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# Delaware Register of Regulations

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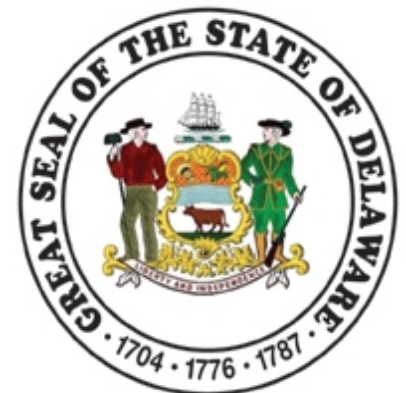


## IN THIS ISSUE:

Regulations:  
Emergency  
Proposed  
Final

Governor:  
Appointments  
Executive Orders

General Notice  
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 October 17, 2011.

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The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.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

15 **DE Reg.** 24-47 (07/01/11)

Refers to Volume 15, pages 24-47 of the *Delaware Register* issued on July 1, 2011.

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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and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.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
December 1	November 15	4:30 p.m.
January 1	December 15	4:30 p.m.
February 1	January 16	4:30 p.m.
March 1	February 15	4:30 p.m.
April 1	March 15	4:30 p.m.

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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.

**Emergency Regulations**

Under 29 **Del.C.** §10119 an agency may promulgate a regulatory change as an Emergency under the following conditions:

**§ 10119. Emergency regulations.**

If an agency determines that an imminent peril to the public health, safety or welfare requires the adoption, amendment or repeal of a regulation with less than the notice required by § 10115, the following rules shall apply:

(1) The agency may proceed to act without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable;

(2) The order adopting, amending or repealing a regulation shall state, in writing, the reasons for the agency's determination that such emergency action is necessary;

(3) The order effecting such action may be effective for a period of not longer than 120 days and may be renewed once for a period not exceeding 60 days;

(4) When such an order is issued without any of the public procedures otherwise required or authorized by this chapter, the agency shall state as part of the order that it will receive, consider and respond to petitions by any interested person for the reconsideration or revision thereof; and

(5) The agency shall submit a copy of the emergency order to the Registrar for publication in the next issue of the Register of Regulations. (60 Del. Laws, c. 585, § 1; 62 Del. Laws, c. 301, § 2; 71 Del. Laws, c. 48, § 10.)

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**DEPARTMENT OF STATE****DIVISION OF PROFESSIONAL REGULATION****Controlled Substance Advisory Committee**

Statutory Authority: 16 Delaware Code, Section 4731 (16 **Del.C.** §4731)

**Emergency Rule Adoption Placing Mephedrone, Methydone, and MDPV In Schedule I**

**WHEREAS**, the Secretary of the Department of State ("the Secretary") has been charged by the Delaware legislature with placing substances in Schedule I if the Secretary finds that the substances: (1) have high potential for abuse; and (2) have no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision. 16 **Del.C.** §4713; and

**WHEREAS**, available data and information for mephedrone, methydone, and methylenedioxypropylvalerone (MDPV) indicate that these three synthetic cathinones have a high potential for abuse, no currently accepted medical use in treatment in the United States and lack accepted safety for use under medical supervision; and

**WHEREAS**, these three synthetic cathinones are not currently listed in any schedule under Delaware law; and

**WHEREAS**, on September 8, 2011 the Drug Enforcement Agency published in the Federal Register an emergency notice, temporarily placing these three synthetic cathinones in Schedule I for a twelve month period effective October 8, 2011 finding that these three synthetic cathinones have a high potential for abuse, no currently accepted medical use in treatment in the United States and lack accepted safety for use under medical supervision; and

**WHEREAS**, the Delaware Controlled Substance Advisory Committee has recommended the enactment of an emergency regulation placing these three substances in Schedule I; and

**WHEREAS**, the Secretary finds that adoption of a regulation placing these three synthetic cathinones temporarily in Schedule I under Delaware law must occur on an emergency basis in order to properly protect the public until such time as the legislature may reconvene to adopt a statutory amendment to 16 **Del.C.** §4714; and

**WHEREAS**, the Secretary will accept, consider and respond to petitions by any interested person for the

reconsideration or revision of this regulation by addressing the same to the attention of Mr. Dave Dryden, Cannon Building, 861 Silver Lake Blvd., Dover, DE 19904; and

**WHEREAS**, a copy of this Order will be submitted to the Registrar for publication in the next issue of the Delaware *Register of Regulations*;

**NOW, THEREFORE, IT IS ORDERED** this 30<sup>th</sup> day of September, 2011.

In accordance with the provisions of 29 **Del.C.** §10119(3), this Order shall be effective for 120 days from the date of execution.

**SO ORDERED** this 30<sup>th</sup> day of September, 2011.

Jeffrey W. Bullock, Secretary of State

### **Uniform Controlled Substances Act Regulations**

(Adopted by the Secretary of Health and Social Services pursuant to 16 **Del.C.** §4731 effective February, 1973 amended July 8, 1974, May 27, October 30, 1975, September 27, 1976, February 1, 1983, July 1, 1985, January 28, 1987, March 5, 1992, and August 29, 1995.)

#### **Adoption of Federal Regulations**

To the extent consistent with 16 **Del.C.** Ch. 47, regulations promulgated by the Federal Government pursuant to the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, and in effect as of this date, are adopted as a part of these regulations. Readopted October 30, 1975.

#### **13 DE Reg. 281 (08/01/09)**

#### **1.0 Controlled Substance Advisory Committee**

- 1.1 The Controlled Substance Advisory Committee (hereafter designated as "the Committee") has a primary objective to promote, preserve and protect the public health, safety and welfare by regulating and monitoring controlled substance use and abuse through a program of registration, inspection, investigation and education. The Committee regulates by registering prescribers, dispensers, manufactures, distributors, clinics, researchers and other controlled substance registrants (i.e. – dog handler). Among its functions, the Committee issues and renews licenses; and makes recommendations to the Secretary of State of new or amended controlled substance regulations and disciplinary actions of registrants who violate the law. (16 **Del.C.** § 4700 to the end)
- 1.2 The Committee shall consist of 9 members: one physician, one dentist, one podiatrist, one veterinarian, one nurse practitioner, two pharmacists, one physician assistant and one public member. The Secretary of State will be provided recommendations for appointments to the Committee from the associated licensing Boards. Members shall have engaged in the prescribing, dispensing or storing of controlled substances for at least 5 years except for the public member. The public member will be appointed by the Secretary of State or their designee.
- 1.3 Each Committee member shall serve a term of three years and may succeed themselves for one additional term. A Committee member whose appointment has expired remains eligible to participate in Committee proceedings unless replaced by their respective regulatory board.
- 1.4 The Committee shall hold regularly scheduled meetings at least four times a calendar year and at other times the Committee considers necessary at the request of a majority of the members. A president and vice-president shall be elected by the members annually.
- 1.5 The conduct of all hearings and issuance of orders shall be in accordance with the procedures established pursuant to this section, Chapter 101 of Title 29, Section 8735 of Title 29, and Sections 4731 through 4736 of Title 16.

- 1.6 The Drug Control Administrator for the Division of Professional Regulation, who is an ex officio member of the Committee without a vote, is responsible for the performance of the regular administrative functions of the Committee and other duties as the Committee may direct.
- 1.7 A majority of members shall constitute a quorum, and no action shall be taken without the affirmative vote of at least 5 members. For proceedings involving the denial, suspension or revocation of a controlled substance registration at least 1 member of the quorum must be from the same profession as the practitioner whose registration is the subject of the proceeding. Any member who fails to attend 3 consecutive meetings, or who fails to attend at least half of all regular business meetings during any calendar year, shall automatically upon such occurrence be deemed to have resigned from office and a replacement shall be appointed by the Secretary of State.
- 1.8 Minutes of all meetings shall be maintained by the Division of Professional Regulation. A record from which a verbatim transcript can be prepared shall be made of all hearings where evidence is presented. The expense of preparing any transcript shall be borne by the person requesting it.

**13 DE Reg. 281 (08/01/09)****2.0 Requirements**

- 2.1 Registration shall be on a biennial basis upon forms supplied by the Division of Professional Regulation and/or Secretary of State for that purpose. A separate registration is required at each principal place of business or professional practice where controlled substances are manufactured, distributed, dispensed, or kept for research substances are manufactured, distributed, dispensed, or kept for research or analysis. Out-of-State registrants who dispense or distribute controlled substances to patients or facilities in Delaware are required to obtain a registration.
- 2.2 Revocation and Suspension
  - 2.2.1 Revocation of registration by the Federal Government will result in automatic revocation of the State registration.
  - 2.2.2 Proceedings for denying, suspending or revoking a registration shall be held before the Committee. The Committee will forward their recommendation in writing to the Secretary of State for his/her review and decision. Persons complained against may appear personally or by counsel, and may produce any competent evidence in their behalf in answer to the alleged violation.
  - 2.2.3 Whenever a registration is denied, suspended, or revoked by the Secretary of State, the Secretary of State or his/her designee will reduce in writing his/her findings and rulings, and the reasons therefore, and forward them to the persons complained against within 15 days of receiving the written recommendation of the Committee. This provision shall in no way stay any such denial, suspension, or revocation. The Secretary of State's decision is final and conclusive. A person aggrieved may file an appeal as provided in 16 **Del.C.** §4786.

**13 DE Reg. 281 (08/01/09)****3.0 Records and Inventory**

- 3.1 Requirements
  - 3.1.1 Practitioners authorized to prescribe or dispense controlled substance shall maintain a record with the following information:
    - 3.1.1.1 Name and address of patient
    - 3.1.1.2 Date prescribed
    - 3.1.1.3 Name, strength, refills authorized and amount of medication.
  - 3.1.2 Other records required by 21 **CFR** 1300 to end of 1316. The information for prescribed controlled substances may be kept either in a log or on patient records provided such records or logs are made available for inspection. The information for dispensed controlled substances must be maintained in a separate log. Entries must include the date dispensed, name and address of the patient, name and strength of medication, and amount dispensed.
  - 3.1.3 Other persons registered to manufacture, distribute, or dispense controlled substances shall maintain a record with the following information:

- 3.1.3.1 Amount received or distributed.
- 3.1.3.2 Names, addresses and dates regarding these transactions.
- 3.1.3.3 Other records required by 21 **CFR** 1300 to the end of 1316.
- 3.2 Accountability Audits
  - 3.2.1 Accountability audits in pharmacies will be accomplished through a review of invoices, prescription files, other records required by 21 **CFR** 1300 to the end of 1316.
  - 3.2.2 Accountability audits of registered practitioners will be accomplished through a review of records to be kept by paragraph 3.1 of this section.
  - 3.2.3 Accountability audits of registered manufacturers and distributors (including wholesalers) will be accomplished through a review of invoices received and distributed and other records required by 21 **CFR** 1300 to the end of 1316.
- 3.3 Final inventory
  - 3.3.1 Pharmacies. Whenever the pharmacist in charge of a pharmacy in the State of Delaware leaves his position, a complete inventory of all medication covered by 16 **Del.C.**, Ch. 47 will be taken by the present and prospective pharmacist-in-charge. A copy of such inventory will be sent to the Office of Controlled Substances and another copy retained on the premises.  
For the purpose of this regulation, the "pharmacist-in-charge" is a pharmacist registered with the State Board of Pharmacy and who is responsible for the prescription department of the registrant.
  - 3.3.2 Registered practitioners who cease legal existence or discontinue business or professional practice shall notify the Office of Controlled Substances promptly of such fact, and shall provide the Office with an inventory of controlled substances on hand.
- 3.4 Retention of Records
  - 3.4.1 All records required by this Regulation must be retained for a period of at least two (2) years.

**13 DE Reg. 281 (08/01/09)****4.0 Prescriptions**

- 4.1 Definitions. As used in this section:
  - 4.1.1 The term "**Act**" means the Controlled Substance Act, 16 **Del.C.**, Ch. 47.
  - 4.1.2 The term "practitioner" means physician, dentist, veterinarian, podiatrist, nurse practitioner, physician assistant or other individual, licensed, registered, or otherwise permitted, by the United States or the State of Delaware to prescribe, dispense or store a controlled substance in the course of professional practice but does not include a pharmacist, a pharmacy, or an institutional practitioner.
  - 4.1.3 The term "pharmacist" means any pharmacist licensed by the State of Delaware to dispense controlled substances and shall include any other person (e.g. pharmacist intern) authorized by the State of Delaware to prescribe, dispense or store controlled substances under the supervision of a pharmacist licensed by this State.
  - 4.1.4 The term "prescription" means an order for medication which is dispensed to or for an ultimate user but does not include an order for medication which is dispensed for immediate administration to the ultimate user. (e.g., an order to dispense a drug to a bed patient for immediate administration in a hospital is not a prescription.)
  - 4.1.5 The terms "register" and "registered" refer to registration required by 16 **Del.C.** §4732.
- 4.2 Persons Entitled to Issue Prescriptions
  - 4.2.1 A Prescription for a controlled substance may be issued only by a practitioner who is:
    - 4.2.1.1 Authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession; and
    - 4.2.1.2 Either registered or exempt from registration pursuant to 16 **Del.C.** §4732.
  - 4.2.2 A verbal prescription for a controlled substance may only be communicated to a pharmacist or pharmacy intern by the prescriber. Prescriptions for controlled substances communicated by an employee or agent of the prescriber are not valid.



- 4.2.3 Written prescriptions for controlled substances may be transmitted via facsimile by a practitioner or by the practitioner's authorized agent to a pharmacy only when the transmission complies with 21 **CFR** 1306.11, 1306.21 and 1306.31.
- 4.3 Purposes of Issue of Prescription
- 4.3.1 A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by practitioner acting in the usual course of their professional practice. The responsibility for proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription not issued in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of §4738 of the Act and the person knowingly filling such a purported prescription, as well as the person issuing it shall be subject to the penalties provided for violation of the provisions of law relating to controlled substances.
- 4.3.2 A prescription may not be issued in order for a practitioner to obtain controlled substances for supplying the practitioner for the purpose of general dispensing to patients.
- 4.3.3 A prescription may not be issued for the dispensing of narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence upon such drugs, unless otherwise authorized by law.
- 4.4 Manner of Issuance of Prescriptions. All prescriptions for controlled substances shall be dated and signed on the day when issued and shall bear the full name and address of the patient, and the name, address, telephone number and registration number of the practitioner. A practitioner may sign a prescription in the same manner as he would sign a check or legal document (e.g. J.H. Smith or John H. Smith). When an oral order is not permitted, prescriptions shall be written with ink or indelible pencil or typewriter and shall be manually signed by the practitioner. The prescriptions may be prepared by a secretary or agent for the signature of a practitioner but the prescribing practitioner is responsible where the prescription does not conform in all essential respects to the law and regulations. A corresponding liability rests upon the pharmacist who fills a prescription not prepared in the form prescribed by these regulations. Each written prescription shall have the name of the practitioner stamped, typed, or hand-printed on it, as well as the signature of the practitioner.
- 4.5 Persons Entitled to fill Prescriptions. A prescription for controlled substances may only be filled by a pharmacist acting in the usual course of his professional practice and either registered individually or employed in a registered pharmacy or by a registered institutional practitioner.
- 4.6 Dispensing Narcotic Drugs for Maintenance Purposes. No person shall administer or dispense narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence except in compliance with and as authorized by Federal law and regulation.
- 4.7 Emergency Dispensing of Schedule II Substances. In an emergency situation a pharmacist may dispense controlled substances listed in Schedule II upon receiving oral authorization of a prescribing practitioner, provided that the procedures comply with Federal law and regulation.
- 4.8 Expiration of Prescription.
- 4.8.1 Prescriptions for controlled substances in Schedules II and III will become void unless dispensed within seven (7) days of the original date of the prescription or unless the original prescriber authorizes the prescription past the seven (7) day period. Such prescriptions cannot be written nor dispensed for more than 100 dosage units or a 31 day supply whatever is the greater at one time. As an exception to dosage limitations set forth in this subparagraph, and in accordance with 21 **CFR** Section 1306.1(b), prescriptions for controlled substances in Schedule II for patients either having a medically documented terminal illness or patients in Long Term Care Facilities (LTCF), may be filled in partial quantities, to include individual dosage units. For each partial filling, the dispensing pharmacist shall record on the back of the prescription (or another appropriate record, uniformly maintained, and readily retrievable) the date of the partial filling, quantity dispensed, remaining quantity authorized to be dispensed and the identification of the dispensing pharmacist. The total quantity of Schedule II controlled substances dispensed in all partial fillings must not exceed the total quantity prescribed.

- 4.8.2 Schedule II prescriptions for terminally ill or LTCF patients, shall be valid for a period not to exceed 60 days from the issue date unless sooner terminated by the discontinuance of the medication.
- 4.9 Mail Order Prescription. Before dispensing prescriptions for Schedules II, III, IV, V controlled substances by mail, the registrant and/or the pharmacist-in-charge must assure that the prescription is valid and written by a prescriber properly registered with the Federal Government. Such verification may be made either in writing or orally.
- 4.10 Pursuant to authority granted by 16 **Del.C.** §4732 the Secretary of State finds that waiver of the registration requirements contained in that section as to non-resident practitioners is consistent with the public health and safety subject to the conditions contained in this regulation. Pharmacists may dispense controlled substances pursuant to a prescription written by a non-resident practitioner (who is not registered under 16 **Del.C.** Ch. 47) provided that:
- 4.10.1 The pharmacist must establish that the non-resident practitioner is properly registered to prescribe controlled substances under Federal Law. The pharmacist may keep a record which contains the name and address of the non-resident practitioner, his Federal registration number, and the name and address of the source of the registration data.
- 4.10.2 The pharmacist and/or an employee under his/her direct supervision must verify the identification of the bearer and receiver of the controlled substance prescription by reference to valid photographic identification and record the unique number associated with the valid photographic identification as part of the prescription record. For the purposes of this section, a valid photographic identification is limited to the following:
- 4.10.2.1 A valid Delaware motor vehicle operator's license which contains a photograph of the person presenting the prescription - record the license number listed on the license as part of the prescription record.
- 4.10.2.2 A valid Delaware identification card which contains the photograph of the person presenting the prescription - record the identification number listed on the card as part of the prescription record.
- 4.10.2.3 A valid United States passport.
- 4.10.2.4 A valid passport or motor vehicle operator's license or state identification card of another state, territory or possession of the United States or a foreign country only if it:
- 4.10.2.4.1 Contains a photograph of the person presenting the prescription:
- 4.10.2.4.2 Is encased in tamper-resistant plastic or is otherwise tamper-resistant.
- 4.10.2.4.3 Identifies the date of birth of the person presenting the prescription and has an identification number assigned to the document which can be recorded as part of the prescription record.
- 4.10.3 The pharmacist must establish that the name of the non-resident practitioner does not appear on the list kept by the Office of Controlled Substances of those non-resident practitioners to whom the waiver granted by this regulation does not apply.
- 4.10.3.1 The waiver of the registration requirement provided by the registration shall not apply to non-resident practitioners determined by the Office of Controlled Substances to have acted in a manner inconsistent with the Public Health and Safety. The Office of Controlled Substances shall maintain a list of those non-resident practitioners found by them to have so acted. Pharmacists shall not honor the prescriptions of non-resident practitioners whose names appear on that list unless such non-resident practitioners have registered pursuant to the provisions of 16 **Del.C.** §4732.
- 4.11 Except when dispensed directly by a practitioner other than a pharmacy to an ultimate user, no Schedule V cough preparation containing codeine, dilaudid or any other narcotic cough preparation may be dispensed without the written or oral prescription of a practitioner.
- 4.12 The pharmacist and/or an employee under his/her supervision must also verify the identity of the person receiving a dispensed controlled substance at the time it is transferred to that person. The manner in which valid photographic identification is verified and recorded shall be the same as provided in 4.10.2.

**13 DE Reg. 281 (08/01/09)****5.0 Security and Disposal****5.1 Security****5.1.1 Schedule II Substances Storage**

5.1.1.1 Pharmacies and practitioners must store Schedule II controlled substances in a burglar resistant type safe. If the safe weighs less than 750 pounds, it must be bolted, cemented, or secured to the wall or floor in such a way that it cannot be readily removed. Other types of substantially construed, securely locked cabinets or drawers are acceptable provided that the room, storage area or areas shall be provided with electronic intrusion detection equipment to all sections of the said area or areas where Schedule II controlled substances are stored, so as to detect four-step movement (as defined in Section 12.8 of U.L. Standards 681).

5.1.1.1.1 The aforementioned electronic intrusion detection equipment shall be installed using equipment that must be U.L. approved and listed. The said system must be capable of transmitting a local alarm to an outside audible device that shall comply with U.L. Standard 4.64.

5.1.1.1.2 A local alarm connection shall not be permitted if the controlled substance premise is located more than 400 feet from a public roadway. If said controlled substances premise is more than 400 feet from public roadway or found to be within a location where such an alarm would not be effective, then the alarm system on said controlled substances premises shall transmit an alarm signal to a certified station or directly into a law enforcement agency that has 24-hour monitoring capabilities.

5.1.1.1.3 The Secretary of State may require additional security requirements if he/she deems it necessary as a result of diversion of controlled substances.

5.1.1.1.4 Definitions: Four-step movement - 12.8 - The system shall respond to the movement of a Four-step person walking not more than four consecutive steps at a rate of one step per second. Such Four-step movement shall constitute a "trial", and a sufficient number of detection units shall be installed so that, upon test, an alarm will be initiated in at least three out of every four consecutive "trials" made moving progressively through the protective area.

5.1.1.2 Safes containing Schedule II controlled substances must be kept locked at all times. They may be opened only by the practitioner or by the pharmacist-in charge or other designees, who must be licensed medical professionals.

5.1.1.3 Practitioners who store no more than 400 total dosage units of Schedule II substances are not required to comply with the safe or alarm requirements of the Regulation. However, their Schedule II controlled substances must be stored in securely locked, substantially constructed cabinets.

5.1.1.4 Controlled substances listed in Schedules III, IV and V shall be stored in a securely locked, substantially constructed cabinet. Pharmacies may disperse such substances in Schedule III, IV and V throughout the stock of non-controlled substances in such a manner as to obstruct the theft or diversion of the controlled substances. The immediate area in a pharmacy containing dispersed, controlled drugs must be secured in a manner approved by the Office of Controlled Substances which will prevent entry by unauthorized persons. The keys to such area shall at all times be carried by a pharmacist. The doors shall be locked whenever the area is not directly under the supervision of a pharmacist or a responsible person designated by the pharmacist.

**5.1.2 Pharmacies.**

5.1.2.1 Schedule II controlled substances kept in areas other than prescription areas in pharmacies must be placed in safes of the type described above. These must be kept locked at all times and may be opened only by the pharmacist-in-charge or his designee, who must also be a registered pharmacist.

- 5.1.2.2 Schedule III through V controlled substances kept in areas other than prescription areas in pharmacies must be kept in adequately locked enclosures. They may be opened only by the pharmacist-in-charge, or his designees, who must be licensed pharmacists.
- 5.1.3 Report of Loss or Theft. Registrants shall notify the Office of Controlled Substances, of any theft or significant loss of any controlled substances, or of any prescription blanks, upon the discovery of such loss or theft. In addition, registrants shall complete the Federal forms regarding such loss or theft, one copy of which must be filed with the Office of Controlled Substances.
- 5.1.4 Hypodermic syringes and needles must be secured in an area only accessible to personnel authorized under 16 **Del.C.** Ch. 47 to dispense such items.
- 5.2 Disposal
  - 5.2.1 Controlled Substances. Any registrant in possession of any controlled substances and desiring or required to dispose of such substance or substances shall contact the Office of Controlled Substances for proper instructions regarding disposal.
  - 5.2.2 Hypodermic Syringe or Needle. Hypodermic syringes or needles shall be destroyed before disposal in such a manner as will render it impossible to adapt them for the use of narcotic drugs by subcutaneous injections.

**13 DE Reg. 281 (08/01/09)****6.0 Procedures for Adoption of Regulations**

- 6.1 Notice. Prior to the adoption, amendment or repeal of any of these controlled substances regulations, the Secretary of State/Committee will give at least twenty (20) days notice of the intended action. The notice will include a statement of either the terms of substance of the intended action or a description of the subjects and issues involved, or the time when, the place where present their views thereon. The notice will be mailed to persons who have made timely request of the Office of Controlled Substances for advance notice of such rule-making proceedings and shall be published in two newspapers of general circulation in this State.
- 6.2 Hearing. The Secretary of State shall designate the Committee to preside over hearings. The Committee will afford all interested persons a reasonable opportunity to submit data, views or arguments, orally or in writing.
- 6.3 Emergency Regulations. If the Secretary of State, upon the recommendation of the Committee, finds that an imminent peril to the public health, safety or welfare requires adoption of a regulation upon fewer than twenty (20) days notice and states in writing his/her reasons for that finding, the Secretary of State may proceed without prior notice or hearing or upon any abbreviated notice and hearing he/she finds practicable, to adopt an emergency regulation. Such rules will be effective for a period not longer than 120 days, but the adoption of an identical rule under the procedures discussed above is not precluded.
- 6.4 Finding and Availability. The Secretary of State will maintain on file any adoption, amendment or repeal of these regulations. In addition, copies of these regulations will be available for public inspection at the Office of Controlled Substances.

**13 DE Reg. 281 (08/01/09)****7.0 Severability**

- 7.1 If any provision of these regulations is held invalid the invalidity does not effect other provisions of the regulations which can be given effect without the invalid provisions or application, and to this end the provisions of the regulation are severable.
- 7.2 Pursuant to 16 **Del.C.** §4718(f) and 16 **Del.C.** §4720(c) the Secretary of State finds that the compounds, mixtures or preparations listed in 21 CFR 1301.21, 21 CFR 1308.24 contain one or more active medical ingredients not having a stimulant or depressant effect on the central nervous system and that the admixtures included therein are in combinations, quantities, proportions, or concentrations that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system, and therefore:

7.2.1 The Secretary of State, as authorized by 16 **Del.C.** §4718(f) and 16 **Del.C.** §4720(c), does hereby except by rule the substances listed in 21 CFR 130.21, CFR 1308.24 and 21 CFR 1308.32 from Schedules III and IV of the Uniform Controlled Substances Act, 16 **Del.C.** Ch. 47.

7.3 Pursuant to 16 **Del.C.** §4713 the Secretary of State finds that mephedrone, methylone, and methylenedioxypropylone (MDPV) have high potential for abuse; have no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision, and therefore:

7.3.1 The Secretary of State, as authorized by 16 **Del.C.** §4713 does hereby add by rule mephedrone, methylone, and methylenedioxypropylone (MDPV) in Schedule I of the Uniform Controlled Substances Act, 16 **Del.C.** Ch. 47.

**13 DE Reg. 281 (08/01/09)**

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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(d) (14 **Del.C.** §122(d))  
14 **DE Admin. Code** 885

**Education Impact Analysis Pursuant To 14 Del.C. Section 122(d)****885 Safe Management and Disposal of Chemicals in the Delaware Public School System****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** 885 Safe Management and Disposal of Chemicals in the Delaware Public School System. The amendments include, but are not limited to, the following: 1) a purpose statement; 2) addition of definitions; 3) explicit delineation of the areas the regulation applies; 4) requirements for a Chemical Safety Plan; 5) requirements for chemicals with special conditions; 6) expansion of the requirements around the storage, management and disposal of chemicals; and 7) requirements for instructional area(s) where chemicals are used.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before **December 2, 2011** to Susan Haberstroh, Education Associate, Regulation Review, Department of Education, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office.

**C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amendments are related to the safe management and disposal of chemicals and not specifically related to student achievement as measured against state achievement standards.



2. Will the amended regulation help ensure that all students receive an equitable education? The amendments are related to the safe management and disposal of chemicals and not specifically related to ensuring 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 are related to the safe management and disposal of chemicals and will help ensure all students' health and safety are adequately protected.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amendments are related to the safe management and disposal of chemicals and not specifically related to students' legal rights.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amended regulation preserves the necessary authority and flexibility of 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 regulations does not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.

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 is placed in the same entity and did not change.

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 amended 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 may be some costs to the local schools for compliance with the regulation because of current storage deficiencies or safety equipment for instructional areas.

## **885 Safe Management and Disposal of Chemicals in the Delaware Public School System**

### **4-0 ~~Mercury and Mercury Compounds~~**

- 4.1 ~~Mercury and mercury compounds, both organic and inorganic, shall not be used in the science classrooms in the public schools in Delaware later than January 1, 2005. Instruments which contain mercury such as thermometers, hydrometers, barometers, etc. shall be replaced at all grade levels in order to guard against spillage.~~

### **2-0 ~~Storage of Chemicals~~**

- 2.1 ~~The storage of all chemicals shall conform to the specifications stated in *Safety First: Guidelines for Safety in the Science or Science Related Classrooms*.~~

### **3-0 ~~Inventory of Chemicals, Hazardous and Non-Hazardous~~**

- 3.1 ~~All laboratories and science storage in the Delaware public schools shall be inventoried each year during the month of September. The list of the chemicals shall be kept by the school principal. The inventory of chemicals both hazardous and nonhazardous shall contain the following information:~~
- 3.2 ~~Who may handle the chemical and use it;~~
- 3.3 ~~The name of the chemical;~~
- 3.4 ~~The amount on hand;~~
- 3.5 ~~The location where the chemical is stored;~~
- 3.6 ~~The date purchased; and~~
- 3.7 ~~The date discarded.~~

# PROPOSED REGULATIONS

## ~~4.0 Inventory of Surplus Chemicals~~

- ~~4.1 For purposes of this regulation, surplus shall refer to chemicals which are no longer usable or needed.~~
- ~~4.2 Each district and charter school shall prepare a list of surplus chemicals and send a copy to the Education Associate, Science Environmental Education by October 15 of each year. The Department shall duplicate and disseminate these lists to school districts and charter schools so that they may negotiate, trade or exchange their surplus chemicals.~~

## ~~5.0 Disposal of Surplus Non Hazardous Chemicals~~

- ~~5.1 Disposal of surplus nonhazardous chemicals shall be carried out by the school district and charter school in accordance with procedures outlined in the Flinn Chemical Catalog Reference Manual, using trained staff.~~

## ~~6.0 Disposal of Non Surplus Transportable Hazardous Chemicals~~

- ~~6.1 Surplus hazardous chemicals such as diethyl ether, picric acid, benzoyl peroxide and other materials that are listed in *Safety First: Guidelines for Safety in the Science or Science Related Classrooms*, must be disposed of through the use of a licensed waste hauler.~~
- ~~6.1.1 Each district and charter school shall prepare a list of surplus hazardous chemicals and submit it to the Education Associate for Science and Environmental Education by November 15 of each year. The Department shall arrange for a licensed waste hauler to take the chemicals to a proper waste facility for disposal. The cost of disposal shall be prorated among the districts and charter schools based upon the weight of the hazardous materials.~~

~~8-DE Reg. 346 (8/1/04)~~

~~40-DE Reg. 1432 (03/01/07)~~

## 1.0 Purpose

The purpose of this regulation is to outline the criteria and processes for Chemical Storage and for Chemical use in the classroom, laboratory, or other Instructional Areas in Delaware public schools. This regulation sets forth the requirements for the safe management, storage, and disposal of chemicals. Additional information may be found in the *Safety First: Safe Instructional Practices in the Classroom and Laboratory* manual.

## 2.0 Definitions:

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

**“Carcinogen”** means any Chemical that can cause cancer. Included are known or suspected Carcinogens such as formaldehyde, benzene, carbon tetrachloride, nickel salts, sodium dichromate and sodium chromate.

**“Chemical”** means any element, compound, or mixture of elements and/or compounds.

**“Chemical Name”** means the scientific designation of a Chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name which will clearly identify the Chemical for the purpose of conducting a hazard evaluation.

**“Common Name”** means any designation or identification such as a code name, code number, trade name, brand name, or generic name used to identify a Chemical other than its Chemical name.

**“Corrosive”** means a Chemical that causes visible destruction of or irreversible alterations in, living tissue by Chemical action at the site of contact.

**“Explosive”** means a Chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

**“Expose or Exposure”** means an instance where an individual is subjected to a Hazardous Chemical through any route of entry (inhalation, ingestion, skin contact or absorption, etc.) and includes potential (e.g., accidental or possible) Exposure.

**“Hazardous Chemical”** means any element, compound or mixture of elements and/or compounds which presents a Physical Hazard or Health Hazard.

**“Health Hazard”** means a Chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term “Health Hazard” includes Chemicals which are Carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, Corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. The Material Safety Data Sheet (MSDS) will provide information to determine whether or not the Chemical is a Health Hazard.

**“Instructional Area”** means a room or defined space used for an educational activity. An Instructional Area may be a classroom, a laboratory, a field, a special building such as a greenhouse, or any other space where educational activities may take place.

**“Long-Term Storage”** means the storage of any Chemical for a time period past the end of the school day.

**“Material Safety Data Sheet (MSDS)”** means a document that contains information on the potential health effects of exposure to Chemicals, or other potentially dangerous substances, and on safe working procedures when handling Chemical products. It contains hazard evaluations on the use, Storage, handling and emergency procedures related to that material. The Material Safety Data Sheet (MSDS) contains much more information about the material than the label and is prepared by the supplier. It is intended to tell what the hazards of the product are, how to use the product safely, what to expect if the recommendations are not followed, what to do if accidents occur, how to recognize symptoms of overexposure, and what to do if such incidents occur.

**“Non-hazardous Chemical”** means any element, compound or mixture of elements and/or compounds which do not present a Physical Hazard or Health Hazard.

**“Occupational Safety and Health Administration (OSHA)”** means the government agency in the Department of Labor that develops guidelines to maintain a healthy and safe working environment.

**“Physical Hazard”** means a Chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, Explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive. The Material Safety Data Sheet (MSDS) will provide information to determine whether or not the Chemical is a Physical Hazard.

**“Safety First: Safe Instructional Practices in the Classroom and Laboratory Manual”** means the collection of documents that outline the mandatory safety procedures regarding the safe management, storage, and disposal of chemicals for Instructional Areas in Delaware public schools and which may be amended from time to time as published in the Delaware Registrar of Regulations. The manual also provides safety practices that are governed by this regulation. This document is available on the Delaware Department of Education Website ([www.doe.k12.de.us](http://www.doe.k12.de.us)).

**“Short-Term Storage”** means the storage of any Chemical for a time period before the end of the school day.

**“Storage”** means a space for the containment of Chemicals or other materials.

**“Surplus Chemical”** means any Chemical that is no longer Useable or needed.

**“Useable”** means that the Chemical or other material has not surpassed its expiration date.

### **3.0 Applicable Areas**

This regulation is applicable to all public schools, including charter schools and all programs they offer, not already regulated by OSHA standards, including but not limited to science education (including classrooms, laboratories, combination classroom and laboratory settings, and outdoor education settings); Career and Technical Education; Technology and Engineering Education; Agricultural Education; Family and Consumer Science Education, Art Education; and Athletics/Athletic Training.

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# PROPOSED REGULATIONS

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## **4.0 Chemical Safety Plan**

- 4.1 All Delaware public schools shall have a Chemical Safety Plan that outlines specific district or charter school procedures in the area of staff and student Chemical safety. The plan shall include at least the following:
- 4.1.1 Identification of at least one Chemical Safety Officer for the district or charter school who shall:
- 4.1.1.1 Act as liaison between teachers, building and administration, and facilities staff regarding Chemical safety issues;
  - 4.1.1.2 Maintain the Chemical inventory for the school(s);
  - 4.1.1.3 Approve all Chemical orders by the district or charter school.
  - 4.1.1.4 Maintain a supply of Material Safety Data Sheets (MSDS) for all Chemicals in the Chemical inventory;
  - 4.1.1.5 Assist with maintenance requests related to safety equipment; and
  - 4.1.1.6 Identify and coordinate disposal of Hazardous Chemical wastes.
- 4.1.2 Standard operating procedures associated with Chemical use, Chemical Storage, Chemical disposal (both Hazardous and Non-hazardous), and the handling of Chemical spills.

## **5.0 Inventory of Chemicals, Hazardous and Non-Hazardous**

- 5.1 Each district and charter school shall prepare an inventory of Chemicals by September 15 of each year. A copy of this inventory of Chemicals, along with the respective Material Safety Data Sheet (MSDS), shall be maintained by the school principal, chief custodian, and the Chemical Safety Officer. Additionally, copies shall be maintained in the Chemical Storage area and with the school nurse or school health manager. The inventory of Chemicals, both Hazardous and Non-hazardous, shall contain at least the following information:
- 5.1.1 The name of the Chemical;
  - 5.1.2 The amount of the Chemical (in appropriate measurement units);
  - 5.1.3 The location where the Chemical is stored; and
  - 5.1.4 The date of purchase.

