverage and reimbursement methodology plan amendments will accomplish the following, effective July 1, 2016: The new SPA will make small changes that allow the Department of Services to Children, Youth and Their Families (DSCYF) to set program requirements for children. The Division of Substance Abuse and Mental Health (DSAMH) will still license the programs. This SPA includes one change requested by the industry to correct the scope of practice for licensed chemical dependency professional (LCDP) and Certified Dependency and Addiction Counselors (CDACs). DSCYF will use the Delaware Medical Assistance Program (DMAP) Current Procedural Terminology/Healthcare Common Procedures Coding System (CPT/HCPCS) fee schedule for licensed practitioners and set modeled rates for unlicensed practitioners and programs (thus, no changes are needed to the SPA reimbursement pages for SUD). The EPSDT rates for unlicensed practitioners and programs will be the same or similar to the adult SUD rates depending upon the need for adaptations to the rates for accessibility of services by children.

*Public Notice*

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input to the coverage and payment methodology for rehabilitative substance use disorder services under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. Comments must be received by 4:30 p.m. on December 1, 2015.

*CMS Review and Approval*

The provisions of this draft state plan amendment (SPA) are subject to the Centers for Medicare and Medicaid Services (CMS) review and approval. The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

*Provider Manual Update*

Also, upon CMS approval, the applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates.

**Fiscal Impact Statement**

The purpose of this state plan amendment is to update and reorganize both the services (Attachment 3.1-A) and reimbursement (Attachment 4.19-B) sections of the Medicaid State Plan that primarily address rehabilitative services under the early and periodic screening, diagnostic, and treatment (EPSDT) program.

This amendment is not for the purpose of making program changes. Rather, this is part of DHSS/DMMA's continuing effort in working with CMS to assure the reimbursement pages clearly correspond to the service sections of the state plan and to implement the required wording regarding fee schedules and the dates for which reimbursement rates were set for these services.

There are no intended content changes other than improved descriptions. The proposed amendment imposes no increase in cost on the General Fund as the proposed services in this State plan amendment will be budget neutral. The federal fiscal impact associated with this amendment will be zero dollars.

**SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES**

The State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

As background, the Division notes that Federal EPSDT standards require State Medicaid programs to offer a comprehensive array of services for individuals under age 21. On February 23, 2011, CMS sent DMMA a letter sharing concerns with the Division's monthly bundled rates for rehabilitative child mental health and substance abuse services under the EPSDT program. In response, DMMA proposes to add clarifying language to the Medicaid State Plan in through the following: 1) defining the reimbursable unit of service; 2) describing payment limitations; 3) providing a reference to the provider qualifications; and 4) publishing the location if State fee scheduled rates.

The changes are highly prescriptive and detailed.

**Agency Response:** With respect to the provision of rehabilitative services, CMS requires more specificity of providers and services due to the wide spectrum of rehabilitative services coverable under the broad definition. CMS expects the State Plan to include a description of the services, and providers with their qualifications, as well as a reimbursement methodology for each service. No change was made to the regulation as a result of this comment.

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## FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2015 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Delaware Title XIX Medicaid State Plan regarding Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services, specifically, *coverage and reimbursement methodologies for Medicaid rehabilitative substance use disorder services*, is adopted and shall be final effective February 11, 2016.

Rita M. Landgraf, Secretary, DHSS, January 19, 2016

**\*Please note that no changes were made to the regulation as originally proposed and published in the November 2015 issue of the *Register* at page 377 (19 DE Reg. 377). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services - Substance Use Disorder Services**

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## DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

### ORDER

**Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services - Inpatient Psychiatric Hospital Services for Individuals under Age 21**

### NATURE OF THE PROCEEDINGS

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Delaware Title XIX Medicaid State Plan regarding Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services, addressing Inpatient Psychiatric Hospital Services for Individuals under Age 21, specifically, *coverage and reimbursement methodology for psychiatric residential treatment facilities (PRTFs)*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Del.C.** §10114 and its authority as prescribed by 31 **Del.C.** §512.

The Department published its notice of proposed regulation changes pursuant to 29 **Del.C.** §10115 in the November 2015 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by December 1, 2015 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

### SUMMARY OF PROPOSAL

The purpose of this notice is to advise the public that Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend the Title XIX Medicaid State Plan regarding the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program addressing Inpatient Psychiatric Hospital Services for Individuals under Age 21, specifically, *coverage and reimbursement methodology for psychiatric residential treatment facilities (PRTFs)*.

#### Statutory Authority

- Section 1905(r) of the Social Security Act, *Early and Periodic Screening, Diagnostic, and Treatment Services*
- Section 1905(a)(16), *Inpatient Psychiatric Hospital Services for Individuals under Age 21*
- 42 CFR §441 Subpart B, *Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) of Individuals under Age 21*
- 42 CFR §440.60, *Medical or other remedial care provided by licensed practitioners*

- 42 CFR §440.130, *Diagnostic, screening, preventive, and rehabilitative services*
- 42 CFR §447.205, *Public notice of changes in statewide methods and standards for setting payment rates*
- State Medicaid Manual, Section 5010, *Early and Periodic Screening, Diagnostic, and Treatment Services*

## Background

### *Early and Periodic Screening, Diagnostic and Treatment Services*

The Medicaid program's benefit for children and adolescents is known as Early and Periodic Screening, Diagnostic and Treatment services, or EPSDT. Under federal Medicaid law at 42 U.S.C. § 1396d(r) [1905(r) of the Social Security Act], EPSDT provides a comprehensive array of prevention, diagnostic, and treatment services for low-income infants, children and adolescents under age 21, as specified in Section 1905(r) of the Social Security Act (the Act). The EPSDT benefit is more robust than the Medicaid benefit for adults and is designed to assure that children receive early detection and care, so that health problems are averted or diagnosed and treated as early as possible. The goal of EPSDT is to assure that individual children get the health care they need when they need it - the right care to the right child at the right time in the right setting.

Within the scope of EPSDT benefits under the federal Medicaid law, states are required to cover any service that is medically necessary "to correct or ameliorate a defect, physical or mental illness, or a condition identified by screening," whether or not the service is covered under the Medicaid State Plan. The services covered under EPSDT are limited to those within the scope of the category of services listed in the federal law at 42 U.S.C. § 1396d (a) [1905(a) of the Social Security Act].

States have an affirmative obligation to make sure that Medicaid-eligible children and their families are aware of EPSDT and have access to required screenings and necessary treatment services. States also have broad flexibility to determine how to best ensure such services are provided. In general, they either administer the benefit outright (through fee-for-service arrangements) or provide oversight to private entities with whom they have contracted to administer the benefit (e.g., managed care entities). States must arrange (directly or through delegations or contracts) for children to receive the physical, mental, vision, hearing, and dental services they need to treat health problems and conditions.

### *Medicaid Rehabilitative Services*

Treatment for mental health and substance use issues and conditions is available under a number of Medicaid service categories, including hospital and clinic services, physician services, and services provided by a licensed professional such as a psychologist. States also make use of rehabilitative services. While rehabilitative services can meet a range of children's treatment needs, they can be particularly critical for children with mental health and substance use issues. Rehabilitative services are defined to include:

*any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.*

Like other services covered under EPSDT, rehabilitative services need not actually cure a disability or completely restore an individual to a previous functional level. Rather, such services are covered when they ameliorate a physical or mental disability, as discussed above. Moreover, determinations of whether a service is rehabilitative must take into consideration that a child may not have attained the ability to perform certain functions. That is, a child's rehabilitative services plan of care should reflect goals appropriate for the child's developmental stage.

Depending on the interventions that the individual child needs, services that can be covered as rehabilitative services include:

- Community-based crisis services, such as mobile crisis teams, and intensive outpatient services;
- Individualized mental health and substance use treatment services, including in non-traditional settings such as a school, a workplace or at home;
- Medication management;
- Counseling and therapy, including to eliminate psychological barriers that would impede development of community living skills; and

- Rehabilitative equipment, for instance daily living aids.

With respect to the provision of rehabilitative services, including those noted above, CMS requires more specificity of providers and services due to the wide spectrum of rehabilitative services coverable under the broad definition. CMS expects a state to include in their State Plan the services, and providers with their qualifications, as well as a reimbursement methodology for each service it provides.

### *Inpatient Psychiatric Services for Individuals under Age 21 Benefit*

The Psychiatric Services for Individuals under Age 21 benefit at section 1905(a)(16) of the Act, is optional. The benefit must be provided in all States to those individuals who are determined during the course of an Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) screen to need this type of inpatient psychiatric care. Under the EPSDT provision, States must provide any services listed in section 1905(a) of the Act that is needed to correct or ameliorate defects and physical and mental conditions discovered by EPSDT screening, whether or not the service is covered under the State plan.

This benefit has a long title, and so is often referred to as "Psych under 21". Most states have chosen to provide this optional benefit. Services are provided in psychiatric hospitals or psychiatric units in a hospital, or psychiatric facilities for which states may define accreditation requirements, subject to requirements at 42 CFR 441 Subpart D. Among the requirements for this service is certification of need for inpatient care, and a plan of care for active treatment, developed by an interdisciplinary team.