## **6.0 Chemicals with Special Conditions**

- 6.1 Mercury and mercury compounds, both organic and inorganic, shall not be present in or used in public schools in Delaware. Schools may continue to use mercury discharge tubes and fluorescent lights even though they contain a small amount of mercury gas because the mercury is enclosed in the glass container.
- 6.2 Known Carcinogens shall not be present in or used in public schools in Delaware. A listing of known Carcinogens can be found in *Safety First: Safe Instructional Practices in the Classroom and Laboratory*.
- 6.3 All schools shall comply with current Environmental Protection Agency (EPA) regulations regarding regulated refrigerants.

## **7.0 Storage of Chemicals**

- 7.1 The Storage of all Chemicals shall conform to the mandatory specifications stated in *Safety First: Safe Instructional Practices in the Classroom and Laboratory*.
- 7.2 Chemicals in the Instructional Area shall be for immediate use only (Short-Term Storage). All Long-Term Storage of Chemicals shall be in a properly equipped Chemical Storage room.
- 7.3 Pressurized Storage of liquids and gases shall conform to OSHA Storage and handling regulations.

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## **8.0 Management of Chemicals**

- 8.1 Instructional staff shall provide training in the safe management of Chemicals to all students in Instructional Areas that use Chemicals annually. All students shall sign a student safety contract at the conclusion of this training. The training shall include at least the following:
- 8.1.1 An overview of the school safety program;
  - 8.1.2 The location of all Hazardous Chemical containers in the Instructional Area;
  - 8.1.3 An explanation of how to read labels on containers;
  - 8.1.4 The location, availability and content of Material Safety Data Sheets (MSDS) and an explanation of how they are used;
  - 8.1.5 An explanation of the nature of Health Hazards and Physical Hazards associated with the use of all Hazardous Chemicals (regardless of quantity) to which they may be exposed;
  - 8.1.6 An explanation of the proper handling, Storage and disposal methods for each of the Hazardous Chemicals present in the Instructional Area; and
  - 8.1.7 Measures taken by the instructional staff and school personnel to prevent or control Exposure such as engineering controls, personal protective equipment, and emergency procedures for spills or leaks.

## **9.0 Disposal of Surplus Chemicals**

- 9.1 Disposal of Surplus Non-hazardous Chemicals shall be carried out by the school district or charter school in accordance with procedures outlined in the Material Safety Data Sheet (MSDS).
- 9.2 Disposal of Surplus Chemicals, that meet the definition of Hazardous Chemical, shall only be disposed of through the use of a licensed waste hauler.
- 9.2.1 Each district and charter school shall prepare a list of Surplus Hazardous Chemicals and submit it to the Education Associate, Science by November 15 of each year. The Department of Education shall arrange for a licensed waste hauler to take the Chemicals to a proper waste facility for disposal. The cost of disposal shall be prorated among the participating schools. Alternatively, a school district or charter school may independently contract with a licensed waste hauler. An official letter shall be sent to the Education Associate, Science describing the school's intentions and naming the licensed waste hauler.

## **10.0 Facility Requirements for Instructional Areas that use Hazardous Chemicals**

- 10.1 Basic safety equipment shall be installed in all Instructional Areas that use Hazardous Chemicals and shall conform to the requirements outlined in *Safety First: Safe Instructional Practices in the Classroom and Laboratory*. Non-traditional instructional areas such as an outdoor classroom or an agricultural field shall include all of the safety equipment as warranted and deemed necessary based on the hazard level of the lesson and materials being used in the instruction of students. Basic safety equipment shall include at least the following items:
- 10.1.1 Eyewash (running water, continuous flow style)
  - 10.1.2 Acid/Chemical shower (continuous flow style)
  - 10.1.3 Eye protection (wrap-around, splash-shield style goggles)
  - 10.1.4 Fire extinguisher
  - 10.1.5 Fire blanket
  - 10.1.6 Chemical spill equipment
- 10.2 A properly functioning fume hood and/or other industry-standard ventilation system shall be used when mixing Chemicals, using Chemicals, and/or for Short-term Storage of Chemicals that release hazardous fumes. The determination that hazardous fumes may be released is determined by a hazard analysis and a review of the MSDS document(s). Fume hoods and other ventilation systems shall conform to the requirements outlined in *Safety First: Safe Instructional Practices in the Classroom and Laboratory*.

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10.3 All Instructional Areas that use Hazardous Chemicals which are constructed, reconfigured, or renovated after September 1, 2011 shall provide adequate space for student work at a minimum of 50 square feet per student.

10.4 All Instructional Areas that use Hazardous Chemicals shall have at least two means of egress. The second exit may pass through another room and/or a Non-Chemical Storage room if it is used only as an emergency exit.

**8 DE Reg. 346 (8/1/04)**

**10 DE Reg. 1432 (03/01/07)**

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## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(d) (14 Del.C. §122(d))  
14 DE Admin. Code 910

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

### 910 Delaware General Educational Development (GED) Endorsement

#### 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 910 Delaware General Educational Development (GED) Endorsement. This regulation has been reviewed as part of the five year cycle and changes were made to the title and references to the test to be consistent with the American Council of Education's titling of the test and other GED<sup>®</sup> brand usage guidelines. The GED<sup>®</sup> is a brand name and registered trademark of the American Council on Education (ACE). GED<sup>®</sup> and GED Testing Service<sup>®</sup> are registered trademarks of the American Council on Education (ACE). They may not be used or reproduced without the express written permission of ACE or GED Testing Service. The GED<sup>®</sup> and GED Testing Service<sup>®</sup> brands are administered by GED testing Service LLC under license from the American Council on Education. The following highlights are from the ACE website:

- GED<sup>®</sup> tests are designed to measure the skills and knowledge equivalent to a high school course of study.
- The GED<sup>®</sup> test battery comprises five content area assessments:
  - Language Arts, Reading
  - Language Arts, Writing
  - (including an essay)
  - Mathematics
  - Science
  - Social Studies
- The GED<sup>®</sup> tests are currently offered only in a paper-pencil format at Official GED Testing Centers<sup>™</sup> - they cannot be taken online.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before **December 5, 2011** to Susan Haberstroh, Education Associate, Regulation Review, Department of Education, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office.



**C. Impact Criteria**

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The regulation is related to the GED® test and to providing a credential to adult students who have not completed the requirements for a traditional high school diploma. The regulation and GED® tests do not specifically address student achievement as measured against state achievement standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The regulation is related to the GED® test and to providing a credential to adult students who have not completed the requirements for a traditional high school diploma.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The regulation is related to the GED® test and providing a credential to adult students who have not completed the requirements for a traditional high school diploma. The regulation and GED® tests do not specifically address the health and safety of students.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The regulation is related to the GED® test and providing a credential to adult students who have not completed the requirements for a traditional high school diploma. The regulation and GED® tests do not specifically address the legal rights of students.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The regulation preserves the necessary authority and flexibility of decision making at the local board and 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 regulation does not place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The regulation maintains the current process for authority and accountability for the GED® testing program.

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 regulation is consistent with other state educational policies, especially as it relates to providing opportunities for adult students.

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 are no additional costs to the State or to the local school boards for compliance with the regulation.

**910 Delaware ~~General Educational Development (GED) Endorsement~~ GED® Test Credential Requirements for issuance of the GED® Test Credential**

The Delaware ~~General Educational Development (GED) Endorsement~~ GED® test credential is given to persons who satisfactorily pass the ~~General Educational Development (GED)~~ GED® Test.

**1.0 For a person 18 years of age or older to be eligible to take the ~~GED Test~~ GED® test an applicant shall:**

- 1.1 Be a resident of Delaware or, if a resident of another state, be currently employed in Delaware and have been so employed for a minimum of six months prior to taking the test; and
- 1.2 Certify under his or her signature on the GED® application form that he or she is not enrolled in a public or non public school program; and

# PROPOSED REGULATIONS

- 1.3 Provide ~~an official~~ a verified copy of the Official GED Practice Test<sup>®</sup> indicating the applicant has passed the Official GED Practice Test<sup>™</sup> with a score of 2450 or better and not less than 470 on each of the 5 sub test areas.

## 2.0 For a person 16 or 17 years of age to be ~~GED-Endorsement~~ GED<sup>®</sup> test credential to take the GED Test an applicant shall:

- 2.1 Seek a waiver of the 18 years of age requirement by completing a written application to the Delaware Department of Education that includes showing good cause for taking the test early and designating where the test will be taken; and
- 2.2 Be a resident of the State of Delaware; and
- 2.3 Verify that they are at least 16 years of age at the time of the application for the waiver of the age requirement using a birth certificate, drivers license, a State of Delaware Identification Card or other comparable and reliable documentation of age; and
- 2.4 Provide verification of withdrawal from the applicant's public or non public school program; and
- 2.5 Provide a transcript from the applicant's public or non public school program; and
- 2.6 Provide ~~an official~~ a verified copy of the ~~GED practice test~~ Official GED Practice Test<sup>™</sup> indicating the applicant has passed the Official GED Practice Test<sup>™</sup> with a score of 2450 or better and not less than 470 on each of the 5 sub test areas.

## 3.0 Scores Required for the Delaware ~~General Educational Development (GED)-Endorsement~~ GED<sup>®</sup> test Credential

An individual shall have a standard score of not less than 410 on each of the five tests with an average standard score of not less than 450 for all five tests and a total standard score of not less than 2250 in order to be issued a ~~GED-Endorsement~~ GED<sup>®</sup> test credential.

## 4.0 Retesting

Forty five days shall lapse prior to retesting and instruction is recommended before retesting.

2 DE Reg. 375 (09/01/98)

5 DE Reg. 1285 (12/01/01)

10 DE Reg. 862 (11/01/06)

## DEPARTMENT OF HEALTH AND SOCIAL SERVICES

### DIVISION OF LONG TERM CARE RESIDENTS PROTECTION

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

16 DE Admin. Code 3225

### PUBLIC NOTICE

### 3225 Assisted Living Facilities

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 29 of the Delaware Code, Section 7971(d)(1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection is proposing revisions of Regulation 3325, Assisted Living Facilities.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Susan Del Pesco, Director, DHSS,

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Division of Long Term Care Residents Protection, 3 Mill Rd, Suite 308, Wilmington, DE 19806 by December 1, 2011.

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

## SUMMARY OF PROPOSED CHANGES

This regulatory proposal includes a definition of Significant Medication Error in the Glossary of Terms and revises reporting requirements pertaining to the errors at Section 19.7.7.5. In addition, the requirement at Section 19.3 for facilities to maintain records on discharged residents for five years is reduced to 3 years

### Statutory Authority

29 Del.C. §7971(d)(1), Duties and functions of the Division

### 3225 Assisted Living Facilities

#### 1.0 Purpose

The Department of Health and Social Services is issuing these regulations to promote and ensure the health, safety, and well-being of all residents of assisted living facilities. These regulations are also meant to ensure that service providers will be accountable to their residents and the Department, and to differentiate assisted living care from skilled nursing care. The essential nature of assisted living is to offer living arrangements to medically stable persons who do not require skilled nursing services and supervision. The regulations establish the minimal acceptable level of services for residents of assisted living facilities.

#### 2.0 Authority and Applicability

These regulations are promulgated in accordance with 16 Del.C. Ch. 11 and shall apply to any facility providing assisted living to elderly individuals or adults with disabilities. The term "assisted living" shall not be used as part of the official name of any facility in this State unless the facility has been so licensed by the Department of Health and Social Services.

#### 3.0 Glossary of Terms

**"Activities of Daily Living" ("ADLs")** - Normal daily activities including but not limited to ambulating, transferring, range of motion, grooming, bathing, dressing, eating, and toileting.

**"Administration of Medication"** - The process whereby a single dose of a prescribed drug is given to a resident by an authorized licensed person, as described in 24 Del.C. §1902.

**"Assisted Living"** - A special combination of housing, supportive services, supervision, personalized assistance and health care designed to respond to the individual needs of those who need help with activities of daily living and/or instrumental activities of daily living.

**"Assisted Living Facility"** - A licensed entity that provides the services described in **Assisted Living**.

**"Assistive Technology"** - Any item, piece of equipment or product system whether acquired commercially off the shelf, modified, or customized that is used to increase or improve functional capabilities of adults with disabilities.

**"Assistance with Self-Administration of Medication" ("AWSAM")** - Assistance with medication provided by facility personnel who are not nurses or nurse practitioners but who have successfully completed a Board of Nursing-approved medication training program in accordance with the Delaware Nurse Practice Act, 24 Del.C. Ch. 19, and applicable rules and regulations. Assistance with medication includes holding the container, opening the container, and assisting the resident in taking the

medication, other than by injection, following the directions of the original container, and documenting in the medication log that each medication has been taken by the residents.

**“Communicable Disease”** - An illness caused by a microorganism or its toxin characterized by spread from host to victim by air, contact, blood, or bodily fluids.

**“Contract”** - A legally binding written agreement between the facility and the resident which enumerates all charges for services, materials, and equipment, as well as non-financial obligations of both parties, as specified in these regulations.

**“Cuing”** - The act of guiding residents, verbally or by gestures, to facilitate memory and/or organize verbal and/or behavioral responses.

**“Department”** - Department of Health and Social Services.

**“Division”** - Division of Long Term Care Residents Protection.

**“Durable Medical Equipment”** - Equipment capable of withstanding repeated use, primarily and customarily used to serve a medical purpose, generally not useful to a person in the absence of an illness or injury, and needed to maintain the resident in the facility, e.g., wheelchairs, hospital beds, oxygen tanks.

**“Homelike”** - Having the qualities of a home, including privacy, comfortable surroundings supported by the use of residential building materials and furnishings, and the opportunity to modify one's living area to suit one's individual preferences, in accordance with the facility's policies. A homelike environment provides residents with an opportunity for self-expression and encourages interaction with community, family, and friends.

**“Hospice”** - An agency licensed by the State of Delaware that provides palliative and supportive medical and other health services to terminally ill residents and their families.

**“Incident”** - An occurrence or event, a record of which must be maintained in facility files, which includes all reportable incidents and the additional occurrences or events listed in Section 19.5 of these regulations. (Also see Reportable Incident, 19.6 and 19.7)

**“Individual Living Unit”** - A separate dwelling area within an assisted living facility which has living and sleeping space for one or more residents, as prescribed in these regulations.

**“Instrumental Activities of Daily Living” (“IADLs”)** - Home management skills, such as shopping for food and personal items, preparing meals, or handling money.

**“Managed/Negotiated Risk Agreement”** - A signed document between the resident and the facility, and any other involved party, which describes mutually agreeable action balancing resident choice and independence with the health and safety of the resident or others.

**“Medication Log”** - A written document in which licensed personnel and unlicensed personnel who have completed AWSAM training record administration/ assistance with the resident's medications. The log shall list the resident's name; date of birth; allergies; reason the medication is given; special instructions; and the dosage, route(s), and time(s), for all medications received/taken with staff administration or staff assistance. The log is signed/initialed by a staff member after each resident has received/taken the appropriate medication, or when the medication was not taken/given as prescribed.

**“Medication Management by an Adult Family Member/Support Person”** - Any help with prescription or non-prescription medication provided by an adult family member/support person, as identified in the resident's contract and service agreement.

**“Personal Care Supplies”** - Those supplies, often disposable, used by a resident, such as incontinence products and hygiene supplies.

**“Reportable Incident”** - An occurrence or event which must be reported immediately to the Division and for which there is reasonable cause to believe that a resident has been abused, neglected, mistreated or subjected to financial exploitation as those terms are defined in 16 Del.C. §1131. Reportable incident also includes an occurrence or event listed in Sections 19.6 and 19.7 of these regulations. (Also see Incident, 19.5.)

**“Representative”** - A person acting on behalf of the resident pursuant to Delaware law.

**“Resident”** - An individual 18 years old or older who lives in an assisted living facility. Where appropriate in the context of these regulations, “resident” as used herein includes an authorized representative as defined in 3.0.

**“Resident Assessment”** - Evaluation of a resident’s physical, medical, and psychosocial status as documented in a Uniform Assessment Instrument (UAI), by a registered nurse.

**“Resident Assistant”** – Any unlicensed direct caregiver who, under the supervision of the assisted living director or director of health services, assists the resident with personal needs and monitors the activities of the resident while on the premises to ensure his/her health, safety, and well-being.

**“Secretary”** - Secretary of the Department of Health and Social Services.

**“Service Agreement”** - A written document developed with each resident which describes what services will be provided, who will provide the services, when the services will be provided, how the services will be provided, and, if applicable, the expected outcome.

**“Shared Responsibility”** - The concept that residents and assisted living facilities share responsibility for planning and decision-making affecting the resident.

**“Significant Change”** - A major deterioration or improvement in a resident’s health status or ability to perform ADLs; a major alteration in behavior or mood resulting in ongoing problematic behavior or the elimination of that behavior on a sustained basis. Significant change does not include ordinary, day-to-day fluctuations in health status, functioning, and behavior, or a short-term illness such as a cold, unless these fluctuations continue to recur, nor does it include deterioration that will normally resolve without further intervention.

**“Significant Medication Error”** – means one which causes the resident discomfort or jeopardizes his or her health or safety.

**“Social Services”** - Services provided to assist residents in maintaining or improving their ability to manage their everyday physical, mental and psychosocial needs.

**“Third-Party Provider”** - Any party, including a family member, other than the assisted living facility which furnishes services/supplies to a resident.

**“Uniform Assessment Instrument” (“UAI”)** - A document setting forth standardized criteria developed by the Division to assess each resident’s functional, cognitive, physical, medical, and psychosocial needs and status. The assisted living facility shall be required to use the UAI to evaluate each resident on both an initial and ongoing basis in accordance with these regulations.

**8 DE Reg. 85 (7/1/04)**

**15 DE Reg. 81 (07/01/11)**

*(Break in Continuity of Sections)*

**19.0 Records and Reports**

- 19.1 The assisted living facility shall be responsible for maintaining appropriate records for each resident. These records shall document the implementation of the service agreement for each resident.
- 19.2 Records shall be available, along with the equipment to read them if electronically maintained, at all times to legally authorized persons; otherwise such records shall be held confidential.
- 19.3 The assisted living facility resident clinical records shall be retained for a minimum of 53 years following discharge before being destroyed.
- 19.4 In cases in which facilities have created the option for an individual’s record to be maintained by computer, rather than hard copy, electronic signatures shall be acceptable. In cases when such attestation is done on computer records, safeguards to prevent unauthorized access and reconstruction of information must be in place. The following is an example of how such a system may be set up:
  - 19.4.1 There is a written policy, at the assisted living facility, describing the attestation policy(ies) force at the facility;
  - 19.4.2 The computer has built-in safeguards to minimize the possibility of fraud;

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## PROPOSED REGULATIONS

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- 19.4.3 Each person responsible for an attestation has an individualized identifier;
  - 19.4.4 The date and time is recorded from the computer's internal clock at the time of entry;
  - 19.4.5 An entry is not to be changed after it has been recorded; and
  - 19.4.6 The computer program controls what sections/ areas any individual can access/enter data based on the individual's personal identifier.
- 19.5 Incident reports, with adequate documentation, shall be completed for each incident. Records of incident reports shall be retained in facility files for the following:
- 19.5.1 All reportable incidents.
  - 19.5.2 Falls without injury and falls with injuries that do not require transfer to an acute care facility or do not require reassessment of the resident.
  - 19.5.3 Errors or omissions in treatment or medication.
  - 19.5.4 Injuries of unknown source.
  - 19.5.5 Lost items, in accordance with facility policy, which are not subject to financial exploitation. Adequate documentation shall consist of the name of the resident(s) involved; the date, time and place of the incident; a description of the incident; a list of other parties involved, including witnesses and any accused persons; the nature of any injuries; resident outcome; and follow-up action, including notification of the resident's representative or family, attending physician and licensing or law enforcement authorities when appropriate.
- 19.6 Reportable incidents shall be reported immediately, which shall be within 8 hours of the occurrence of the incident, to the Division. The method of reporting shall be as directed by the Division.
- 19.7 Reportable incidents include:
- 19.7.1 Abuse as defined in 16 **Del.C.** §1131.
    - 19.7.1.1 Physical abuse.
      - 19.7.1.1.1 Staff to resident with or without injury.
      - 19.7.1.1.2 Resident to resident with or without injury.
      - 19.7.1.1.3 Other (e.g., visitor, relative) to resident with or without injury.
    - 19.7.1.2 Sexual abuse.
      - 19.7.1.2.1 Staff to resident sexual acts.
      - 19.7.1.2.2 Resident to resident non-consensual sexual acts.
      - 19.7.1.2.3 Other (e.g., visitor, relative) to resident non-consensual sexual acts.
    - 19.7.1.3 Emotional abuse.
      - 19.7.1.3.1 Staff to resident.
      - 19.7.1.3.2 Resident to resident.
      - 19.7.1.3.3 Other (e.g., visitor, relative) to resident.
  - 19.7.2 Neglect as defined in 16 **Del.C.** §1131.
  - 19.7.3 Mistreatment as defined in 16 **Del.C.** §1131.
  - 19.7.4 Financial exploitation as defined in 16 **Del.C.** §1131.
  - 19.7.5 Resident elopement.
    - 19.7.5.1 Any circumstance in which a resident's whereabouts are unknown to staff and the resident suffers harm.
    - 19.7.5.2 Any circumstance in which a cognitively impaired resident, whose whereabouts are unknown to staff, exits the facility.
    - 19.7.5.3 Any circumstance in which a resident cannot be found inside or outside a facility and the police are summoned.
  - 19.7.6 Death of a resident in a facility or within 5 days of transfer to an acute care facility.
  - 19.7.7 Significant injuries.
    - 19.7.7.1 Injury from an incident of unknown source in which the initial investigation concludes that there is reasonable basis to suspect that the injury is suspicious. An injury is suspicious

based on; the extent of the injury, the location of the injury (e.g., the injury is located in an area not generally vulnerable to trauma), the number of injuries observed at one particular point in time or the incidence of injuries over time.

- 19.7.7.2 Injury from a fall which results in transfer to an acute care facility for treatment or evaluation or which requires periodic reassessment of the resident's clinical status by facility professional staff for up to 48 hours.
- 19.7.7.3 Injury sustained while a resident is physically restrained.
- 19.7.7.4 Injury sustained by a resident dependent on staff for toileting, mobility, transfer and/or bathing.
- 19.7.7.5 Significant medication error or omission in medication/treatment, including drug diversion, which causes the resident discomfort, jeopardizes the resident's health and safety or requires extensive monitoring for up to 48 hours.
- 19.7.7.6 A burn greater than first degree.
- 19.7.7.7 Choking resulting in transfer to an acute care facility.
- 19.7.7.8 Areas of contusions or lacerations which may be attributable to abuse or neglect.
- 19.7.7.9 Serious unusual and/or life-threatening injury.
- 19.7.8 Attempted suicide.
- 19.7.9 Poisoning.
- 19.7.10 Epidemic outbreak or quarantine.
- 19.7.11 Fire within a facility due to any cause.
- 19.7.12 Utility interruption lasting more than 8 hours in one or more major service including electricity, water supply, plumbing, heating or air conditioning, fire alarm, sprinkler system or telephone system.
- 19.7.13 Structural damage or unsafe structural conditions.
  - 19.7.13.1 Structural damage to a facility due to natural disasters such as hurricanes, tornadoes, flooding or earthquakes.
  - 19.7.13.2 Water damage which impacts resident health, safety or comfort.

**8 DE Reg. 85 (7/1/04)**

**13 DE Reg. 1328 (04/01/10)**

## **20.0 Waivers and Severability**

- 20.1 Waivers may be granted by the Division for good cause.
- 20.2 Should any section, sentence, clause or phrase of these regulations be legally declared unconstitutional or invalid for any reason, the remainder of said regulations shall not be affected thereby.

**6 DE Reg. 525 (10/1/02)**

**14 DE Reg. 1190 (05/01/11)**

**15 DE Reg. 81 (07/01/11)**

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

**3225 Assisted Living Facilities**

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# PROPOSED REGULATIONS

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## DIVISION OF LONG TERM CARE RESIDENTS PROTECTION

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

### PUBLIC NOTICE

#### **3320 Intensive Behavioral Support and Educational Residences (IBSER)**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 29 of the Delaware Code, Section 7971(d)(1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection is proposing the creation of Regulation 3320, Intensive Behavioral Support and Educational Residences (IBSER) to regulate facilities within this new licensure category.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Susan Del Pesco, Director, DHSS, Division of Long Term Care Residents Protection, 3 Mill Rd, Suite 308, Wilmington, DE 19806 by December 1, 2011.

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

### SUMMARY OF PROPOSED CHANGES

This regulatory proposal creates regulations for various aspects and business practices of these facilities as listed below:

- Definition
- Glossary
- Licensing requirements and procedures
- General requirements
- Physical Plant
- Kitchen and food storage
- Emergencies and disasters
- Administration
- Description of Services
- Maintenance of records
- Insurance
- Personnel policies and procedures
- Orientation and training of employees and volunteers
- Personnel records
- Use of volunteers
- Human rights
- Abuse and neglect
- Documentation requirements
- Use of restraints
- Health
- Administration or Assistance with Self-Administration of Medication
- Universal Precautions
- Incident reports
- Facility closure
- Waivers and severability



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## Statutory Authority

29 Del.C. §7971(d)(1), Duties and functions of the Division

### 3320 Intensive Behavioral Support and Educational Residence

#### 1.0 Definition

Intensive Behavioral Support and Educational Residence (IBSER) regulations apply to individuals who are 18 years of age and older, with autism, developmental disabilities, dual diagnoses of severe mental or emotional disturbances and who have specialized behavioral needs. These regulations establish the minimal acceptable level of living and programmatic conditions for such individuals.

#### 2.0 Glossary of Terms

“AWSAM” means assistance with medications as defined in 25 Del.C. §1902(c).

“Behavior Management Committee” (BMC) is the committee that establishes and reviews each resident’s Specialized Behavior Support Plan (SBS Plan) as described in §16.2 of these regulations.

“Comprehensive behavior support plan” means a written document, designed by the individual, his or her family, and his or her education, habilitation or treatment team, and includes the elements described in §19.1.2 of these regulations.

“Chemical restraint” means the use of any medication that is used for discipline or convenience to effect control over an individual's behavior, is not part of the individual's usual medication regimen, and is not required to treat a medical symptom, i.e. a physical or psychological condition.

“Director” means the Chief Operating Officer of the IBSER.

“Division” means the Division of Long Term Care Residents Protection, Department of Health and Social Services.

“Funding Agency” – means is a governmental or private agency that provides funding for the support and treatment of residents in the IBSER’s care.

“Human Rights Committee” (HRC) means an advisory committee established as a mechanism for the protection of rights and welfare of persons receiving services from the facility.

“Incident” means an occurrence or event, a record of which must be maintained in facility files, which includes all reportable incidents and the additional occurrences or events listed in section 23.0 of these regulations.

“Legal Representative” includes payor source, guardian or surrogate.

“Medical Protective Equipment” means health-related protective devices prescribed by a physician or dentist for use only during and after specific medical or surgical procedures, or for use as protection in response to an existing medical condition.

Medical Protective Equipment includes:

Physical equipment or orthopedic appliances or other restraints necessary for medical treatment, routine physical examinations, or medical tests.

Devices used to support functional body position or proper balance, or to prevent a person from falling out of bed, falling from a wheelchair; or

Equipment used for safety such as seatbelts, helmets, mittens, wheelchair tie-downs or other types of devices.

“Reportable Incident” means an occurrence or event which must be reported immediately to the Division and for which there is reasonable cause to believe that a resident has been abused, neglected, mistreated or subjected to financial exploitation or misappropriation of their property as those terms are defined in 16 Del.C. §1131. Reportable incident also includes an occurrence or event listed in §23.4 of these regulations.

“Resident” is the individual residing in the IBSER and subject to IBSER regulation.

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# PROPOSED REGULATIONS

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“Restraint” is any manual method, physical, or mechanical device, material, or equipment attached or adjacent to the resident's body that the resident cannot remove easily which restricts freedom of movement or normal access to one's body. Restraints include, but are not limited to, wrap mats, standing basket holds, leg restraints, arm restraints, hand mitts, soft ties or vests, side rails, lap cushions, and lap trays that the resident cannot easily remove. Also included is the use of Velcro to hold a sheet, fabric or clothing so tightly that the resident's movement is restricted and any use of equipment or furniture positioning that likewise prevents the resident from rising voluntarily. The following are prohibited: a prone (face down) restraint of any kind and a seated basket hold.

“Seclusion” means the separation of an individual from others in a locked room. The use of seclusion is expressly prohibited.

“Specialized Behavior Support Plan” (SBS Plan) is a written document, the consent to which must be provided in writing by the resident, his or her guardian or surrogate. The SBS Plan must confirm that restraint protocols have been reviewed. The SBS Plan may be supplemented by a Comprehensive Behavior Support Plan when appropriate.

## **3.0 Licensing Requirements and Procedures**

- 3.1 When a facility is licensed under this law or regulation and plans to construct, extensively remodel or convert any buildings, one (1) copy of properly prepared plans and specifications for the entire facility are to be submitted to the Division. An approval in writing is to be obtained before such work is begun. After the work is completed, in accordance with the plans and specifications, a new license to operate will be issued.
- 3.2 Separate licenses are required for facilities at separate locations, even though operated under the same management. A separate license is not required for separate buildings maintained at the same location by the same management. A change in ownership necessitates a new application and a new license.
- 3.3 Inspections
  - 3.3.1 Every residence for which a license has been issued under this chapter shall be periodically inspected by a representative of the Division. Inspections shall include the review of current facility policies and procedures. Inspections must be unannounced.
  - 3.3.2 Each Licensed facility must submit to the Division quarterly reports on each of its residents. The quarterly reports prepared for the funding agency supporting each resident must meet this reporting requirement unless otherwise informed by the Division that additional information is required.
- 3.4 Licenses shall be issued in the following categories:
  - 3.4.1 Annual License. An annual license (12 months) may be renewed yearly if the holder is in full compliance with the provisions of 16 Del.C., Ch. 11 and the rules and regulations of the Department of Health and Social Services.
  - 3.4.2 Provisional License. A provisional license shall be granted for a term of ninety (90) days only, and shall be granted to a facility during its first 90 days of operation. A provisional license may also be granted to a facility, which although not in full compliance, is nevertheless demonstrating evidence of improvement.

## **4.0 General Requirements**

- 4.1 All required records maintained by the residence must be open to inspection by the authorized representatives of the Division.
- 4.2 The term "Intensive Behavioral Support Educational Residence" must not be used as part of the name of any facility in this State, unless it has been so classified and licensed by the Department of Health and Social Services.
- 4.3 No rules may be adopted by the licensee or administrators which are in conflict with these regulations.
- 4.4 The Division must be notified, in writing, within 10 days of any change in the Director.

- 4.5 The residence must establish and follow written policies and procedures regarding the rights and responsibilities of the residents, and these policies and procedures are to be made available to sponsoring agencies, and authorized representatives of the Division.
- 4.6 The facility must provide safe storage for residents' valuables.
- 4.7 The provider must assure emergency transportation and care through use of appropriate transfer agreements with local medical facilities.
- 4.8 All residents must be afforded all protections and privileges contained in the Delaware Patient's Bill of Rights.
- 4.9 The facility must cooperate fully with the state protection and advocacy agency, as defined in 16 Del.C. §1107.

**5.0 Physical Plant****5.1 Premises and Equipment**

- 5.1.1 A licensee must ensure that the facility's or program's premises and equipment accessible to or used by residents are free from any danger to their health, safety and well-being.
- 5.1.2 A licensee must maintain on file written documentation that the buildings and premises of the facility or program conform to all applicable federal, State and local zoning fire, health, education, and construction laws, ordinances and regulations.
- 5.1.3 A licensee must ensure that porches, elevated walkways and elevated areas of more than two feet in height have barriers that meet all regulatory standards to prevent falls.
- 5.1.4 A licensee must ensure that all indoor and outdoor areas, toilets, wash basins, tubs, sinks, and showers are maintained in an operable, safe and sanitary manner. Showers and tubs must have a handrail or a handgrip.
- 5.1.5 A licensee must utilize approved products and procedures in accordance with labeled instructions to ensure that the premises are protected from insect infestation.
- 5.1.6 A licensee must ensure that all premises used by residents are rodent-free.
- 5.1.7 Living Unit Space

- 5.1.7.1 No residence may house more than 16 residents—regardless of whether the residents are subject to IBSER or to DelaCare regulations. A facility must ensure that the living unit(s) have designated space for daily living activities, including dining, recreation, indoor activities and areas where residents may visit privately with their parent(s), legal guardian, relatives and friends.
- 5.1.7.2 A facility must ensure that a dining area is provided which must be maintained in a clean manner, be well-lighted and ventilated. The licensee must ensure that dining room tables and chairs or benches are sturdy and appropriate for the sizes and ages and capabilities of the residents.

**5.1.8 Furnishings and Maintenance**

- 5.1.8.1 A licensee must ensure that buildings are furnished with comfortable, clean furniture in good repair and appropriate to the age, size and capabilities of the residents.
- 5.1.8.2 A licensee must ensure that the premises are maintained and cleaned in a scheduled or routine manner.
- 5.1.8.3 A licensee must ensure that all cleaning equipment, including mops and buckets, are cleaned and stored in an area separate and distinct from the kitchen and food preparation, serving and storage areas. Kitchen and bathroom sinks must not be utilized for cleaning mops, emptying mop buckets. Kitchen sinks must not be used for any purpose not connected with food preparation or the cleaning of dishes, pots, pans and utensils.
- 5.1.8.4 A facility licensed to care for 13 or more residents must have a service sink.

**5.1.9 Storage**

- 5.1.9.1 A licensee must provide areas with sufficient space for storing all supplies and equipment in a safe and sanitary manner.

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# PROPOSED REGULATIONS

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5.1.9.2 A licensee must ensure that all poisonous and toxic materials are stored in accordance with the following:

5.1.9.2.1 All poisonous and toxic materials must be prominently and distinctly labeled for easy identification as to contents;

5.1.9.2.2 All poisonous and toxic materials must be stored so as to not contaminate food or constitute a hazard to residents, employees and volunteers;

5.1.9.2.3 All poisonous and toxic materials must be stored in a secure and locked room with access only by authorized employees.

5.1.9.2.4 Flammable liquids, gasoline, or kerosene may not be stored on the premises except in a manner and place that has been authorized in writing by the Office of the Fire Marshal.

## 5.2 Toilet and Bathing

5.2.1 A facility must ensure that there are toilet and bathing accommodations that meet the following specifications:

5.2.1.1 For every eight residents, there must be at least one flush toilet, wash basin, and bathtub or shower;

5.2.1.2 These toileting and bathing facilities must not be located more than one floor from any bedroom; and

5.2.1.3 Bathrooms must have at least one unbreakable mirror fastened to the wall at an age appropriate height.

5.2.2 A licensee must ensure that toilets, showers, sinks, and bathing facilities and other are provided for residents and:

5.2.2.1 Allow for privacy unless this privacy is in conflict with toilet training or needed supervision; and

5.2.2.2 Are maintained in a safe and sanitary manner.

5.2.3 A licensee must ensure that bathroom surfaces subject to splash are cleanable and impervious to water.

5.2.4 A licensee must ensure that bathroom floors, showers, and bathtubs have slip-proof surfaces. Glass shower doors must be marked for safety.

5.2.5 A licensee must ensure that bathrooms are equipped with operable windows or mechanical ventilation systems to the outside.

## 5.3 Bedroom Accommodations

5.3.1 A facility must ensure that any bedroom used by residents includes:

5.3.1.1 A designated area for sleeping;

5.3.1.2 A floor area of at least 70 square feet in a single-occupancy bedroom and at least 50 square feet per person in a multiple-occupancy bedroom, excluding closet space;

5.3.1.3 Sufficient space for beds to be at least three feet apart at the head, foot, and sides. Bunk beds must be at least five feet apart at the head, foot and sides;

5.3.1.3.1 No more than four residents for sleeping per room;

5.3.1.3.2 A door that may be closed;

5.3.1.3.3 A direct source of natural light;

5.3.1.3.4 A window covering to ensure privacy; and

5.3.1.3.5 Lights with safety covers or shields.

5.3.2 A facility must ensure that each resident is provided with:

5.3.2.1 A bed;

5.3.2.2 A cleanable, fire retarding mattress with mattress cover;

5.3.2.3 Clean bed linens at least every seven calendar days or more often if needed;

5.3.2.4 A pillow; and

5.3.2.5 Blanket(s) appropriate for season and weather.

- 5.3.3 A facility may use cots or portable beds in an emergency only and for no longer than a period of 72 hours.
- 5.3.4 A facility must ensure that there are no more than two tiers when bunk beds are used. In addition, the facility must ensure that the distance between the top bunk mattress and ceiling is of sufficient height to enable the resident to sit upright in bed without his or her head touching the ceiling.
- 5.3.5 Unless clinically contraindicated, a facility must provide and locate in the bedroom for each resident a chest of drawers, a bureau, or other bedroom furniture for the storage of clothing and other personal belongings.
- 5.3.6 A facility may not permit a resident to share the same bed with any other resident.
- 5.3.7 A facility must ensure that residents occupy a bedroom only with members of the same sex.
- 5.4 Water Supply and Sewage Disposal
  - 5.4.1 A licensee must maintain on file written documentation that the building's water supply and sewage disposal system are in compliance with applicable State laws and regulations of the Delaware Division of Public Health and the Delaware Department of Natural Resources and Environmental Control, respectively.
  - 5.4.2 A licensee must ensure that hot tap water does not exceed 115 degrees Fahrenheit at all outlets accessible to residents, and that cold or tempered water are also provided.
- 5.5 Garbage and Refuse
  - 5.5.1 A licensee must ensure that:
    - 5.5.1.1 Garbage is stored outside in watertight containers with tight-fitting covers that are insect and rodent proof;
    - 5.5.1.2 Garbage and refuse are removed from the premises at intervals of at least once a week; and
    - 5.5.1.3 Garbage and refuse are contained in an area that is separate from any outdoor recreation areas.
- 5.6 Lighting
  - 5.6.1 A licensee must ensure that kitchens and all rooms used by residents, including bedrooms, dining rooms, recreation rooms and classrooms, are suitably lighted for safety and comfort, with a minimum of 30 foot candles of light. All other areas must have a minimum of 10 foot candles of light.
  - 5.6.2 A licensee must ensure that all lights located over, by or within food preparation, serving and storage areas have safety shields or light covers.
  - 5.6.3 A licensee must ensure that all corridors are illuminated during night-time hours.
  - 5.6.4 During night-time hours, a licensee must provide for exterior lighting of the building(s), parking areas, pedestrian walkways or other premises subject to use by residents, visitors, employees and volunteers.
- 5.7 Heating
  - 5.7.1 A licensee must ensure that a minimum temperature of 68 degrees Fahrenheit is maintained at floor level in all rooms occupied by residents.
  - 5.7.2 A licensee must ensure that all working fireplaces, pipes, and electric space heaters accessible to residents are protected by screens, guards, insulation or any other suitable, non-combustible protective device. All radiators accessible to residents must be protected by screens, guards, insulation or any other suitable, non-combustible protective device.
  - 5.7.3 Portable fuel burning or wood burning heating appliances are prohibited.
- 5.8 Ventilation
  - 5.8.1 A licensee must ensure that each habitable room has direct outside ventilation by means of windows, louvers, air conditioning or mechanical ventilation.
  - 5.8.2 A licensee must ensure that:
    - 5.8.2.1 Each door, operable window and other opening to the outside is equipped with insect screening in good repair and not less than 16 mesh to the inch, unless the facility is air

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conditioned and provided that it does not conflict with applicable fire safety requirements; and

5.8.2.2 This screening can be readily removed in emergencies.

5.8.3 A licensee must ensure that ventilation outlets are maintained in a clean and sanitary manner, and kept free from obstructions.

5.8.4 A licensee must ensure that all floor or window fans accessible to residents have a protective grill, screen or other protective covering.

## 5.9 Access to Telephone

5.9.1 A licensee must ensure that each building used by residents has at least one working telephone that is directly available for immediate access or that is connected to an operating central telephone system.

5.9.2 A licensee must ensure that the licensee's telephone number is clearly posted and available to residents, their parent(s) or legal guardian, and the general public.

5.9.3 A licensee must provide residents in care reasonable access to a free telephone that has statewide access and has processes in place for free calls to other states.

5.9.4 A licensee must provide residents reasonable privacy for telephone use.

## 6.0 Kitchen and Food Storage

6.1 A licensee must ensure that kitchens are provided with the necessary operable equipment for the preparation, storage, serving and clean-up of all meals for all of the residents and employees regularly served by such kitchens. A licensee that does not prepare food on the premises and that utilizes single-service (disposable) dishes, pots, pans and utensils is not governed by this Requirement.

6.2 A licensee must ensure that a kitchen or food preparation area has a hand washing sink within the food preparation area and separate from the sink used for food preparation and dish washing.

6.3 A licensee must ensure that:

6.3.1 A mechanical dishwasher is used for the cleaning and sanitizing of all dishes, pots, pans and utensils after each meal; and

6.3.2 The dishwasher is capable of sanitizing at the proper time, temperature and pressure ratio, and those dishes, pots, pans and utensils are washed in accordance with the manufacturer's instructions. Dishwasher temperatures must be checked periodically and documented.

6.4 A licensee must ensure that all food service equipment and utensils are constructed of material that is nontoxic, easily cleanable and maintained in good repair.

6.5 A licensee must ensure that all food services equipment, eating and drinking utensils, counter-tops and other food contact areas are thoroughly cleaned and sanitized after each use.

6.6 A licensee must ensure that the floor, walls and counter-top surfaces of the kitchen are made of cleanable materials and impervious to water to the level of splash.

6.7 A licensee must ensure that the kitchen has a cook stove and oven with an appropriately vented hood that is maintained in a safe and operable condition in accordance with fire and safety regulations.

6.8 A licensee must ensure that the kitchen is so constructed or supervised as to limit access by residents when necessary.

6.9 A licensee must ensure that food preparation areas and appliances, dishes, pots, pans, and utensils in which food was prepared or served are cleaned following each meal.

6.10 A licensee must ensure that all foods subject to spoilage are stored at temperatures that will protect against spoilage. This means that:

6.10.1 All refrigerated foods are to be kept cold at 41 degrees Fahrenheit or below.

6.10.2 All frozen foods are to be kept at 0 degrees Fahrenheit or below.

6.10.3 All hot foods are to be kept at 140 degrees Fahrenheit or above, except during periods that are necessary for preparation and serving. Refrigerators and freezers must be equipped with accurate, easily readable thermometers located in the warmest part of the refrigerator or freezer.

- 6.10.4 There must be three days' supply of food in each facility at all times as posted on the menus.
- 6.10.5 Opened foods that are to be stored must immediately be dated with the date that the foods were opened.

6.11 A licensee must ensure that:

- 6.11.1 All food storage areas are clean, dry and free of food particles, dust and dirt;
- 6.11.2 All packaged food items and can goods are stored at least six inches above the floor in sealed or closed containers that are labeled;
- 6.11.3 All dishes, pots, pans and utensils are stored in a clean and dry place; and
- 6.11.4 All paper goods are stored at least six inches above the floor.

## **7.0** **Emergencies and Disasters**

- 7.1 Fire safety in Facilities must comply with the rules and regulations of the State Fire Prevention Commission or the appropriate local jurisdiction. All applications for a license or renewal of a license must include a letter certifying compliance by the Fire Marshal with jurisdiction. Notification of non-compliance with the applicable rules and regulations must be grounds for revocation of a license.

- 7.2 The facility must have a minimum of two means of egress.

- 7.3 The facility must have an adequate number of UL approved smoke detectors in working order.

- 7.3.1 In a single level facility, a minimum of one smoke detector must be placed between the bedroom area and the remainder of the facility.

- 7.3.2 In a multi-story facility, a minimum of one smoke detector must be on each level. On levels which have bedrooms, the detector must be placed between the bedroom area and the remainder of the facility.

- 7.4 There must be at least one functional two and one-half to five pound ABC fire extinguisher on each floor of living space in the facility that is readily accessible to staff. Inspections shall be completed by the service company or as regulated by the Fire Marshal. Each extinguisher must be checked annually.

- 7.5 Evacuation Drills

- 7.5.1 A licensee must conduct at least four emergency evacuation drills annually and maintain on file a record of each drill. Two of these drills must include evacuations, unless the Division, in writing, has determined that an evacuation is clinically contraindicated. Where a licensee utilizes two or more employee shifts, there must be at least four emergency evacuation drills conducted annually for each shift.

- 7.5.2 Emergency evacuation drills must include all persons on the premises, including employees, volunteers, residents and visitors.

- 7.5.3 The location of egress during these evacuation drills must be varied, with window evacuation procedures discussed as an alternative, if not practiced.

- 7.5.4 During drills, persons must be evacuated with staff assistance to the designated safe area outside of the facility.

- 7.5.5 As evidenced by evacuation drill reports that are maintained by the Facility, drills must assure that all persons and staff are familiar with the evacuation requirements and procedures. Any problems persons have evacuating a building during a drill must result in a written plan of specific corrective action(s) to be taken.

- 7.5.6 Persons who are unable to achieve the exit schedule prescribed by the Life/Safety Code with available assistance must be either relocated or provided with additional assistance.

- 7.6 Emergency Procedures

- 7.6.1 A licensee must develop, adopt, follow and maintain on file written policies and procedures governing the handling of emergencies, including:

- 7.6.1.1 Accident;

- 7.6.1.2 Bomb threat;

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- 7.6.1.3 Fire;
- 7.6.1.4 Flooding;
- 7.6.1.5 Medical;
- 7.6.1.6 Missing resident, including referral to Gold Alert Program;
- 7.6.1.7 Power outage;
- 7.6.1.8 Severe weather conditions;
- 7.6.1.9 Radiation, if within a 10-mile radius of a nuclear reactor.
- 7.6.2 The policies and procedures must include:
  - 7.6.2.1 An emergency evacuation plan;
  - 7.6.2.2 Instructions and telephone numbers for contacting ambulance, emergency medical response team, fire, hospital, poison control center, police, and other emergency services;
  - 7.6.2.3 Location and use of first aid kits; and
  - 7.6.2.4 Roster and telephone numbers of employees to be contacted during an emergency.
- 7.6.3 A licensee must ensure that each newly admitted resident is provided an orientation regarding emergency procedures and the location of all exits within 48 hours of admission.
- 7.6.4 The procedures must contain instructions related to the use of alarm and signal systems. Provisions must be made to alert persons living in the facility according to their abilities, and these provisions must be included in the procedures.
- 7.6.5 Evacuation routes and the location of fire-fighting equipment must be posted in areas used by the public as required by the applicable fire safety regulations. The number and placement of postings are otherwise dictated by building use and configuration and by the needs of persons and staff.
- 7.6.6 The provider must maintain an adequate communication system to ensure that on and off-duty personnel and local fire and safety authorities are notified promptly in the event of an emergency or disaster.
- 7.6.7 The telephone numbers of the nearest poison control center and the nearest source of emergency medical services must be posted.
- 7.6.8 Provisions must be made for emergency auxiliary heat and lighting by means of alternate sources of electric power, alternate fuels, and stand-by equipment, or arrangements with neighbors, other agencies or community resources.
- 7.6.9 A licensee must prohibit the storage or use of any firearms or other weapons on the grounds of the facility or program or in any building used by residents.

## **8.0 Administration**

- 8.1 Division Notification
  - 8.1.1 A licensee must notify the Division in writing at least 90 consecutive calendar days before any of the following changes occur:
    - 8.1.1.1 A change of ownership or sponsorship;
    - 8.1.1.2 A change of location;
    - 8.1.1.3 A change in the name of the facility or program;
    - 8.1.1.4 A change in the applicable type of regulated service being provided;
    - 8.1.1.5 A change in population capacity; or
    - 8.1.1.6 The anticipated closing of the facility or program.
- 8.2 Governing Body
  - 8.2.1 A licensee must have an identifiable functioning governing body. The governing body must designate a Director.
- 8.3 Director Responsibilities



8.3.1 A licensee must delineate in writing the job responsibilities and functions of the Director. The Director must adopt and implement a chain of command that ensures the proper and effective supervision and monitoring of employees and volunteers.

## **9.0 Facility or Program Description of Services**

- 9.1 A licensee must develop, adopt, follow and maintain on file a current written description of the facility's or programs:
- 9.1.1 Admission policies governing the specific characteristics, and treatment or service needs of residents accepted for care; and
- 9.1.2 Services provided to residents, including those provided directly by the licensee or arranged through another source.
- 9.2 A licensee must make available to the public a brochure or other generic written description of its mission, policies and the types of services offered by the facility or program.

## **10.0 Maintenance of Resident's Records**

- 10.1 A licensee must develop, adopt, follow and maintain on file on the premises written procedures governing the maintenance and security of resident records in care. These procedures must:
- 10.1.1 Assure that records are stored in a secure manner; and
- 10.1.2 Assure confidentiality of and prevent unauthorized access to such records.
- 10.2 Administrative Records
- 10.2.1 A licensee must develop, adopt, follow and maintain on file on the premises up-to-date administrative records containing the following:
- 10.2.1.1 Organizational chart;
- 10.2.1.2 Name and position of persons authorized to sign agreements and to submit official documentation to the appropriate government agency; and
- 10.2.1.3 Written standard operating procedures.
- 10.3 All records maintained by the facility must at all times be open to inspection and copying by authorized representatives of the Division as well as all other agencies as required by state and federal laws and regulations. Such records must be made available in accordance with 16 Del.C., Ch. 11, Subchapter I, Licensing by the State.

## **11.0 Insurance Coverage**

A licensee must secure and maintain on file written documentation of appropriate motor vehicle, fire and comprehensive general liability insurance, as required by State law(s) and regulations.

## **12.0 Personnel Policies and Procedures**

- 12.1 A licensee must develop, adopt, follow and maintain on file written personnel policies and procedures governing the recruitment, screening, hiring, supervision, training, evaluation, promotion, and disciplining of employees and volunteers.
- 12.2 Personnel: Qualifications
- 12.2.1 Director Qualifications
- 12.2.1.1 A Director, at the time of appointment, must be at least 21 years of age and must possess one of the following:
- 12.2.1.1.1 A master's degree in social work, sociology, psychology, guidance and counseling, education, business administration, a human behavioral science, public administration or a related field from an accredited college, and three years of full-time work experience in human services or a related field, at least two years of which must have been in an administrative or supervisory capacity; or

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12.2.1.1.2 A bachelor's degree in social work, sociology, psychology, guidance and counseling, education, business administration, a human behavioral science, public administration or a related field from an accredited college, and four years of post-bachelor's degree full-time work experience in human services or a related field, at least two years of which must have been in an administrative or supervisory capacity.

## 12.2.2 Direct Care Supervisor Qualifications

12.2.2.1 A direct care supervisor, at the time of appointment, must be at least 21 years of age and must possess at least one of the following:

12.2.2.1.1 A bachelor's degree from an accredited college and one year of full-time work experience in a residential care facility or program;

12.2.2.1.2 An associate degree or a minimum of 48 credit hours from an accredited college and two years of full-time work experience in a residential care facility or program; or

12.2.2.1.3 A high school diploma or equivalent and three years of full-time work experience in a residential care facility or program.

## 12.2.3 Direct Care Worker Qualifications

12.2.3.1 A direct care worker, at the time of appointment, must be at least 21 years of age and must possess a high school diploma or an equivalent.

## 12.2.4 Service Supervisor Qualifications

12.2.4.1 A service supervisor, at the time of appointment, must be at least 21 years of age and must possess at least one of the following:

12.2.4.1.1 A master's degree in social work, sociology, psychology, criminal justice, education, guidance and counseling, human behavioral science or a related field from an accredited college and at least two years of full-time work experience in social work, human services, teaching, counseling or a related field, at least one year of which must have been in a supervisory capacity; or

12.2.4.1.2 A bachelor's degree in social work, sociology, psychology, criminal justice, education, guidance and counseling, human behavioral science or a related field from an accredited college and at least four years of full-time work experience in social work, human services, teaching, counseling or a related field, at least two years of which must have been in a supervisory capacity.

## 12.2.5 Service Worker Qualifications

12.2.5.1 A service worker, at the time of appointment, must be at least 21 years of age and must possess a bachelor's degree from an accredited college in social work, sociology, psychology, criminal justice, education, guidance and counseling, a human behavioral science or a related field and at least two years of full-time work experience in human services, teaching, counseling or a related field.

## 12.3 Administrative Oversight and Supervisor-to-Staff Ratios

12.3.1 The Director must ensure that there is a sufficient number of administrative, supervisory, social service, educational, recreational, direct care, and support employees or volunteers to perform the functions prescribed by these requirements and to provide for the care, needs, protection and supervision of residents. The ratio of direct care workers to residents during off-grounds activities or excursions must be the same as the ratios of direct care workers to residents that are required during on-grounds activities.

## 12.4 A licensee must have either:

12.4.1 A full-time Director; or

12.4.2 If its licensed capacity is less than 13 residents, a part-time Director and a full-time service supervisor.

12.4.3 A licensee must ensure that a designated employee is in charge on the premises at all times when residents are present.

12.4.4 A licensee must have a ratio of one service supervisor for every ten service workers or fraction thereof. A full-time Director may also serve as the service supervisor when there are three or fewer service workers.

12.5 Minimum Staffing at all times

12.5.1 A minimum of one (1) direct care worker who meets the training requirements of Section 13.0 below must be on duty and on site whenever (1) to five (5) residents are present in the home.

12.5.2 A minimum of two (2) staff members who meet the training requirements of Section 13.0 below must be on duty and on site whenever six (6) or more residents are present in the home.

12.5.3 At all times, at least one (1) service worker must be available on call.

**13.0 Orientation and Training of Employees and Volunteers**

13.1 A licensee must ensure that all new employees and volunteers participate in an orientation that includes the purpose, policies and procedures of the facility or program, the employee's role and responsibilities and the State's requirements to report allegations of abuse, neglect, mistreatment and financial exploitation.

13.2 A licensee must ensure that each new employee, volunteer, or any current employee or volunteer whose job function changes, and whose primary role or function requires interaction with residents, receives at least 15 hours of planned training preceding the assumption of his or her work assignment on an independent basis. The training must include instruction in:

13.2.1 Carrying out job responsibilities;

13.2.2 The licensee's purpose, policies and procedures, including those governing behavior management, crisis management and safety;

13.2.3 Emergency procedures and the location of emergency exits and emergency equipment, including first aid kits;

13.2.4 The role of employees and volunteers in client service delivery and the protection of residents;

13.2.5 The Delaware abuse, neglect, mistreatment and financial exploitation law(s) and regulations; and

13.2.6 The provisions of these licensing requirements.

This requirement must not apply to licensed professionals under contract with the licensee.

13.3 A licensee must ensure that each employee and volunteer whose primary role or function requires interaction with residents and who works 24 or more hours a week receives at least 40 hours of training annually, including the 15 hours of training provided pursuant to subsection 13.2. This training must cover subject matters designed to maintain, improve or enhance the employee's knowledge of or skills in carrying out his or her job responsibilities, including:

13.3.1 Instruction in administering cardiopulmonary resuscitation (CPR) and first aid, including the location of first aid kits;

13.3.2 Cultural sensitivity; and

13.3.3 Behavior management policies and procedures.

13.4 A licensee must ensure that any employee or volunteer whose primary role or function requires interaction with residents and who works fewer than 24 hours a week receives at least 20 hours of training annually.

13.5 A licensee must maintain on file written materials documenting the delivery of orientation and training for all employees and volunteers.

**14.0 Personnel Records**

14.1 A licensee must develop, adopt and maintain on file a personnel record for every employee and volunteer.

14.2 The personnel record must contain the following:

14.2.1 Employment application;

14.2.2 Name, current address and phone number of the employee;

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- 14.2.3 Verification of education where specified by these requirements;
  - 14.2.4 Documentation of training received prior to and during employment at the facility or program;
  - 14.2.5 Work history;
  - 14.2.6 Three references from persons who are unrelated to the employee or volunteer, one of which must be from any previous employer;
  - 14.2.7 Any health verification including meeting the minimum requirements for pre-employment tuberculosis (TB) testing which requires all employees to have a base line two-step tuberculin skin test (TST) or single Interferon Gamma Release Assay (IGRA or TB blood test) such as QuantiFeron. Any required subsequent testing according to risk category shall be in accordance with the recommendations of the Centers for Disease Control and Prevention (CDC) of the U. S. Department of Health and Human Services. Should the category of risk change, which is determined by the Division of Public Health, the facility must comply with the recommendations of the CDC for the appropriate risk category.
  - 14.2.8 Verification of completed criminal history record information check and abuse registry information check;
  - 14.2.9 Verification of receipt by the employee or volunteer of his or her current job description;
  - 14.2.10 A valid Driver's License if required to transport residents;
  - 14.2.11 An annual employee performance evaluation;
  - 14.2.12 Employee disciplinary actions and history; and
  - 14.2.13 All other reports required by statute or regulation.
- 14.3 Job Descriptions for Employees**
- 14.3.1 A licensee must maintain on file a current written job description for every employee and for every volunteer who works more than 24 hours a week.
  - 14.3.2 A licensee must ensure that an employee's and volunteer's permanent or temporary assignment and functions must be consistent with his or her respective current written job description.

## **15.0 Use of Volunteers**

- 15.1 A licensee must develop, adopt, follow and maintain on file policies and procedures governing the qualifications and use of volunteers. The qualifications must be appropriate to the duties they perform.
- 15.2 A licensee must assign designated employees to supervise volunteers.
- 15.3 Any volunteer who provides services or assistance on a routine basis is subject to the same background check as employees, unless the volunteer is limited to less than 3 visits in a calendar year.

## **16.0 Human Rights**

### 16.1 Human Rights Committee

#### 16.1.1 Membership:

- 16.1.1.1 At least five adult individuals of high professional standing, two of whom must be professionally knowledgeable or experienced in the theory and ethical application of various treatment techniques used to address behavioral problems.
- 16.1.1.2 A majority of Committee members must be external to the licensee or its parent organization. One member must be a member of the community or parent of a resident. One member must be a licensed mental health professional, a licensed physician, a licensed clinical psychologist, or a clinical social worker.
- 16.1.1.3 The Committee must meet at least on a quarterly basis

#### 16.1.2 The Human Rights Committee is responsible for:

- 16.1.2.1 Determining that residents in care are receiving humane and proper treatment;
- 16.1.2.2 Reviewing and making recommendations regarding the licensee's policies and procedures governing the use of restraint;
- 16.1.2.3 Reviewing the restraint records and advising the Director accordingly;

- 16.1.2.4 Recording and maintaining on file written minutes of all of its meetings, and providing the Director with a copy of these minutes;
- 16.1.2.5 Making inquiries into any allegations of abusive techniques or the misuse of restraint procedures. A report of the inquiry must be provided by the Committee to the Director and sent to the Division;
- 16.1.2.6 Monitoring the qualifications and training of employees who have been given responsibility for administering restraint procedures and to make recommendations to the Director accordingly; and
- 16.1.2.7 Reviewing and making recommendations on comprehensive behavioral support plans that include the application of some form of restraint procedures.
- 16.2 Behavior Management Committee (BMC). The BMC must be comprised of the licensee's clinical director and all on-staff clinicians. It must establish a SBS Plan upon admission of a resident and must conduct SBS Plan reviews on each resident on at least a monthly basis.
  - 16.2.1 With regard to each SBS Plan, the BMC review must provide input as to the presumed clinical efficacy and ethical acceptability of the plan.
  - 16.2.2 Each SBS Plan author must present to the BMC for review:
    - 16.2.2.1 A description of the results of the most recent functional assessment to identify environmental factors that correlate with the occurrence of dangerous target behaviors;
    - 16.2.2.2 A description of the individual and his or her clinical/educational/vocational progress;
    - 16.2.2.3 Documentation of each time a form of restraint was utilized with the resident in the form of clinical data for review by BMC members;
    - 16.2.2.4 A description of positive reinforcement components of the SBS Plan that are designed to teach and strengthen appropriate replacement behaviors;
    - 16.2.2.5 A description of the most recent mental health review and recent changes in medication or other psychiatric interventions;
    - 16.2.2.6 A description of any medical conditions that might be expected to impact on the occurrence of dangerous behaviors;
    - 16.2.2.7 A description of any familial or other emotional variables that might be expected to impact on the occurrence of dangerous behaviors;
    - 16.2.2.8 A summary of the risk benefit analysis for each proposed intervention;
    - 16.2.2.9 A summary statement as to the general effectiveness of the SBS Plan and a recommendation for future use.
- 16.3 Following approval by the BMC, review by the HRC must occur prior to implementation of the SBS Plan, or the Comprehensive Behavior Support Plan.
- 16.4 Prior to implementation of the SBS Plan or the Comprehensive Behavior Support Plan, informed consent must be obtained from:
  - 16.4.1 The individual, and/or parent /guardian.
  - 16.4.2 A physician attesting that there are no known medical conditions that would contraindicate use of the restraint.
- 16.5 Episodes of restraint utilization must be documented as follows:
  - 16.5.1 Date and time, staff involved, location, activity, antecedent conditions, specific behaviors observed, interventions implemented, duration of interventions, well being checks, clinical review and approval for interventions longer than 15 minutes, physical examination for possible injury after the termination of the restraint utilization, supervisor signature; and
  - 16.5.2 A report of each episodes of restraint utilization as documented in 16.5.1 must be provided to the Division on the fifth day of each month for the previous month in a manner prescribed by the Division.
- 16.6 When a restraint utilization event is less than 15 minutes, it must be reviewed by a clinician within one business day of said intervention.

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- 16.7 Each SBS that has been approved and implemented must be reviewed at least monthly by the BMC for the first 90 days following implementation and quarterly thereafter.
- 16.8 Individual and aggregate clinical data on the frequency of restraint interventions for each individual must be reviewed monthly by the HRC.

### **17.0 Abuse and Neglect**

- 17.1 A licensee must provide each employee or volunteer who has contact with residents written information governing the reporting provisions of the Delaware abuse, neglect, mistreatment and financial exploitation law(s) and regulations, and must maintain on file written documentation of their receipt of this information.
- 17.2 A licensee must not discourage, inhibit, penalize or otherwise impede any employee, volunteer or resident reporting any suspected or alleged incident of abuse, neglect, mistreatment or financial exploitation.
- 17.3 A licensee must develop, adopt, follow and maintain on file written policies and procedures for handling any incident of suspected abuse, neglect, mistreatment or financial exploitation. The policies and procedures must contain provisions specifying that:
- 17.3.1 The licensee immediately must take appropriate remedial action to protect residents from harm;
- 17.3.2 The licensee must take appropriate long-term corrective action to eliminate the factors or circumstances that may have caused or may have otherwise resulted in a continuing risk of abuse or neglect to residents;
- 17.3.3 Any employee or volunteer involved in an incident of alleged abuse or neglect must be removed or suspended from having direct contact with any residents, or must be reassigned to other duties that do not involve having contact with residents until the investigation of the incident has been completed;
- 17.3.4 The licensee must take appropriate disciplinary action against any employee or volunteer who committed an act of abuse or neglect, mistreatment or financial exploitation.
- 17.3.5 All incidents must be reported to the Division pursuant to Section 23.0 below, and to the police if criminal conduct is suspected.

### **18.0 Documentation Requirements**

- 18.1 A licensee must develop, adopt, follow and maintain on written file policies and procedures governing the accurate and timely recording of each incident in which a time-out technique or a non-violent physical intervention strategy is used. Such policies and procedures must ensure that the identity of the resident, the date, time, place, and circumstances of, and the name of the employee or volunteer who administered the time-out technique or the non-violent physical intervention strategy is recorded. The nature of the technique or strategy and the elapsed time used must also be recorded.
- 18.2 A licensee must ensure that the Director or his or her designee reviews the documentation on a weekly basis.

### **19.0 Use of Restraints**

- 19.1 These regulations describe the procedures to be followed whenever the use of restraints is required. All residents have the right to be free from physical or mental abuse, discipline and corporal punishment. All residents have the right to be free from restraints of any form, imposed as a means of coercion, discipline, convenience, or retaliation by staff. Facility staff must review restraint protocols with residents and their legal representative upon admission and document the review.
- 19.2 Restraint procedures may be employed only when:
- 19.2.1 The individual is exhibiting a problem behavior that is so severe that it poses a risk to the safety and wellbeing of the individual or others;
- 19.2.2 It is part of a written comprehensive behavior support plan that incorporates all of the elements cited below;

- 19.2.3 An initial medical evaluation has been conducted to assess and address medical conditions that may be contributing to the problem behavior;
  - 19.2.4 A physician, nurse practitioner or other qualified and licensed medical professional has determined that there are no contraindications to the use of the intervention;
  - 19.2.5 It has been determined that less-restrictive alternative interventions are not safe, feasible or effective;
  - 19.2.6 A functional behavioral assessment has been conducted to identify the situations and conditions that trigger and/or maintain the severe problem behavior, and means taken to address and correct those conditions.
- 19.3 The written comprehensive behavior support plan which includes the use of restraint must be developed by the individual, his or her family, and his or her education, habilitation or treatment team. The team must include a Board Certified Behavior Analyst, Licensed Psychologist, or other properly credentialed professional with documented training and experience in behavioral treatment of severe behavior disorders; a physician and/or psychiatrist; nurse practitioner; or medical professional and other relevant professionals;
- 19.3.1 The behavioral clinical professional must ensure that the comprehensive behavior support plan conforms to current best practices and ethical standards pertaining to the behavioral treatment of severe problem behavior, and is responsible for overseeing its implementation.
  - 19.3.2 The physician, nurse practitioner or other medical professional determines that there are no medical contraindications to the planned intervention.
- 19.4 The comprehensive behavior support plan that includes a restraint component must include:
- 19.4.1 Individualized arrangements addressing the strengths, preferences, needs, and circumstances of the individual and his or her family;
  - 19.4.2 Informed consent rendered voluntarily and in writing by the individual, his or her parents or legally authorized guardians or surrogates after they have been provided with complete, accurate, and understandable information about all aspects of the intervention techniques that will be used with the individual;
  - 19.4.3 Review by the BMC and the HRC to ensure professional and ethical standards are met;
  - 19.4.4 Procedures to diffuse prevent or reduce a problem before it evolves into a significant event that places the individual or others at risk;
  - 19.4.5 Methods to teach and support alternative skills, to both replace the problem behavior and improve the individual's capabilities and quality of life;
  - 19.4.6 Implementation by personnel with documented training to implement the entire comprehensive behavior support plan competently, safely and ethically.
- 19.5 Comprehensive behavior support plans including the use of restraint must feature the following safeguards and methods of oversight:
- 19.5.1 Staff must receive frequent monitoring and direct supervision from the behavioral clinical professionals and administration. Data on all usages of restraint are provided and reviewed at frequent intervals by all levels of the administration.
  - 19.5.2 The plan includes safeguards to minimize all risks of harm and insure the individual's safety at all times, including during restraint.
  - 19.5.3 The plan is adjusted as needed based on frequent review by the behavioral clinical professionals of data representing objectively measured occurrences of the problem behavior, and implementation of the intervention procedures.
  - 19.5.4 Safeguards are provided during the restraint procedures to insure the individual's safety at all times.
  - 19.5.5 Upon initiation of the restraint procedure staff must notify the on-site supervisor, and behavioral clinical professional for approval of the implementation of the procedure.
  - 19.5.6 Trained staff must continuously monitor the individual during the restraint procedure, as follows:

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- 19.5.6.1 If the individual is observed to be in medical distress, e.g., exhibiting labored breathing, or there is evidence of physical injury, the individual must immediately be released from restraint, and medical attention applied.
  - 19.5.6.2 The restraint procedure is terminated when there is no imminent risk to either the individual or others.
  - 19.5.6.3 At the termination of the intervention the individual is observed by both the staff terminating the procedure and a second staff person to evaluate the individual's medical and emotional condition.
  - 19.5.6.4 If any signs of medical or emotional distress are observed, a medical and/or behavioral clinical professional must be contacted and decisions made about the next steps to resolve the situation.
- 19.6 Documentation of each use of a restraint or seclusion procedure must include:
- 19.6.1 The behavior that necessitated the restraint procedure;
  - 19.6.2 The specific restraint procedure employed;
  - 19.6.3 The date and time of the restraint procedure, and time the restraint procedure was terminated;
  - 19.6.4 The person who authorized, initiated, applied and terminated the restraint procedure; and
  - 19.6.5 Any injuries sustained and treatment received.
- 19.7 If emergency use of restraint occurs six or more times in a 1-month period, the comprehensive behavior support plan must be reviewed and modified, if indicated.
- 19.8 The following are prohibited:
- 19.8.1 A prone (face down) restraint of any kind;
  - 19.8.2 A seated basket hold;
  - 19.8.3 Restraint procedures that employ painful stimuli;
  - 19.8.4 Restraint of an individual's hands, with or without a mechanical device, behind his or her back;
  - 19.8.5 Physical holds relying on the inducement of pain for behavioral control;
  - 19.8.6 Movement that results in hyperextension or twisting of body parts;
  - 19.8.7 Any restraint procedure in which a pillow, blanket, or other item is used to cover the individual's face as part of the restraint process;
  - 19.8.8 Any restraint procedure that may exacerbate a known medical or physical condition;
  - 19.8.9 Use of any restraint technique medically contraindicated for an individual;
  - 19.8.10 Restraint without continuous monitoring;
  - 19.8.11 All forms of chemical restraint; and
  - 19.8.12 Seclusion.
  - 19.8.13 Electroconvulsive Therapy

## **20.0 Health**

### 20.1 Employee and Volunteer Health

- 20.1.1 Prior to employing any person or accepting any volunteer, a licensee must secure and maintain on file written documentation certifying and verifying that the prospective employee and volunteer has had a general physical examination within 12 months prior to the date of employment. The examination must include a medically accepted procedure for screening for tuberculosis.
- 20.1.2 Minimum requirements for pre-employment and tuberculosis (TB) testing are those currently recommended by the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services.
- 20.1.3 To be eligible to work in the facility or program, an employee or volunteer must be free from active tuberculosis; and
- 20.1.4 If a licensee determines that the prospective employee or volunteer has not had a general physical examination within 12 consecutive calendar months prior to the anticipated date of employment or volunteer work, or if a licensee is unable to document that such an examination was completed, a



licensee must require the prospective employee or volunteer, as a condition of employment, to have such a general physical examination within three consecutive calendar months of the date of employment or volunteer work.

## **21.0 Administration or Assistance with Self-Administration of Medication**

- 21.1 A licensee must develop, adopt, follow and maintain on file written policies and procedures governing the use, administration or assistance with administration of medications, prescription and non-prescription medications to residents.
- 21.2 The facility must establish and adhere to written medication policies and procedures which must address:
  - 21.2.1 Obtaining and refilling medications
  - 21.2.2 Storing and controlling medications
  - 21.2.3 Disposing of medications; and
  - 21.2.4 Administration of medication and self-administration of medication.
- 21.3 Each facility must have a drug reference guide, with a copyright date no older than 2 years, available and accessible for use by employees.
- 21.4 Medication must be stored and controlled as follows:
  - 21.4.1 Medication must be stored in a locked container, cabinet, refrigerator or area that is only accessible to authorized personnel.
  - 21.4.2 Medication that is not in locked storage may not be left unattended and may not be accessible to unauthorized personnel.
  - 21.4.3 Medication must be stored in the original labeled container.
  - 21.4.4 A bathroom or laundry room may not be used for medication storage.
  - 21.4.5 All expired or discontinued medication must be disposed of according to the facility's medication policies and procedures.
- 21.5 A separate medication log must be maintained for each resident documenting the administration of the medication by licensed staff member or staff assistance with self-administration by the resident (AWSAM). The log is either preprinted by the pharmacy or created by the facility. Instructions must appear as on the prescription container label. When a resident refuses a medication or is unavailable, the incident must be documented on the medication log or according to facility policy.
- 21.6 Psychotropic medications are prohibited for disciplinary purposes for the convenience of staff or as a substitute for appropriate treatment service. An informed, written consent of the parents or legal guardian is secured and maintained in the resident's file prior to the administration of any psychotropic medication.
- 21.7 A minimum of a three (3) day supply of each resident's medication must be available at all times.
- 21.8 The facility admitting residents on prescribed psychotropic medication and/or residents on prescribed medication for chronic illness, such as diabetes or asthma, must ensure that each of these residents receives a minimum of one hour per month of Medical Consultant services. The Medical Consultant services must include:
  - 21.8.1 Review of administration of the resident's medication, including determination of problems in adherence or administration and development of corrective action plans.
  - 21.8.2 Assessment and monitoring of the resident with regard to the impact of their medication, including whether the medication is having its desired effects and whether the resident is suffering from undesired side-effects.
  - 21.8.3 Service as liaison between the licensee and the resident's physician(s).
  - 21.8.4 Provision of instruction of employees regarding the expected outcomes from each resident's medication regime and the possible side-effects of that medication regime.
- 21.9 Residents receiving medication must be trained to take their own medication, where possible. Staff who have successfully completed a Board of Nursing approved AWSAM training program may assist

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residents in the taking of medication provided that the medication is in the original container and properly labeled. The medication must be taken exactly as indicated on the label.