This benefit is significant as a means for Medicaid to cover the cost of inpatient mental health services. The federal Medicaid program does not reimburse states for the cost of institutions for mental diseases (IMDs) except for young people, who receive this service, and individuals age 65 or older served in an IMD. No later than age 22, individuals are transitioned to community services, or non-Medicaid inpatient services.

Many states provide psych under 21 service through psychiatric residential treatment facilities (PRTFs). A PRTF provides comprehensive mental health treatment to children and adolescents (youth) who, due to mental illness, substance abuse, or severe emotional disturbance, are in need of treatment that can most effectively be provided in a residential treatment facility. All other ambulatory care resources available in the community must have been identified, and if not accessed, determined to not meet the immediate treatment needs of the youth.

PRTF programs are designed to offer a short term, intense, focused mental health treatment program to promote a successful return of the youth to the community. Specific outcomes of the mental health services include the youth returning to the family or to another less restrictive community living situation as soon as clinically possible and when treatment in a PRTF is no longer medically necessary. The residential treatment facility is expected to work actively with the family, other agencies, and the community to offer strengths-based, culturally competent, medically appropriate treatment designed to meet the individual needs of the youth including those identified with emotional and behavioral issues.

### *What is a Psychiatric Residential Treatment Facility?*

A Psychiatric Residential Treatment Facility (PRTF) is any non-hospital facility with a provider agreement with a State Medicaid Agency to provide the inpatient services benefit to Medicaid-eligible individuals under the age of 21 (psych under 21 benefit). The facility must be accredited by Joint Commission on Accreditation of Healthcare (JCAHO) or any other accrediting organization with comparable standards recognized by the State. PRTFs must also meet the requirements in §441.151 through 441.182 of the CFR. The regulatory authority for PRTFs includes Section 1864(a) of the Social Security Act (the Act), which authorizes the Secretary to enter into an agreement with the State. Authority also includes Section 1902(a)(9)(A), which authorizes the state agency or other appropriate medical agency, to be responsible for establishing and maintaining health standards, and Section 1902(a)(33)(B), licensing requirement.

### **Summary of Proposal**

*Note: This Inpatient Psychiatric Hospital Services for Individuals under Age 21 state plan amendment (SPA) is third of three (3) proposed SPA actions related to Medicaid rehabilitative services under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program.*

### *Purpose*

The purpose of this notice is to clarify service descriptions and reimbursement methodologies for Inpatient Psychiatric Hospital Services for Individuals under Age 21 and to request comments from the public.

On February 23, 2011, the Centers for Medicare and Medicaid Services (CMS) sent a companion letter to the Division of Medicaid and Medical Assistance (DMMA) concerning a previously approved State Plan Amendment #08-004, School-Based Health Services. CMS performed a program analysis of corresponding coverage sections not originally submitted with this SPA. This analysis revealed concerns regarding the monthly bundled rates for rehabilitative child mental health and substance use disorder services under the EPSDT program. CMS determined that the service descriptions and reimbursement language for rehabilitative child mental health and substance use disorder services fails to comply with 42 CFR 430.10 and 42 CFR 447.252 which implement in part Section 1902(a)(30)(A) of the Social Security Act, to require collectively that States comprehensively describe the methodologies that they use to reimburse service providers. The methodologies must be understandable, clear, unambiguous and auditable.

#### *Proposal*

In order to comport with 42 CFR 430.10 and 42 CFR 447.252, DMMA proposes to clarify existing rehabilitative child mental health and substance use disorder services reimbursement methodology language currently described at Medicaid State plan page Attachment 3.1-A and new Attachment 4.19-A.3 by:

- defining the reimbursable unit of service;
- describing payment limitations;
- providing a reference to the provider qualifications per the State Plan;
- publishing location to access State developed fee schedule rates.

The agency's proposal involves no change in the definition of those eligible to receive the inpatient psychiatric hospital services for individuals under age 21 benefit under the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, and the "Psych under 21" benefit available to eligible recipients remains the same.

#### *Summary of Proposed Changes*

The proposed "Psych under 21" SPA provides a reimbursement methodology for psychiatric residential treatment facilities (PRTFs) for children in compliance with CMS guidance. On November 28, 2012, CMS issued an informational bulletin clarifying that states may structure coverage and payment for the benefit category of inpatient psychiatric hospital or facility services for individuals under age 21 to ensure youth receiving inpatient psychiatric services would receive medically necessary Medicaid services to meet their medical, psychological, social, behavioral, and developmental needs as identified in their plan of care. This clarification is intended to describe flexibility currently available to states to ensure the provision of medically necessary Medicaid services to children in inpatient psychiatric facilities.

To view the CMCS Informational Bulletin regarding Inpatient Psychiatric Hospital Services for Individuals under age 21, use the following link to the CMS website: <http://www.medicaid.gov/Federal-Policy-Guidance/downloads/CIB-11-28-12.pdf>.

The proposed effective date for this state plan amendment is July 1, 2016.

#### *Public Notice*

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input to the methods and standards governing payment methodology for the rehabilitative inpatient psychiatric hospital services for individuals under age 21 benefit under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. Comments were to be received by 4:30 p.m. on December 1, 2015.

#### *CMS Review and Approval*

The provisions of this draft state plan amendment (SPA) are subject to the Centers for Medicare and Medicaid Services (CMS) review and approval. The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

#### *Provider Manual Update*

Also, upon CMS approval, the applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates.

## Fiscal Impact Statement

The purpose of this state plan amendment is to update and reorganize both the services (Attachment 3.1-A) and reimbursement (Attachment 4.19-A and Attachment 4.19-B) sections of the Medicaid State Plan that primarily address rehabilitative services under the early and periodic screening, diagnostic, and treatment (EPSDT) program.

This amendment is not for the purpose of making program changes. Rather, this is part of DHSS/DMMA's continuing effort in working with CMS to assure the reimbursement pages clearly correspond to the service sections of the state plan and to implement the required wording regarding fee schedules and the dates for which reimbursement rates were set for these services.

There are no intended content changes other than improved descriptions. The proposed amendment imposes no increase in cost on the General Fund as the proposed services in this State plan amendment will be budget neutral. The federal fiscal impact associated with this amendment will be zero dollars.

## SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

The State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

As background, the Division notes that Federal EPSDT standards require State Medicaid programs to offer a comprehensive array of services for individuals under age 21. In the mental health and substance abuse contexts, such services include "rehabilitative services" and "inpatient psychiatric services for individuals under age 21." On February 23, 2011, CMS sent DMMA a letter sharing concerns with the Division's monthly bundled rates for rehabilitative child mental health and substance abuse services under the EPSDT program. Moreover, CMS issued a bulletin in 2012 which increased flexibility in covering costs of services to persons under age 21 in inpatient psychiatric facilities.

DMMA is now implementing the CMS guidance by adopting a Medicaid State Plan Amendment based on a CMS template. The amendment results in no increase to the General Fund.

SCPD Endorses the proposed regulation since the changes are needed to conform to CMS guidance, increases flexibility, and results in no cost in General Funds to the State.

**Agency Response:** DMMA thanks the Council for its endorsement. No change was made to the regulation as a result of this comment.

## FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2015 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Delaware Title XIX Medicaid State Plan regarding Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program addressing Inpatient Psychiatric Hospital Services for Individuals under Age 21, specifically, *coverage and reimbursement methodology for psychiatric residential treatment facilities (PRTFs)*, is adopted and shall be final effective February 11, 2016.

January 19, 2016

Rita M. Landgraf, Secretary, DHSS

**\*Please note that no changes were made to the regulation as originally proposed and published in the November 2015 issue of the *Register* at page 380 (19 DE Reg. 380). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services - Inpatient Psychiatric Hospital Services for Individuals under Age 21**



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# FINAL REGULATIONS

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## DEPARTMENT OF INSURANCE OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Section 311, 3370, and 3571R  
(18 Del.C. §§311, 3370, & 3571R)

ORDER  
Docket No. 2988-2015

### 1409 Insurance Coverage for Telemedicine and Telehealth

Proposed Regulation 1409 relating to Insurance Coverage for Telemedicine and Telehealth was published in the Delaware *Register of Regulations* on December 1, 2015. The comment period remained open until December 31, 2015. There was no public hearing on proposed Regulation 1409. Public notice of the proposed Regulation 1409 was published in the *Register of Regulations* in conformity with Delaware law.

#### SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

Comments were received on the proposed Regulation 1409 from:

- ERISA Industry Committee - Allison M. Wils, Director, Health Policy

The collective comments were reviewed and considered, with no amendments being suggested. No substantive changes were made to the proposed Regulation 1409.