21.10 No person other than a physician or licensed nurse may administer medication by injection.

21.11 Records must be kept on file at the facility identifying AWSAM trained staff.

21.12 Each facility must complete an annual AWSAM report on the form provided by the Board of Nursing. The report must be submitted pursuant to the Delaware Nurse Practice Act, 24 Del.C. Ch. 19.

## **22.0 Universal Precautions**

A licensee must employ universal precautions for protection from disease and infection in accordance with the most current guidelines of the Centers for Disease Control and Prevention.

## **23.0 Incident Reports to the Division**

23.1 Incident reports, with adequate documentation, must be completed for each incident. Adequate documentation includes the name of the resident(s) involved; the date, time and place of the incident; a description of the incident; a list of other parties involved, including witnesses; the nature of any injuries; resident outcome; and follow-up action, including notification of the resident's guardian or surrogate, attending physician and licensing or law enforcement authorities, when appropriate.

23.2 All incident reports whether or not required to be reported must be retained in facility files for three years. Reportable incidents must be communicated immediately, which means within eight hours of the occurrence of the incident, to the Division. The method of reporting shall be as directed by the Division.

23.3 Incident reports which must be retained in facility files are as follows:

23.3.1 All reportable incidents as detailed below.

23.3.2 Falls without injury and falls with minor injuries that do not require transfer to an acute care facility or neurological reassessment of the resident.

23.3.3 Errors or omissions in treatment or medication.

23.3.4 Injuries of unknown source.

23.3.5 Lost items which are not subject to financial exploitation.

23.3.6 Skin tears.

23.3.7 Bruises of unknown origin.

23.4 Reportable incidents are as follows:

23.4.1 Abuse as defined in 16 Del.C., §1131.

23.4.2 Physical abuse with injury if resident to resident and physical abuse with or without injury if staff to resident or any other person to resident.

23.4.3 Any sexual act between staff and a resident and any non-consensual sexual act between residents or between a resident and any other person such as a visitor.

23.4.4 Emotional abuse whether staff to resident, resident to resident or any other person to resident.

23.4.5 Neglect, mistreatment or financial exploitation as defined in 16 Del.C., §1131.

23.4.6 Resident elopement under the following circumstances:

23.4.6.1 A resident's whereabouts on or off the premises are unknown to staff and the resident suffers harm.

23.4.6.2 A cognitively impaired resident's whereabouts are unknown to staff and the resident leaves the facility premises.

23.4.6.3 A resident cannot be found inside or outside a facility and the police are summoned.

23.4.7 Significant injuries.

23.4.8 Injury from an incident of unknown source in which the initial investigation or evaluation supports the conclusion that the injury is suspicious. Circumstances which may cause an injury to be suspicious are: the extent of the injury, the location of the injury (e.g., the injury is located in an

area not generally vulnerable to trauma), the number of injuries observed at one particular point in time, or the incidence of injuries over time.

- 23.4.9 Injury which results in transfer to an acute care facility for treatment or evaluation or which requires periodic neurological reassessment of the resident's clinical status by professional staff for up to 24 hours.
  - 23.4.10 Areas of contusions or bruises caused by staff to a dependent resident during ambulation, transport, transfer or bathing.
  - 23.4.11 An error or omission in medication/treatment, including drug diversion, which causes the resident discomfort, jeopardizes the resident's health and safety or requires periodic monitoring for up to 48 hours.
  - 23.4.12 A burn greater than first degree.
  - 23.4.13 Any serious unusual and/or life-threatening injury.
  - 23.4.14 Entrapment which causes the resident injury or immobility of body or limb or which requires assistance from another person for the resident to secure release.
  - 23.4.15 Suicide or attempted suicide.
  - 23.4.16 Poisoning.
  - 23.4.17 Fire within a facility.
  - 23.4.18 Utility interruption lasting more than eight hours in one or more major service including electricity, water supply, plumbing, heating or air conditioning, fire alarm, sprinkler system or telephones.
  - 23.4.19 Structural damage or unsafe structural conditions.
  - 23.4.20 Water damage which impacts resident health, safety or comfort.
- 23.5 The facility must maintain and follow written policies and procedures, in accordance with 16 Del.C., Ch. 25, regarding health care decisions including advance directives. The facility must provide written information to all residents explaining such policies and procedures.

## **24.0 Facility Closure**

- 24.1 In the event of the closing of a facility, the facility shall:
  - 24.1.1 Notify the Division, and the Ombudsman, at least 90 days before the planned closure.
  - 24.1.2 Notify each resident directly and his/her attending physician and, if applicable, his/her responsible party by telephone and in writing at least 90 days before the planned closure.
  - 24.1.3 Give the resident or the resident's responsible person an opportunity to designate a preference for relocation to a specific facility or for other arrangements.
  - 24.1.4 Arrange for relocation to other facilities in accordance with the resident's preference, if possible.
  - 24.1.5 Ensure that all resident records, medications, and personal belongings are transferred with the resident and, if to another facility, accompanied by an interagency transfer form.
  - 24.1.6 Provide an accounting of resident trust fund accounts which must be transferred to each resident's possession or to the facility to which the resident relocates. A record of the accounting of the funds must be maintained by the closing facility for audit purposes.
  - 24.1.7 Advise any applicant for admission to a facility which has a planned closure date in writing of the planned closure date prior to admission.

## **25.0 Waivers and Severability**

- 25.1 Waivers may be granted by the Division for good cause.
- 25.2 Should any section, sentence, clause or phrase of these regulations be legally declared unconstitutional or invalid for any reason, the remainder of said regulations shall not be affected thereby.

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# PROPOSED REGULATIONS

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## DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

### PUBLIC NOTICE

#### **DSSM: 14370 Coverage of Emergency Services and Labor and Delivery**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Division of Social Services Manual regarding *Coverage of Emergency Services and Labor and Delivery*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by November 30, 2011.

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

### SUMMARY OF PROPOSAL

The proposed amends the Division of Social Services Manual regarding *Coverage of Emergency Services and Labor and Delivery Only*.

#### **Statutory Authority**

42 CFR §440.255, *Limited services available to certain aliens*

#### **Background**

Aliens who are not otherwise eligible for full Medicaid because of immigration status may be eligible for emergency services and labor and delivery only.

For the purposes of emergency services and labor and delivery only, federal Medicaid regulations define emergency services (including labor and delivery) as a sudden onset of a physical or mental condition which causes acute symptoms, including severe pain, where the absence of immediate medical attention could reasonably be expected to:

- Place the person's health in serious jeopardy, or
- Cause serious impairment to bodily function, or
- Cause serious dysfunction of any bodily organ or part.

#### **Summary of Proposal**

**DSSM 14370**, *Coverage of Emergency Services and Labor and Delivery Only*: The Division of Medicaid and Medical Assistance (DMMA) is proposing a change to the Medicaid emergency services for undocumented aliens' benefit. The primary change is to include birthing centers as a place of service for emergency labor and delivery services, effective November 1, 2011.

#### **Fiscal Impact Statement**

The proposed revision imposes no increase in cost on the General Fund.

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## DMMA PROPOSED REGULATION #11-47

### REVISION:

#### 14370 Coverage of Emergency Services and Labor and Delivery Only

These Emergency services must be rendered in an acute care hospital emergency room or in an acute care inpatient hospital. Labor and delivery only services must be rendered in an acute care hospital emergency room, an acute care inpatient hospital, or a birthing center. The DMAP defines an emergency as:

- a sudden serious medical situation that is life threatening; or
- a severe acute illness or accidental injury that demands immediate medical attention or surgical attention; and
- without the treatment a person's life could be threatened or he or she could suffer serious long lasting disability.

Medically necessary physician (surgeon, pathologist, anesthesiologist, emergency room physician, internist, etc.) or midwife services rendered during an emergency service that meets the above criteria are covered. Ancillary services (lab, x-ray, pharmacy, etc.) rendered during an emergency service that meets the above criteria are also covered. Emergency ambulance services to transport these individuals to and from the services defined above are also covered.

Services not covered for aliens who are determined to be eligible for emergency services and labor and delivery only include but are not limited to:

- any service delivered in a setting other than an acute care hospital emergency room or an acute care inpatient hospital. Exception: labor and delivery services may be rendered in a birthing center.
- any service (such as pharmacy, transportation, office visit, lab or x-ray, home health) that precedes or is subsequent to a covered emergency service. Exception: ambulance transportation that is directly related to the emergency is covered.
- organ transplants
- long term care or rehabilitation care
- routine prenatal and post partum care

**13 DE Reg. 1540 (06/01/10)**

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### DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

#### PUBLIC NOTICE

#### Qualified Long-Term Care Insurance Partnership Program

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Delaware Title XIX Medicaid State Plan and the Division of Social Services Manual regarding implementation of a *Qualified Long-Term Care Insurance Partnership Program*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by November 30, 2011.

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

**SUMMARY OF PROPOSAL**

The proposed amends the Delaware Title XIX Medicaid State Plan and the Division of Social Services Manual regarding implementation of a *Qualified State Long-Term Care Insurance Partnership Program*.

**Statutory Authority**

Deficit Reduction Act of 2005 (Public Law 109-171), enacted on February 8, 2006

**Background**

Section 6021 amends section 1917(b) of the Social Security Act (the Act) to provide for Qualified State Long-Term Care (LTC) Insurance Partnership programs, and permits an exception to estate recovery provisions with respect to individuals who receive benefits under LTC insurance policies sold in States that implement a Partnership program.

Section 6021(a)(1)(A)(iii) defines the term "Qualified State LTC Partnership" to mean an approved State plan amendment (SPA) that provides for the disregard of resources, when determining estate recovery obligations, in an amount equal to the LTC insurance benefits paid to, or on behalf of, an individual who has received medical assistance. A policy that meets all of the requirements specified in a Qualified State LTC Partnership SPA is referred to as a "Partnership policy."

**Summary of Proposal**

The proposed amendment provides incentive to individuals who purchase a Qualified Long-Term Care Partnership Policy by allowing the policyholder a disregard of assets or resources in an amount equal to the insurance benefit payments paid for the beneficiary once the policy holder has exhausted their long-term care benefits. The dollar amount paid by the policy for their care is also exempt from the recovery of medical assistance received by the participant (Estate Recovery). Individuals will not be eligible for Medicaid to meet their long-term care needs until the policyholder has exhausted the long-term care benefits provided by their Qualified LTC Partnership Policy.

Delaware's Department of Insurance would approve long-term care insurance policies and ensure that insurance agents are trained and certified. Insurers authorized to offer long-term care insurance will be obligated to disclose the existence of the *Qualified Long-Term Care Insurance Partnership Program*.

This amendment provides for the disregard of resources in an amount equal to the insurance benefit payments made to or on behalf of an individual who is a beneficiary under a long-term care insurance policy, in accordance with the provisions of Section 6021 of the Deficit Reduction Act of 2005. The disregard will be in the form of one dollar of assets retainable for every dollar in benefits paid under a long-term care insurance policy if the policyholder received Medicaid benefits while or after accessing the long-term care insurance benefits.

The provisions of these amendments are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

**Fiscal Impact Statement**

The intent of a *Qualified Long-Term Care Insurance Partnership Program (QLTCIP)* is to reduce the burden of long-term expenses on Medicaid by providing incentives to purchase long-term care insurance. The fiscal impact of implementation is an indeterminable decrease in expenditures. There may be costs associated with the establishment of the QLTCIP program, such as: developing training programs; preparation of annual reports; and, potential reduction in Medicaid estate recovery proceeds. However, these costs are expected to more than offset by the fact that long-term care insurance policies will initially be paying for services rather than Medicaid. Exact dollar amounts are indeterminable because the number of people who will participate in the Program is unknown.

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**DMMA PROPOSED REGULATION #11-46a****REVISION:**

Page 53b

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

State/Territory: DELAWARE

- 1917(b)(1)(C) (4)  If an individual covered under a long-term care insurance policy received benefits for which assets or resources were disregarded as provided for in Attachment 2.6-A, Supplement 8c (State Long-Term Care Insurance Partnership) the State does not seek adjustment or recovery from the individual's estate for the amount of assets or resources disregarded.

*(Break in Continuity of Sections)*

**REVISION:**

Supplement 8b to  
ATTACHMENT 2.6-A  
Page 1

## STATE PLAN UNDER TITLE OF THE SOCIAL SECURITY ACT

State: DELAWARE

MORE LIBERAL METHODS OF TREATING RESOURCES  
UNDER SECTION 1902 (r) (2) OF THE ACT

/ / Section 1902(f) State

/ X / Non-Section 1902 (f) State

D. Qualified State Long-Term Care Insurance Partnership

1. A resource disregard is given to an individual who has purchased a qualified long-term care insurance policy and has used such policy to pay for certain medical costs as approved or covered under Delaware Medicaid as follows:
  - a. Long-term nursing care in nursing facilities. 42 CFR 440.40
  - b. Home and community-based services (HCBS) as defined in the Delaware HCBS Waiver for the elderly and disabled (Elderly & Disabled Waiver DE.0136).
2. The amount of the disregard is equal to the dollar amount of insurance benefits that have been paid by the long-term care insurance company in accordance with the provisions of Section 6021 of the Deficit Reduction Act of 2005.
3. Such disregard is in effect for the lifetime of the individual who has purchased the long-term care insurance policy and used the policy to pay for long-term care services.
4. Persons eligible for a resource disregard are categorically needy individuals in nursing facilities and home and community-based waiver programs under the special income level (250%) defined at 1902(a)(10)(A)(ii)(V).
5. Effective November 1, 2011, Delaware shall accept all of the reciprocity standards as promulgated

# PROPOSED REGULATIONS

pursuant to Section 6201(b) of Public Law 109-171 with respect to all other states agreeing to participate under such reciprocity standards.

6. Resources disregarded under this provision are not subject to recovery of medical payments made on behalf of the individual.

NEW:

Supplement 8c to  
ATTACHMENT 2.6-A  
Page 1

## STATE PLAN UNDER TITLE OF THE SOCIAL SECURITY ACT

State: DELAWARE

### STATE LONG-TERM CARE INSURANCE PARTNERSHIP

1902(r)(2)  
1917(b)(1)(C)

The following more liberal methodology applies to individuals who are eligible for medical assistance under one of the following eligibility groups: Individuals who meet the requirements under the following sections of the Social Security Act:

Categorically needy individuals in nursing facilities and home and community-based waiver programs under the special income level (250%) defined at 1902 (a)(10)(A)(ii)(V).

An individual who is a beneficiary under a long-term care insurance policy that meets the requirements of a "qualified State long-term care insurance partnership" policy (partnership policy) as set forth below, is given a resource disregard as described in this amendment. The amount of the disregard is equal to the amount of the insurance benefit payments made to or on behalf of the individual. The term "long-term care insurance policy" includes a certificate issued under a group insurance contract.

X The State Medicaid Agency (Agency) stipulates that the following requirements will be satisfied in order for a long-term care policy to qualify for a disregard. Where appropriate, the Agency relies on attestations by the State Insurance Commissioner (Commissioner) or other State official charged with regulation and oversight of insurance policies sold in the state, regarding information within the expertise of the State's Insurance Department.

- : The policy is a qualified long-term care insurance policy as defined in section 7702B(b) of the Internal Revenue Code of 1986.
- : The policy meets the requirements of the long-term care insurance model regulation and long-term care insurance model Act promulgated by the National Association of Insurance Commissioners (as adopted as of October 2000) as those requirements are set forth in section 1917(b)(5)(A) of the Social Security Act.
- : The policy was issued no earlier than the effective date of this State plan amendment.
- : The insured individual was a resident of a Partnership State when coverage first became effective under the policy. If the policy is later



exchanged for a different long-term care policy, the individual was a resident of a Partnership State when coverage under the earliest policy became effective.

- The policy meets the inflation protection requirements set forth in section 1917(b)(1)(C)(iii)(IV) of the Social Security Act.

**NEW:**

Supplement 8c to  
ATTACHMENT 2.6-A  
Page 2

## STATE PLAN UNDER TITLE OF THE SOCIAL SECURITY ACT

State: DELAWARE

STATE LONG-TERM CARE INSURANCE PARTNERSHIP CONTINUED

- The Commissioner requires the issuer of the policy to make regular reports to the Secretary that include notification regarding when benefits provided under the policy have been paid and the amount of such benefits paid, notification regarding when the policy otherwise terminates, and such other information as the Secretary determines may be appropriate to the administration of such partnerships.
- The State does not impose any requirement affecting the terms or benefits of a partnership policy that the state does not also impose on non-partnership policies.
- The State Insurance Department assures that any individual who sells a partnership policy receives training, and demonstrates evidence of an understanding of such policies and how they relate to other public and private coverage of long-term care.
- The Agency provides information and technical assistance to the Insurance Department regarding the training described above.

**DMMA PROPOSED REGULATION #11-46b****REVISION:****(Policy Number Pending)****Qualified State Long-Term Care Insurance Partnership Program**

This policy applies to Long-Term Care Insurance Partnership policies purchased on or after November 1, 2011.

**1. Defining a Qualified State Long-Term Care Insurance Partnership.**

The Delaware Qualified State Long-Term Care (LTC) Insurance Partnership is a partnership between States that implement a Partnership program, private insurance companies that offer long term care insurance policies and State insurance departments. The term "Qualified State Long-Term Care Insurance Partnership" means an approved State plan amendment (SPA) that provides for the disregard of any assets or resources from Medicaid estate recovery in an amount equal to the insurance benefits paid by certain LTC insurance policies, where those benefits were disregarded in determining an individual's Medicaid eligibility. The term "long-term care insurance policy" includes a certificate issued under a group insurance contract.

Purchasing or owning a Qualified State Long-Term Care Insurance Partnership policy does not guarantee Medicaid eligibility. All other financial, non-financial and medical eligibility requirements must be met.

Policies must meet specific conditions and the State Insurance Commissioner must certify that a policy meets those conditions, in order for the State to apply the disregard from estate recovery.

## PROPOSED REGULATIONS

The long-term care partnership policy is designed to do all of the following:

- a. Provide incentives for individuals to insure against the costs of providing for their long-term care needs.
- b. Provide a mechanism for individuals to qualify for coverage of the cost of their long-term care needs under Medicaid without first being required to substantially exhaust their resources.
- c. Reduce Medicaid expenditures by delaying or eliminating the need for Long-Term Care Medicaid.

2. Long-term care insurance policies purchased prior to November 1, 2011 are not Partnership policies.

3. Long-term care insurance policies purchased on or after November 1, 2011 may or may not be Partnership policies.

A long-term care partnership program policy means a policy that must meet all of the following requirements:

- a. The policy must have been issued on or after November 1, 2011.
- b. The covered individual must be a resident of a Qualified Partnership State when coverage first becomes effective. If a policy is exchanged for another policy, the residency rule applies to the issuance date of the original policy.
- c. The policy must meet the definition of a "qualified long-term care insurance policy" as stated in section 7702B(b) of the Internal Revenue Code of 1986.
- d. The policy must meet specific requirement of the National Association of Insurance Commissioners (NAIC) Long Term Care Insurance Model Regulations Act and Model Act.
- e. The policy must include inflation protection.
  - i. For purchasers under 61 years of age, compound annual inflation protection.
  - ii. For purchasers 61 to 76 years of age, some level of inflation protection; or
  - iii. For purchasers 76 years of age or older, inflation protection may be offered, but is not required.

4. A Partnership policy allows for assets to be disregarded from eligibility.

The amount of the disregard is equal to the dollar amount of insurance benefits that have been paid to or on behalf of the individual.

This amount is limited to the amount paid as of the month of application, even if additional benefits are available under the terms of the policy.

5. Assets are also protected from the Medicaid Estate Recovery Program.

The amount of the assets disregarded in the eligibility process is not recoverable under the Medicaid estate recovery program.

6. Disregarded assets are counted in the Spousal Resource Assessment.

The disregarded assets are included in determining the amount of the community spouse resource allowance in a Spousal Impoverishment case.

However, the disregarded asset is not counted in determining the individual's eligibility.

7. Reciprocity with other states.

DMMA will accept partnership policies issued in other States with qualified long-term care insurance partnership programs.

8. Exhaustion of Benefits.

An individual who owns a Qualified State Long-Term Care Insurance Partnership policy can apply for Medicaid before exhausting policy benefits.

The partnership policy is treated as a third party liability and Medicaid will pay for services not covered. Medicaid will be payor of last resort.

9. Verification of the Partnership policy.

A Qualified State Long-Term Care Insurance Partnership policy must meet all relevant requirements of federal and state law. Qualified partnership policies are certified by the Delaware Department of Insurance (DOI).

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**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL****DIVISION OF FISH AND WILDLIFE**

Statutory Authority: 7 Delaware Code, Section 901(b) and 903(e)(2)a (7 Del.C. §901(b) §903(e)(2)a)

**7 DE Admin. Code 3553**

**REGISTER NOTICE #2011-15**

**3553 River Herring Creel Limit****1. TITLE OF THE REGULATIONS:**

3553 River Herring Creel Limit

**2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:**

Amendment 2 to the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan for Shad and River Herring prohibits commercial and recreational river herring fisheries in state waters beginning January 1, 2012 unless a state or jurisdiction can demonstrate that their alewife and/or blueback herring stock(s) can support a commercial and/or recreational fishery that will not diminish potential future stock reproduction and recruitment. The lack of reliable, system-specific data prevents Delaware/New Jersey (Delaware River & Bay) and Delaware/Maryland (Nanticoke River) from providing reliable targets that would satisfy this mandate. Therefore, Delaware must close its recreational and commercial river herring fisheries.

Prior to the adoption of Amendment 2, Delaware adopted a 25 fish per day recreational possession limit in 2005 to discourage the development of a live-bait river herring fishery to support a growing recreational striped bass fishery. In 2008, this regulation was amended from a 25 fish per day possession limit to a 10 fish per person daily creel (harvest) limit. These actions were consistent with the management objectives of Amendment 1 to reduce fishing mortality on river herring.

River herring was listed as a "species of concern" in 2006 by the National Marine Fisheries Service. In addition, the commercial catch of river herring has been declining coastwide to very low levels. Only 300lbs of river herring were reported from Delaware commercial fishermen in 2011 which is the lowest amount reported since mandatory reporting began in 1985. The majority of commercial river herring landings in Delaware have originated from the Nanticoke River and its tributaries. The Maryland portion of the Nanticoke River will be closed to recreational and commercial fishing as part of a statewide river herring closure planned for the State of Maryland. New Jersey plans to close its river herring fishery in the Delaware River and Bay as well.

**3. POSSIBLE TERMS OF THE AGENCY ACTION:**

N/A

**4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:**

§901(b), §903(e)(2)a, Title 7 Delaware Code

**5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:**

N/A

**6. NOTICE OF PUBLIC COMMENT:**

The hearing record on the proposed changes to the river herring regulation will be open November 1, 2011. Individuals may submit written comments regarding the proposed changes via e-mail to Lisa.Vest@state.de.us or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. A public

hearing on the proposed amendment will be held on November 28, 2011 beginning at 7 pm in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901.

**7. PREPARED BY:**

Stewart Michels, Stewart.Michels@state.de.us, (302) 739-9914

Michael Stangl, Michael.Stangl@state.de.us, (302) 739-4782

David E. Saveikis, Director

**3553 River Herring Creel Limit**

(Penalty Section 7 **Del.C.** 936(b)(2))

Unless otherwise authorized, it shall be unlawful for any person to have in possession ~~except a person with a valid Delaware commercial food fishing license, more than ten (10)~~ any blueback herring and/or alewife (*Alosa aestivalis* and/or *Alosa pseudoharengus*), collectively known as river herring, unless said person has a valid bill-of-sale or receipt for said river herring that indicates the date said river herring were received, the number of said river herring received and the name, address and signature of the ~~commercial food fisherman~~ harvester who legally caught said river herring; or, a bill-of-sale or receipt from a person who is a licensed retailer and legally obtained said river herring for resale.

**8 DE Reg. 1315 (03/01/05)**

**11 DE Reg. 1259 (03/01/08)**

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**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 Board of Dentistry and Dental Hygiene ("the Board") in accordance with 24 **Del.C.** §1106 (a)(1) has proposed amendments to its regulations governing Continuing Professional Education. The proposed amendments add a requirement that two (2) of the fifty (50) credit hours of continuing education required for dentists and two (2) of the twenty-four (24) credit hours required for hygienists must be in courses covering infection control. The regulations are also being modified to require that licensees renew their license online and to enable licensees to attest to the completion of continuing education at the time of renewal. Finally, the regulations delineate the audit and hearing process for non-compliance with the continuing education requirements.

A public hearing will be held on December 15, 2011 at 3:15 p.m. in the PSC Hearing Room located on the first floor 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 Board of Dentistry and Dental Hygiene, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

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## 1100 Board of Dentistry and Dental Hygiene

### 1.0 Supervision: Definitions - There are 3 recognized levels of supervision:

- 1.1 **Direct Supervision** - The dentist is present in the office, personally examines the patient and specifically authorized the work to be performed. The dentist checks the work before the patient leaves the office.
- 1.2 **Indirect Supervision** - A dentist is present in the office and generally authorizes the work to be performed. The dentist may examine the patient, either before or after work is performed. The dentist is available for consultation during the patient visit.
- 1.3 **General Supervision** - A dentist may or may not be present in the office while the work is performed. The dentist authorizes the work to be performed. Emergency care and consultant services are provided by an "on-call" dentist not present in the treatment facility, if the primary dentist is not present.
- 1.4 **Dental Technician** - Any person not licensed to practice dentistry in this State, engaged in the business of constructing, altering, repairing or duplicating full dentures ("plates"), partial dentures, splints, orthodontic appliances, fixed bridges or any other prosthetic appliances.

### 2.0 Auxiliary Personnel

- 2.1 Expanded Duties: A legally licensed and registered dentist may delegate to competent dental auxiliary personnel, those procedures for which the dentist exercises direct supervision and full responsibility except as follows:
  - 2.1.1 Those procedures which require professional judgement and skill, such as diagnosis and treatment planning, and the cutting of hard and/or soft tissues, or any intra-oral procedure which would lead to the fabrication of an appliance and/or restoration which, when received by the patient, would come in direct contact with hard or soft tissue and which could result in tissue irritation or injury.
  - 2.1.2 Those procedures allocated by the Dental Code to registered dental hygienists.
- 2.2 Interpretation of Regulation - Competency of the dental auxiliary personnel must be determined by the individual dentist in assigning specific duties. The dentist is given full responsibility in deciding the scope of work to be allocated to the auxiliary personnel.
- 2.3 Training of Auxiliary Personnel - Adequate training of dental auxiliary personnel will be the responsibility of the dentist.
- 2.4 Assignment of Duties - Following are some of the procedures that may be assigned to auxiliary personnel under the conditions and provisions stated above:
  - Take and develop x-rays. This involves placing an x-ray film in the patient's mouth and exposing that film.
  - Give and demonstrate home-care procedures to the patient, including those procedures the patient is expected to carry out in preventive care.
  - Placing a rubber dam.
  - Placing cotton rolls.
  - Taking impressions for study models.
  - Removal of excess cements from dental restorations and appliances with hand instruments only.
  - Removal of temporary medicinal fillings or packs under direct orders of the dentist.
- 2.5 Responsibilities - In summary, the Dental Board places full responsibility for the work done by auxiliary personnel directly upon the dentist. Violations of the regulations will be subject to penalties as spelled out in 24 Del.C. §1131(5).

### 3.0 Prescriptions to Dental Technicians

- 3.1 Written Prescriptions - Any dentist who uses the services of a dental technician in this State shall furnish him/her with a written prescription, which shall contain:

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# PROPOSED REGULATIONS

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- 3.1.1 the name and address of the technician,
  - 3.1.2 the patient's name and/or identification number,
  - 3.1.3 the date on which the prescription was written,
  - 3.1.4 a prescription of the work to be done,
  - 3.1.5 specification of the type and quality of materials to be used and
  - 3.1.6 signature of the dentist and his/her license number.
- 3.2 Record of Prescriptions - The dentist shall retain a duplicate copy thereof for inspection by the Board or its agent for a period of two years of the original.
- 3.3 The Dental Technician as an Auxiliary - Dentists employing a dental technician as an auxiliary within the confines of his/her office, may elect to maintain the required date of the prescription as an entry on the patient's record, in lieu of duplicating the prescription form to the technician.

## 4.0 Acupuncture

- is considered to be an experimental procedure to be researched by qualified investigators, only in institutions having a committee on human research, and only on patients who have given written informed consent.

## 5.0 Supervision

- 5.1 Conditions Applicable to General Supervision - A licensed dental hygienist, by virtue of having passed a licensure examination and being duly licensed by the State, is capable of performing those services allowed by law under supervision, the following conditions shall exist:
- 5.2 Advance Notice to Patient - The patient is notified, as soon as it is known, that the dentist will not be present, and is given the option to reschedule to a time when the dentist will be present in the office.
- 5.3 Dentist Review of Records - The dentist shall review the treatment records of each patient prior to and following the patient treatment.
- 5.4 Patient Contraindications - Patients for whom it is medically or dentally contraindicated, will not be scheduled when the dentist is not present.
- 5.5 Office Requirements - A second office employee shall be present in the treatment facility at all times when patient care is performed. This is both for safety and security reasons.
- 5.6 Practice in a Public Health Institution - A licensed dental hygienist, per 24 **Del.C.** §1157(c), may operate under the general direction of a dentist in an institution, provided that all of the conditions of general supervision are met.

## 6.0 Continuing Professional Education (CPE) - Dentists [24 Del. C. §1106(a)(1) and (7)]

All persons licensed to practice dentistry in the State of Delaware shall be required to acquire fifty (50) hours of continuing professional education (CPE) credit and to every two (2) years. Two (2) of the 50 credit hours shall be obtained in courses covering infection control. In addition to the CPE, licensees must provide evidence that they have successfully completed a current course in cardiopulmonary resuscitation (CPR) every two (2) years. The CPR course must encompass hands on clinical participation. On-line courses will not be accepted to satisfy the CPR requirement. Examples of acceptable courses include, but are not limited to, courses offered by the American Red Cross and the American Heart Association. All dentists, upon initial licensure in Delaware and prior to registration renewal, shall be given a written notice of these CPE requirements.

- 6.1 Proof of successful completion of the requisite CPE credits is required for registration renewal every two years. Proof of continuing education is satisfied with an attestation by the licensee that he or she has satisfied the Requirements of Rule 6.0.
- 6.2 Said CPE requirements shall become effective May 1, 1988. Proof of CPE credits must be submitted by March 1 of every two (2) even years. Attestation must be completed electronically at the time of renewal.

- 6.3 ~~It shall be the responsibility of the candidate for re licensure to submit to the Board of Dental Examiners, evidence of his/her compliance with these requirements. The Division of Professional Regulation shall notify the candidate at least 30 days in advance of the need to renew his/her license, and shall request that the candidate submit evidence of compliance with the CPE requirements stated herein, along with other fees and documents required. However, failure to be notified by such agency shall not relieve the licensee of this obligation. Licensees selected for random audit will be required to supplement the attestation with attendance verification pursuant to Rule 6.8.~~
- 6.4 Not more than ten (10) hours of the fifty (50) hour biennial CPE requirement may be satisfied by self-study without testing from sources approved by the Board which shall include but not be limited to:
- 6.4.1 Reading dental textbooks
  - 6.4.2 Reading dental tape journals
  - 6.4.3 Viewing and listening to dental audio-visual materials.
- 6.5 CPE credits may be granted upon proof of successful completion of:
- 6.5.1 Scientific CPE programs or courses and/or the scientific sessions of meetings sponsored or approved by:
- 6.5.1.1 American Dental Association, its constituents and components
  - 6.5.1.2 American Dental Hygienists' Association, its constituents and components
  - 6.5.1.3 American Dental Assisting Association, its constituents and components
  - 6.5.1.4 Recognized national, regional, state and local dental and dental hygiene specialty organizations
  - 6.5.1.5 Recognized dental and dental hygiene study clubs
  - 6.5.1.6 Accredited dental and dental hygiene CPE programs offered by dental and dental hygiene schools.
  - 6.5.1.7 Approved hospital programs.
  - 6.5.1.8 Such other organizations and associations as may be approved by the Board.
- 6.5.2 In addition to the maximum of ten (10) hours of the CPE requirement which may be satisfied by self-study without testing and certification, a maximum of twenty (20) hours of the total CPE requirements may be fulfilled by self-study with test and certificate of completion from bona fide dental educational sources including but not limited to:
- 6.5.2.1 Dental journals
  - 6.5.2.2 Dental textbooks
  - 6.5.2.3 Dental video and audio tape presentations
  - 6.5.2.4 Dental mail-in courses
  - 6.5.2.5 Dental courses presented on the Internet
  - 6.5.2.6 Dental lectures and courses presented via electronic media including computer disks where CPE credits are not specified, one (1) hour of credit will be given for each hour of scientific session attended.
- 6.6 Special Provisions
- 6.6.1 A dentist, employed as a faculty member in a recognized school of dentistry, dental hygiene, dental assisting or any dentally-related field will be allowed not more than ten (10) hours credit for teaching per year.
  - 6.6.2 A dentist presenting a CPE course shall be allowed the hours involved in preparation and presentation on a one-time-per-course basis for a maximum of ten (10) hours for the two-year period.
  - 6.6.3 Table Clinics will be allowed, one (1) hour of credit per hour of presentation for a maximum of two (2) hours.
  - 6.6.4 Twelve (12) hours of credit shall be allowed for a scientific article published in a component or state society journal. 25 hours of credit shall be allowed for a scientific article published in a national journal or for a published scientific textbook or a chapter therein.

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## PROPOSED REGULATIONS

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- 6.6.5 Any public health dentally-related presentation will be allowed one (1) hour of credit per hour of participation for a maximum of two (2) hours for the two year period.
- 6.6.6 Practice management or personal self-improvement courses shall be limited to a total of ten (10) hours for the two (2) year period.
- 6.6.7 The Board reserves the right to approve any and all activities deemed appropriate for CPE credit. The Board also reserves the right and is the final word to disapprove any activities submitted for credit which it deems inappropriate.
- 6.6.8 All dentists licensed to practice in Delaware shall be given written notice of these CPE requirements when receiving their initial license.
- 6.6.9 For existing holders of an Unrestricted Permit for anesthesia, at least twelve (12) hours of the required CPE credits must be taken on an Anesthesia topic by the end of the six (6) year re-evaluation period (i.e. by the end of the third biennial licensure renewal period).
- 6.6.10 For existing holders of a Restricted I Permit, at least six (6) hours of the required CPE credits must be taken on an Anesthesia topic by the end of the six (6) year re-evaluation period (i.e. by the end of the third biennial license renewal period).
- 6.7 Exceptions
- 6.7.1 An exception will be granted to any dentist who can demonstrate to the Board an acceptable cause as to why he/she should be relieved of this obligation. Exemptions will be granted only in unusual or extraordinary circumstances. Licensees must petition the Board for exemptions. Should the Board deny the request, the licensee must complete the requirements. Examples of circumstances for which the Board might grant exemptions include prolonged illness, extended absence from the country, or the like.
- 6.7.2 An individual initially licensed by the Board within the last 2 years shall meet the following schedule of reporting CPE credits for license renewal:
- 6.7.2.1 If, as of March 1st of the year for license renewal, the licensee has been licensed for less than 1 year, zero hours of CPE is required for license renewal; for licensees who are 1 or more but less than 2 years from their initial licensure, one-half of the required CPE must be presented; for individuals 2 years or more from their initial licensure, the full CPE requirement must be presented for renewal.
- 6.8 Failure to Comply
- ~~When the Board deems someone to be deficient in CPE requirements, the following procedure shall be followed:~~
- 6.8.1 ~~The licensee for renewal shall be notified by the Division of Professional Regulation ("Division") by certified mail that a deficiency exists. The deficiency shall be specifically described by the Division.~~
- 6.8.2 ~~The licensee's registration will not be renewed until he/she submits proof that the described deficiency has been corrected. Upon submission of satisfactory proof of correction of said deficiency, the licensee shall be eligible for registration renewal.~~
- 6.8 Audit of Continuing Education Contact Hours
- 6.8.1 Audit. Each biennium, the Division of Professional Regulation shall randomly select from the list of renewed licensees a percentage of licensees, determined by the Board, to be audited. The Board may also audit based on complaints or charges against an individual license, relative to compliance with continuing education requirements or based on a finding of past non-compliance during prior audits.
- 6.8.2 Documentation. When a licensee is selected for audit, the licensee shall be required to submit documentation showing detailed accounting of the various CPE's claimed by the licensee. Licensees selected for random audit are required to supplement the attestation with supporting materials which may include a syllabus, agenda, itinerary or brochure published by the sponsor of the activity and a document showing proof of attendance (i.e., certificate, a signed letter from the sponsor attesting to attendance, report of passing test score). The Board shall attempt to verify the CPEs shown on the documentation provided by the licensee. Upon completion of the review, the Board will decide whether the licensee's CPEs meet the requirements of these regulations.