#### FINDINGS OF FACT

Based on Delaware law and the record in this docket, I make the following findings of fact:

1. 18 Del.C. §§311, 3370, and 3571R require a regulation to set forth rules and procedural requirements which the Commissioner deems necessary to carry out the provisions of the Code.
2. The requirements of proposed Regulation 1409 best serve the interests of the public and of insurers and comply with Delaware law.

#### DECISION AND EFFECTIVE DATE

Based on the provisions of 18 Del.C. §§311, 3370, and 3571R; and 29 Del.C. Ch. 101, and the record in this docket, I hereby adopt proposed Regulation 1409 as may more fully and at large appear in the version attached hereto to be effective 10 days after being published as final.

#### TEXT AND CITATION

The text of proposed Regulation 1409 last appeared in the *Register of Regulations* Vol. 19, Issue 6, pages 469-471.

**IT IS SO ORDERED** this 1<sup>st</sup> day of February, 2016.  
Karen Weldin Stewart, CIR-ML  
Insurance Commissioner

### 1409 Insurance Coverage for Telemedicine and Telehealth

#### **1.0 Authority**

This regulation is adopted by the Commissioner pursuant to the authority granted by 18 Del.C. §§311, 3370 and 3571R and is promulgated in accordance with 29 Del.C. Chapter 101.

## **2.0 Definitions**

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

“Distant site” means a site at which a health care provider legally allowed to practice in the state is located while providing health care services by means of telehealth.

“Originating site” means a site in Delaware at which a patient is located at the time health care services are provided to him or her by means of telehealth, unless the term is otherwise defined with respect to the provision in which it is used; provided, however, notwithstanding any other provision of law, insurers and providers may agree to alternative siting arrangements deemed appropriate by the parties.

“Store and forward transfer” means the transmission of a patient’s medical information either to or from an originating site or to or from the provider at the distant site, but does not require the patient being present nor must it be in real time.

“Telehealth” means the use of information and communications technologies consisting of telephones, store and forward transfers, remote patient monitoring devices or other electronic means which support clinical health care, provider consultation, patient and professional health-related education, public health, and health administration services.

“Telemedicine” means a form of telehealth which is the delivery of clinical health-care services by means of real time 2-way audio, visual, or other telecommunications or electronic communications, including the application of secure video conferencing or store and forward transfer technology to provide or support health-care delivery, which facilitate the assessment, diagnosis, consultation, treatment, education, care management and self-management of a patient’s health care by a health-care provider practicing within his or her scope of practice as would be practiced in-person with a patient, and legally allowed to practice in the State, while such patient is at an originating site and the health-care provider is at a distant site.

## **3.0 Compliance with Statutes Regarding Telemedicine and Telehealth**

Each insurer proposing to issue individual or group accident and sickness insurance policies providing hospital, medical and surgical, or major medical coverage on an expense-incurred basis; each health service corporation providing individual or group accident and sickness subscription contracts; and each managed care organization and health maintenance organization providing a health care plan for health care services shall comply with the provisions of 18 Del.C. §§3370 and 3571R, and this regulation.

## **4.0 Telehealth**

4.1 Each insurer proposing to issue individual or group accident and sickness insurance policies providing hospital, medical and surgical, or major medical coverage on an expense-incurred basis; each health service corporation providing individual or group accident and sickness subscription contracts; and each managed care organization and health maintenance organization providing a health care plan for health care services shall provide coverage for the cost of such health care services provided through telehealth. Coverage for health care services provided through telehealth shall be provided so long as the underlying health care service is a covered service and the health care provider providing the service is licensed to furnish the service under State law and is practicing within the scope of State law.

4.2 No insurer proposing to issue individual or group accident and sickness insurance policies providing hospital, medical and surgical, or major medical coverage on an expense-incurred basis; health service corporation providing individual or group accident and sickness subscription contracts; or managed care organization or health maintenance organization providing a health care plan for health care services shall impose any limitation on the ability of an insured to seek medical care through the use of telehealth service solely because the health care service is being provided through telehealth. Such prohibited limitations shall include, but not be limited to, preauthorization, medical necessity or homebound requirements.

**5.0 Severability**

If any provision of this regulation or the application of any such provision to any person or circumstance shall be held invalid, the remainder of such provisions, and the application of such provision to any person or circumstance other than those as to which it is held invalid, shall not be affected.

**6.0 Effective Date**

This regulation shall become effective ~~on February 1, 2016~~ ten (10) days after being published as a final regulation].

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**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL****DIVISION OF AIR QUALITY**

Statutory Authority: 7 Delaware Code, Chapter 60 (7 Del.C. Ch. 60)  
7 DE Admin. Code 1141

Secretary's Order No.: 2016-A-0002

**1141 Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products**

Date of Issuance: January 15, 2016

Effective Date of the Amendment: February 11, 2016

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 Del.C. §§6006, 6010, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

**Background, Procedural History and Findings of Fact**

This Order relates to proposed regulation Amendments to 7 DE Admin. Code §1141, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products*, Section 2.0: *Consumer Products*. The Department's Division of Air Quality ("DAQ") commenced the regulatory development process with Start Action Notice 2014-09 dated December 8, 2014. The Department published its initial proposed regulation Amendments in the July 1, 2015 Delaware *Register of Regulations*. The Department then held a public hearing on August 4, 2015. Consistent with 29 Del.C. §10118(a), the public hearing record remained open for public comment through August 19, 2015.

The purpose of this proposed regulatory promulgation is to adopt as final the aforementioned proposed Amendments to 7 DE Admin. Code 1141, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products*, Section 2.0: *Consumer Products* ("Amendments"), in order for Delaware to adopt revisions to the Consumer Products Model Rules developed by the Ozone Transport Commission ("OTC") to further reduce emissions of volatile organic compounds ("VOCs") to aid in meeting the 8-hour ground-level ozone National Ambient Air Quality Standard ("NAAQS") in 2015. The Environmental Protection Agency ("EPA") has designated a part of Delaware in non-attainment for the 2008 NAAQS for ground-level ozone, also known as smog. Ground-level ozone is formed through the reaction of VOCs and other compounds in the ambient air, particularly on hot, sunny days. High concentration of ozone can cause or exacerbate difficulty in breathing, asthma and other serious respiratory problems, a health problem that could be more severe for children and the elderly. Thus, Delaware must continue to enact regulations to gain further reductions of the emissions of VOC.

Delaware's first consumer product regulation was approved in 2002, and later revised in 2009. This present regulatory action was based upon guidelines as set forth in the OTC Model Rules, which were developed by a team of environmental personnel from a number of OTC states, and are based upon the 2006 and 2009 amendments to the California Air Resources Board ("CARB") consumer products rule. The OTC is an organization authorized under the Clean Air Act ("CAA") to provide assistance to the northeast and mid-Atlantic states in

attaining the ground-level ozone NAAQS. Based upon the relatively high VOC emissions attributable in general to the consumer products category and the relatively poor air quality in parts of California, CARB has established a continuing program to make significant reductions in VOC emissions of regulated consumer products and to add new products to their rules on a regular basis. The OTC has adopted a policy of following behind the CARB rule amendment process, allowing sufficient time for their rules to be in force to work out any problems.

In June of 2010, the OTC approved the third model rule for consumer products based upon CARB's 2006 amendments. Shortly thereafter, the Consumer Specialty Products Association ("CSPA"), a group representing many U.S. manufacturers of consumer products, asked the OTC to adopt two major CARB product additions previously unregulated: Multi-Purpose Solvents and Paint Thinners at 3% VOC content. OTC agreed, and bypassed adopting the CARB 2008 amendments and went directly to the CARB 2009 amendments to capture the solvents and thinners reduction. These revisions became the fourth OTC Consumer Products Model Rule, which was approved in May of 2012. The OTC states agreed to delay enacting the third OTC Model Rule and make both the third and fourth revisions at the same time.

Delaware developed a draft regulation in January of 2015, which was sent to 37 stakeholders for comment. In response, the Department's Division of Air Quality ("DAQ") received nine replies, and included some of those comments in the proposed regulation amendment. In this present action, the Department's DAQ proposes to revise the Consumer Products regulation by adding and deleting certain products and product forms listed in the OTC Model Rules, yielding 120 regulated products and product forms in the revised regulation. Multiple existing products will have their VOC content reduced. Also, ten new products and product forms will be added to the list of regulated compounds. Additionally, new definitions will be added, and many will be revised, some extensively, to improve clarity. These proposed revisions are needed to further reduce VOC emissions to aid in meeting the ground-level ozone NAAQS.

CARB has a long history of regulating consumer products, has performed significant scientific studies, and held many stakeholder meetings to insure product categories were correctly identified, and that VOC content targets specified in their initial and updated rules were attainable. The Department believes that CARB and OTC stakeholder meetings provided ample opportunity for consumer product manufacturer involvement regarding this matter.

The aforementioned proposed Amendments were presented and thoroughly vetted by the Department at the public hearing on August 4, 2015. Members of the public attended that public hearing, and provided comment to the Department regarding the same, both at the time of the hearing and during the post-hearing time period. The public comment period closed on August 19, 2015.

Subsequent to the record closing for comment after this public hearing, the Department's DAQ conducted a thorough review of the hearing record and prepared its formal Technical Response Memorandum ("TRM"), dated November 19, 2015, which documents the Department's review of the record, and offers DAQ's response to all comments received throughout this regulatory process. In many instances, the comments received by the Department expressed support for the proposed regulatory amendments, and DAQ thanked those commenters for their support in this matter. Other commenters suggested revisions to portions of 7 **Del. Admin. Code** 1141 which were not contained in Section 2.0, and therefore not a part of this specific proposed regulatory amendment promulgation. In such instances, DAQ thanked those commenters for their suggestions, and advised (where applicable) that the Department has already begun its review process for future regulatory amendments related to those concerns, and anticipated completion of the same in the near future. Yet other commenters requested allowances be made within the proposed regulation amendments for limited use of certain solvents (such as methylene chloride); however, given the health hazards associated with the use of such products (and the unnecessary exposure of the same to Delaware consumers), DAQ denied those requests.

One comment received by the Department from Doug Raymond (of Raymond Regulatory Resources), on behalf of Stoner, Inc. ("Stoner"), resulted in DAQ making changes to the proposed regulatory amendments in this matter. Stoner sells a tire coating currently regulated under the EPA's Aerosol Coating rule. The Department's proposed amendments, if promulgated as initially published, would regulate this product as a Rubber/Vinyl Protectant, which would, in turn, require a drastic reformulation of this product by Stoner. Mr. Raymond noted that the effective date for the Rubber/Vinyl Protectant rule was proposed to be January 1, 2016, while all of the other proposed amendments under this rule had their effective dates set to be January 1, 2017. Mr. Raymond respectfully requested that the Department delay this particular effective date from the originally proposed deadline of January 1, 2016, to January 1, 2017, noting that, such change would "...allow for consistency throughout the rule and provide Stoner the much needed time for further reformulation of the current product."

In its response to Mr. Raymond's comments, DAQ acknowledged the difficulty associated with Stoner having to reformulate its product, and also recognized that, at this point, the original effective deadline of January 1, 2016 had already passed. Moreover, if the regulation amendments were promulgated as initially proposed, it would give the regulated community absolutely no time to come into compliance with regard to this particular deadline. Thus, the Department has agreed to *revise* the proposed regulatory amendments, thereby extending the aforementioned Rubber/Vinyl Protectant rule compliance deadline from January 1, 2016 to the general rule compliance date of January 1, 2017.

It should be noted that, while the Department has made revisions to the proposed Amendments to 7 **DE Admin. Code** 1141, Section 2.0 as a result of the comment received in this matter as noted above (and also to correct previous clerical error), such changes are non-substantive, as they neither alter the meaning or intent of the proposed regulatory amendments, and therefore, no additional noticing or re-publication of the same is necessitated at this time. It should also be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Subsequent to receiving the Division of Air Quality's aforementioned TRM, The Department's presiding hearing officer, Lisa A. Vest, then prepared a Hearing Officer's Report dated January 8, 2016 ("Report"). The Report documents the proper completion of the required regulatory development process, establishes the record, and recommends the adoption of the *revised* proposed regulatory Amendments as attached to the Report as Appendix "B".

### Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the *revised* proposed regulatory Amendments to 7 **DE Admin. Code** 1141, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products*, Section 2.0: *Consumer Products*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the *revised* proposed regulatory Amendments be promulgated as final.

I find that the Department's experts in the Division of Air Quality fully developed the record to support adoption of these *revised* regulatory Amendments. The adoption of these *revised* regulatory Amendments will allow Delaware's regulations to remain consistent with the guidelines set forth in the Model Rules of the Ozone Transport Commission states, further reduce VOC emissions to aid in meeting the new 8-hour ground-level ozone NAAQS, and assist Delaware in achieving healthy air quality for its citizens;

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the *revised* proposed Amendments to 7 **DE Admin. Code** 1141, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products*, Section 2.0: *Consumer Products*, pursuant to 7 **Del.C.**, Ch. 60;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, to issue an Order adopting these *revised* proposed regulatory amendments as final;
3. The Department provided adequate public notice of the proposed regulatory amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory amendments, including at the time of the public hearing held on August 4, 2015, and held the record open through close of business on August 19, 2015, consistent with 29 **Del.C.** §10118(a), in order to consider public comment on these proposed regulatory amendments before making any final decision;
4. While the Department has made revisions to the initial proposed regulatory amendments to 7 **DE Admin. Code** 1141, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products*, Section 2.0: *Consumer Products*, as set forth above, such changes are non-substantive, as they neither alter the meaning or intent of the proposed regulatory amendments, and therefore no additional re-publication or noticing of this proposed regulation is necessitated at this time;
5. The Department's Hearing Officer's Report, including its established record and the recommended *revised* proposed regulatory Amendments as set forth in Appendix "B", are hereby adopted to provide additional reasons and findings for this Order;

6. Promulgation of the *revised* proposed regulatory amendments to 7 **DE Admin. Code** 1141, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products*, Section 2.0: *Consumer Products*, will enable the Department to (1) make Delaware's regulation consistent with the guidelines as set forth in the Model Rules of the Ozone Transport Commission states; (2) add 10 new definitions and revise 32 definitions to improve clarity and increase understanding to the regulated community; and (3) further reduce VOC emissions to aid in meeting the new 8-hour ground-level ozone NAAQS, and assist Delaware in achieving healthy air quality for its citizens;
7. The Department has reviewed these *revised* proposed regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104 (version applicable to all regulations initially published on or before December 31, 2015), and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
8. The Department's *revised* proposed regulatory Amendments, as initially published in the July 1, 2015 Delaware *Register of Regulations*, and as *revised* and set forth in Appendix "B" as noted above, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final *revised* regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
9. The Department shall submit this Order approving as final the *revised* proposed Amendments to 7 **DE Admin. Code** 1141, *Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products*, Section 2.0: *Consumer Products*, to the Delaware Registrar of Regulations for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

David S. Small, Secretary

**\*Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

**1141 Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products**

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**DIVISION OF WASTE AND HAZARDOUS SUBSTANCES  
TANK MANAGEMENT BRANCH**

Statutory Authority: 7 Delaware Code, Chapters 60 and 74 (7 **Del.C.** Ch. 60 & 74)  
7 **DE Admin. Code** 1351

**Secretary's Order No.: 2016-WH-0001**

**1351 Underground Storage Tank Systems**

**Date of Issuance: January 12, 2016**

**Effective Date of the Amendment: February 11, 2016**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 **Del.C.** §§6006, 6010, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

**Background, Procedural History and Findings of Fact**

This Order relates to proposed regulation Amendments to 7 **DE Admin. Code** 1351: *Delaware Regulations Governing Underground Storage Tank Systems*. The Department's Division of Waste and Hazardous Substances, Tank Management Section, commenced the regulatory development process with Start Action Notice 2015-04

dated June 24, 2015. The Department published its initial proposed regulation Amendments in the November 1, 2015 *Delaware Register of Regulations*. The Department then held a public hearing on December 1, 2015. Consistent with 29 **Del.C.** §10118(a), the public hearing record remained open for public comment through December 16, 2015.

The purpose of this proposed regulatory promulgation is to adopt as final the aforementioned proposed Amendments to the *Delaware Regulations Governing Underground Storage Tank Systems* ("Amendments"), in order to remain consistent with current Delaware law. Specifically, DNREC is taking this action to clarify several issues resulting from amending 7 **Del.C.** Ch. 74, the *Delaware Underground Storage Tank Act*, in October of 2014 (note: said amendments have an effective date of January 1, 2016), to wit: (1) amend the existing regulatory language concerning cleanup liability relating to releases from USTs from the proximate cause standard to that of strict (joint and several) liability, effective January 1, 2016; (2) update the ways by which owners and operators of UST facilities currently and in the future may manage and reduce their cleanup liability; (3) add regulatory language that describes "All Appropriate Inquiry for Residential Properties"; and (4) clarify how the Department will use environmental covenants and deed notices to ensure the long term stewardship of leaking underground storage tank sites that are either undergoing or have had corrective actions completed in the past.

It should be noted that the changes to the aforementioned UST cleanup liability also apply to residential properties that have had a release from a home heating fuel UST. DNREC's new Heating Fuel UST Closure Assistance Program, launched in March of 2015, now provides for the Department to pay to remove or close in place residential and commercial tanks buried below ground that hold 1,100 gallons or less of heating fuel. Since its inception, DNREC has received over 175 applications for the program, and has removed or closed in place over 111 tanks. Response from property owners in Delaware has been overwhelmingly positive, as they are grateful for the financial assistance, and are relieved to be rid of a potential liability on their property.

The above-referenced proposed Amendments, which reflect the statutory changes referenced above, were presented and thoroughly vetted by the Department at the public hearing on December 1, 2015. Members of the public attended the December 1, 2015 hearing, however, no comment was received by the Department with regard to this proposed regulatory promulgation. It should be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated January 7, 2016 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments as attached to the Report as Appendix "A".

### Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory Amendments to 7 **DE Admin. Code** 1351: *Delaware Regulations Governing Underground Storage Tank Systems* are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory Amendments be promulgated as final.

I find that the Department's experts in the Division of Waste and Hazardous Substances, Tank Management Section, fully developed the record to support adoption of these regulatory Amendments. The adoption of these regulatory Amendments will allow Delaware to modify existing regulatory language concerning cleanup liability relating to releases from USTs from the proximate cause standard to that of strict (joint and several) liability, effective January 1, 2016, update the ways by which owners and operators of UST facilities currently and in the future may manage and reduce their cleanup liability, add regulatory language that describes "All Appropriate Inquiry for Residential Properties", and clarify how the Department will use environmental covenants and deed notices to ensure the long term stewardship of leaking underground storage tank sites that are either undergoing or have had corrective actions completed in the past.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed Amendments to 7 **DE Admin. Code** 1351: *Delaware Regulations Governing Underground Storage Tank Systems*, pursuant to 7 **Del.C.** Ch. 74;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 **Del.C.** Ch. 60, to issue an Order adopting these proposed regulatory amendments as final;

3. The Department provided adequate public notice of the proposed regulatory amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory amendments, including at the time of the public hearing held on December 1, 2015, and held the record open through close of business on December 16, 2015, consistent with 29 **Del.C.** §10118(a), in order to consider public comment on these proposed regulatory amendments before making any final decision;
4. The Department's Hearing Officer's Report, including its established record and the recommended proposed regulatory Amendments as set forth in Appendix "A", are hereby adopted to provide additional reasons and findings for this Order;
5. The adoption of these proposed regulatory Amendments will allow Delaware to (1) modify existing regulatory language concerning cleanup liability relating to releases from USTs from the proximate cause standard to that of strict (joint and several) liability, effective January 1, 2016; (2) update the ways by which owners and operators of UST facilities currently and in the future may manage and reduce their cleanup liability; (3) add regulatory language that describes "All Appropriate Inquiry for Residential Properties"; and (4) clarify how the Department will use environmental covenants and deed notices to ensure the long term stewardship of leaking underground storage tank sites that are either undergoing or have had corrective actions completed in the past;
6. The Department has reviewed these proposed regulatory Amendments in the light of the Regulatory Flexibility Act, consistent with 29 **Del.C.** Ch. 104 (version applicable to all regulations initially published on or before December 31, 2015), and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
7. The Department's proposed regulatory Amendments, as published in the November 1, 2015 Delaware *Register of Regulations*, and as set forth in Appendix "A" as noted above, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the Delaware *Register of Regulations*; and
8. The Department shall submit this Order approving as final the proposed Amendments to 7 **DE Admin. Code** 1351: *Delaware Regulations Governing Underground Storage Tank Systems* to the Delaware *Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

David S. Small, Secretary

**\*Please note that no changes were made to the regulation as originally proposed and published in the November 2015 issue of the *Register* at page 402 (19 DE Reg. 402). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**1351 Underground Storage Tank Systems**

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**DEPARTMENT OF SAFETY AND HOMELAND SECURITY**

**OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER**

Statutory Authority: 4 Delaware Code, Section 304(a) (4 **Del.C.** §304(a))

**4 DE Admin. Code**

**ORDER**

**Alcoholic Beverage Control Regulations**

**I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED**

The Commissioner has proposed amendments to 4 **DE Admin. Code** to reflect the current regulatory environment. The proposed regulations were available on the website of the Registrar of Regulations as well as at



the Office of the Commissioner.

The notice of the proposed regulations was first made on September 1, 2014 and the same proposals were made on November 1, 2015. Three hearings were held to receive comments, September 24, 2014 in Wilmington, Delaware; September 30, 2104 in Dover, Delaware; and October 1, 2014 in Georgetown, Delaware. In addition comments were solicited and received by e-mail and by regular mail.

Many participants of the hearings and those commenting through e-mails praised the proposed changes and urged the adoption of the proposals. There were a few persons who testified on specific proposals that suggested that the proposed changes were better than the current Rule, but did not go far enough. These participants agreed that the proposed rules should be adopted, and then further changes should be explored. The comments expressed support for the adoption of the Rules with the following exceptions:

Rule 2.1: Concern was expressed about the expansion of the type (specifically concerned about allowing the sale of cheeses) and area where products other than alcohol, ice and mixers might be displayed. Others expressed concern that the proposed rule did not go far enough in that it still prohibited the sale of meats and bread.

Rule 7.1: Broadening the employment of minors in a package store, Comments were made that allowing minors in stores selling alcohol is contrary to the public policy limiting access to alcohol to persons over the age of 21.

Rule 8: Concern was raised about the abolishment of the requirement of a surety bond in the amount of \$20,000.

Rule 11: Concern was expressed about the mandating of hours for stores.

Rule 27: Concern that deleting the words "package store" would result in unintended consequences.

Rule 29: Concern was raised that the requirement of a monthly book unduly increases the cost of alcohol to consumers.

Rule 36: Concern was raised about decreasing the time where patrons of on-premises licensees could consume alcoholic beverages purchased prior to 1:00 a.m. from 2:00 a.m. to 1:30 a.m.

Rule 43: Concern was raised that the inclusion of spouses of employees, stockholders, directors and officers of Suppliers and Wholesalers would be overly broad.

Rule 52: Opposition was raised to including premises other than restaurants and hotels in the prohibition of minors standing or sitting at service counters.

Rule 77: Opposition was raised to reducing the licensing fee for a Direct Shipper.

Unnumbered:

- A. One person commented that it would be a good idea to permit a "BYOB" night at restaurants.
- B. There was a recommendation to increase the amount of alcohol that it is permissible for one retailer to purchase from another retailer from one case per day to five cases per day.

## II. FINDINGS OF FACTS

The Commissioner finds that it is appropriate to amend 4 **DE Admin. Code** as outlined in the proposed Rules. The comments made by the public were generally in favor of the proposals. With regard to the specific negative comments the following is the Commissioner's findings:

Rule 2.1: The proposal to increase the area where items other than alcohol, mixers and ice can be displayed from 20 square feet to the larger of 20 square feet or 5% of the floor space was intended to recognize that all off-premises licensees are not the same size, This change in the Rule would allow a larger store to have a proportionally larger area to display these products. Many off-premises retailers have expressed an interest in "pairing" wines and cheeses and specifically allowing cheeses to be sold clarifies the confusing language currently found in these sections. Further expansion of the rule to permit the sale of meats and breads would bring the package stores closer to being a "grocery store" or "delicatessen" that is prohibited under Title 4 Section 516 from obtaining a license.

Rule 7.1: Persons who have reached the age of 18 may work in a store. (See Title 4, Section 904(m)). The current rule limits those persons who can utilize this statute to children of the owner of a store. There is no reason to believe that this limitation will result in better, more responsible minors employed

in a store. The statutory provision is permissive, thus any store that is concerned about the employment of a minor in the store may choose not to employ any person under the age of 21.

Rule 8: The requirement of a surety bond in the amount of \$20,000 for a wholesaler has been abandoned prior to the change from the Commission to the Commissioner. Any entity applying for a license as a wholesaler must demonstrate that it has the financial stability to acquire such a license. The deletion of this requirement is appropriate.

Rule 11: The current Rule requires all stores to be open from 9:00 a.m. until 1:00 a.m. unless a variance is granted by the Commissioner. The proposed rule reduces the requirement to 10 hours (significantly reduced from the currently required 16 hours) while still mandating that the store meet the need and convenience of the public.

Rule 27: The deletion of the words "package store" from new Roman Numeral IV would change the intent of the rule and is therefore inappropriate. These words will not be removed.

Rule 29: The Rule does not require a "book" form, rather a "publication" that can be distributed. The Wholesalers may agree to any "publication" form as long as all stores may access the pricing list and there are records maintained to insure compliance with the Rule.

Rule 36: As pointed out in the correspondences, reducing the time when alcohol can be consumed from 2:00 a.m. to 1:30 a.m. will result in many of the patrons drinking the beverages more rapidly. In addition, it would likely result in areas with a higher concentration of licensees with more congestion of persons leaving the establishments as there would be less staggering of closing times. The change of hours from 2:00 a.m. to 1:30 a.m. will not be made.

Rule 43: The current rule prohibits employees, stockholders and officers of Suppliers and Wholesalers from having a position with another tier. This is in keeping with the provisions of Title 4 Section 506. By adding a spouse to these restrictions, the policy behind this statute and rule is not thwarted by a subterfuge of violating the policy through a spouse. A general prohibition is appropriate and applications for variances can be made explaining the nature of the relationship and the duties and authority of the persons involved. The proposal to modify the rule will be adopted.