- 6.8.2.1 Any continuing education not meeting all provisions of these regulations shall be rejected in part or in whole by the Board
- 6.8.2.2 Any incomplete or inaccurate documentation of continuing education may be rejected in part or in whole by the Board.
- 6.8.2.3 Any continuing education that is rejected must be replaced by acceptable continuing education within a reasonable period of time established by the Board. This continuing education will not be counted towards the next renewal period.
- 6.8.3 Board Review and Hearing Process. The Board shall review all documentation requested of any licensee shown on the audit list. If the Board determines the licensee has met the requirements, the licensee's license shall remain in effect. If the Board initially determines the licensee has not met the requirements, the licensee shall be notified and a hearing may be held pursuant to the Administrative Procedures Act. This hearing will be conducted to determine if there are any extenuating circumstances justifying the apparent noncompliance with these regulations. Unjustified noncompliance with these regulations shall be considered unprofessional conduct and grounds for discipline pursuant to 24 Del.C. §1128(6).
- 6.8.4 Sanctions for Unjustified Noncompliance. If the Board finds unjustified non-compliance, the Board will impose discipline in accordance with 29 Del.C. §1129 which may include, but is not limited to monetary penalties up to \$1,000, suspension and/or revocation of a practitioner's license.
- 6.9 Continuing Professional Education (CPE) - Dental Hygienists Hygienists [24 Del.C. §1106(a)(1) and (7)]
- All persons licensed to practice dental hygiene in the State of Delaware shall be required to acquire twenty-four (24) hours of CPE credit every two (2) years. Two (2) of the 24 credit hours shall be obtained in courses covering infection control. In addition to the CPE, licensees must provide evidence that they have and successfully completed a current course in cardiopulmonary resuscitation (CPR) every two (2) years. The CPR course must encompass hands on clinical participation. On-line courses will not be accepted to satisfy the CPR requirement. Examples of acceptable courses include, but are not limited to, courses offered by the American Red Cross and the American Heart Association. All Dental hygienists, upon initial licensure and prior to registration renewal, shall be given written notice of these CPE requirements.
- ~~6.9.1 Proof of successful completion of the requisite CPE credits is required for registration renewal every two (2) years. Proof of continuing education is satisfied with an attestation by the licensee that he or she has satisfied the Requirements of Rule 6.9.~~
- ~~6.9.2 Said CPE requirements shall become effective May 1, 1988. Proof of CPE credits must be submitted by March 1st of every two (2) even years. Attestation must be completed electronically at the time of renewal.~~
- ~~6.9.3 It shall be the responsibility of the candidate for re licensure to submit to the Board of Dental Examiners, evidence of his/her compliance with these requirements. The Division of Professional Regulation shall notify the candidate at least 30 days in advance of the need to renew his/her license, and shall request that the candidate submit evidence of compliance with the CPE requirements state herein, along with other fees and documents required. However, failure to be notified by such agency shall not relieve the licensee of this obligation. Licensees selected for random audit will be required to supplement the attestation with attendance verification pursuant to Rule 6.12.~~
- 6.9.4 CPE credits may be granted upon proof of successful completion of programs including, but not limited to, the following categories:
- 6.9.4.1 Scientific CPE programs or courses and/or scientific sessions of meetings sponsored or approved by:
- 6.9.4.1.1 American Dental Hygienists Association, its constituents and components
- 6.9.4.1.2 American Dental Association, its constituents and components
- 6.9.4.1.3 American Dental Assisting Association, its constituents, and components

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**PROPOSED REGULATIONS**

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- 6.9.4.1.4 Recognized national, regional, state, and local dental and dental hygiene specialty societies
- 6.9.4.1.5 Recognized dental and dental hygiene study clubs
- 6.9.4.1.6 Accredited dental and dental hygiene schools
- 6.9.4.1.7 Approved hospital programs
- 6.9.4.1.8 Such other organizations and associations as may be approved by the Board
- 6.9.4.2 A maximum of five (5) hours of the total twenty-four (24) hour requirement may be satisfied by self-study without testing from sources approved by the Board which shall include but not be limited to:
  - 6.9.4.2.1 Reading of dental or dental hygiene journals
  - 6.9.4.2.2 Reading dental or dental hygiene textbooks
  - 6.9.4.2.3 Viewing and listening to dental or dental hygiene audio-visual materials
- 6.9.4.3 In addition to the maximum of five (5) hours which may be satisfied by self-study without testing, a maximum of ten (10) hours of the total twenty-four (24) hour requirement may be fulfilled by self-study with test and certificate of completion from bona fide dental hygiene educational sources including but not limited to:
  - 6.9.4.3.1 Dental or dental hygiene journals
  - 6.9.4.3.2 Dental or dental hygiene textbooks
  - 6.9.4.3.3 Dental or dental hygiene video and audio tape presentations
  - 6.9.4.3.4 Dental or dental hygiene mail-in courses
  - 6.9.4.3.5 Dental or dental hygiene courses presented on the Internet
  - 6.9.4.3.6 Dental or dental hygiene lectures and courses presented via electronic media including computer disks

Where CPE credits are not specified, one (1) hour of CPE credit will be given for each hour of scientific session attended.

The final approval of acceptable dental hygiene CPE credits shall be made by the Board of Dental Examiners in consultation with the Dental Hygiene Advisory Committee.
- 6.10 Special Provisions
  - 6.10.1 A dental hygienist, employed as a faculty member in a recognized school of dentistry, dental hygiene or dental assisting, will be allowed not more than five (5) hours credit for teaching per year.
  - 6.10.2 A dental hygienist presenting a CPE course shall be allowed the hours involved in preparation and presentation on a one-time-per-course basis for a maximum of five (5) credits for the two-year period.
  - 6.10.3 Table clinics will be allowed one (1) hour of credit per hour of presentation for a maximum of two (2) hours.
  - 6.10.4 Twelve (12) hours of credit shall be granted for a scientific article published in a component or state society journal. Twelve (12) hours of credit shall be allowed for a scientific article published in a national journal or for a published scientific textbook or a chapter therein.
  - 6.10.5 A dental hygienist giving public education instruction in a school will receive credit up to one (1) hour per year.
  - 6.10.6 Practice management or personal self-improvement courses shall be limited to five (5) hours for the two (2) year period.
    - 6.10.6.1 Practice management, personal self-improvement and computer courses shall be limited to 2.5 hours a year for a total of five(5) hours for the two year period.
  - 6.10.7 The Board reserves the right to approve any and all activities deemed appropriate for CPE credit. The Board also reserves the right and is the final word to disapprove any activities submitted for credit which it deems inappropriate.

6.10.8 All dental hygienists licensed to practice in Delaware shall be given written notice of these CPE requirements when receiving their initial license.

## 6.11 Exceptions

6.11.1 An exception will be granted to any dental hygienist who can demonstrate to the Board an acceptable cause as to why he/she should be relieved of this obligation. Exemptions will be granted only in unusual or extraordinary circumstances. Licensees must petition the Board for exemptions. Should the Board deny the request, the licensee must complete the requirements. Examples of circumstances for which the Board might grant exemptions include prolonged illness, extended absence from the country, or the like.

6.11.2 An individual initially licensed by the Board within the last 2 years shall meet the following schedule of reporting CPE credits for license renewal:

6.11.2.1 If, as of March 1st of the year for license renewal, the licensee has been licensed for less than 1 year, zero hours of CPE is required for license renewal; for licensees who are 1 or more but less than 2 years from their initial licensure, one-half of the required CPE must be presented; for individuals 2 years or more from their initial licensure, the full CPE requirement must be presented for renewal.

## 6.12 Failure to Comply

~~When the Board deems someone to be deficient in CPE requirements, the following procedure shall be followed:~~

~~6.12.1 The licensee for registration renewal shall be notified by the Division by certified mail that a deficiency exists. The deficiency shall be specifically described by the Division.~~

~~6.12.2 The licensee's registration will not be renewed until he/she submits proof that the described deficiency has been corrected. Upon submission of satisfactory proof of correcting said deficiency, a licensee shall be eligible for registration renewal.~~

## 6.12 Audit of Continuing Education Contact Hours

6.12.1 Audit. Each biennium, the Division of Professional Regulation shall randomly select from the list of renewed licensees a percentage of licensees, determined by the Board, to be audited. The Board may also audit based on complaints or charges against an individual license, relative to compliance with continuing education requirements or based on a finding of past non-compliance during prior audits.

6.12.2 Documentation. When a licensee is selected for audit, the licensee shall be required to submit documentation showing detailed accounting of the various CPE's claimed by the licensee. Licensees selected for random audit are required to supplement the attestation with supporting materials which may include a syllabus, agenda, itinerary or brochure published by the sponsor of the activity and a document showing proof of attendance (i.e., certificate, a signed letter from the sponsor attesting to attendance, report of passing test score). The Board shall attempt to verify the CPEs shown on the documentation provided by the licensee. Upon completion of the review, the Board will decide whether the licensee's CPEs meet the requirements of these regulations.

6.12.2.1 Any continuing education not meeting all provisions of these regulations shall be rejected in part or in whole by the Board

6.12.2.2 Any incomplete or inaccurate documentation of continuing education may be rejected in part or in whole by the Board.

6.12.2.3 Any continuing education that is rejected must be replaced by acceptable continuing education within a reasonable period of time established by the Board. This continuing education will not be counted towards the next renewal period.

6.12.3 Board Review and Hearing Process. The Board shall review all documentation requested of any licensee shown on the audit list. If the Board determines the licensee has met the requirements, the licensee's license shall remain in effect. If the Board initially determines the licensee has not met the requirements, the licensee shall be notified and a hearing may be held pursuant to the Administrative Procedures Act. This hearing will be conducted to determine if there are any extenuating circumstances justifying the apparent noncompliance with these regulations.

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## PROPOSED REGULATIONS

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Unjustified noncompliance with these regulations shall be considered unprofessional conduct and grounds for discipline pursuant to 24 Del. C. § 1128(6).

6.12.4 Sanctions for Unjustified Noncompliance. If the Board finds unjustified non-compliance, the Board will impose discipline in accordance with 29 Del. C. § 1129 which may include, but is not limited to monetary penalties up to \$1,000, suspension and/or revocation of a practitioner's license.

5 DE Reg. 1251 (12/01/01)

9 DE Reg. 1583 (04/01/06)

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

**1100 Board of Dentistry and Dental Hygiene**

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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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**DELAWARE SOLID WASTE AUTHORITY**

Statutory Authority: 7 Delaware Code, Section 6403 (7 Del.C. §6403)  
1 DE Admin. Code 501

**ORDER****501 Regulations of the Delaware Solid Waste Authority**

1. This is the Final Order and Decision of the Directors of the Delaware Solid Waste Authority (the "Authority") on proposed amendments to the Regulations (the "Regulations") of the DSWA.

2. On July 1, 2011, the Delaware Solid Waste Authority caused to be published, in the Delaware *Register of Regulations*, notice of proposed amendments to the Regulations. The proposed amendments to the Regulations were also the subject of publication in the Delaware *News Journal* and the Delaware *State News* on July 4, 2011.

3. In accordance with 7 Del.C. §6403(i) and 29 Del.C. §10117, on Monday July 25, 2011 a hearing was held before Michael W. Teichman, Esquire, the Authority's designated hearing officer. At the hearing, documents and sworn testimony were received into evidence. No public comment was offered.

4. The Authority issues this Final Order and Decision after a review of the documents and evidence admitted into the record at the hearing, as well as a careful review of the hearing officer's Proposed Order and Recommendations dated August 22, 2011.

**Summary of Evidence, Findings of Fact and Conclusions of Law**

5. The summary of evidence set forth in the hearing officer's Proposed Order and Recommendations accurately summarizes the documentary evidence and verbal testimony received into the record.

6. The findings of fact and conclusions of law in the Proposed Order and Recommendations appear well reasoned and amply supported by the summary of the evidence contained therein.

7. Accordingly, the summary of the evidence, findings of fact and conclusions of law set forth in the Proposed Order and Recommendations are incorporated by reference and adopted herein in their entirety as if fully set forth herein.

**Decision**

8. For the reasons set forth above, the Regulations of the Delaware Solid Waste Authority are amended in the form set forth in Exhibit A hereto.

SO ORDERED, this 22<sup>nd</sup> Day of September, 2011.

Ronald G. McCabe, Vice Chair  
William J. DiMondi  
Gerard L. Esposito

Theodore W. Ryan  
Timothy P. Sheldon

**501 Regulations of the Delaware Solid Waste Authority**

\*Please note that no changes were made to the regulation as originally proposed and published in the July 2011 issue of the *Register* at page 6 (15 DE Reg. 6). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

**501 Regulations of the Delaware Solid Waste Authority**

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**DEPARTMENT OF AGRICULTURE**  
**HARNESS RACING COMMISSION**  
**Delaware Standardbred Breeders' Fund**

Statutory Authority: 29 Delaware Code, Section 4815(b)(3)b.2.D (29 **Del.C.** §4815(b)(3)b.2.D)  
**3 DE Admin. Code 502**

**ORDER****502 Delaware Standardbred Breeders' Fund Regulations****I. NATURE OF PROCEEDINGS**

Pursuant to its authority under 29 **Del.C.** §4815(b)(3)b.2.D and §10115, the State of Delaware, Department of Agriculture's Standardbred Breeder's Fund (herein "the Fund") proposed to amend its regulations. The Fund's purpose in proposing these amended regulations clarify the definition of "Breeder" and add a definition for "Owner." The proposed amendment of regulation 4.2 establishes a racing program for four year old horses with bonuses to breeders and owners, which is an effort by the Board to keep Delaware's harness racing industry competitive with those of neighboring states. The Board proposes to delete language from its regulation 6.0 that currently and improperly calls for the program Administrator to request and certify the social security and tax identification numbers of owners and their agents when registering for the program. The Board proposes to adopt a regulation expanding the recording duty of the Administrator pertaining to the program and bonuses for four year olds. The proposed amended regulations delete two words from the heading of regulation 10. The proposed amendment to regulation 13.1 makes clear its applicability to the two and three year old racing programs only. The proposed amendment to regulation 14 adds the nomination payment requirements for eligibility in the new program for four year olds.

Notice of a public comment period of thirty (30) days on the Fund's proposed amendments was published in the Delaware *Register of Regulations* for September 1, 2011 in accordance with 29 **Del.C.** §10115. This is the Fund's Decision and Order adopting the proposed amended regulations.

**II. PUBLIC COMMENTS**

The Fund received no public comments in response to its notice of intention to adopt the proposed amended regulations.

**III. FINDINGS AND CONCLUSIONS**

The public was given the required notice of the Fund's intention to adopt the proposed amended regulations and was given ample opportunity to provide the Fund with comments opposing the Fund's plan. Thus, the Fund concludes that its consideration of the proposed amended regulations was entirely within its prerogatives and statutory authority and, having received no comments opposed to adoption, is now free to adopt the proposed amended regulations.

**IV. ORDER**

**AND NOW this 7th day of October, 2011**, it is hereby ordered that:

1. The proposed amendments to the Fund's regulations are adopted;
2. The text of the regulations shall be in the form attached hereto as Exhibit A;
3. The effective date of this Order is ten days from the date of its publication in the *Delaware Register of Regulations* in accordance with 29 **Del.C.** §10118(e); and
4. The Fund reserves to itself the authority to issue such other and further orders in this matter as may be just and proper.

**IT IS SO ORDERED.**

**502 Delaware Standardbred Breeders' Fund Regulations**

\*Please note that no changes were made to the regulation as originally proposed and published in the September 2011 issue of the *Register* at page 255 (15 DE Reg. 255). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

**502 Delaware Standardbred Breeders' Fund Regulations**

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**DEPARTMENT OF EDUCATION****OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(d) (14 **Del.C.** §122(d))  
14 **DE Admin. Code** 245

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

**245 Michael C. Ferguson Achievement Awards Scholarship****I. Summary of the Evidence and Information Submitted**

The Secretary of Education intends to amend 14 **DE Admin. Code** 245 Michael C. Ferguson Achievement Awards Scholarship to take into consideration changes from the Delaware Student Testing Program (DSTP) to the current state assessment system, titled the Delaware Comprehensive Assessment System (DCAS). Additionally, amendments are being made to provide a provision for military obligations and clarification that the scholarship may also be used in US territories.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on **September 2, 2011**, in the form hereto attached as *Exhibit "A"*. The Department did not receive comments on the amendments.

**II. Findings of Facts**

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 245 Michael C. Ferguson Achievement Awards Scholarship in order to take into consideration changes from the Delaware Student Testing Program (DSTP) to the current state assessment system, titled the Delaware Comprehensive Assessment System (DCAS). Additionally, amendments are being made to provide a provision for military obligations and clarification

that the scholarship may also be used in US territories.

### III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 245 Michael C. Ferguson Achievement Awards Scholarship. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 245 Michael C. Ferguson Achievement Awards Scholarship attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 245 Michael C. Ferguson Achievement Awards Scholarship 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** 245 Michael C. Ferguson Achievement Awards Scholarship amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 245 Michael C. Ferguson Achievement Awards Scholarship 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 **October 20, 2011**. 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 20th day of October 2011.

#### Department of Education

Lillian M. Lowery, Ed.D., Secretary of Education

Approved this 20th day of October 2011

### 245 Michael C. Ferguson Achievement Awards Scholarship

The Michael C. Ferguson Achievement Awards Scholarship Program, included in the Educational Accountability Act of 1998, recognizes students who demonstrate superior performance on the state assessments administered pursuant to 14 **Del.C.** §153 (c).

#### 1.0 Basis for Granting Scholarships

1.1 Subject to available funding, the Michael C. Ferguson Achievement Awards shall be made based on the student's score on the results of the annual spring summative administration of the ~~Delaware Student Testing Program~~ state assessment. The student's score that is used for federal Adequate Yearly Progress (AYP) shall be used to determine this award. ~~Scores from re-testing shall not be considered. Students who have completed the eighth grade prior to first participating in the eighth grade assessment(s) pursuant to 14 Del.C. §151 shall not be eligible to receive an eighth grade scholarship.~~ The Scholarships may be awarded to a maximum of 300 eighth grade students in the content areas of reading, ~~writing~~ and mathematics and to a maximum of 300 tenth grade students in the content areas of reading, ~~writing~~, and mathematics.

1.2 The awards shall be provided to the highest scoring eighth and tenth grade students in the state in reading and mathematics as well as the highest scoring eighth and tenth grades students in the state in reading and mathematics who participate in the free and reduced lunch program pursuant to the provisions below:

1.2.1 The highest scoring eighth and tenth grade students in the state in reading, ~~in writing~~ and in mathematics shall receive the scholarships.

1.2.1.1 The eighth grade awards may be given to a maximum of 150 students in the areas of reading ~~writing~~ and mathematics. The number of awards shall be as close to fifty percent



(50%) in each area as possible and the The unassigned awards shall be awarded in the priority order of reading; then mathematics and writing.

1.2.1.2 The tenth grade awards may be given to a maximum of 150 students in the areas of reading ~~writing~~ and mathematics. The number of awards shall be as close to fifty percent (50%) in each area as possible. and ~~the~~ The unassigned awards shall be allocated in the priority order of reading then mathematics and writing.

1.2.2 The highest scoring eighth and tenth grade students in the state in reading, ~~in writing~~ and in mathematics, who participate in the free and reduced lunch program and who are not already identified as one of the students in section 4.4. 1.2 shall receive the scholarships.

1.2.2.1 The eighth grade awards may be given to a maximum of 150 students in the areas of reading, ~~writing~~ and mathematics. The number of awards shall be as close to fifty percent (50%) in each area as possible and the The unassigned awards shall be allocated in the priority order of reading; then mathematics and writing.

1.2.2.2 The tenth grade awards may be given to a maximum of 150 students in the areas of reading, writing and mathematics. The number of awards shall be as close to fifty in each area as possible and the The unassigned awards shall be allocated in the priority order of reading; then mathematics and writing.

1.3 A Foreign Exchange student who is on a temporary visa is not eligible to receive the Michael C Ferguson Achievement Award Scholarship.

**5 DE Reg. 1906 (4/1/02)**

**7 DE Reg. 998 (2/1/04)**

**12 DE Reg. 780 (12/01/08)**

## **2.0 Eligibility for More Than One Scholarship**

Students may receive a scholarship in more than one content area and may also receive scholarships for their 8th and their 10th grade scores.

**5 DE Reg. 1906 (4/1/02)**

**12 DE Reg. 780 (12/01/08)**

## **3.0 Use of Scholarship Funds**

The Michael C. Ferguson Scholarship Award can only be used at a regionally or nationally accredited post secondary institution or at a Delaware or other state approved private business and trade school in the United States of America and its territories. The award cannot exceed direct educational costs.

**5 DE Reg. 1906 (4/1/02)**

**12 DE Reg. 780 (12/01/08)**

## **4.0 Higher Education (Commission) Office Account and Notification Procedures**

4.1 All scholarship awards shall be deposited in an account at the Delaware Higher Education Commission Office in an interest bearing account. Interest earned or forfeited scholarships shall be utilized by the Department of Education and Delaware Higher Education Commission Office to offset administrative expenses associated with the program.

4.12 Funds deposited for scholarships through the Michael C. Ferguson Achievement Awards shall cease to be available to the recipient if the recipient does not attend a post secondary institution within five calendar years after graduating from high school. Provided further that a recipient may have one additional year of availability of the funds for each year the recipient serves as an active duty member of the military.

4.23 It is the responsibility of the parent or guardian to notify the Delaware Higher Education Commission Office of any change of address during the scholarship eligibility period. Students may receive their scholarship awards even if they are living in another state at the time they attend a post secondary institution.

- 4.34 The Department of Education shall annually announce the winners of Michael C. Ferguson Scholarships.
- 4.45 The Delaware Higher Education ~~Commission~~ Office shall send a "Request for Information" form to Michael C. Ferguson Scholarship recipients annually to update their account information.
- 4.45.1 The Delaware Higher Education ~~Commission~~ Office shall send enrollment verification forms to institutions identified by recipients. When completed verification forms are received by the Delaware Higher Education ~~Commission~~ Office, disbursement of scholarship funds will be made to the institution.
- 4.45.2 If a student does not plan to attend a post secondary institution immediately after high school graduation, it is the parent or guardian's responsibility to provide timely notification to the Delaware Higher Education ~~Commission~~ Office prior to enrollment in order to receive payment of the scholarship.
- 4.45.3 Recipients may defer all or a portion of payment of Michael C. Ferguson Scholarships beyond their first post secondary year, but must assume the responsibility to notify the Delaware Higher Education ~~Commission~~ Office of their plans to claim the Scholarship, and may not extend payment beyond the five year limit.

4 DE Reg. 224 (7/1/00)

5 DE Reg. 1906 (4/1/02)

7 DE Reg. 998 (2/1/04)

12 DE Reg. 780 (12/01/08)

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### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(d) (14 Del.C. §122(d))  
14 DE Admin. Code 290

### REGULATORY IMPLEMENTING ORDER

#### 290 Approval of Educator Preparation Programs

#### I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend 14 **DE Admin. Code** 290 Approval of Educator Preparation Programs to establish an additional process for the approval of new alternative routes for teacher licensure and certification programs, non-applicable to those currently in place or eligible via current PSB regulation, to be approved by the Secretary. New alternative routes under this amendment would only be formed upon request by the Secretary and a subsequent RFP process.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on **August 2, 2011**, in the form hereto attached as *Exhibit "A"*. The Department received comments from the State Council for Persons with Disabilities and the Governor's Advisory Council for Exceptional Citizens endorsing the amendments.

Comments were also received from representatives of two of the Delaware higher education institutions, Wilmington University and the University of Delaware. The University of Delaware proposed a language change that would require a comprehensive evaluation of performance of the alternative route contracted program to include the same outcome criteria and expectations applied to all other state-approved teacher education programs. The Department has added an analysis component; however, is not requiring the same outcome criteria and expectations as outlined in the recommendation. The Department is concerned with added costs for this type of evaluation as well as the concern this language may inadvertently limit the types of entities that could offer an alternative route program.

#### II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 290 Approval of Educator Preparation Programs in order to provide additional opportunities for high-quality teacher preparation pipelines that will directly staff critical-need subject areas per the state's current Alternative Routes to Teacher Licensure and Certification

legislation.

### **III. Decision to Amend the Regulation**

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 290 Approval of Educator Preparation Programs. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 290 Approval of Educator Preparation Programs attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 290 Approval of Educator Preparation Programs 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** 290 Approval of Educator Preparation Programs amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 290 Approval of Educator Preparation Programs 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 **September 15, 2011**. 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 15th day of September 2011.

#### **Department of Education**

Lillian M. Lowery, Ed.D., Secretary of Education

Approved this 15th day of September 2011

## **290 Approval of Educator Preparation Programs**

### **1.0 Definitions**

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

- “**Accreditation**” means the decision rendered by NCATE when an institution’s professional education unit meets NCATE standards and requirements.
- “**Administrator**” means Department of Education Associate charged with oversight of Program Approval for college and university educator preparation Programs.
- “**Associate Degree**” means a two (2) year degree conferred by a regionally accredited Institution of higher education or by a distance education Institution that is regionally or nationally accredited through an agency recognized by the U.S. Secretary of Education.
- “**Concurrent Agreement**” means the process where an NCATE review and a review by the Delaware Department of Education occur in a concurrent manner.
- “**Department**” means the Delaware Department of Education.
- “**Department Approval**” means the process by which a specific professional education Program is recognized by the State Department of Education as meeting state standards for the content and operation of such Programs.
- “**Department of Education Program Approval Regulations**” means the regulations set forth herein.
- “**Educator**” means a person licensed and certified by the State under 14 **Del.C.**, Ch 12 to engage in the practice of instruction, administration or other related professional support services in Delaware public schools, including charter schools, pursuant to rules and regulations promulgated by the Standards Board and approved by the State Board but does not include substitute teachers.
- “**Higher Education Degree Advanced Level**” means post baccalaureate degree Programs for the advanced preparation of teachers, and the initial or advanced preparation of professional school

personnel. Programs at the advanced level lead to a master's, specialist, or doctoral degree, or they may culminate in non degree licensure at the graduate level.

**"Higher Education Degree Basic (Initial) Level"** means programs leading to the initial preparation of teachers, commonly leading to a baccalaureate degree, a master of arts in teaching, or other programs designed to prepare teachers for initial licensure.

**"Institution"** means the college or university offering baccalaureate and post baccalaureate degree teacher preparation programs.

**"Institutional Report"** means a report submitted to NCATE as part of the review process that provides the institutional and unit context, a description of the unit's conceptual framework, and evidence that the unit is meeting the NCATE unit standards.

**"National Recognition"** means approval of a program that has met the standards of a specialized professional association that is a constituent member of NCATE.

**"NASDTEC"** means The National Association of State Directors of Teacher Education and Certification. The organization represents professional standards boards, commissions and departments of education in all 50 states, the District of Columbia, the Department of Defense Dependent Schools, the U.S. Territories, New Zealand, and British Columbia, which are responsible for the preparation, licensure, and discipline of educational personnel.

**"NCATE"** means The National Council for Accreditation of Teacher Education, a national accrediting body for schools, colleges, and departments of education authorized by the U.S. Department of Education.

**"Professional Education Unit"** means the school, college, department or other administrative body within an Institution of higher learning that is primarily responsible for the preparation of teachers and other professional education personnel.

**"Program(s)"** means the sequence of courses and experiences required by a college or university for the preparation of professional education candidates to teach a specific subject or academic area, to provide professional education services, or to administer schools; except that where used in section 9.0 of this regulation, the word "program(s)" shall mean the program(s) approved pursuant to said section.

**"Proposal for Program Approval for Education Preparation Programs Which Do Not Have Specialized Professional Association (SPA) Approval"** means the formal proposal that the Department requires higher education institutions to complete and submit in order to seek approval for teacher education programs in a Professional Education Unit for which there is no national Specialized Professional Association (SPA) or for which the institution has not received approval from the SPA.

**"Secretary"** means the Secretary of the Delaware Department of Education.

**"Specialized Professional Association (SPA)"** means national bodies such as the American Alliance for Health, Physical Education, Recreation and Dance (AAHPERD) and the International Reading Association (IRA) whose program review standards have been approved by NCATE.

**"State Program Proposal Review Team"** means the team assembled pursuant to section 4.4 of this regulation.

**"State Review Team"** means the team assembled by the Department of Education pursuant to section 3.3 of this regulation.

## 2.0 Prior Approval from the Department Required to Offer Programs

- 2.1 Pursuant to 14 Del.C. §122(b)(22), no individual, public or private educational association, corporation or Institution, including any Institution of post secondary education, shall offer a Program for the training of educators to be licensed in this State without first having procured the assent of the Department for the offering of such a Program. In order to be approved by the Department, Programs of Educator Preparation in Delaware Institutions of higher education that lead to educator licensure and certification shall meet State and, where applicable, national standards appropriate to the Professional Education Unit and the Professional Education Unit's individual Programs. All Professional Education Units and their Programs shall be reviewed through a fair and uniform application of standards.

- 2.2 The Department shall approve an Institution's Educator Preparation Programs. Approval is based on an institutional self study report and an on site visit by teams, one trained and selected by NCATE and one with Department representation. Institutions seeking approval of Educator Preparation Programs in the state shall meet the Professional Education Unit Standards established by NCATE and the appropriate Program standards established by the Specialized Professional Association. All Programs shall also comply with the state's regulations for Educator licensure and certification, the Delaware Teacher or Administrator Standards, and other applicable regulations and standards as are established by the Department or the Professional Standards Board, in cooperation and consultation with the Department and with the concurrence of the State Board of Education. Units having been accredited by NCATE and Programs receiving national recognition from a SPA will have met the above State regulations and standards.

### **3.0 NCATE State Partnership Review**

National Council for Accreditation of Teacher Education (NCATE) Standards, Procedures and Policies for the Accreditation of Professional Education Units and Programs.

- 3.1 The Department shall enter into agreements with the higher education governing boards and their Institutions for the purpose of coordination of review procedures on a five (5) year cycle for Institutions receiving their initial accreditation from NCATE and on a seven (7) year cycle for Institutions seeking continuing accreditation. As established by NCATE, such agreements shall include, but are not limited to, Program review timetables; format and content of Institutional reports; selection, number, and role of review team members; and the reporting of Program results.
- 3.2 Accreditation Request
- 3.2.1 Institutions shall submit to NCATE the forms required of NCATE as per established NCATE guidelines to seek accreditation to NCATE twenty four (24) months before the scheduled visit.
- 3.2.2 Program reports submitted to Specialized Professional Associations shall follow the NCATE requirements and shall be submitted to NCATE as per established NCATE guidelines before the on site reviews.
- 3.3 The State Review Team
- 3.3.1 The state review team assembled by the Department to work concurrently with the NCATE review team shall have up to three (3) members designated by the Department and the Department shall agree to comply with the schedule established by NCATE in the review and on site visits of NCATE accredited Institutions.
- 3.3.1.1 State Review Team members shall be selected in accordance with NCATE Partnership Agreement Guidelines. A list of members shall be given to the Institution at least six (6) months prior to the site review. Substitute members may be selected and the Institution notified of the substitute members closer to the time of the review, if those initially selected are unable to serve.
- 3.3.1.2 State Review Team members shall be selected from the following:
- 3.3.1.2.1 Employees of the Department of Education, one of whom shall be the Administrator.
- 3.3.1.2.2 Persons who have experience in higher education or education administration.
- 3.3.1.3 State Review Team member(s) shall attend a training session on NCATE standards and procedures and State expectations paid for by the Department and conducted by the staff of NCATE.
- 3.3.1.4 The State Review Team members shall be responsible for the following:
- 3.3.1.4.1 Meeting with the NCATE review team and participating in informal deliberations with that group in accordance with NCATE requirements;
- 3.3.1.4.2 Reviewing the reports of the SPAs on those Programs covered by SPA standards, to understand the conclusions reached by the SPA;
- 3.3.1.4.3 Reporting to the Secretary the decisions of the SPA including a description of the conclusions of the SPA and whether the Program was recommended for national recognition, national recognition with conditions or was not recognized by the SPA.

- 3.3.2 Conflict of Interest: Team members from the State shall not participate on a team if they have a close, active association with the Institution to be visited. A close, active association shall be presumed where:
- 3.3.2.1 The member is currently in attendance at, or, within the past ten years, has received a degree from or has been forced to discontinue studies at the Institution;
  - 3.3.2.2 The member has children or other close relatives in attendance at the Institution, and those persons are matriculated into the education Programs being reviewed;
  - 3.3.2.3 The member has taught, consulted, or otherwise been employed in a paid position, at the Institution within the past five years;
  - 3.3.2.4 The member has ever been denied tenure by or forced to leave a position at the Institution;
  - 3.3.2.5 The member currently serves on, or has been nominated to, any advisory group at the Institution;
  - 3.3.2.6 The member maintains any current close personal or professional relationship with a person at the Institution; or
  - 3.3.2.7 The member is an employee of another Institution in the state with a teacher education Program.

#### 3.4 Final Report

- 3.4.1 Institutions, Professional Education Units and Programs approved through NCATE accreditation and SPA recognition shall comply with NCATE self study requirements. Copies of any reports to NCATE shall also be submitted to the Administrator.
- 3.4.2 For Programs being reviewed by a SPA, Professional Education Units shall submit to the Administrator a copy of the materials sent to the Specialty Professional Association.
- 3.4.3 A final report on the reviews shall be forwarded to the Secretary for action. The report shall make recommendations for full approval, provisional approval, or disapproval of the Professional Education Unit and of each of the individual Programs. Units accredited by NCATE and Programs recognized by SPAs shall receive Department Approval.
  - 3.4.3.1 Copies of the final report shall be sent to the chief executive officer of the Institution and to the leader of the Professional Education Unit.
- 3.4.4 The report, and the accreditation decision of the NCATE Unit Accreditation Board, and the recognition decisions of the SPAs shall be used to determine whether the Department will approve the Educator Preparation Programs.
- 3.4.5 In addition to individual Program recommendations, a recommendation on whether or not the Department should authorize the university or college to operate Educator Preparation Programs shall also be included.
- 3.4.6 Two copies of the final report and related documents shall be maintained by the Department and submitted to the State Archives as provided by the retention schedule for the State Archives.

#### **4.0 Procedures for Teacher Education Programs in a Professional Education Unit Seeking Approval for Programs for Which There is no Specialized Professional Association (SPA) or for Which the Institution has Not Received Approval from the SPA.**

- 4.1 Higher education institutions seeking approval for Educator Preparation Programs in a Professional Education Unit for which there is no Specialized Professional Association (SPA) or for which the institution has not received national recognition from the SPA shall complete the Department's *Proposal for Program Approval for Education Preparation Programs Which do Not Have Specialized Professional Association (SPA) Approval* and shall submit the Proposal to the Department at least six (6) months before the on site reviews.
  - 4.1.1 In the case where a Program has been submitted to a SPA and subsequently was not granted national recognition by the SPA, the Professional Education Unit shall submit the Department's *Proposal for Program Approval for Education Preparation Programs Which do Not Have*

*Specialized Professional Association (SPA) Approval* within two (2) months of final notification that the Program has not been recognized by the SPA.