Rule 52: The prohibition of minors sitting or standing at service counters should apply to all establishments, not just restaurants and hotels. Clubs, bowling alleys, brew-pubs and other on-premises licensees should be prohibited from having minors sitting or standing at a bar where alcohol is being dispensed. The proposed rule change is adopted as proposed.

Rule 77: The fee for a Direct Shipper was statutorily decreased, therefore the change of the fee found in the Rule is required.

Unnumbered:

- A. The proposal to have a "BYOB" night at restaurants is statutorily prohibited, thus no change in the rule can be made.
- B. A proposal to increase the amount of alcohol a retailer can purchase from another retailer from one case per day to fives per day would be a change that was not proposed in this rule making procedure. We will consider that at some point in the near future.

### III. DECISION TO AMEND THE REGULATIONS

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 4 **DE Admin. Code** as proposed with two exceptions. The proposal to delete the words "package store" from Rule 27 is not approved and they will remain as part of that rule. Rule 36 will not change the time when patrons can consume on the premises from 2:00 a.m. to 1:30 a.m. and it shall remain at 2:00 a.m.

### IV. TEXT AND CITATION

The text of 4 **DE Admin. Code** as revised and amended hereby shall be in the form attached hereto as *Exhibit "A"*, and said regulation shall be cited as 4 **DE Admin. Code** in the *Administrative Code of Regulations* for the Office of the Alcoholic Beverage Control Commissioner.

## V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Commissioner pursuant to 4 **Del.C.** §§304(a) and 308 on January 15, 2016. The effective date of this Order shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*.

**IT IS SO ORDERED** the 15<sup>th</sup> day of January 2016.

Office of the Alcoholic Beverage Control Commissioner

John H. Cordrey, Commissioner

Approved this 15<sup>th</sup> day of January 2016

\* **Please Note: Due to the size and extent of the revisions they are not printed here. A PDF version is available at the following link:**

**Alcoholic Beverage Control Regulations**

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**DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES****DIVISION OF PREVENTION AND BEHAVIORAL HEALTH SERVICES**

Statutory Authority: 16 Delaware Code, Section 5001(11); 29 Delaware Code, Section 9005(7)  
(16 **Del.C.** §5001(11) & 29 **Del.C.** §9005(7))

**ORDER****Qualifications for Juvenile Mental Health Screeners****NATURE OF THE PROCEEDINGS:**

Delaware Department of Services for Children, Youth and Their Families (DSCYF) initiated the process to adopt the State of Delaware Regulations Governing the Qualifications for Juvenile Mental Health Screeners. The DSCYF proceedings to adopt regulations were initiated pursuant to 29 **Del.C.** Ch. 101 and authority as prescribed by 16 **Del.C.** §5001, (11).

During the 147<sup>th</sup> Delaware General Assembly, HB 346, AN ACT TO AMEND TITLE 16 OF THE DELAWARE CODE RELATING TO THE COMMITMENT OF THE MENTALLY ILL, was signed into law. The new law created a definition for "Juvenile Mental Health Screener" and authorized DSCYF to establish regulations concerning the credentialing process and criteria for Juvenile Mental Health Screeners.

On December 1, 2015 (Volume 19, Issue 6), DSCYF published in the Delaware *Register of Regulations* its proposal to promulgate regulations, pursuant to 29 **Del.C.** §10113. After receiving written public comment, DSCYF is amending the proposed regulation by changing the first sentence of 3.2.3.2 to read as follows: "Current employment or contract relationship required with one of the following: DSCYF operated facility, DSCYF crisis services, or a Delaware licensed mental health hospital under contract with DSCYF." Since this only clarifies a definition, it is not a substantive change.

**FINDINGS OF FACT:**

Language relating to the Qualifications for Juvenile Mental Health Screeners is being promulgated as a new regulation in accordance with 16 **Del.C.** §5001, (11).

**THEREFORE, IT IS ORDERED**, that the State of Delaware Regulations Governing Qualifications of Juvenile Mental Health Screeners is adopted and shall become effective February 11, 2016, after publication of the final regulation in the Delaware *Register of Regulations*.

Carla Benson-Green, Secretary  
January 15, 2016

## Qualifications for Juvenile Mental Health Screeners (Break in Continuity of Sections)

### **3.0 Qualifications of Applicants for Credentialed Mental Health Screener**

- 3.1 Psychiatrists, Board Certified Emergency Physicians, and Physicians.
- 3.1.1 Psychiatrists, board certified emergency physicians and physicians who meet the criteria of 16 **DE Admin. Code** §§6002.3.1 - 6002.3.3 may detain or abrogate a detainment for a psychiatric evaluation of any person, over or under age 18 as detailed in 16 **DE Admin. Code** §6002.
- 3.2 Licensed Non-Physician Mental Health Professionals
- 3.2.1 A credentialed Licensed Non-Physician Mental Health Professional, who meets the qualifications enumerated in this regulation, may detain or abrogate a detainment for a psychiatric evaluation of a person under the age of 18.
- 3.2.2 Licensed Non-Physician Mental Health Professionals must meet the following qualifications:
- 3.2.2.1 Registered Nurse. Each applicant shall document current licensure by the State of Delaware as a Registered Nurse with a BSN degree and in good standing, as set forth in 24 **Del.C.** Ch. 19;
- 3.2.2.2 Advanced Practice Nurse. Each applicant shall document current licensure by the State of Delaware as an Advanced Practice Nurse in good standing, as set forth in 24 **Del.C.** Ch. 19;
- 3.2.2.3 Licensed Clinical Social Worker. Each applicant shall document current licensure in the State of Delaware as a Licensed Clinical Social Worker in good standing, as set forth in 24 **Del.C.** Ch. 39 and have at least 2 years/4000 hours of post masters clinical experience;
- 3.2.2.4 Licensed Professional Counselor of Mental Health. Each applicant shall document current licensure by the State of Delaware as a Licensed Professional Counselor of Mental Health in good standing, as set forth in 24 **Del.C.** Ch. 30 and have at least 2 years/4000 hours of post masters clinical experience;
- 3.2.2.5 Licensed Psychologist. Each applicant shall document current licensure by in the State of Delaware as a Licensed Clinical Psychologist in good standing, as set forth in 24 **Del.C.** Ch. 35;
- 3.2.2.6 Other Licensed Behavioral Health Professional. The Secretary of the Division of Services for Children Youth and Their Families may designate other behavioral or mental health professionals, who are licensed under Delaware Law, and the Secretary may set requirements for their qualifications to serve as juvenile mental health screeners.
- 3.2.3 Additional requirements; Licensed Non-Physician Mental Health Professionals
- 3.2.3.1 Licensed Non-Physician Mental Health Professionals must complete DPBHS's juvenile mental health screener training, or the Division of Substance Abuse and Mental Health mental health screener training, in order to be authorized to act as a juvenile mental health screener.
- 3.2.3.2 Current employment or contract relationship required [with one of the following: DSCYF operated facility, DSCYF crisis services, or a Delaware licensed mental health hospital under contract with DSCYF]. A credentialed Licensed Non-Physician Mental Health Professional will no longer be considered a Juvenile Mental Health Screener, and his authority to detain or abrogate detainments will end, when the professional is no longer employed by the DSCYF operated facility, or employed by or under contract with the DSCYF to perform crisis services, or is no longer employed by or under contract with a Delaware licensed mental health hospital under contract with the DSCYF.
- 3.2.3.3 For non-physician juvenile mental health screeners, consultation with another juvenile mental health screener is required. If both juvenile mental health screeners are non-

physicians, they must concur with the detainment. A physician with juvenile mental health screener status may override the detainment determination of a non-physician juvenile mental health screener.

3.2.3.4 Each applicant under this section must be approved or credentialed by the DPBHS.

\*Please note that no additional changes were made to the regulation as originally proposed and published in the December 2015 issue of the *Register* at page 473 (19 DE Reg. 473). Therefore, the final regulation is not being republished here in its entirety. A copy of the final regulation is available at:

**Qualifications for Juvenile Mental Health Screeners**

## DEPARTMENT OF STATE

### DIVISION OF PROFESSIONAL REGULATION

#### 1725 POLYSOMNOGRAPHY ADVISORY COUNCIL

Statutory Authority: 24 Delaware Code, Section 1799W(c) (24 Del.C. §1799W(c))  
24 DE Admin. Code 1725

#### ORDER

#### 1725 Polysomnography Advisory Council

The Delaware Polysomnography Advisory Council, pursuant to 24 Del.C. §§1799W(c), proposed to amend the regulations governing the practice of polysomnography in the State of Delaware to clarify that the practice of polysomnography is always deemed to occur where the patient is located.

Following publication in the Delaware *Register of Regulations* on September 1, 2015 a public hearing was held on September 28, 2015. Written comment periods were held open for thirty days, and fifteen days following the public hearing.

#### SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

At the time of the deliberations, the Board considered the following documents:

**Board Exhibit 1** - Affidavit of publication of the public hearing notice in the *News Journal*;

**Board Exhibit 2** - Affidavit of publication of the public hearing notice in the *Delaware State News*.

There was no verbal testimony given at the public hearing on September 28, 2015. No written comments were received by the Board during the initial thirty day public comment period; nor were any written comments received after the public hearing during the fifteen day 29 Del.C. §10118(a) second public comment period.

#### FINDINGS OF FACT AND CONCLUSIONS

1. The public was given notice and an opportunity to provide the Board with comments in writing and by testimony at the public hearing on the proposed amendments to the Board's regulations.
2. There were no public comments provided to the Board during the two written public comment periods, or the public hearing.
3. Pursuant to 24 Del.C. §1799W(c), the Board has statutory authority to promulgate rules and regulations clarifying specific statutory sections of its statute.
4. The proposed regulations seek to clarify that polysomnographic trainees are limited to a total of two years of training before they are required to either obtain a license or cease practicing.
5. Having received no public comments, the Board finds no reason to amend the regulations as proposed.

#### DECISION AND EFFECTIVE DATE

The Board hereby adopts the changes to its rules and regulations as proposed, to be effective 10 days

following publication of this order in the *Register of Regulations*. The new regulations are attached hereto as Exhibit A.

**IT IS SO ORDERED** this 30<sup>th</sup> day of November, 2015 by the Delaware Polysomnography Advisory Council.  
Steven D. Conley, President  
Grace R. Denault

Theodore S. Kruppa, III  
Paul Walker

**AND NOW**, this 5th day of January, 2016;

**WHEREAS**, the Board of Medical Licensure and Discipline has considered the attached recommendation of the Polysomnography Advisory Council for approval of amended rules and regulations related to licensure renewal; and

**WHEREAS**, the Board has determined to approve the aforesaid rules and regulations as proposed by the Polysomnography Advisory Council and attached hereto as Exhibit A.

**NOW THEREFORE IT IS ORDERED by the Board of Medical Licensure and Discipline:**

1. The rules and regulations recommended by the Polysomnography Advisory Council governing licensure renewal are hereby approved by the Board of Medical Licensure and Discipline.
2. The rules and regulations shall be effective ten days after publication of this Final Order in the *Register of Regulations*.

**IT IS SO ORDERED** this 5<sup>th</sup> day of January, 2016;

:

Joseph M. Parise, D.O., President  
Stephen G. Cooper, M.D. (absent)  
Georges A. Dahr, M.D.  
Barry L. Bakst, D.O.  
N.C. Vasuki, Public Member  
Garrett H. Colmorgen, M.D.  
Stephen Lawless, M.D.

Gregory D. Adams, M.D.  
Mary Lomax, Ed.D., Public Member  
Vonda Calhoun, Public Member  
Karyl Rattay, M.D.  
Malvine Richard, Ed.D., Public Member  
Mary Ryan, Public Member  
Sharon Williams-Mayo, Public Member

**\*Please note that no changes were made to the regulation as originally proposed and published in the September 2015 issue of the *Register* at page 184 (19 DE Reg. 184). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**1725 Polysomnography Advisory Council**

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# CALENDAR OF EVENTS/HEARING NOTICES

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## DELAWARE RIVER BASIN COMMISSION

### PUBLIC NOTICE

The Delaware River Basin Commission will hold a public hearing on **Wednesday, February 10, 2016** beginning at **1:30 p.m.** A business meeting will be held the following month on **Wednesday, March 16, 2016** beginning at **10:30 a.m.** The hearing and meeting are open to the public and will be held at the Washington Crossing Historic Park Visitor Center, 1112 River Road, Washington Crossing, Pennsylvania. For more information, visit the DRBC web site at [www.drbc.net](http://www.drbc.net) or contact Pamela M. Bush, Commission Secretary and Assistant General Counsel, at 609-883-9500 extension 203 and [pamela.bush@drbc.nj.gov](mailto:pamela.bush@drbc.nj.gov).

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## DEPARTMENT OF EDUCATION

### PUBLIC NOTICE

The State Board of Education will hold its monthly meeting on Thursday, February 18, 2016 at 9:00 a.m. in the Townsend Building, Dover, Delaware.

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## DEPARTMENT OF FINANCE

### OFFICE OF UNCLAIMED PROPERTY, STATE ESCHEATOR

### PUBLIC NOTICE

#### Voluntary Disclosure Agreement and Escheat Examination Manual

In compliance with the State's Administrative Procedures Act (Title 29, Chapter 101 of the Delaware Code) and under the authority of 12 **Del.C.** §1154, the Delaware Department of Finance's Office of Unclaimed Property, State Escheator, proposes to revise and replace its regulations related to its Voluntary Disclosure Agreements and Escheat Examinations.

In accordance with 29 **Del.C.** §10116, persons wishing to submit written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed regulations should direct them to the following address:

David Gregor  
State Escheator  
Department of Finance  
820 N. French Street  
Wilmington, DE 19801

Notice may also be directed via electronic mail to [david.gregor@state.de.us](mailto:david.gregor@state.de.us). Any written submission in response to this notice and relevant to the proposed regulations must be received by the Department of Finance no later than **4:30 p.m. EST, Friday, April 1, 2016**.

The action concerning determination of whether to adopt the proposed regulations will be based upon the results of Department analysis and the consideration of the comments and written materials filed by other interested persons.

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## DEPARTMENT OF HEALTH AND SOCIAL SERVICES

### DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

### PUBLIC NOTICE

#### Statewide Transition Plan Home and Community-Based Services Settings Transition Plan Updates

In accordance with the public notice requirements of 42 CFR 441.301(6)(B)(iii), 42 CFR 441.710(3)(iii), and

Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives notice related to the state's plan to comply with new federal regulations governing the settings in which the delivery of services to Medicaid Home and Community-Based Services (HCBS) waiver recipients may be provided.

**Purpose**

The purpose of this posting is to provide public notice and receive public input for consideration regarding Delaware Medicaid's Proposed Home and Community-Based Services (HCBS) Settings Transition Plan, specifically the HCBS Transition Plan Updates.

**Overview**

The Centers for Medicare and Medicaid Services (CMS) published regulations in the Federal Register (42 CFR 441.301(c)(4)-(6) on January 16, 2014, effective March 17, 2014, which changed the definition of Home and Community-Based Services (HCBS) settings. Because Delaware's 1115 Demonstration refers to the 1915(c) authority for HCBS services, the state must comply with these regulatory changes. Delaware does not have a 1915(k) waiver. The transition plan must describe the process by which the state will ensure that service settings used in each of its home and community-based waivers meet "community-like" expectations. The final rule provides for a five-year transition process that will allow states to implement this rule in a manner that supports continuity of services for Medicaid recipients and minimizes disruptions in service during implementation; as such, all such services must be in compliance with CMS requirements before March 2019.

For additional information about the CMS HCBS final rule, use the following link to the CMS website:

<http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html>.

Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) previously provided an opportunity for comment on Delaware's HCBS Transition Plan.

**Transition Plan Update**

The Department of Health and Social Services (DHSS) is updating the Delaware Statewide Transition Plan (the Plan) to reflect the current status of implementation activities as of February 2016. We direct you to the following sections of the Plan that contain updated information:

1. February 2016 Update to the Division of Developmental Disability Services (DDDS) Waiver Assessment and Remediation Plan and February 2016 Update to Diamond State Health Plan (DSHP) Demonstration and Remediation Plan for new information since publication of the Plan in September 2015;
2. Attachment 5 for the CMS comments and DHSS' responses;
3. Attachment 6 for updated state systemic assessments by provider setting type;
4. Attachment 7 for DDDS provider surveys; and
5. Attachment 8 for DSHP provider and member survey instruments and findings, and Managed Care Organizations (MCOs) self-assessment instrument.

We have updated the Statewide Transition Plan Timeline matrices on pages 10 and 11 to show any tasks, dates, and completion statuses that have been revised. Moving forward, we plan to update the Plan as needed to reflect the status of implementation activities as they occur.

**Draft of Proposed Statewide 1915 HCBS Settings Transition Plan Update**

This public notice, transition plan containing updates, and other related information for participating in and submitting comment are posted online at:

[http://dhss.delaware.gov/dhss/dmma/hcbs\\_trans\\_plan.html](http://dhss.delaware.gov/dhss/dmma/hcbs_trans_plan.html). Delaware will be submitting its updated Transition Plan to CMS by March 31, 2016.

Hard copies are available by contacting Arlene Baal at [Arlene.Baal@state.de.us](mailto:Arlene.Baal@state.de.us).

Hard copies are available for review at the Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, Holloway Campus, Lewis Building, Conference Room 198, New Castle, Delaware 19720 from 8:00 a.m. – 4:30 p.m.



**Public Hearings**

DHSS/DMMA will provide the following opportunities to the public to provide input on the proposed (HCBS) Settings Transition Plan Updates in person. Three (3) public hearings are scheduled. The detailed information for each public hearing is shown below.