- 4.1.2 In the case where a Program has been submitted to a SPA and no decision has been made about national recognition by the SPA, the Professional Education Unit shall submit the same Program report submitted to the SPA to the Department of Education.
- 4.2 Time lines related to the submission of data and other documentation of the Institution's compliance with Program approval criteria, the submission of Program reports, the role of Department review members, and the procedures for the reporting of Program review results shall follow NCATE guidelines.
- 4.3 At least one year before the impending review, the Institution shall contact the Department. The Institution shall appoint one person to act as liaison for all of the Programs at the Institution under this Non SPA State Review. The Administrator shall meet with the liaison to establish the review process and to report the potential Programs to be reviewed. The decisions made shall be communicated by the Administrator and the liaison to all of the Programs. This process shall be completed nine months prior to the review dates.
- 4.4 Selection, Training and Conduct of the State Program Proposal Review Team Members for the Non SPA State Review
  - 4.4.1 State Program Proposal Review Teams shall consist of at least three (3) members including the Administrator or designee, one of whom shall be the chair, who shall be selected at least six months prior to the review. The Institution shall be notified as to the members chosen for the review.
    - 4.4.1.1 If those initially selected are unable to serve, substitute members may be selected and the Institution notified of the substitute members closer to the time of the review.
  - 4.4.2 Conflict of Interest is the same as defined in 3.3.2
  - 4.4.3 Training of State Program Proposal Review Team Members
    - 4.4.3.1 State Program Proposal Review Team members shall receive training at the Department in the following areas prior to participating in any review; the purpose of the self study, the State Standards and criteria, the procedure for review of Program proposals, timelines for proposal review, the completion of team reports, and the reimbursement of expenses. Information about the NCATE accreditation process and the SPA process for national recognition, including the evaluation of the Professional Evaluation Unit and the background of, rationale for, and the review procedures of NCATE and the SPAs will also be part of the training.
  - 4.4.4 Persons taking part in State Program Proposal Review Team member training shall be reimbursed for expenses in accordance with the Department's guidelines.
- 4.5 The Program shall prepare the Proposal which shows how it meets the Department of Education Program Approval Regulations and the Delaware Licensure and Certification Regulations.
  - 4.5.1 Five (5) copies of the Proposal and all additional documentation shall be submitted as per established NCATE timelines prior to the visit of the State Review Team.
  - 4.5.2 Proposals and additional materials requested for each Program shall be reviewed by appropriate Program Proposal reviewers at the Department and the review on the content and quality of each, where possible, shall be made available to the State Program Proposal Review Team at least three (3) months prior to the on-site visit of the NCATE and State Teams. In the case of a Program submitted to a SPA in accordance with NCATE guidelines, where the SPA has not nationally recognized the Program, the Program proposal reviewers shall make their Program review available for the State Review Team at least one (1) month prior to the on-site visit. If any aspect of the Proposal is deemed inadequate, the Administrator may contact the Institution to supplement the submission or may return the Proposal to the Program.
  - 4.5.3 The State Program Proposal Review Team shall verify the accuracy of the Proposal, consider the Department review and write a draft report on the Program. The report shall make recommendations for full approval, provisional approval, or disapproval of the Program.

- 4.6 The final report of the State Program Proposal Review Team members on the Program(s) shall be due to the Administrator or the chair of the team three (3) weeks after the last day of the visit.
- 4.7 Within ten (10) weeks of the last day of the visit, the Administrator or the chair of the State Program Proposal Review Team shall submit the final draft of the report to the Program for the correction of factual errors only. The Program shall return the final draft to the Administrator with factual errors and suggested corrections noted, within two (2) weeks.
- 4.8 Professional Education Units shall submit a report for any provisionally approved Programs as requested by the Department. The report shall detail how previous weaknesses, if any, have been addressed.

## **5.0 Provisional Program Approval for New Programs**

- 5.1 An Institution that has approved educator preparation Programs may request interim provisional Program approval for new education Programs added between regularly scheduled reviews. The following documentation shall be supplied to the administrator:
  - 5.1.1 A description of the Program for which approval is sought and other administrative information;
  - 5.1.2 The curriculum for the Program, including syllabi for any new courses;
  - 5.1.3 Descriptions of the expected outcomes of the Programs and of how those outcomes will be assessed;
  - 5.1.4 Vitae for all faculty delivering the Program; and
  - 5.1.5 Descriptions of materials, media and resources available for the Program, and how technology is integrated into the curriculum or Program.
- 5.2 An Institution currently operating approved educator preparation Programs may seek approval for a new specialization in a currently operating Program in teaching, specialist services or administrative area provided the documentation submitted contains sufficient justification to warrant the new specialization. The Institution is encouraged to collaborate with the Department during the Program's initial planning. The Institution must identify the Program objectives for the new Program from which the curriculum shall be developed.
- 5.3 Experimental or innovative Programs that do not meet NCATE standards may be allowed by the Department. Such an allowance may be requested by submitting the material for new Programs, and where the standards are not met, a rationale for the exception(s). Experimental or innovative Programs that are approved by the Department shall be given provisional approval; full approval may not be granted until a full on site review of the Program takes place, or it is recommended and approved by the Secretary.
- 5.4 Programs or specializations, such as those described in 5.1, 5.2, and 5.3 above, that have received only paper review, without full on site verification, will be granted provisional approval. Full approval may not be granted until a full on site review of the Institution takes place, or is recommended and approved by the Secretary.

## **6.0 Professional Education Units that do not Receive Accreditation by NCATE**

- 6.1 Professional Education Units that do not receive NCATE accreditation, and which have exhausted or decided not to use the NCATE rejoinder process, will have a period of time agreed upon by the Institution and the Administrator in which to submit additional materials which demonstrate how the Institution meets the NCATE Standards and SPA Program Standards. Such Units will only be eligible for provisional approval for three (3) years; renewal after that time will be contingent upon a full site review.
- 6.2 Programs that do not receive SPA recognition should submit materials to the Department in accordance with the provisions set forth in 4.0.
- 6.3 Programs that do not meet the SPA standards, Delaware Teacher or Administrator Standards, or the State's licensure and certification regulations at the full approval level, shall be given either provisional approval or not be approved to operate. All Programs given provisional approval shall:
  - 6.3.1 Report annually to the Administrator on the progress made on those standards that were not met.



6.3.2 Undergo Program proposal review submission and site review within three (3) years from the date of provisional approval.

6.4 Institutions that do not receive full or provisional approval through review pursuant to NCATE Standards or Delaware Program Approval Regulations shall not be permitted to operate licensure Programs in Delaware.

## **7.0 Required Format for the State Report**

The format of the State Report shall follow the format consistent with NCATE procedures and shall include recommendations on whether the Professional Education Unit and each individual Program shall receive approval to operate in Delaware.

## **8.0 Rejoinder Process**

### **8.1 NCATE Review**

8.1.1 If the Professional Education Unit accreditation is not granted by NCATE, the Institution may contest any of the recommendations through the NCATE rejoinder process. If a Program is not nationally recognized by a SPA, the Institution may contest any of the recommendations through the SPA rejoinder process. The Department shall accept the decision of NCATE or a SPA when their rejoinder process is followed.

### **8.2 Non SPA State Review**

8.2.1 Within thirty (30) days after the State Review Team visit, the team chair shall prepare a report of the team visit, make a recommendation(s) on the Program(s) and send three copies to the Institution, one to the Institution's president, one to the head of the professional education unit and one to the Institution's liaison for the review process.

8.2.1.1 The Institution shall respond within fifteen (15) days as to the accuracy of the factual information in the report of the team visit.

8.2.2 Intent to contest the recommendations: A letter shall be sent from the Institution's president or the head of the professional education unit designee notifying the Secretary of the intent to contest the recommendations accompanied by a short statement explaining the rationale for contesting the review. The letter must be received in the Office of the Secretary within ten (10) days of the delivery of the reports.

8.2.2.1 The Secretary shall review the materials submitted by the Institution including written statements of position, documents, and comments supporting the claims.

8.2.2.2 The Secretary, after considering the evidence presented and the arguments made by the parties, shall make a decision and so inform the institution's president and the head of the professional education unit in writing of that decision. The decision of the Secretary is final.

**10 DE Reg. 835 (11/01/06)**

## **9.0 Alternative Routes for Teacher Licensure and Certification Programs**

9.1 Notwithstanding any other provision of this regulation to the contrary, any individual, public or private educational association, corporation or institution, which, pursuant to the provisions of 14 DE Admin. Code 1507 and subsection 9.2 below, is approved by the Secretary of Education to operate an Alternative Routes to Teacher Licensure and Certification Program shall be deemed to be an approved teacher preparation program.

9.2 Any individual, public or private educational association, corporation or institution, which is approved by the Secretary of Education to operate an Alternative Routes to Teacher Licensure and Certification Program as set forth in subsection 9.1 above, shall in addition to the provisions of 14 DE Admin. Code 1507 and any applicable statute, comply with the following requirements:

9.2.1 Applications for approval will be accepted only when the Secretary of Education shall post a Request For Proposals requesting the same. The application process shall be competitive and the Secretary may elect to approve some, all or none of the applications.

- 9.2.2 Approved applicants shall enter into a contract with the Department, on a form approved by the Department for an initial term of three (3) years, renewable for an additional five (5) years at the discretion of the Department [upon an analysis of the program, during the final year of the contract, by the Department or by an external program assessment entity selected by the Department].
- 9.2.3 Applications shall be responsive to the Request for Proposals and, in addition to any other requirements, shall address how the applicant will determine the coursework and experiences leading to its participants' application for certification to the Department, shall include intensive pre-service training, teacher evaluations conducted by school administrators, completion of coursework, and measures of teacher effectiveness based upon student performance data.
- 9.2.4 The Department shall evaluate approved programs based upon the terms and conditions of the Request for Proposals and the applicant's contract with the Department.

### OFFICE OF THE SECRETARY

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

### REGULATORY IMPLEMENTING ORDER

**1104 Standards for School Buses placed in production on or after January 1, 2012**  
(Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>).

#### I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend 14 **DE Admin. Code** by adding a new regulation 1104 Standards for School Buses placed in production on or after January 1, 2012 (Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>). This regulation is necessary in order to add new standards for buses built after January 2012 and update the document for current equipment terminology, production capabilities and additional safety features.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on **September 2, 2011**, in the form hereto attached as *Exhibit "A"*. The Department received comments from one of the bus vendors as well as from the Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities regarding concerns with the lift buses, ramps, and air conditioning. The bus vendor stated all seat manufacturers may not be able to equip some seats with the number of LATCH (Lower Anchors and Tethers for CHildren). Changes were made to align with manufacturers' available specifications.

The Department provides the following responses for the concerns expressed by both of the Councils which we hope will clarify the issues that were raised.

- **Lift buses:** While DeIDOT has made all of its fixed route buses wheelchair accessible, the school transportation system has more than adequate resources available to respond to lift requirements for students with disabilities. DeIDOT is required to provide this capability on all of their buses because they do not know when such a requirement can arise. On the other hand, school transportation assigns students with lift requirements to an available lift bus. In order to stay ahead of an unknown requirement, the Department has actually funded additional buses so they will be available in case a short-term requirement comes up. Additionally, the system has spare buses that can be used and shared between districts, if needed. The Department provides the same lift capabilities for students who are "mainstreamed".
- **Ramps:** The requirement for a manual lift capability when power is not available is not mentioned because it is a mandatory requirement. For this reason, it is not mentioned in the *National School Transportation Specifications & Procedures (NSTSP)* which is a source document for our regulation. While the NSTSP mentions that ramps can be installed, it was similarly mentioned in Regulations 1101-04 and the previous standards (1988). However, there are extremely few buses across the country that

have them installed since it is costly to include this item based on the unlikely circumstance that it would ever be used. It would require installation of a secondary floor, and the estimated cost would be over \$10,000. It would require additional training for drivers and aides and it might not be feasible for some of them to pull it out and install the ramp in a timely manner. Finally, it could be pulled out/unsecured by mischievous students/other parties.

- **Air Conditioning:** There may be a misunderstanding of what is included in the proposed regulation and the concern of the cooling requirements. The regulation is only providing a test performance standard of the capability of the bus to reduce temperatures by 20 degrees with the engine at idle. Operationally, buses run at engine speeds above idle and keep temperatures well below 80 degrees. Again, this standard comes from the NSTSP and is used nationally. We solicited inputs from users in the field, and they have not indicated any deficiencies in the systems provided.

## **II. Findings of Facts**

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 1104 Standards for School Buses placed in production on or after January 1, 2012 (Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>) in order to add new standards for buses built after January 2012 and update the document for current equipment terminology, production capabilities and additional safety features.

## **III. Decision to Amend the Regulation**

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 1104 Standards for School Buses placed in production on or after January 1, 2012 (Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>). Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 1104 Standards for School Buses placed in production on or after January 1, 2012 (Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>) attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 1104 Standards for School Buses placed in production on or after January 1, 2012 (Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>) 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** 1104 Standards for School Buses placed in production on or after January 1, 2012 (Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>) amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 1104 Standards for School Buses placed in production on or after January 1, 2012 (Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>) 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 **October 20, 2011**. 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 20th day of October 2011.

### **Department of Education**

Lillian M. Lowery, Ed.D., Secretary of Education

Approved this 20th day of October 2011

1104 Standards for School Buses placed in production on or after January 1, 2012  
(Terminology and School Bus Types are Those Described in the *National School Transportation Specifications and Procedures (NSTSP)*, May 2010- available at <http://www.ncstonline.org>).

*Multifunction School Activity Buses shall also meet all of the following school bus chassis and body standards.*

*(Break in Continuity of Sections)*

**2.0 Standards for Specially Equipped School Buses**

**2.1 General Requirements**

- 2.1.1 Specially equipped school buses shall comply with these standards and with FMVSSs applicable to their GVWR category.
- 2.1.2 Any school bus to be used for the transportation of children who utilize a wheelchair or other mobile positioning device, or who require life support equipment that prohibits use of the regular service entrance, shall be equipped with a power lift, unless a ramp is needed for unusual circumstances related to passenger needs.
- 2.1.3 Lift buses (48-60 passengers only) shall have flat floors.
- 2.1.4 Padded barriers shall be installed to protect wheelchair positions where seating does not interface as barrier.
- 2.1.5 Seats shall have the minimum spacing specified under FMVSS No. 222 School Bus Passenger Seating and Crash Protection per NHTSA February 1999 Guideline for the Safe Transportation of PreSchool Age Children in School Buses. There shall be at least 27 inches, measured at seat cushion level between the back of the seat back or barrier and the front of the seat back of the next seat to the rear.
- 2.1.6 All seats shall have lap shoulder seat belts installed with LATCH (Lower Anchors and Tethers for Children). The 45 inch seats shall have 3 lap shoulder seat belts and [32] sets of LATCH; ~~[36 and]~~ 39 inch seats shall have 2 lap shoulder seat belts and 2 sets of LATCH; and 30 ~~[and 36]~~ inch seats shall have 2 lap shoulder seat belts and 1 set of LATCH.
- 2.1.7 Buses shall not be equipped with vehicle ramps.
- 2.2 Aisles: All school buses equipped with a power lift shall provide a minimum 30 inch aisle leading from any wheelchair position to at least one 30 inches wide emergency exit door. A wheelchair securement position shall never be located directly in front of (blocking) a power lift door location.
- 2.3 Glazing: Tinted glazing may be installed in all doors, windows and windshields (see "Windows", section 1.2 and "Special Service Entrance Door", this section).
- 2.4 Handrails: Two handrails (at the front and rear of the stepwell) shall be provided to assist passengers during entry or exit, and shall be designed to prevent entanglement, as evidenced by the passage of the National Highway Traffic Safety Administration (NHTSA) string and nut test.
- 2.5 Identification: Specially equipped school buses shall display the International Symbol of Accessibility below the window line. Such emblems shall be white on blue or black background, shall not exceed 12 inches square in size and shall be of a high intensity retroreflective material meeting the requirements of Federal Highway Administration (FHWA) FP-85, Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects.
- 2.6 Passenger Capacity Rating: In determining the passenger capacity of a school bus for purposes other than actual passenger load (e.g., vehicle classification or various billing/reimbursement models), any location in a school bus intended for securement of a wheelchair during vehicle operations shall be regarded as four designated seating positions, and each lift area shall count as four designated seating positions.
- 2.7 **Power Lifts**
- 2.7.1 The power lift shall be located on the right side of the bus body.
- 2.7.1.1 All specially equipped school buses shall have a lift complying with paragraphs 2.7.2 with sufficient clearances to permit a wheelchair user to reach a securement location.

**2.7.2 Vehicle lift and installation**

- 2.7.2.1 General: Vehicle lifts and installations shall comply with the requirements set forth in FMVSS No. 403, Platform Lift Systems for Motor Vehicles, and FMVSS No. 404, Platform Lift Installations in Motor Vehicles. For lifts located at the rear of the bus, the power unit for the lift shall be located forward of the lift with controls secured to the interior of the lift door. For lifts located at the forward of the bus, the power unit for the lift shall be located rearward of the lift with controls secured to the interior of the lift door.
- 2.7.2.2 Design loads. The design load of the lift shall be at least 800 pounds. Working parts, such as cables, pulleys, and shafts, which can be expected to wear, and upon which the lift depends for support of the load, shall have a safety factor of at least six, based on the ultimate strength of the material. Non working parts, such as platform, frame, and attachment hardware that would not be expected to wear, shall have a safety factor of at least three, based on the ultimate strength of the material.
- 2.7.2.3 Lift capacity: The lifting mechanism and platform shall be capable of operating effectively with a wheelchair and occupant mass of at least 800 pounds.
- 2.7.2.4 Controls: (See 49 CFR 571.403, S6.7, Control systems.)
- 2.7.2.5 Emergency operations: (See 49 CFR 571.403, S6.9, Backup operation.)
- 2.7.2.6 Power or equipment failures: (See 49 CFR 571.403, S6.2.2, Maximum platform velocity.)
- 2.7.2.7 Platform barriers: (See 49 CFR 571.403, S6.4.7, Wheelchair retention.)
- 2.7.2.8 Platform surface: (See 49 CFR 571.403, S6.4.2, S6.4.3, Platform requirements.) (See also "Wheelchair or Mobility Aid Envelope" figure in the NSTSP, Specially Equipped School Bus Specifications.) The platform shall have a minimum clear width of 32 inches measured from two inches above the platform surface to 30 inches above the surface of the platform, and a minimum clear length of 48 inches measured from two inches above the surface of the platform to 30 inches above the surface of the platform.
- 2.7.2.9 Platform gaps and entrance ramps: (See 49 CFR 571.403, S6.4.4, Gaps, transitions and openings.)
- 2.7.2.10 Platform deflection: (See 49 CFR 571.403, S6.4.5, Platform deflection.)
- 2.7.2.11 Platform movement: (See 49 CFR 571.403, S6.2.3, Maximum platform acceleration.)
- 2.7.2.12 Boarding direction: The lift shall permit both inboard and outboard facing of wheelchair and mobility aid users.
- 2.7.2.13 Handrails: (See 49 CFR 571.403, S6.4.9, Handrails)
- 2.7.2.14 Circuit breaker: A resettable circuit breaker shall be installed between the power source and lift motor if electrical power is used. It shall be located as close to the power source as possible, but not within the passenger/driver compartment.
- 2.7.2.15 Excessive pressure: (See 49 CFR 571.403, S6.8, Jacking prevention.)
- 2.7.2.16 Documentation: The following information shall be provided with each vehicle equipped with a lift:
- 2.7.2.16.1 A phone number where information can be obtained about installation, repair, and parts. (Detailed written instructions and a parts list shall be available upon request.)
- 2.7.2.16.2 Detailed instructions regarding use of the lift and readily visible when the lift door is open, including a diagram showing the proper placement and positioning of wheelchair mobility aids on the lift.
- 2.7.2.17 Training materials: The lift manufacturer shall make training materials available to ensure the proper use and maintenance of the lift. These may include instructional videos, classroom curriculum, system test results or other related materials.
- 2.7.2.18 Identification and certification: Each lift shall be permanently and legibly marked or shall incorporate a non removable label or tag that states it conforms to all applicable requirements of the NSTSP. In addition and upon request of the original titled purchaser, the lift manufacturer or an authorized representative shall provide a notarized Certificate of

# FINAL REGULATIONS

Conformance, either original or photocopied, which states that the lift system meets all the applicable requirements of the current NSTSP.

- 2.8 Regular Service Entrance: On power lift equipped vehicles, steps shall be the full width of the step well, excluding the thickness of doors in the open position.
- 2.9 Restraining Devices
- 2.9.1 On power lift equipped vehicles with a GVWR of 10,000 pounds or more, seat frames may be equipped with attachment points to which belt assemblies can be attached for use with Child Safety Restraint Systems (CSRSs) that comply with FMVSS No. 213, Child Restraint Systems. Any belt assembly anchorage shall comply with FMVSS No. 210, Seat Belt Assembly Anchorages.
- 2.9.2 Alternatively, a child restraint anchorage system that complies with FMVSS No. 225, Child Restraint Anchorage Systems, may be installed.
- 2.9.3 Seat belt assemblies, if installed, shall conform to FMVSS No. 209, Seat Belt Assemblies.
- 2.9.4 Child safety restraint systems, which are used to facilitate the transportation of children who in other modes of transportation would be required to use a child, infant, or booster seat, shall conform to FMVSS No. 213.
- 2.10 Seating Arrangements: Flexibility in seat spacing to accommodate special devices shall be permitted to meet passenger requirements. All seating (forward facing) shall meet the requirements of FMVSS No. 222, School Bus Passenger Seating and Crash Protection.
- 2.11 Securement and Restraint System for Wheelchair or Mobility Aid and Occupants: For purposes of understanding the various aspects and components of this section, the term securement and tie down and the phrases securement system or tie down system are used exclusively in reference to the devices that anchor the wheelchair to the vehicle. The term restraint and the phrase restraint system are used exclusively in reference to the equipment that is intended to limit the movement of the wheelchair occupant in a crash or sudden maneuver. The term wheelchair tiedown and occupant restraint system (WTORS) is used to refer to the total system that secures the wheelchair and restrains the wheelchair occupant.
- 2.11.1 WTORS general requirements
- 2.11.1.1 A wheelchair tie down and occupant restraint system installed in a specially equipped school bus shall be designed, installed and operated for use with forward facing wheel chair seated passengers and shall comply with all applicable requirements of FMVSS No. 222, School Bus Passenger Seating and Crash Protection, and SAE J2249, Wheelchair Tie down and Occupant Restraint Systems for Use in Motor Vehicles.
- 2.11.1.2 WTORS, including the anchorage track, floor plates, pockets or other anchorages, shall be provided by the same manufacturer, or shall be certified to be compatible by manufacturers of all equipment systems used.
- 2.11.1.3 Wheelchair securement positions shall be located such that wheelchairs and their occupants do not block access to the lift door.
- 2.11.1.4 A device for storage of the WTORS shall be provided. When the system is not in use, the storage device shall allow for clean storage of the system, shall keep the system securely contained within the passenger compartment, shall provide reasonable protection from vandalism and shall enable the system to be readily accessed for use.
- 2.11.1.5 The WTORS, including the storage device, shall meet the flammability standards established in FMVSS No. 302, Flammability of Interior Materials.
- 2.11.1.6 The following information shall be provided with each vehicle equipped with a securement and restraint system:
- 2.11.1.6.1 A phone number where information can be obtained about installation, repair and parts. (Detailed written instructions and a parts list shall be available upon request.)
- 2.11.1.6.2 Detailed instructions regarding use, including a diagram showing the proper placement of the wheelchair mobility aids and positioning of securement devices and occupant restraints, including correct belt angles.

- 2.11.1.7 The WTORS manufacturer shall make training materials available to ensure the proper use and maintenance of the WTORS. These may include instructional videos, classroom curriculum, system test results or other related materials.
- 2.11.2 Wheelchair Securement Tiedown: (See 49 CFR 571.403, S5.4.1, S5.4.2.)
- 2.11.2.1 Each wheelchair position in a specially equipped school bus shall have a minimum clear floor area of 30 inches laterally by 52 inches longitudinally. Additional floor area may be required for some wheelchairs. Consultation between the user and the manufacturer is recommended to ensure that adequate area is provided.
- 2.11.3 Occupant Restraint System (See 49 CFR 571.403, S5.4.3, S5.4.4.)
- 2.12 Special Light: Doorways in which lifts are installed shall be equipped with a special light that provides a minimum of 2 foot candles of illumination measured on the floor of the bus immediately adjacent to the lift and on the lift during lift operation.
- 2.13 Special Service Entrance
- 2.13.1 Power lift equipped bodies shall have a special service entrance to accommodate the power lift.  
Exception: A special service entrance shall not be required if the lift is designed to operate within the regular service entrance, is capable of stowing such that the regular service entrance is not blocked in any way and a person entering or exiting the bus is not impeded in any way.
- 2.13.2 The special service entrance and door shall be located on the right side of the bus and shall be designed so as not to obstruct the regular service entrance.
- 2.13.3 The opening may extend below the floor through the bottom of the body skirt. If such an opening is used, reinforcements shall be installed at the front and rear of the floor opening to support the floor and give the same strength as other floor openings.
- 2.13.4 A drip molding shall be installed above the special service entrance to effectively divert water from the entrance.
- 2.13.5 Door posts and headers at the special service entrance shall be reinforced sufficiently to provide support and strength equivalent to the areas of the side of the bus not used for special service entrance.
- 2.14 Special Service Entrance Door
- 2.14.1 A single door shall be used for the special service entrance. They shall have rub rails.
- 2.14.2 There shall be a 57" door height opening.
- 2.14.3 The door shall be hinged to the forward side of the entrance unless this would obstruct the regular service entrance. If the door is hinged to the rearward side of the doorway, the door shall utilize a safety mechanism which will prevent the door from swinging open should the primary door latch fail.
- 2.14.4 The door shall have positive fastening devices to hold the doors in the "open" position when the special service entrance is in use.
- 2.14.5 The door shall be weather sealed.
- 2.14.6 Door materials, panels and structural components shall have strength equivalent to the conventional service and emergency doors. Color, rub rail extensions, lettering and other exterior features shall match adjacent sections of the body.
- 2.14.7 The door shall have windows set in a waterproof manner that are visually similar in size and location to adjacent non door windows. Glazing shall be of same type and tinting as standard fixed glass in the side windows.
- 2.14.8 The door shall be equipped with a device that will actuate an audible or visible signal located in the driver's compartment when the door is not securely closed and the ignition is in "on" position.
- 2.14.9 A switch shall be installed so that the lift mechanism will not operate when the lift platform door is closed.

2.14.10 The special service entrance door shall be equipped with padding at the top edge of the door opening. The padding shall be at least 3 inches wide and 1 inch thick and shall extend the full width of the door opening.

15 DE Reg. 268 (09/01/11) (Prop.)

\*Please note that no additional changes were made to the regulation as originally proposed and published in the September 2011 issue of the *Register* at page 268 (15 DE Reg. 268). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

**1104 Standards for School Buses placed in production on or after January 1, 2012**

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## DEPARTMENT OF HEALTH AND SOCIAL SERVICES DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

### ORDER

#### Tobacco Cessation Counseling Services

#### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Title XIX Medicaid State Plan regarding *Comprehensive Tobacco Cessation Services*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the September 2011 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by September 30, 2011 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 proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX Medicaid State Plan regarding *Medicaid coverage of comprehensive tobacco cessation services for pregnant women and all Medicaid beneficiaries*.

#### Statutory Authority

- Patient Protection and Affordable Care Act (Pub. L. No. 111-148 as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152)), together known as the Affordable Care Act;
- 42 CFR §434.6, *General requirements for all contracts and subcontracts*;
- 42 CFR §438.6, *Contract requirements*;
- 42 CFR §447.26, *Prohibition on payment for provider-preventable conditions*.

#### Background

On June 24, 2011, the Centers for Medicare and Medicaid Services (CMS) issued guidance on the mandatory implementation of Section 4107 of the Patient Protection and Affordable Care Act (Affordable Care Act), P.L. 111-148, which amended Title XIX (Medicaid) of the Social Security Act (the Act) to provide for Medicaid coverage of comprehensive tobacco cessation services for pregnant women, including both counseling and pharmacotherapy, without cost sharing. The period for which these services must be covered includes the prenatal period through the postpartum period.

Section 1905(bb)(2) of the Act defines the new tobacco cessation coverage for pregnant women as services recommended in the 2008 Public Health Service (PHS) Guideline, or any subsequent modification of this



Guideline, and such other services that the Secretary recognizes to be effective for cessation of tobacco use by pregnant women. This publication can be accessed at [www.surgeongeneral.gov/tobacco/treating\\_tobacco\\_use08.pdf](http://www.surgeongeneral.gov/tobacco/treating_tobacco_use08.pdf).

This new coverage offers States flexibility with respect to how the services shall be provided: 1) by or under the supervision of a physician; 2) by any other health care professional who is legally authorized to furnish such services under State law and who is authorized to provide Medicaid coverable services other than tobacco cessation services; or 3) by any other health care professional legally authorized to provide tobacco cessation services under State law and who is designated by the Secretary to provide these services.

In addition to this new benefit requirement for pregnant women described above, States are required to cover tobacco cessation services for children when medically necessary and may rely on optional Medicaid benefit categories to provide coverage of tobacco cessation services to other Medicaid beneficiaries.

To implement this new benefit requirement, States should submit an amendment to their Medicaid State plans as soon as possible.

This provision was effective October 1, 2010.

### **Summary of Proposal**

In accordance with the requirements and options outlined in Section 4107 of the Affordable Care Act (ACA), the Delaware Medical Assistance Program (DMAP) is proposing to identify comprehensive tobacco cessation services as a covered Medicaid benefit for the Medicaid eligible population effective for dates of service on and after July 1, 2011.

The Medicaid state plan will be amended at Attachment 3.1-A and Attachment 4.19-B to reflect coverage for diagnostic, therapy and counseling services. DMAP already provides, within program limitations, reimbursement for rebated tobacco cessation products and Nicotine Replacement Therapy (NRT) products; as well as, cessation counseling services through the Delaware Tobacco Quitline.

Tobacco cessation services shall be provided by licensed providers practicing within their scope of practice and the recommended pharmacotherapy shall be based on the most current Public Health Service (PHS) guidelines.

Tobacco Cessation Telephone Quitlines as Allowable Medicaid Administrative Activities

The Delaware Division of Public Health works to prevent the use of tobacco products through its Tobacco Prevention and Control Program (TPCP). The Tobacco Program offers the Delaware Tobacco Quitline and is available to any Delaware resident to help smokers quit and is not limited to Medicaid beneficiaries. The Quitline program is a free comprehensive tobacco treatment service that follows the evidence-based protocols set forth in the PHS Guideline. This State plan amendment will also allow the State to claim expenditures related to Quitlines as administration at the 50 percent Federal Medicaid matching rate, as specified in 42 CFR §433.15(b)(7).

The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

### **Fiscal Impact Statement**

Delaware currently has a smoking cessation program that covers all of its citizens; so, there is no increase in costs on the General Fund. In addition, telephone "quitlines" will be coverable for the first time as an optional administrative activity in Medicaid and the State will be eligible for the 50 percent federal matching rate.

## **SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE**

The American Heart Association (AHA), the Governor's Advisory Council for Exceptional Citizens (GACEC) 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.

### **AHA**

On behalf of the American Heart Association, the following comments are submitted regarding the proposed new regulations regarding smoking cessation services for pregnant women and for the general Medicaid population in Delaware. Unfortunately, cigarette smoking continues to be the leading cause of preventable disease and death in the United States claiming approximately 443,000 lives prematurely every year. Across the nation the

adult smoking rate among Medicaid recipients is 36.6%, compared to 22.6% of the general population. Smoking cessation treatments and services are highly cost effective despite how difficult it is for the smoker to successfully quit.

The American Heart Association recommends that **at a minimum** coverage for Medicaid tobacco cessation services in Delaware should:

- Include both pregnant women and the general Medicaid population;
- Follow recommendations in the Public Health Service sponsored 2008 clinical practice guideline, "Treating Tobacco Use and Dependence: 2008 Update," or its successors;
- Include at least two courses of treatment in a 12-month period including personal counseling, which may be telephone, group or individual counseling, and all medications approved by the FDA for the purpose of tobacco cessation, including all prescription and over-the-counter medications; and
- Be provided to this population without any or with very minimal cost sharing.

Additionally, to remove barriers to quitting for this population, we would recommend that these services and benefits be offered under the following provisions:

- No prior authorization requirements
- No annual or lifetime limits on quit attempts or costs
- No limits on treatment duration
- No requirements to pair counseling with medications
- No stepped care therapy
- Require plans to promote services and benefits to members & clinicians.

Comprehensive coverage for smoking cessation within the Medicaid program has the potential to save even more lives and reduce the overall, long-term cost burdens of smoking related disease on public health insurance programs. Significant progress has been made in this area in Massachusetts, and I am attaching a copy of an abstract detailing that study. We at the American Heart Association look forward to working with the Division of Medicaid and Medical Assistance to reduce the human and financial toll on Delaware attributable to tobacco use.

**Agency Response:** DMMA agrees that the Medicaid program should follow the U. S. Public Health Service-sponsored clinical practice guideline, "Treating Tobacco Use and Dependence: 2008 Update" (PHS Guideline). The Medicaid program expects utilization of tobacco cessation services will be in accordance with medical necessity, medical standards of practice, the evidence-based protocols set forth in the PHS guideline, Food and Drug Administration (FDA) guidelines and manufacturers' recommendations for dosage and duration.

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

### GACEC and SCPD

As background, CMS recently issued a June 24, 2011 guidance implementing Section 4107 of the Patient Protection and Affordable Care Act. States are now required to provide for Medicaid coverage of comprehensive tobacco cessation services to pregnant women which include the prenatal period through the postpartum period. The new standards are based on recommendations included in a 2008 Public Health Service (PHS) Guideline. DMMA proposes to implement this requirement through Medicaid Plan amendments. DHSS already offers a "Delaware Tobacco Quitline" through the Division of Public Health. Delaware will now be able to claim a 50% Federal Medicaid match for this service. Otherwise, the Plan amendments authorize Medicaid coverage of tobacco dependence assessment, face-to-face counseling, and pharmacotherapy such as nicotine patches. The Councils have the following observations.

First, DMMA interprets the CMA guidance as requiring coverage of tobacco cessation services for children. At 279. The Plan amendments do not address children. It would be preferable for DMMA to clarify whether tobacco cessation services for children is already covered in the State Plan or to develop a conforming State Plan amendment.

**Agency Response:** As indicated in the "Summary of Proposal" the plan amendment identifies comprehensive tobacco cessation services as a covered Medicaid benefit for the Medicaid eligible population. This statement implies all Medicaid eligible beneficiaries and is inclusive. Coverage of medically necessary tobacco cessation services for children under age 21 is already mandatory under Medicaid's Early and Periodic Screening, Diagnostic and Treatment (EPSDT) benefit.

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

Second, the Plan amendments require reimbursable counseling to be "face-to-face". The Councils suspect that

“in-person” counseling is generally more effective than telephone-based counseling. Cf. the attached 2008 Guideline at 166. However, the Guideline also describes a study involving an initial in-person counseling session followed by 12 telephone counseling sessions. DMMA may wish to assess whether covering telephone counseling sessions may be appropriate. For example, there may be pregnant women who would prefer telephone-based counseling since it obviates transportation time and inconvenience (e.g. finding babysitter for existing children). Perhaps DMMA could consider a lower reimbursement rate for telephone-based counseling to provide an incentive for “in-person” counseling while not precluding reimbursement for telephone-based counseling altogether.

**Agency Response:** The Medicaid program expects utilization of tobacco cessation services will be in accordance with medical necessity, medical standards of practice, the evidence-based protocols set forth in the PHS guideline, FDA guidelines and manufacturers’ recommendations for dosage and duration.

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 September 2011 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Title XIX Medicaid State Plan regarding *Comprehensive Tobacco Cessation Services* and is adopted and shall be final effective November 10, 2011.