1. **NEW CASTLE COUNTY****Friday, March 4, 2016****4:00pm – 6:00pm**

Delaware State Police

Troop 2

Robert Paris Community Room

100 Lagrange Avenue

Newark, Delaware 19702

Phone: 302-834-2620 - main line

(Visitor parking is in the front of the building)

2. **Sussex County****Monday, March 7, 2016****1:30am-3:30pm**

Thurman Adams State Service Center

*(Formerly, Georgetown State Service Center)*

546 South Bedford Street

Georgetown, Delaware 19947

Phone: 302-856-5211 or 302-856-5574

(Visitor parking is designated by signs and is close to the entrance of the building)

3. **KENT COUNTY****Monday, March 7, 2016 \*\*\*CORRECTION\*\*\*****5:00pm – 7:00pm**

Delaware Department of Transportation

Administration Center

800 Bay Road

Dover, Delaware 19901

Phone: 302-760-2000

(Visitor parking is in the front of the building)

The State will take verbal and written comments at the public hearings. The input provided will be summarized and used to formulate Delaware's final statewide transition plan that will be submitted to CMS.

If you require special assistance or auxiliary aids and/or services to participate in the public hearing (e.g., sign language or wheelchair accessibility), please call the following contact at least ten (10) days prior to the hearing for arrangements: Arlene Baal at (302) 255-9561

The prompt submission of requests helps to ensure the availability of qualified individuals and appropriate accommodations in advance.

**Public Comment Submission Process**

As required by 42 CFR Part 441.301, DHSS/DMMA must provide, at a minimum, a thirty-day public notice and comment period. Per Del. Code, Title 29, Ch. 101 §10118 (a), the public comment period will be extended to 15 days after the final public hearing. The public is invited to review and comment on the State's proposed Transition Plan Updates. Comments must be received by 4:30 p.m. on March 22, 2016. Comments and input regarding the draft transition plan may be submitted in the following ways:

By email: [DMMA\\_PublicHearing@state.de.us](mailto:DMMA_PublicHearing@state.de.us)

By fax: 302-255-4481 to the attention of HCBS Transition Plan Updates

By written comments sent to:

HCBS Transition Plan Updates  
Division of Medicaid and Medical Assistance  
Planning, Policy & Quality Unit  
1901 North DuPont Highway  
P.O. Box 906  
New Castle, Delaware 19720-0906

Please identify in the subject line: Draft Home and Community-Based Services (HCBS) Settings Transition Plan Updates.

The summary of comments, in addition to a summary of modifications made in response to the public comments, will be added to the Delaware's updated HCBS Transition Plan. The state will post on the **DMMA website** a summary of public comments and our responses and, the final updated transition plan with any modifications after the receipt of public comments.

**Stephen M. Groff**      **July 27, 2015**  
Director  
Division of Medicaid and Medical Assistance

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**DEPARTMENT OF STATE**  
**DIVISION OF PROFESSIONAL REGULATION**  
**PUBLIC NOTICE**  
**1100 Board of Dentistry and Dental Hygiene**

The Delaware Board of Dentistry and Dental Hygiene, pursuant to 24 **Del.C.** §1106(a)(1), proposes to revise its regulations. The proposed amendments to subsections 4.0 and 4.1 seek to clarify that the statutory requirement set forth at 24 **Del.C.** §1122(a)(1) requiring dental candidates to have "received a degree in dentistry from an accredited dental college or university accredited by the Commission on Dental Accreditation of the American Dental Association" may obtain such a degree through either a pre-doctoral dental education program or a post-doctoral dental program of at least 24 months in any specialty that includes a clinical component. The proposed changes at subsection 12.2.28 seek to clarify that fee-splitting is a basis for discipline of a Delaware dentist or dental hygienist.

The Board will hold a public hearing on the proposed rule change on March 17, 2016 at 3:00 PM, Second Floor Conference Room A, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments should be sent to Jennifer Witte, Administrator of the Delaware Board of Dentistry and Dental Hygiene, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904. Written comments will be accepted until April 1, 2016.

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**DIVISION OF PROFESSIONAL REGULATION**  
**PUBLIC NOTICE**  
**1799 Genetic Counselor Advisory Council**

Pursuant to 24 **Del.C.** §1799I(c), the Genetic Counselor Advisory Council ("the Council") of the Delaware Board of Medical Licensure and Discipline has proposed revisions to its rules and regulations pertaining to license renewal and continuing education requirements.

A public hearing will be held on March 4, 2016 at 3:30 p.m. in the second floor conference room B of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware, where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Genetic Counselor Advisory Council, 861 Silver Lake Boulevard, Dover, Delaware 19904. Persons wishing to submit written comments may forward these to the Council at the above address. Pursuant to 29 **Del.C.** §10118(a), the

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final date to receive written comments will be March 19, 2016, which is 15 days following the public hearing.

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**DIVISION OF PROFESSIONAL REGULATION**  
**PUBLIC NOTICE**  
**2925 Real Estate Commission Education Committee**

Pursuant to 24 **Del.C.** §2906(a)(1), the Delaware Real Estate Commission has proposed revisions to the Real Estate Commission Education Guidelines (the "Guidelines").

A public hearing will be held on March 10, 2016 at 9:00 a.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware, where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Real Estate Commission, 861 Silver Lake Boulevard, Dover, Delaware 19904. Persons wishing to submit written comments may forward these to the Commission at the above address. Pursuant to 29 **Del.C.** §10118(a), the final date to receive written comments will be March 25, 2016, which is 15 days following the public hearing. The Commission will deliberate on all of the public comments at its regularly scheduled meeting on April 14, 2016, at which time the Commission will decide whether to adopt the revisions as proposed.

The Commission has proposed a new Rule 4.0 to address distance education. Rule 4.0 provides that prelicensing education, for both salespeople and brokers, and continuing education, may be accomplished through distance education. The proposed rule establishes standards for distance education courses, providers and instructors to ensure that applicants and licensees receive appropriate training. Other rules are revised to accommodate the new Rule 4.0.

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**DEPARTMENT OF TRANSPORTATION**  
**DIVISION OF MAINTENANCE AND OPERATIONS**  
**PUBLIC NOTICE**  
**2601 Outdoor Advertising**

The Department of Transportation has developed a general revision of its Outdoor Advertising regulations. Among other changes, the regulations clarify standards for public service signs as well as decorative residential subdivision signs. It also changes the time period for agri-produce signs to reflect seasonal products outside of the typical growing season.

The Department will take written comments on the proposed Outdoor Advertising Regulations from February 1, 2016 through March 2, 2016. The proposed Regulations appear below.

Any request for copies of the proposed Regulations, or any questions or comments regarding this document should be directed to:

Jeff Leonard  
Outdoor Advertising and Roadside Control Manager  
Division of Maintenance and Operations  
Delaware Department of Transportation  
250 Bear-Christiana Road  
Bear, DE 19701  
(302) 326-4585 (telephone)  
(302) 739-2895 (fax)  
jeff.leonard@state.de.us

**DIVISION OF MOTOR VEHICLES**  
**PUBLIC NOTICE**  
**2289 Transportation Network Companies**

The Delaware Division of Motor Vehicles (DMV) gives notice of intent to create a new regulation Title 2 Transportation Regulation 2289 Transportation Network Companies. This regulation sets forth regulations and procedures to clearly identify the roles and responsibilities of each party as they relate to Transportation Network Companies (TNC) and the safe movement of persons using a TNC service for transportation via a TNC digital network in the State of Delaware.

The DMV will take written comments on the proposed new Regulation 2289 of Title 2, Delaware Administrative Code, from February 1, 2016 through March 2, 2016.

The public may submit their comments to Ken Shock, Chief of Compliance and Investigations, Delaware Division of Motor Vehicles, P.O. Box 698, Dover, Delaware 19903, or by fax to (302) 736-7993 Attn: Ken Shock.

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**DIVISION OF PLANNING AND POLICY**  
**PUBLIC NOTICE**  
**2309 Development Coordination Manual**

Pursuant to the authority provided by 17 **Del.C.** §§132(e), 507, and 508, as well as 29 **Del.C.** §8404(8), the Delaware Department of Transportation (DelDOT) adopted the Development Coordination Manual.

The Department, through its Division of Planning and Public Policy, seeks to adopt general revisions to its existing regulations, the Development Coordination Manual, to address procedural changes, add or modify technical requirements, clarify and amend design criteria and generally clarify the role of external technical references and guidance materials, (as supporting documentation for design firms that are implementing the regulations). These collective changes are both technical and administrative in nature and serve in part to clarify the intent of the Department as enacted through these regulations.

DelDOT will take written comments on these proposed general revisions to Section 2309 of Title 2, Delaware Administrative Code, from February 1, 2016 through March 2, 2016. The public may submit their comments to:

Marc Coté, P.E., Assistant Director, Planning Development Coordination via email  
(Marc.Cote@state.de.us) or in writing to his attention,  
Division of Planning  
Delaware Department of Transportation  
P.O. Box 778  
Dover, DE 19903

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