Rita M. Landgraf, Secretary, DHSS

## DMMA FINAL ORDER REGULATION #11-51

### REVISION:

**NOTE: Since publication of the Proposed Regulation, CMS has issued an additional Medicaid State plan amendment preprint template, as indicated by bracketed bold type)**

[Revision:

ATTACHMENT 3.1-A  
Page 2.1  
OMB No.:

State/Territory: Delaware

### AMOUNT, DURATION, AND SCOPE OF MEDICAL AND REMDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

4. d. 1) Face-to-Face Tobacco Cessation Counseling Services provided (by):

(i) By or under supervision of a physician;

(ii) By any other health care professional who is legally authorized to furnish such services under State law and who is authorized to provide Medicaid coverable services *other than tobacco cessation services*; \* or

(iii) Any other health care professional legally authorized to provide tobacco cessation services under State law *and who is specifically designated by the Secretary in regulations.* (None are designated at this time; this item is reserved for future use.)

\*Describe if there are any limits on who can provide these counseling services

2) Face-to-Face Tobacco Cessation Counseling Services Benefit Package for Pregnant Women  
Provided:  No limitations  With limitations\*

\*Any benefit package that consists of *less than four (4) counseling sessions per quit*

attempt, with a minimum of two (2) quit attempts per 12 month period (eight (8) per year) should be explained below.

Please describe any limitations:]

Revision:

ATTACHMENT 3.1-A  
Page 3 Addendum

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
State/Territory: Delaware

LIMITATIONS ON AMOUNT, DURATION AND SCOPE OF MEDICAL AND REMEDIAL CARE AND SERVICES  
PROVIDED TO THE CATEGORICALLY NEEDY

6.d. Other Practitioners' Services

6.d.2. Comprehensive Tobacco Cessation Services, as recommended in the 2008 Public Health Service (PHS) Guideline or any subsequent modification of this Guideline, and provided by 1) by or under the supervision of Medicaid-enrolled physician; or 2) by any other Medicaid-enrolled health care professional who is legally authorized to furnish such services under State law and who is authorized to provide Medicaid coverable services other than tobacco cessation services under State law to include the following:

1. Assessment of tobacco dependence, including a written tobacco cessation treatment plan of care;
2. Face-to-face counseling; and,
3. If appropriate, prescribing tobacco cessation pharmacotherapy, as medically necessary.

Vendors that contract with the State may be included in the group of eligible tobacco cessation service providers.

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

Revision:

Attachment 3.1-A  
Page 8 Addendum

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
State/Territory: DELAWARE

LIMITATIONS ON AMOUNT, DURATION AND SCOPE OF MEDICAL AND REMEDIAL CARE AND SERVICES  
PROVIDED TO THE CATEGORICALLY NEEDY

20. a. & b. Extended Services to Pregnant Women

Those services normally covered by Medicaid for all eligibles are available to pregnant women.

~~In addition, the~~ The following extended services are available with prior authorization include:

- Nutrition assessment, counseling and education.
- Nursing assessment, education and referral to needed medical services.
- Social services as medically necessary to assure that home, family, community and environmental issues are not complicating the pregnancy.

Prior authorization will be based on complicating and social problems that would have a negative impact on the outcome of the pregnancy.

In addition, the following extended services available without prior authorization include:

- Comprehensive tobacco cessation services, as recommended in the 2008 Public Health Service (PHS) Guideline or any subsequent modification of this Guideline, to include the following:

1) Assessing the pregnant and postpartum woman's tobacco dependence, including a written tobacco cessation treatment plan of care;

2) Face-to-face counseling; and,

3) If appropriate, prescribing tobacco cessation pharmacotherapy, as medically necessary.

Extended services to pregnant women will include the above services when given as part of a medical service provided: 1) by agencies organized, and licensed by the State of Delaware, to provide medical care or under the supervision of Medicaid-enrolled physician; or 2) by any other Medicaid-enrolled health care professional who is legally authorized to furnish such services under State law and who is authorized to provide Medicaid coverable services other than tobacco cessation services under State law.

Vendors that contract with the State may be included in the group of eligible tobacco cessation service providers.

**(Break in Continuity of Sections)**

ATTACHMENT 4.19-B  
Page 2 Addendum

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
State/Territory: Delaware

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

Tobacco Cessation Counseling Services

To maximize the effectiveness of tobacco cessation medications, counseling services are available for Medicaid beneficiary use in conjunction with cessation medication.

Counseling services must be prescribed by a licensed practitioner participating in the Delaware Medical Assistance Program (DMAP).

Clinicians and other licensed practitioners must bill their usual and customary charges and must use the appropriate CPT/CDT Codes to bill for their counseling services. Services supplied by contracted vendors are reimbursable under the terms of the agreement with the State of Delaware.

State developed fee schedule rates and any annual periodic adjustments to the fee schedule and its effective dates are published at <http://www.dmap.state.de.us/downloads/hcpcs.html>

Assurances – Cost Sharing Exemption for Tobacco Cessation Services

The State assures that cost-sharing is prohibited for tobacco cessation services for pregnant women. In accordance with Section 1916(a)(2)(B) and section 1916A(b)(3)(B)(iii) of the Act, the State does not permit cost sharing for services furnished to pregnant women, if such services are related to the pregnancy or to any other medical condition which may complicate the pregnancy. The State assures that the prohibition on cost-sharing for pregnant women specifically includes “counseling and pharmacotherapy for cessation of tobacco use by pregnant women (as defined in section 1905(bb)).”

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**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**

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

**ORDER**

**Concurrent Hospice Care for Children Under Age 21 Years**

**NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Title XIX Medicaid State Plan regarding *concurrent hospice care for children under age 21 years*. The Department’s proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section

10115 in the September 2011 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by September 30, 2011 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 proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX Medicaid State Plan regarding election of hospice services for children under age 21 years.

#### Statutory Authority

- Patient Protection and Affordable Care Act (Pub. L. No. 111-148 as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152)), together known as the Affordable Care Act
- 1905(o)(1) of the Social Security Act, *Hospice care*
- 2110(a)(23) of the Social Security Act, *Hospice Care*

#### Background

Specifically, this regulatory action provides for the mandatory implementation of section 2302 of the Affordable Care Act, entitled "Concurrent Care for Children." Section 2302 of the law amends sections 1905(o)(1) and 2110(a)(23) of the Social Security Act to remove the prohibition of receiving curative treatment upon the election of the hospice benefit by or on behalf of a Medicaid or Children's Health Insurance Program (CHIP) eligible child.

Hospice services are covered under the Medicaid and CHIP programs as an optional benefit. However, the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provision requires Medicaid and CHIP programs operating as Medicaid expansions to provide all medically necessary services, including hospice services, to children under age 21. In order to qualify for the hospice service in either Medicaid or CHIP, a physician must certify that the eligible person is within the last 6 months of life.

The Affordable Care Act does not change the criteria for receiving hospice services; however, prior to enactment of the new law, curative treatment of the terminal illness ceased upon election of the hospice benefit. This new provision requires States to make hospice services available to children eligible for Medicaid and children eligible for Medicaid-expansion CHIP programs without forgoing any other service to which the child is entitled under Medicaid for treatment of the terminal condition. These services and supports may include pain and symptom management and family counseling provided by specially-trained hospice staff. Implementation of this new provision is vitally important for children and their families seeking a blended package of curative and palliative services.

States are required to comply with these requirements in advance of amending their state plans.

This provision was effective upon enactment of the Affordable Care Act on March 23, 2010 and is subject to approval by the Centers for Medicare and Medicaid Services (CMS).

#### Summary of Proposal

While the State already covers this service, the State plan is amended in accordance with the provisions of Section 2302 of the Affordable Care Act. This provision allows hospice care to be available to recipients under age 21 without forgoing any other medically necessary curative services to which the child is entitled under Medicaid or the Delaware Healthy Children Program. Attachment 3.1-A is amended by establishing hospice care for children concurrent with curative treatment of the child's terminal illness.

The Affordable Care Act (ACA) does not change the eligibility criteria for receiving hospice care. The ACA only removes the prohibition of receiving curative treatment upon the election of the hospice benefit.

Please note that States, like Delaware that currently cover hospice services in its CHIP program do not need to submit a State Plan amendment (SPA) to modify the hospice definition, but States are expected to implement these services in compliance with the Affordable Care Act. Hospice policy of the Delaware Healthy Children Program will remain consistent with Medicaid hospice policy.

The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

**Fiscal Impact**

The proposed amendment imposes no increase in costs on the General Fund.

**SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE**

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows.

GACEC and SCPD endorse the proposed regulation and have the following observations.

As background, there was an historical anomaly in provision of hospice care to individuals under age 21 under both the Medicaid and CHIP programs. If parents elected to obtain hospice services for a child, the child became categorically ineligible for "cure-directed" treatment. The federal Patient Protection and Affordable Health Care Act removed this "one or the other" approach so that a parent does not have to forego all curative treatment as a condition of a child receiving hospice services. DMMA is now implementing the new law through a Medicaid State Plan amendment. DMMA has also agreed to implement the new law in the CHIP program.

**FINDINGS OF FACT:**

The Department finds that the proposed changes as set forth in the September 2011 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Title XIX Medicaid State Plan regarding *concurrent hospice care for children under age 21 years* is adopted and shall be final effective November 10, 2011.

Rita M. Landgraf, Secretary, DHSS

**DMMA FINAL ORDER REGULATION #11-48****REVISION:**

Revision: HCFA-PM-86-20 (BERC)  
SEPTEMBER 1986

ATTACHMENT 3.1-A  
Page 7

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

State/Territory: Delaware

## AMOUNT, DURATION AND SCOPE OF MEDICAL AND REMEDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

18. Hospice care (in accordance with section 1905(o) of the Act)..

- |                                     |                   |                          |                |                                     |  |
|-------------------------------------|-------------------|--------------------------|----------------|-------------------------------------|--|
| <input checked="" type="checkbox"/> | Provided:         | <input type="checkbox"/> | No limitations | <input checked="" type="checkbox"/> | <u>Provided in accordance with section 2302 of the Affordable Care Act</u> |
| <input type="checkbox"/>            | With limitations* | <input type="checkbox"/> | Not provided.  |                                     |  |

\*Description provided on attachment.

## DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

## ORDER

**Medicaid Nonpayment and Reporting Requirements For Provider Preventable Conditions****NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Title XIX Medicaid State Plan regarding *Medicaid nonpayment and reporting requirements for provider preventable conditions*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the September 2011 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by September 30, 2011 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 proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend the Title XIX Medicaid State Plan regarding *Medicaid nonpayment and reporting requirements for provider preventable conditions*.

**Statutory Authority**

- Patient Protection and Affordable Care Act (Pub. L. No. 111-148 as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152)), together known as the Affordable Care Act;
- 42 CFR §434.6, *General requirements for all contracts and subcontracts*;
- 42 CFR §438.6, *Contract requirements*;
- 42 CFR §447.26, *Prohibition on payment for provider-preventable conditions*.

**Background**

On June 6, 2011, the Centers for Medicare and Medicaid Services (CMS) issued a final rule outlining its planned implementation of non-payment for Medicaid healthcare-associated conditions (HCACs). The final rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2011-06-06/pdf/2011-13819.pdf>. The rule implements Section 2702 of the Patient Protection and Affordable Care Act (ACA) of 2010, which prohibits federal payments to state Medicaid programs for the costs associated with HCACs.

In addition, the law allows states to identify other conditions for which they may deny provider payments. States must ensure that any non-payment rules they put into effect do not result in a loss of access to care or services for Medicaid beneficiaries. The rule requires providers to self-report the occurrence of HCACs through their existing claims systems.

Section 2702 of the ACA requires the Secretary to identify current State practices that prohibit Medicaid payment for health care-acquired conditions (HCACs), determine which practices are appropriate for the Medicaid program, and apply them to the Medicaid program through regulations to be effective July 1, 2011. The regulations are to prohibit federal payment for specified HCACs and ensure that the prohibition will not result in loss of access to care for Medicaid beneficiaries. For this purpose, HCACs are defined as medical conditions for which an individual was diagnosed that could be identified by a secondary diagnostic code described in the Medicare requirements at section 1886(d)(4)(D)(iv) of the Social Security Act. (In the Medicare program, this section applies to prohibition of certain inpatient hospital payments, and the identified conditions are referred to as Hospital Acquired Conditions, or HACs.) In implementing the Medicaid payment prohibition, the Secretary must apply, as appropriate, the Medicare inpatient hospital payment regulations promulgated under section 1886(d)(4)(D). In doing so, the Secretary may exclude certain Medicare HACs if they are inapplicable to Medicaid beneficiaries.



While the rule's requirements will take effect July 1, 2011, as required by the statute, CMS intends to delay compliance action on the provision until July 1, 2012.

**Summary of Proposal**

In response to the requirements outlined in Section 2702 of the Affordable Care Act (ACA), the Delaware Medical Assistance Program (DMAP) is implementing new policy that prohibits Medicaid payment for services related to Provider Preventable Conditions (PPCs). In addition, DMAP will require that providers self-report the occurrence of a PPC. DMAP will implement Section 2702 and prohibit Medicaid payments for care associated with PPCs. The new policy is effective for dates of service on and after July 1, 2011.

Specifically, upon receipt of CMS-approved state plan amendment preprint templates, the Medicaid state plan will be amended at Attachment 3.1-A and Attachment 4.19-B to allow enforcement of payment prohibitions for services related to provider preventable conditions. The DMAP will update its payments systems to improve enforcement and, consistent with Section 2702 of the ACA, which takes effect July 1, 2011, implement policies to prohibit Medicaid payment for provider preventable conditions. DMAP provider manual(s) will also be updated, as appropriate.

The provision of this state plan amendments are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

**Fiscal Impact**

It is anticipated that there will be minimal fiscal impact to the General Fund as these Provider Preventable Conditions are generally not billed to the Medicaid program.

**SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE**

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations summarized below. The Division of Medicaid and Medicaid Assistance (DMMA) has considered each comment and responds as follows.

As background, CMS issued a final regulation in June 2011 implementing Section 2702 of the federal Patient Protection and Affordable Care Act. The CMS regulation bars Medicaid payments to hospitals for services rendered related to provider-preventable conditions. Such conditions include foreign objects retained after surgery, blood transfusions with incompatible blood, falls and trauma occurring in the hospital, etc. The bar on payment does not apply to services related to pre-existing conditions, *i.e.*, "present on admission" ("POA"). *Id.* Moreover, covered hospitals must report all provider preventable conditions. Finally, States have some discretion to apply the regulation to non-hospital providers. At 32823. DMMA is now proposing to implement the new CMS regulation through a Medicaid State Plan amendment. The brief amendment essentially adopts the CMS requirements. Hospitals will be required to report provider preventable conditions to DMMA and be barred from submitting claims for services related to such conditions. GACEC and SCPD have the following observations on the proposed DMMA Plan Amendment.

First, the CMS regulation [§447.26(c)(5), reproduced at 76 Fed. Reg. 32837], contains the following provision:

A State plan must ensure that non-payment for provider-preventable conditions does not prevent access to services for Medicaid beneficiaries.

One concern addressed by this provision is that hospitals anticipating Medicaid non-payment to remediate a provider-preventable condition may opt to decline to treat the condition. This could be very harmful to Medicaid beneficiaries who have developed a provider-preventable condition. A related concern would be imposing the costs of treatment of the provider-preventable condition on the Medicaid beneficiary through direct billing. It would be preferable for DMMA to include the following clarification in the regulation:

Providers identifying a provider-preventable condition whose costs of treatment are barred under this section shall not deny medically necessary treatment to the affected patient nor attempt to impose financial liability on the affected patient.

**Agency Response:** As referenced in the regulation's "Summary of Proposal", CMS has issued a State plan

amendment preprint template. The template language captures the assurance that the State is in compliance with 42 CFR 447, Subpart A. Specifically, 42 CFR §447.26(c)(4) addresses the clarification requested. A copy of the template can be provided upon request.

Regarding billing Medicaid beneficiaries, DMAP provider manuals already have in place specific policies that protect Medicaid beneficiaries. See, for example, General Policy Manual, 1.16, *Billing DMAP Clients* on the DMAP website at:

<http://www.dmap.state.de.us/downloads/manuals.html>.

Second, CMS expects states to include “provider-preventable condition” payment and reporting standards in MCO contracts. At 32828-32829. DMMA may wish to review the DSHP and DSHP Plus proposed contract provisions to ensure incorporation of the reporting and billing standards.

**Agency Response:** DMMA will comply with all CMS requirements related to payment and reporting standards.

#### FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the September 2011 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Title XIX Medicaid State Plan regarding *Medicaid nonpayment and reporting requirements for provider preventable conditions* is adopted and shall be final effective November 10, 2011.

Rita M. Landgraf, Secretary, DHSS

#### DMMA FINAL ORDER REGULATION #11-50b REVISION:

Delaware Medical Assistance Program Provider Specific Policy Manual

#### (Policy Number Undetermined) Provider Preventable Conditions

The following applies to any healthcare service provided to Medicaid recipients and dual eligible beneficiaries:

(1) In accordance with 76 FR 32837, which is incorporated by reference, the Delaware Medical Assistance Program (DMAP) will not reimburse providers or contractors for provider preventable conditions (PPCs) as defined in this Centers for Medicare and Medicaid Services (CMS) rule. Providers and contractors are prohibited from submitting claims for payment of these conditions except as permitted in 76 FR 32837 when the provider preventable condition existed prior to the initiation of treatment by the provider.

(2) Medicaid providers who treat Medicaid eligible patients must report all provider preventable conditions whether or not reimbursement for the services is sought.

(3) Providers must report the occurrence of a PPC through the appropriate claim(s) type submission process.

(4) DMAP will not accept Medicare primary, Medicaid secondary professional, or institutional crossover claims resulting in zero liability.

(5) DMAP will align with Medicare’s policy and billing guidelines for all providers impacted by this policy, and adopt CMS’ changes.

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### DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

#### ORDER

#### Diamond State Health Plan Plus 1115 Demonstration Waiver Amendment

#### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Diamond State Health Plan 1115 Demonstration Waiver to implement managed

long-term care under the name, *Diamond State Health Plan Plus*. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the July 2011 Delaware *Register of Regulations* and provided a draft of the waiver amendment application on the Division of Medicaid and Medical Assistance website at <http://dhss.delaware.gov/dhss/dmma/>, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by August 31, 2011 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 proposed provides notice to the public that the Delaware Division of Medicaid and Medical Assistance (DMMA) intends to submit an application to the Centers for Medicare and Medicaid Services (CMS) to amend the Diamond State Health Plan (DSHP) Section 1115 demonstration waiver. Specifically, this waiver amendment integrates Nursing Facility (NF) services and Home and Community-Based Services (HCBS) into the existing managed care delivery system.

#### **Statutory Authority**

- 42 U.S.C. §1315, *Demonstration projects*
- Social Security Act §1115, *Demonstration projects*

#### **Background**

Section 1115 of the Social Security Act provides the Secretary of Health and Human Services broad authority to authorize experimental, pilot, or demonstration projects likely to assist in promoting the objectives of the Medicaid statute. Flexibility under Section 1115 is sufficiently broad to allow states to test substantially new ideas of policy merit. These projects are intended to demonstrate and evaluate a policy or approach has not been demonstrated on a widespread basis. Some states expand eligibility to individuals not otherwise eligible under the Medicaid program, provide services that are not typically covered, or use innovative service delivery systems.

Under a waiver authority of Section 1115(a) of the Social Security Act, the Diamond State Health Plan (DSHP) implemented a mandatory Medicaid managed care demonstration program statewide on January 1, 1996. Using savings achieved under managed care, Delaware expanded Medicaid health coverage to additional low-income adults in the State with incomes less than 100% of the Federal Poverty Level (FPL).

Goals of the Diamond State Health Plan are to improve and expand access to healthcare to more adults and children throughout the State, create and maintain a managed care delivery system emphasizing primary care, and to strive to control the growth of healthcare expenditures for the Medicaid population.

#### **Summary of Proposal**

The Division of Medicaid and Medical Assistance (DMMA) intends to amend its 1115 Demonstration Waiver to integrate primary, acute and long-term care (LTC) services for the elderly and persons with physical disabilities into the Diamond State Health Plan (DSHP) statewide program under the name "Diamond State Health Plan Plus." DMMA is proposing to leverage the existing DSHP 1115 demonstration waiver by expanding it to include full-benefit dual eligibles, individuals receiving institutional LTC (excluding the developmentally disabled population), and individuals enrolled in DMMA's Elderly and Disabled and AIDS section 1915(c) waivers.

DMMA is requesting public comment on the 1115 Demonstration Waiver amendment, "Diamond State Health Plan Plus" (DSHP). Operational implementation of DSHP Plus is projected for April 1, 2012.

The provisions of this demonstration waiver are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

#### **Fiscal Impact Statement**

There is no increase in cost on the General Fund. Demonstrations must be "budget neutral" over the life of the project, meaning they cannot be expected to cost the Federal government more than it would cost without the waiver.

## SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

The Delaware Health Care Facilities Association (DHCFA) offered the following observations and recommendations summarized below. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

**DHCFA Comments Dated June 17, 2011**

The Delaware Health Care Facilities Association's membership is extremely concerned with the impact of the proposed Delaware Medicaid Managed Care Program to providers and their long term care patients. Beginning May of 2011, DHCFA corresponded with Secretary Landgraf, DMMA Staff, consultants and other stakeholders. The purpose was to outline serious concerns with process, potential unintended adverse outcomes and the tight implementation timeline proposed. Since that time, we participated in a helpful and informative meeting with DMMA and Mercer representatives on Monday, June 20<sup>th</sup> and have received answers to preliminary questions. Enclosed herewith are copies of correspondence concerning the proposed new regulations for the Diamond State Health Plan Plus 1115 Demonstration Waiver Amendment published in the July 1, 2011 Proposed *Register of Regulations* for inclusion as written comments.

**Question #1:** For a dual eligible patient when a patient is covered under Part A Medicare will the Medicare rate be paid at the same rate that was in place prior to the inception of managed care? Or will the integration of Medicare and Medicaid benefits somehow impact the Medicare rate for full-eligible dual eligibles?

**Agency Response:** The Plus program will not impact Medicare rates or payments. Medicare will continue to be primary.

**Question #2:** How will the current Medicaid rates with all the levels and add-ons on many of these rates be handled under a managed care model?

**Agency Response:** We are exploring the elimination of the "add-on's" but are just in the preliminary planning stages. We will involve the nursing homes in this process. Should the ultimate decision be made to eliminate the add-ons, it would collapse the virtual 32 levels into 9. The money that would normally be paid out via add-ons could then be folded into the nursing homes' base rates.

**Question #3:** Will there be a hold harmless built-in for some period of time for providers so their Medicaid payments with managed care are not lower than the Medicaid rates in place prior to the implementation of managed care?

**Agency Response:** As a matter of policy, DMMA will require the managed care organizations (MCOs) to pay nursing facilities (NFs) rates equivalent to what fee-for-services (FFS) would have paid for the first three years of the DSHP Plus program and the capitation rates will reflect this policy.

**Question #4:** How will rate changes occur under a managed care level?

**Agency Response:** The Medicaid Reimbursement Team will continue to set the reimbursement level for nursing home residents. DMMA will continue to establish the rates using the nursing homes' cost reports and following the normal process.

**Question #5:** Will January still be the effective date for rate changes?

**Agency Response:** Yes, the reimbursement schedule will remain the same.

**Question #6:** When is it anticipated that the payments for the nursing homes under a managed care model will be lower than payments that would be made to nursing homes under the current payment system?

**Agency Response:** DMMA will continue to set the nursing homes' payment rates for at least three years. We will revisit this as we approach the three year mark.

**Question #7:** One of the exclusion mentioned is "Dual eligibles other than full-benefit duals". Can you please provide a definition of this type of Dual Eligible versus what providers may typically think of as a Dual Eligible?

**Agency Response:** A partial dual eligible is a typical QMB (Qualified Medicare Beneficiary). Under this program Medicaid pays the patient's Medicare Premium, co insurance and deductibles only. The patient is not eligible for full Medicaid benefits. A full dual is someone who has full Medicaid and full Medicare coverage.

**Question #8:** What does it mean that "patients whose needs can no longer be safely handled in the community can be granted an exception"? That note is a foot note to the table listed above.

**Agency Response:** This is in reference to a possible change in the activities for daily living (ADL) requirement for nursing home placement. This has not been approved by the Centers for Medicare and Medicaid Services (CMS).

This is still under exploration.

**Question #9:** Will ADLs of 3 or more automatically qualify an individual for nursing home admission?

**Agency Response:** We are still exploring the possibility of changing the ADL requirement from the individual having to need assistance with one ADL to qualify medically for Medicaid nursing home coverage to having to need assistance with two or more ADLs. Should that change occur, we would expect that individuals needing assistance with 3 or more ADLs who prefer to receive their care in a nursing home would qualify medically for Medicaid nursing home coverage.

**Question #10:** Will the reimbursement rates for nursing homes at of the inception of managed care be impacted in any way?

**Agency Response:** As a matter of policy, DMMA will require the MCOs to pay nursing facilities rates equivalent to what FFS would have paid for the first three years of the DSHP Plus program and the managed care capitation rates will reflect this policy.

**Question #11:** Has statutory language been drafted addressing Medicaid Managed Care Long Term Care Policy considerations? If so, can it the language please be provided.

**Agency Response:** Not at this time. The DMMA policy unit is working on amending DMMA's policy as needed. Every policy change will be published for comment.

**Question #12:** Can you provide a more detailed implementation timeline?

**Agency Response:** This timeline was provided at our meeting and a copy can be found on the web site.

**Question #13:** Will the Plans be allowed to exclude any provider from their network at any time? If so, for what reasons?

**Agency Response:** The Plans will be required to contract with all current Delaware Medicaid enrolled nursing facilities. It is possible that a nursing home would refuse to contract with a MCO. If this should occur and the nursing facility has Medicaid patients, the MCO would pay the facility as a non-participating provider at a reduced rate.

**Question #14:** Will there be two types of plans for recipients or only one?

**Agency Response:** We are not certain if you are asking about Health Plans or Plan Benefits. If you are asking about Health Plans, then there will be two Health Plans for recipients to choose from.

If you are asking about Health Benefits, then full duals in the community that do not qualify medically and financially for Long Term Care Medicaid services will receive the same benefit package that current Diamond State Health Plan programs recipients receive and will not receive the enhanced long term care services that those that qualify medically and financially for Long Term Care Medicaid services. Those that qualify for Long Term Care Medicaid services will receive all of the services that current Diamond State Health Plan members receive plus the enhanced long term care services.

**Question #15:** What incentives will be established with individual health plans as part of the procurement/contracting process to maximize appropriate safe community placement?

**Agency Response:** The details are being worked out now. The state will retain strict oversight of the quality for this program.

**Question #16:** What performance measures will there be in place to ensure quality care is being provided to clients (outside of skilled nursing facility settings) and what checks and balances will there be in place to ensure that the client is placed in the most appropriate setting and not the least costly setting.

**Agency Response:** The MCO contract and quality strategy is currently being developed. Delaware is committed to finding the most appropriate and safe setting for clients.

**Question #17:** How many levels of care are envisioned for the program? Who will determine these levels of care?

**Agency Response:** We need clarification regarding what you are asking. DMMA will determine if DSHP Plus applicants meet the medical eligibility requirement for the program. If you are asking about nursing home reimbursement rates, please see the response to question #2.

**Question #18:** Who will provide the counseling to clients who have to make a decision regarding placement?

**Agency Response:** This will be the responsibility of the Managed Care Companies with oversight by the State. In addition, the Aging & Disability Resource Center (ADRC) staff within the Division of Services for Aging & Adults with Physical Disabilities provides options counseling for individuals facing these types of decisions. Ultimately, placement is the client's decision.

**Question #19:** How will assignment to the MCO work? If the recipient fails to choose a plan, how will this

work?

**Agency Response:** There will be a 50/50 auto assignment to the plans if the client fails to choose a plan within 30 days. The client will have a 90 day period to change plans for any reason. In addition, a client can change Plans for "good cause" at any time. Finally, all clients can change Plans for any reason during the annual Open Enrollment process.

**Question #20:** How will this work if the client is enrolled in a Medicare Advantage Plan or special needs Plan?

**Agency Response:** Medicare and the Advantage or Special Needs Plan will be primary and the Medicaid MCO will pay co-pays, deductibles and for services not covered by Medicare. DMMA will be exploring how to better coordinate care between SNPs and Medicaid MCOs in the future.

**Question #21:** Has language been drafted to establish an independent appeal process for denial of claims and/or coverage?

**Agency Response:** The MCOs are already required to have an internal appeal process for members and for providers. DMMA has staff on the MCO's member appeal board. In addition, members may also appeal separately through the State's appeal process.

**Question #22:** Who will set the rates?

**Agency Response:** Delaware Medicaid will set the nursing home rates.

**Question #23:** Will the Plans be allowed to pay higher rates for patients requiring medically complex services such as ventilator care?

**Agency Response:** Delaware Medicaid will set the nursing home rates. DMMA may at a later date consider allowing the MCOs to contract for specialty care that does not align with one of the current 9 primary rate categories.

**Question #24:** How will the establishment of a Delaware Quality Improvement Fund (provider tax) be incorporated into the program?

**Agency Response:** Funds from the tax would be taken into account by the DMMA when it establishes the nursing home rates.

**Question #25:** How will this be designed and protected? Prompt payment contract must be part of the contract with the MCOs and be set at 14 days for clean claims.

**Agency Response:** There are prompt pay requirements in the MCO contracts.

**Question #26:** What contractual obligations will be imposed on the MCOs with regard to billing systems and claims processing?

**Agency Response:** There are contractual requirements regarding billing systems and prompt pay requirements.

**Question #27:** What is the plan or process to ensure that Medicare crossover claims are processed properly and that documentation is sufficient to support federal requirements for Medicare bad debt?

**Agency Response:** This will be a part of the discussion with the MCOs.

**Question #28:** What are the proposed retroactive Medicaid eligibility standards?

**Agency Response:** Eligibility rules will remain the same and should Medicaid approve a nursing home resident for retroactive Medicaid eligibility, the MCO will be required to pay the nursing home for the care provided retroactively.

**Question #29:** What are the plans for including quality outcomes data reporting by the MCOs?

**Agency Response:** This will be addressed in the Quality Strategy that is being developed now.

**Question #30:** MCOs must be held accountable alongside providers for outcomes.

**Agency Response:** DMMA agrees.

#### **DHCFA Comments Dated August 31, 2011**

DHCFA has reviewed the DHSS Waiver Amendment Request ("Waiver") regarding the creation of the "Diamond State Health Plan Plus" ("Plus"). The Waiver proposes to integrate primary, acute, behavioral health and long term care ("LTC") services for the elderly and persons with physical disabilities into the State's existing Medicaid managed care program. The integration will include individuals who currently receive institutional long term care ("LTC") services (excluding the developmentally disabled population) and individuals enrolled in DMMA's Elderly and Disabled and AIDS waivers. A goal of the Waiver Amendment is to achieve efficiencies through an integrated LTC delivery system. Another goal is to "rebalance" Delaware's LTC delivery system in favor of home and community based services ("HCBS") and away from institutional LTC. The State has indicated its desire to have the Waiver approved by October 1, 2011, and to "go live" with Plus on April 1, 2012. We have concerns with this ambition timetable as we believe it will create many unintended problems, given the Waiver's recognition that a

number of issues remain unresolved and “in progress.” It appears that the intention is to work-out the details in the months leading up to implementation, but we do not believe this is realistic, given the scope and complexity of the Waiver.

We ask that you consider the following comments and questions regarding the Waiver.

**Question #1:** We are concerned about the reliability of the expected costs savings that will be realized by shifting care to home-based settings and out of institutional LTC settings (discussed under the Cost of Care section on page 1) simply because we have not seen meaningful assessments of just how many individuals currently residing in LTC facilities really would be capable of living at home with supports. We find the lack of assessment to be a significant flaw in the justification for the Waiver.

**Agency Response:** The Cost of Care section at the beginning of the Waiver amendment is one component of the general background and context in which the waiver was developed. DMMA does not agree that there is “a significant flaw in the justification for the Waiver” since the primary goal of the waiver amendment is to enhance community-based supports and improve care coordination for individuals with disabilities. Budget Neutrality is, of course, a requirement for CMS waiver approval. Cost estimates are provided in that section of the waiver amendment and do assume slowed cost growth over the duration of the waiver due to increased availability of less expensive service options and improved health outcomes.

**Question #2:** The Delaware MFP program has not uncovered numerous nursing facility residents who are capable of living in the community with (reasonable, i.e., not round-the-clock) supports, so we are concerned with the assumption of projected cost savings associated with the waiver. Of course, the targeted cost savings may be associated with minimizing *future* nursing facility admissions, and if that is the basis for the estimate, the Waiver should be clarified.

**Agency Response:** DMMA would disagree with DHCFA's characterization of the Delaware MFP program. The MFP Program has, in fact, been quite successful in identifying individuals who could transition to the community and the program continues to grow with additional resources, changes in federal MDS reporting, and establishment of the ADRC. Regardless, as noted in question 1, cost savings is not the primary goal of the program and cost assumptions are clearly articulated in the Budget Neutrality section of the waiver amendment.

**Question #3:** The current level of care (“LOC”) review tool, discussed on page 7 of the Waiver, requires that anyone who is entering a nursing facility must need assistance with at least one activity of daily living (“ADL”). New admissions under Plus will need assistance with at least two ADLs to be eligible for nursing facility admission. (The new criteria will not be applied to individuals who already are in institutional LTC settings immediately prior to Plus going into effect.) While we understand that the average nursing facility resident today requires assistance with greater than two ADLs, the Waiver does not address whether there will be any other restrictive revisions to the LOC assessment process or whether participating managed care organizations (“MCOs”) will be able to implement additional restrictive admission criteria going forward.

**Agency Response:** The waiver amendment includes all planned changes regarding level of care requirements.

We also inquire whether the assessment process will recognize a level of ADL assistance that *requires* institutional care for safety reasons (i.e., a recognition that a person could require so much assistance that it does not make sense (from the perspectives of safety, quality and expense) for the person to remain in a community setting, even if they would prefer to do so.

**Agency Response:** The MCOs will be responsible for working with the member and their representatives to determine the appropriate services and supports so that the member may reside safely in the setting of their choice. A member's level of need along with the desire and ability to reside in the community is frequently dependent upon the availability of family and informal supports to assist with the member's care.

**Question #4:** In addition, at page 14, the Waiver notes that “State staff will continue to perform the initial and annual LOC assessments for those being considered for the LTC institutional LOC benefits.” It then states: “Using the State's approved tool, the MCOs will be responsible for assessments to determine LOC for reimbursement and care planning.” It is unclear whether this means that going forward; the State will retain authority over LOC assessments for purposes of admission determinations or whether MCOs will take over that responsibility eventually, with freedom to develop their own admission criteria.

**Agency Response:** The State will retain responsibility for performing LOC assessments and making the medical eligibility determinations.

If so, when will the MCOs take over the responsibility?

**Agency Response:** The MCOs will be responsible for working with the member and their representatives to determine the appropriate services and supports so that the member may reside safely in the setting of their

choice.

**Question #5:** Page 12 discusses two separate home modification budgets (“home modifications” and an additional allowance under “community transition services”) to assist with transitions out of (and avoiding) institutional LTC. Are these intended to be separate pools of money?

**Agency Response:** DMMA agrees and reference to home modifications under Community Transition Services will be removed. Home modifications are a separate service.

**Question #6:** Page 12 includes a benefits table for Plus. It is noted that nursing facility services are covered after the first 30 days of admission. Who is responsible for the cost of the first 30 days, especially if the patient already is Medicaid-qualified and is not dual-eligible (and there is no prospect for Medicare coverage)? Will those expenses be covered by Medicaid fee-for-service?

**Agency Response:** Thirty (30) days of nursing facility services is an existing benefit for the clients who are enrolled in the Diamond State Health Plan. The MCOs are already responsible for covering the first thirty (30) days of nursing facility services for those already in receipt of Medicaid and already enrolled with them.

Those individuals who are not already in receipt of Medicaid and who are not already enrolled with a MCO, and who need more than thirty (30) days of nursing facility services, will need to apply for DSHP Plus program and can be found eligible for retroactive nursing home coverage.

**Question #7:** The benefits table also refers to outpatient behavioral health benefits. We are concerned whether there will be any enhancements to the behavioral health services available to LTC facility residents, given the tremendous need for such services. While meetings with the MCOs have pointed to the intent of this service being provided, the waiver language does not seem to reflect that this will be a mandatory service to be provided by MCOs.

**Agency Response:** As stated earlier, the primary goal of the waiver amendment is to enhance community based support services to reduce unnecessary hospitalization or institutionalization. Individuals in LTC facilities with behavioral health needs will continue to receive the active treatment services to which they are entitled.

**Question #8:** The footnote on page 13 refers to an exception for persons seeking nursing facility admission or readmission who continue to meet the nursing facility LOC in place as of March 31, 2012, but whose needs can no longer be safely be met in the community. Does this refer to *new* admissions as of 4/1/12 and thereafter, and is it an acknowledgment that the State may grant an exception where the person has only one ADL limitation per the LOC assessment, but nonetheless cannot be safely cared for in the community? If so, what types of situations would warrant a “safety” exception?

**Agency Response:** DMMA wishes to retain sufficient flexibility to respond to individual consumer needs and preferences. No specific situation is envisioned at this time where such an exception would need to be made.

**Question #9:** Under the Plan of Care section on page 16, it is unclear what is meant by the reference to “longer term strategic planning” under the MCO’s responsibility for developing the plan of care.

**Agency Response:** This references the goals of the client for their care.

Also, the Waiver characterizes the MCO’s responsibility with respect to care plans as: “[T]he MCO will be expected to emphasize services that are provided in member’s homes and communities in order *to prevent or delay institutionalization whenever possible.*” Does the Waiver include financial incentives for delayed / avoided institutional placements?

**Agency Response:** Capitation payments under the waiver are actuarially determined based on program costs. There are no incentive payments related to institutional placements.

**Question #10:** On page 17, the Waiver notes that Delaware currently carves out pharmacy from the Diamond State Health Plan MCO benefit package and will continue to do so “*upon the initial implementation of DSHP Plus.*” The Waiver goes on to state, however, that the State is requesting authority to include pharmacy under Plus at a later date. We inquire whether this could change the manner in which LTC facilities obtain medications for patients (for example, would all facilities that participate with MCOs be required to obtain medications from pharmacies that have contracts with the MCOs?).

**Agency Response:** There are no specific plans at this time to include pharmacy as a MCO-covered benefit. However, this is something that the State may explore in the future.

Also, will all necessary medications be included in the facility payment rate under Plus?

**Agency Response:** No, medications would continue to be reimbursed as a separate service.

Page 17 also notes that “medically necessary behavioral health services in excess of MCO plan benefit limits” will remain paid directly by fee-for-service Medicaid. Given the collapse of LTC Medicaid into one program (including residents in institutional settings), does this mean that the State will be responsible for providing



enhanced behavioral health services – at the State’s expense -- to Medicaid-covered facility residents? As we have discussed previously, many nursing facility residents would benefit greatly from enhanced behavioral health services, as geriatric psychological services are severely limited in Delaware.

**Agency Response:** Individuals in LTC facilities with behavioral health needs will continue to receive the active treatment services to which they are entitled.

**Question #11:** Page 19 of the Waiver describes how members will be assigned to an MCO plan. This section states that members will be pre-assigned to an MCO in a manner that allows for “shared risk.” This section notes the desire for “continuity of care with current providers,” but with respect to nursing facility and HCBS members, “DMMA is also developing a more refined pre-assignment process that considers both continuity of care as well as the distribution of members between the two MCOs.” This raises a few questions/issues. First, the Waiver does not describe how nursing facilities will become contracted MCO providers.

**Agency Response:** All providers should contact the MCOs to begin the MCO enrollment/contract process.

Is it possible that facilities could be under contract with one plan but not the other(s)? If so, for current facility residents, will pre-assignment determinations take into account whether their facility is a contracted provider with the particular MCO? We also inquire whether the MCOs will be required to enter into provider agreements with all Medicaid-certified facilities that want to enter into managed care agreements, or is it possible that facilities could be excluded. If MCOs are not required to contract with all willing providers, it could dramatically impact each facility’s planning process, as a facility could suddenly find itself unable to provide care for Medicaid beneficiaries.

**Agency Response:** The State is requiring both MCOs to contract with all Medicaid enrolled nursing facilities. However, it is possible that a nursing facility may refuse to contract with a MCO despite the requirement that the MCO pay the nursing facility the rates that the State will continue to set. Should that occur and should that nursing facility have residents that are members of that particular MCO, the MCO would pay the nursing facility as a non-participating provider and would not be required to pay the facility at the Medicaid established rates. We expect the MCOs would pay the non-participating provider a reduced rate.

Pre-Assignment determinations will not take into account whether the Medicaid client’s nursing facility is enrolled with a particular MCO. However, the Health Benefits Manager and DMMA staff will educate the client and his/her family regarding the MCOs’ provider network so that they may make an informed choice regarding an MCO.

**Question #12:** The Waiver is silent about how LTC facilities will be paid. In a July 2011 “Q&A” document, the State represented that it will continue to set rates for nursing homes (and MCOs will be required to pay these State-approved rates for 3 years), but the “Q&A” document also notes that “[t]his will be revisited as the program progresses.” We inquire why the Waiver does not mention these understandings regarding facility rates. We feel that it is important for the State to provide as much detail as possible about how nursing facility rates will be set going forward, including after the 3-year period is over. Will MCOs then be negotiating rates with each contracted facility provider?

**Agency Response:** A Waiver document is not intended to include all details regarding processes. Some of these processes will be articulated in the MCO contract. We agree that it is important that the facilities receive details regarding the reimbursement process and will share those details and obtain your input as soon as practical and possible.

After the State ends its requirement that the MCOs pay nursing facilities at the rates established by the State (after the three year period), the nursing facilities and MCOs will negotiate their own rates.

**Question #13:** Moreover, we have received notification that the 3-year rate setting period is problematic for providers looking to refinance loans, as financial institutions traditionally request projections for 5, 8 and 10 years regarding financial stability. The 3-year plan will hinder the ability of providers to be able to manage their businesses, and we request that consideration be given to extending the rate setting period to a minimum of 5 years.

**Agency Response:** We are considering this request, although we are puzzled as to why facilities are able to now project forward 5, 8 and 10 years, but would not be able to make assumptions required of such projections with a managed care service delivery.

#### **FINDINGS OF FACT:**

The Department finds that the proposed changes as set forth in the July 2011 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED,** that the proposed regulation to amend the Diamond State Health Plan 1115

Demonstration Waiver to implement managed long-term care under the name, *Diamond State Health Plan Plus* is adopted and shall be final effective November 10, 2011.

Rita M. Landgraf, Secretary, DHSS

A copy of the Diamond State Health Plan 1115 Demonstration Waiver is available at:

<http://regulations.delaware.gov/register/november2011/final/1115Waiver.pdf>

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### DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

#### ORDER

#### Freestanding Birth Center 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 to reflect the addition of *freestanding birth center services* as a mandatory Medicaid benefit, in compliance with the Patient Protection and Affordable Care Act (PPACA), P.L. 111-148. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the September 2011 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by September 30, 2011 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 proposed amends the Delaware Title XIX Medicaid State Plan to reflect the addition of *freestanding birth center services* as a mandatory Medicaid benefit, in compliance with the Patient Protection and Affordable Care Act (PPACA), P.L. 111-148.

#### Statutory Authority

- Patient Protection and Affordable Care Act (PPACA), P.L. 111-148, enacted on March 23, 2010
- 1905(a)(28) of the Social Security Act, Freestanding Birth Center Services

#### Background

The Patient Protection and Affordable Care Act, Section 2301, added freestanding birth center services to section 1905(a) of the Social Security Act as a mandatory Medicaid state plan service, effective March 23, 2010. This provision ensures Medicaid coverage of care provided in freestanding birth centers. Section 2301 requires States that recognize freestanding birth centers to provide coverage and separate payments for freestanding birth center facility services and services rendered by certain professionals providing services in a freestanding birth center, to the extent the State licenses or otherwise recognizes such providers under State law.

States will need to submit amendments to their Medicaid State plans that specify coverage and separate reimbursement of freestanding birth center facility services and professional services in order to comply with this provision.

#### Summary of Proposal

While the State already covers this service, this state plan amendment (SPA) establishes services provided by birthing centers as a Medicaid state plan services and modifies reimbursement methodology to allow birthing centers and providers furnishing services in birthing centers to receive payment as mandated under the Patient Protection and Affordable Care Act. Attachment 3.1-A and Attachment 4.19-B are amended by identifying birthing centers as eligible Medicaid providers and providing for direct Medicaid payments for birthing center services.

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The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

**Fiscal Impact Statement**

The proposed amendment imposes no increase in cost on the General Fund.

**SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE**

No public comments were received.

**FINDINGS OF FACT:**

The Department finds that the proposed changes as set forth in the September 2011 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend Delaware Title XIX Medicaid State Plan to reflect the addition of *freestanding birth center services* as a mandatory Medicaid benefit, in compliance with the Patient Protection and Affordable Care Act (PPACA), P.L. 111-148, is adopted and shall be final effective November 10, 2011.

Rita M. Landgraf, Secretary, DHSS

**DMMA FINAL ORDER REGULATIONS #11-49  
REVISION:**

REVISION

ATTACHMENT 3.1-A  
Page 11

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

State/Territory: DELAWAREAMOUNT, DURATION, AND SCOPE OF MEDICAL AND REMEDIAL CARE  
AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

25. (i) Licensed or Otherwise State-Approved Freestanding Birthing Center Services  
Provided: \_\_\_ No limitations X With limitations\* \_\_\_ None licensed or approved  
Please describe any limitations: *See ATTACHMENT 3.1-A Page 11 Addendum*
25. (ii) Licensed or Otherwise State-Recognized covered professionals in the Freestanding Birthing Center Services  
Provided: \_\_\_ No limitations X With limitations\* (please describe below)  
\_\_\_ Not Applicable (there are no licensed or State approved Freestanding Birth Centers)  
Please describe any limitations: *See ATTACHMENT 3.1-A Page 11 Addendum*  
Please check all that apply:  
X (a) Practitioners furnishing mandatory services described in another benefit category and otherwise covered under the State plan (i.e., physicians and certified nurse midwives).  
X (b) Other licensed practitioners furnishing prenatal, labor and delivery, or postpartum care in a freestanding birth center within the scope of practice under State law whose services are otherwise covered under 42 CFR 440.60 (e.g., lay midwives, certified professional midwives (CPMs), and any other type of licensed midwife). \*  
\_\_\_ (c) Other health care professionals licensed or otherwise recognized by the State to provide these birth attendant services (e.g., doulas, lactation consultant, etc.).\*

\*For (b) and (c) above, please list and identify below each type of professional who will be providing birth center

services:

*(Break in Continuity of Sections)*

REVISION

ATTACHMENT 3.1-A  
Page 11 Addendum

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
State/Territory: Delaware

LIMITATIONS ON AMOUNT, DURATION, AND SCOPE OF MEDICAL AND  
REMDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

25. Licensed or Otherwise State-Approved Freestanding Birth Center Services
- (a) Subject to the specifications, conditions, limitations, and requirements established by the single state agency or its designee, birth center facility services, under this State Plan, are limited to birth centers licensed by the State of Delaware and in compliance with regulations found in the Delaware Administrative Code or other legally authorized licensing authority under applicable state laws.
  - (b) Birth center facility services are those services determined by the attending physician (MD or DO) or certified nurse-midwife (CNM) or licensed midwife to be reasonable and necessary for the care of the mother and newborn child following the mother's pregnancy. The center and attending physician or CNM must be licensed at the time and place the services are provided. Reimbursable services are limited to services provided by the birthing center during the labor, delivery, and postpartum periods.
  - (c) Services provided by a physician or CNM or licensed midwife are not considered to be birth center services by the Delaware Medical Assistance Program.
  - (d) For services other than birth center facility services, other applicable provisions of the Title XIX State Plan and the Delaware Medical Assistance Program will apply.

*(Break in Continuity of Sections)*

ATTACHMENT 4.19-B  
Page 22

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
State/Territory: DELAWARE

METHODS AND STANDARDS FOR ESTABLISHING PAYMENT RATES –  
FREESTANDING BIRTH CENTER SERVICES

Medicaid providers of freestanding birth center services are reimbursed as follows:

Reimbursement of freestanding birthing centers is based on a fee-for-service basis. The payment for freestanding birthing center services is limited to the lower of the billed or allowed amount. Established procedure code and revenue code rates govern the birthing center payments. The Medicaid procedure codes are set at a percentage of the Medicare rates for HCPC and CPT codes and a percentage of Medicare rates for lab and x-ray codes. The HCPC and CPT code fee schedules are available on the Delaware Medical Assistance Program (DMAP) website, at: <http://www.dmap.state.de.us/home/index.html>.

The revenue code rates were established by Medicaid. Except as noted in the State Plan, state-developed fee schedule rates are the same for both governmental and private individual practitioners and the fee schedule and any annual/periodic adjustments to the fee schedule are published on the Delaware DMAP website. The agency's fee schedule rate was set as of March 1, 2011, and is effective for services provided on or after that date. All rates are published on the Delaware DMAP website, located at: <http://www.dmap.state.de.us/home/index.html>.

The revenue codes used for the reimbursement of freestanding birthing center services will be indexed forward on an annual basis (Medicare HCPC cycle) using the Medicare outpatient hospital market basket update.

## DIVISION OF PUBLIC HEALTH

Statutory Authority: 16 Delaware Code, Section 122(3)(w) (16 **Del.C.** § 122(3)(w))  
16 **DE Admin. Code** 4451

### ORDER

#### 4451 Body Art Establishments

#### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("DHSS") initiated proceedings to adopt the State of Delaware Regulations Body Art Establishments. The DHSS proceedings to adopt regulations were initiated pursuant to 29 **Delaware Code** Chapter 101 and authority as prescribed by 16 **Delaware Code**, §§122(3)(w).

On September 1, 2011 (Volume 15, Issue 3), DHSS published in the Delaware *Register of Regulations* its notice of proposed regulations, pursuant to 29 **Delaware Code** Section 10115. It requested that written materials and suggestions from the public concerning the proposed regulations be delivered to DHSS by September 30, 2011, or be presented at a public hearing on September 22, 2011, after which time the DHSS would review information, factual evidence and public comment to the said proposed regulations.

No oral comments were made at the public hearing and no written comments were received during the public comment period. Therefore, no evaluation or summarization of comments is presented in the accompanying "Summary of Evidence."

#### SUMMARY OF EVIDENCE

In accordance with Delaware Law, public notices regarding proposed Department of Health and Social Services (DHSS) State of Delaware Body Art Establishments were published in the *Delaware State News*, the *News Journal* and the *Delaware Register of Regulations*.

The public comment period was open from September 1, 2011 through September 30, 2011. No comments were received on the proposed regulations during the public comment period and no changes have been made to the proposed regulations.

Verifying documents are attached to the Hearing Officer's record. The regulation has been approved by the Delaware Attorney General's office and the Cabinet Secretary of DHSS.

#### FINDINGS OF FACT:

There were no public comments received. The Department finds that the proposed regulations, as set forth in the attached copy should be adopted in the best interest of the general public of the State of Delaware.

**THEREFORE, IT IS ORDERED**, that the proposed State of Delaware Regulations Governing Body Art Establishments is adopted and shall become effective November 11, 2011, after publication of the final regulation in the *Delaware Register of Regulations*.

Rita M. Landgraf, Secretary

#### 4451 Body Art Establishments

\*Please note that no changes were made to the regulation as originally proposed and published in the September 2011 issue of the *Register* at page 282 (15 DE Reg. 282). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

#### 4451 Body Art Establishments

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# FINAL REGULATIONS

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## DEPARTMENT OF JUSTICE

### VICTIMS' COMPENSATION ASSISTANCE PROGRAM ADVISORY COUNCIL

Statutory Authority: 11 Delaware Code, Section 9004(a) (11 **Del.C.** §9004(a))  
1 **DE Admin. Code** 301

#### ORDER

#### 301 Victims' Compensation Assistance Program Rules and Regulations

##### Introduction

The Violent Crimes Compensation Advisory Council of the State of Delaware hereby adopts this Report and Order, pursuant to 29 **Del.C.** §10118, for the purpose of final enactment of the amended regulations attached hereto. The proposed changes would add an additional regulation, numbered 30.0, relating to payment of claims, to Section 301 of Title One of the Administrative Code. This regulation would require that VCAP pay all dental providers at 80% of the usual and customary charge for services. This amount would be considered payment in full, and the dental provider who accepted payment from VCAP would be unable to collect any additional monies from the victim, or from third parties. Enactment of this regulation would help preserve VCAP funds and would make VCAP reimbursement practices consistent with how private health insurers and other government programs reimburse dental providers.

##### Summary of Comments

A public hearing on the proposed regulation were held in Dover on August 23, 2011. No one appeared to offer comments on the proposed regulation.

Written comments were received from Daniese McMullin-Powell, Chair of the State Council for Persons with Disabilities ("SCPD"). SCPD correctly pointed out that the proposed regulation is based on the template for medical and mental health payments previously established by the Advisory Council. The regulations incorporate language recommended by the Disabilities Law Program, including protections from "balance billing" of the victim and third parties. These comments were reviewed and discussed by the Advisory Council at its August 24, 2011 meeting.

A letter dated August 31, 2011 from Terri A. Hancharick, Chairperson of the Governor's Advisory Council for Exceptional Citizens, arrived too late to be considered by the Advisory Council. The letter was received on September 6, 2011, after the deadline for submissions. The letter contains an endorsement of the proposed regulation.

##### Findings of Fact

The Advisory Council, upon review of the comment received and further discussion, determined that no changes in the draft proposal were necessary, and that the new regulation should be submitted for publication as drafted.

The Advisory Council further determined that the proposed regulation was consistent with regulations recently adopted that cover medical and mental health expenses, respectively.

The final draft of the proposed rule is consistent with the existing policy and practice of VCAP and its predecessor, the Violent Crimes Compensation Board. However, in the past the rate of reimbursement has been negotiated with individual dental providers on an ad hoc basis, and has not always been uniform or sufficient. The proposal represents an effort by the Advisory Council to adopt regulations that better reflect the operations, procedures, and standards of VCAP with respect to compensation of victims.

##### Decision of the Advisory Council

The Advisory Council reviewed the various suggested changes at its meeting on August 24, 2011 and voted to adopt the proposed new rule, as drafted, with no changes. The effective date is November 11, 2011.

**Text of Rules Adopted**

The final version of the proposed amended regulations of the Advisory Council is attached hereto.

ADOPTED, this 24th day of August, 2011, by the undersigned members of the Victims' Compensation Advisory Council:

July 14, 2011      Lisa Ogden, Director      302 255-1770

**301 Victims' Compensation Assistance Program Rules and Regulations**

\*Please note that no changes were made to the regulation as originally proposed and published in the November 2011 issue of the *Register* at page 175 (15 DE Reg. 175). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

**301 Victims' Compensation Assistance Program Rules and Regulations**

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**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL****DIVISION OF WATER RESOURCES  
Surface Water Discharges Section**

Statutory Authority: 7 Delaware Code, Section 6000 (7 Del.C. §6000)  
7 DE Admin. Code 7201

Secretary's Order No.: 2011-W-0042

**7201 Regulations Governing the Control of Water Pollution, 9.5 The Concentrated Animal Feeding Operation (CAFO)**

Date of Issuance: October 15, 2011

Effective Date of Regulations: November 11, 2011

Under the authority vested in the Secretary of Natural Resources and Environmental Control (DNREC) and the Secretary of the Delaware Department of Agriculture (DDA) the following findings, reasons and conclusions are entered as an Order of the Secretaries in the above referenced rule making proceedings.

**BACKGROUND and PROCEDURAL HISTORY**

This Order considers the proposed regulations entitled "Regulations Governing the Control of Water Pollution, Section 9.5", which the Department of Natural Resources and Environmental Control (specifically the Division of Water), and the Department of Agriculture drafted and published in the August 1, 2011 Delaware *Registrar of Regulations*. The regulations establish requirements to control nitrogen and phosphorus from certain farms where poultry, swine, beef cattle, dairy cattle and horses are raised also known as an Animal Feeding Operation (AFO).

The federal *Clean Water Act* of 1972 established the National Pollution Discharge Elimination System (NPDES) to regulate the discharge of pollutants from point sources to Waters of the United States. The federal NPDES permit program expressly includes and defines Concentrated Animal Feeding Operations (CAFO) as a point source. In 1983, USEPA delegated to the DNREC the authority to administer and enforce the NPDES program. In 1999, Delaware enacted the Nutrient Management Law which created the Delaware Nutrient Management Commission, housed in the Delaware Department of Agriculture (DDA) and established the Nutrient Management Program. The Nutrient Management Law mandates that all farmers, golf courses, and other nutrient handlers develop and implement nutrient management plans, maintain handling records, and submit annual reports. The actions initiated by the two State Agencies are a necessary step to achieve Delaware's water quality goals, protect the "waters of the state" and to continue the United States Environmental Protection Agency's

(USEPA) delegated program. Part 122, Sub Sections 122 and 412 of the Clean Water Act (CWA) require States to develop regulations governing the discharge of nutrients from farms into nearby waterways. These state regulations are required in order to keep our "at least equal to" status with USEPA's requirements. Failure to do so may result in the increased likelihood of federal enforcement actions against Delaware agricultural producers and the withdrawal of Delaware's delegated authority to administer this NPDES program.

In 2003, USEPA issued new CAFO rules that required certain CAFO operators to seek coverage of a NPDES permit. These rules were appealed by industry and environmental groups. In 2005, the 2<sup>nd</sup> Circuit Court of Appeals ruled the CAFO rules did not comply with the 1972 Clean Water Act. To meet the 2<sup>nd</sup> Circuit Courts ruling, USEPA revised the CAFO rules in 2006 and supplemented it in 2008. One consequence of these actions is that CAFOs with potential to discharge effluent from manure, litter or processed wastewater must submit their Nutrient Management Plans with their NPDES CAFO permit applications, or under general permits, with their Notices of Intent (NOI). DNREC, DDA and the Commission have been working to develop a regulatory program which will meet this and other criteria, will achieve equal to status with new approved federal directives, and will most effectively and efficiently address nutrient pollution considering Delaware's particular circumstances. The 2010 7201 Regulations Governing the Control of Water Pollution, Section 9.5 were a result of that effort.

It became apparent during the initial redrafting of the regulations in 2010, through comments received during that regulation promulgation process and further examination of the then current MOA by DDA and DNREC staff that the MOA (written in 2000) needed to be rewritten to provide further clarity related to the roles of each agency. A new 2010 MOA is now in effect and compliments these amended draft regulations. The new December 2010 MOA more accurately expresses the authorities, roles, and responsibilities of the two agencies. In accordance with the MOA, DDA will among other activities, primarily manage the day to day activities of Delaware's CAFO program. DDA will including limitations, be the initial point of contact with the regulated community, review and make permit determinations, perform inspections and enforcement actions if warranted, and review and make Nutrient Management Plan determinations. In accordance with the MOA, among other activities, DNREC retains supervision and enforcement authority, will promulgate CAFO regulations, is the Delaware point of contact with USEPA, and will issue individual permits. This MOA set the framework for joint (DDA and DNREC) promulgation of the 2011 amended Draft CAFO regulations under statutory authorities in Del.C., Title 3, Chapter 22, and Del.C., Title 7, Chapter 60.

After promulgation of the 2010 7201 Regulations Governing the Control of Water Pollution, Section 9.5, USEPA informed DNREC and DDA that the 2010 version was not adequate to satisfy US Environmental Protection Agency criteria. Beginning in January of 2011, DNREC and DDA reinitiated discussions with USEPA to resolve the points of difference between the state agencies and our federal partners. The 2011 amended Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5 are the result of those discussions to achieve equal to status with new approved federal directives, and will most effectively and efficiently address nutrient pollution considering Delaware's particular circumstances

As stated before, a new MOA was signed between DDA and DNREC in December 2010. Discussions with USEPA concerning Delaware's CAFO regulations recommenced in early 2011. Through a series of meetings, DNREC, DDA and USEPA discussed the points of difference and resolved terms of agreement over the next five months; the 2011 amended Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5 are the result of those discussions.

The DNREC and DDA published the complete revised Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5 in the August 1, 2011 Delaware Register of Regulations. A Public Hearing was held at the Delaware Department of Agriculture building in Dover, on August 25, 2011, and the final regulations will be promulgated on November 11, 2011. In addition to the public hearing, the regulations were presented to the Delaware Nutrient Management Commission at their July 2011 monthly meeting and were they voted in support of the regulation revisions. Members of DDA staff also presented the 2011 revised regulations to the Delmarva Poultry Industry (DPI) environmental committee on August 11, 2011.

### FINDINGS and DISCUSSION

The majority of the Draft CAFO Regulations mirror the federal regulations, however; there were points of divergence and consensus that arose in discussions by and among the Departments, USEPA and other agencies and stakeholders. The best science available was used to inform discussions, as was input from the regulated



community. There was a concerted effort to develop regulations which meet the federal intent, protect water quality, and provide practical implementation methods that will enhance compliance. It is important to review the entire "Response to Comments" (Appendix C) portion of the Report; some of the more important issues raised, relate to definitions, regulatory authority, monitoring and enforcement, setback requirements, and stockpiling and field staging of poultry litter. We find that within the context of Delaware's specific circumstances including: the new 2010 MOA; research related to nutrient handling (including documents concerning field staging in the record, and documents related to setbacks which were included in the 2010 amendments of CAFO Regulation Hearing Officer's Report and are incorporated by reference into the record); and the demonstrated successful history of cooperation between DDA and DNREC that the Draft Regulations meet the intent of the federal requirements and in some cases exceed specific requirements, and final promulgation is in the best interests of the environment and the regulated community.

We find that the Draft Regulations, are well supported by the record developed by the Departments and adopt the Report (with Appendices and Attachment) to the extent it is consistent with this Order. We find that the Departments' experts fully developed the record to support adoption of these regulations. With adoption of this Order, Delaware will fully administer a CAFO program.

In conclusion, the following findings and conclusions are entered:

1. The Department of Natural Resources and Environmental Control, and Department of Agriculture (Departments) have jurisdiction under their statutory authorities and in accordance with the current 2010 Memorandum of Agreement between the two agencies to adopt these Regulations as final;
2. The Departments provided adequate public notice of the Draft Regulations, and provided adequate opportunity to comment on the Draft Regulations including a public hearing on August 25, 2011;
3. The Departments held a public hearing in a manner required by the law and regulations;
4. The Departments considered all timely and relevant public comments in making its determination;
5. The Departments' Hearing Officer's Report recommendation, and record, are adopted and provide additional reasons and findings for this Order;
6. The amendments in the Draft Regulations should be adopted as final regulations because they enable the delegated program and are in the best interests of the regulated community and the environment, and the amendments are well supported by documents in the record; and
7. The Departments shall submit this Order approving the Final Regulations to the *Delaware Registrar of Regulations* for publication in its next available issue and shall provide such other notice as the law and regulation require, and the Departments determine appropriate.

Collin P. O'Mara, Secretary  
Department of Natural Resources and  
Environmental Control

Ed Kee, Secretary  
Department of Agriculture

## 7201 Regulations Governing the Control of Water Pollution

**\*Please note that no changes were made to the regulation as originally proposed and published in the August 2011 issue of the *Register* at page 971 (15 DE Reg. 177). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**[7201 Regulations Governing the Control of Water Pollution](#)**

**DEPARTMENT OF SAFETY AND HOMELAND SECURITY  
OFFICE OF THE SECRETARY**

Statutory Authority: 16 Delaware Code, Section 10404  
(16 Del.C., §10404)

**ORDER****Regulations Governing Community Firearm Recovery Programs****I. NATURE OF PROCEEDINGS**

Pursuant to its delegated authority under 16 Del.C. §10400 et seq. and Delaware's Administrative Procedures Act, 29 Del.C. §10100 et seq., the State of Delaware Department of Safety and Homeland Security (DSHS) proposed these regulations in order to implement the Delaware General Assembly's mandate to establish the Community Firearm Recovery Program ("CFRP").

Notice of a public comment period lasting thirty (30) days relating to the proposed regulations was published in the Delaware *Register of Regulations* for September 1, 2011 as required by law.

**II. PUBLIC COMMENTS**

DSHS received the following public comments in response to its notice of intent to adopt the proposed regulations and offers the following responses thereto:

A public comment was received concerning the disposal of the firearms that are acquired by law enforcement agencies through the CFRP. The concern is that all of the firearms recovered will be destroyed. The DSHS response is that the program the proposed regulations are designed to implement are specific as to the disposition of the firearms that are collected or recovered through the CFRP. The proposed regulations track the statutory language verbatim concerning disposal of firearms by means of sales or transfers to federally licensed dealers and add proposed Regulation 3.6.2 which allows for any firearm determined to be stolen to be returned to its rightful owner.

A public comment was received stating the proposed regulations constitute the first step in taking away a citizen's Second Amendment rights under the U.S. Constitution. The DSHS response is that Delaware's General Assembly, expressing the desires of all Delawareans, passed the law that was signed by the Governor calling for the creation of the CFRP as a means of reducing gun violence in this state. The General Assembly delegated to the DSHS the power and responsibility to adopt regulations to implement the program, one that is entirely voluntary. No citizen is being forced to surrender a firearm that is lawfully possessed.

A public comment was received stating that proposed Regulation 4.3, which allows for the anonymous surrender of firearms to the law enforcement agency conducting a CFRP event, would allow residents of other states to violate the federal gun control statute, 18 U.S.C. § 922, that proscribes transfers of firearms between residents of different states. The DSHS response is that Section 922 (a)(1) makes it unlawful for a person "engaged in the business" of dealing in firearms to do so across state lines without a federal license. Unless an individual participating in a CFRP event holds himself out to the public as being a source of guns, he would not be in violation of this federal law merely by surrendering a firearm or firearms in return for gift cards or cash. Section 922 (a)(3) makes it unlawful for a person to transport or receive into his state of residency a firearm purchased or obtained from another state. This statute is clearly not implicated by the surrender of a firearm to a law enforcement agency holding a CFRP event. Finally, Section 922 (a)(5) makes it unlawful for a person to sell, transport, or deliver a firearm to a "person" from a different state. The word "person" is defined in the federal gun control statute at Section 921 (a)(1) and does not contemplate the inclusion of law enforcement agencies within its meaning. Indeed, the term "law enforcement agency" is used throughout the federal gun control statute when that term is meant. DSHS does not believe Regulation 4.3 constitutes an invitation to violate federal law by persons from outside Delaware. Indeed, DSHS believes the anonymity feature of Regulation 4.3 is essential to the success of the CFRP and rejects the commenter's requests for revision.

**III. FINDINGS AND CONCLUSIONS**

The public was given the required notice of DSHS' intent to adopt the proposed regulations and the opportunity to provide DSHS with comments concerning them. Thus, DSHS concludes that its consideration of the proposed regulations was entirely within its prerogatives and statutory authority and having received and considered public comments that did not lead to substantive changes, is now free to adopt the proposed regulations.

**IV. ORDER**

AND NOW, this 17th day of October, 2011 it is hereby ordered that:

The proposed regulations are adopted;

The text of the proposed regulations shall be in the form attached hereto as Exhibit A;

The effective date of this Order is ten (10) days from the date of its publication in the Delaware *Register of Regulations* in accordance with 29 **Del.C.** §10118(e); and

DSHS reserves unto itself the authority to issue such other and further orders concerning its practices and procedures as may be just and proper.

IT IS SO ORDERED.

By: Lewis Schiliro, Secretary, Delaware Department of Safety and Homeland Security

**Regulations Governing Community Firearm Recovery Programs****1.0 Definitions**

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

“Agency” means any local municipal police department, the New Castle County Police Department and the Delaware State Police.

“CFRP” means Community Firearm Recovery.

“DSHS” means Delaware Department of Safety and Homeland Security.

“Firearm” means any firearm as defined in Sec 222(12), Title 11, Delaware Code.

“Gift Card” means type of payment used by a police agency to pay for surrendered- firearms such as a VISA or MasterCard gift card.

“Pilot Period” means July 6, 2011 to May 15, 2012.

“Secretary” means the Secretary of Delaware Department of Safety and Homeland Security.

**2.0 Application by Requesting Police Agency:**

2.1 Funds allocated pursuant to 16 Del.C. Ch. 104 shall be maintained in the DSHS, Office of the Secretary.

2.1.1 Administrative costs incurred pursuant to the recovery of the weapons, the purchase and redemption of gift cards, and, upon approval by the Secretary, publication and advertising of the CFRP event shall be reimbursable through the funds allocated under 16 Del.C. Ch. 104 and these regulations.

2.1.2 Administrative costs shall be requested by the police agency in advance of the CFRP event pursuant to section 2.3 of these regulations.

2.2 Request for funds:

2.2.1 An agency may participate in the CFRP and receive funds, upon approval by the Secretary, by submitting a letter of request, at least 14 days in advance of the event, indicating its desire to do so and stating the following:

2.2.1.1 The date, time, location and duration of the event;

2.2.1.2 Any civic and/or community organization participating in the event in collaboration or partnership with the requesting agency;

- 2.2.1.3 The person in the requesting agency responsible for maintaining the funds and/or inventory allocated by DSHS as well as any funds and/or inventory contributed by sponsoring entities;
- 2.2.1.4 An estimate of firearms the requesting agency believes it will receive as a result of the CFRP event;
- 2.2.1.5 The estimated costs of publication and advertising; and,
- 2.2.1.6 The estimated costs to administer the program.
- 2.3 Agencies may, and are encouraged to, convert any funds received from DSHS for a CFRP event to gift cards redeemable for merchandise in the amounts stated in Sections 3.3 and 3.4 of these regulations, to the extent possible.
- 2.4 Within seven (7) days after the conclusion of the CFRP event, the police agency shall submit to the Secretary an accounting of all funds allocated by DSHS under these regulations.
- 2.5 All unused funds shall be returned to DSHS in the form of U.S. currency, check or money order within seven (7) days of the CFRP event.

### **3.0 Collection and Disposition of Recovered Firearms:**

- 3.1 Upon surrender, all firearms shall be tagged or marked by the collecting agency as to where collected, whom collected by, the date of collection, make, model and serial number.
- 3.2 All ammunition received shall be disposed of at the discretion of the host agency in accordance with their policies.
- 3.3 Funds shall be issued for firearms which, upon preliminary inspection, appear to be operational, in amounts not to exceed the following:

<u>Assault Rifles</u>	<u>\$200.00</u>
<u>Hand Guns</u>	<u>\$150.00</u>
<u>Rifles</u>	<u>\$100.00</u>
<u>Shotguns</u>	<u>\$100.00</u>

- 3.4 The agency shall have the discretion to pay an amount not to exceed \$75.00 for parts of firearms and ammunition received during a CFRP event.
- 3.5 Within seven (7) business days after the conclusion of a CFRP event, a complete list of all firearms collected shall be supplied to the Secretary containing information listed in section 3.1 of these regulations.
- 3.6 It shall be the responsibility of the police agency holding a CFRP event to dispose of the firearms collected. Disposal may include any, or a combination, of the following:
- 3.6.1 Sale or transfer of firearms to a federal licensed dealer, (defined as a person licensed as a firearms collector, dealer, importer, or a manufacturer under the provisions of 18 U.S.C. section 922). The proceeds of any such sale shall be utilized by the agency for any law enforcement or charitable purpose as established by the agency conducting the CFRP event.
- 3.6.2 Destruction in a manner causing total destruction of the firearm through such methods as melting or shredding.
- 3.6.3 Return any firearms determined to be stolen to the rightful owner.
- 3.7 Agencies, upon disposition of firearms, shall furnish a list of all disposed firearms to the Secretary.

### **4.0 General Rules:**

- 4.1 An agency conducting a CFRP event shall be responsible for the security of the site, the surrounding area, the surrendered firearms, transportation of surrendered firearms and all unused funds and inventory.

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- 4.2 To ensure safety, any agency conducting a CFRP event shall have at least one person on site knowledgeable in the operation and safety of firearms.
- 4.3 Any individual who elects to surrender a firearm anonymously at a CFRP event may do so and personal identification shall not be required to be presented at the time of the redemption.
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**DEPARTMENT OF STATE**  
**DIVISION OF PROFESSIONAL REGULATION**  
**Delaware Board of Nursing**

Statutory Authority: 24 Delaware Code, Section 1904(c) (24 **Del.C.** §1904(c))  
24 **DE Admin. Code** 1900

**ORDER**

**1900 Board of Nursing**

After due notice in the Register of Regulations and two Delaware newspapers, a public hearing was held on August 10, 2011 at a scheduled meeting of the Delaware Board of Nursing ("Board") to receive comments regarding the Board's proposed amendments to its rules and regulations. The proposed amendments to Rule 1.0 are an attempt to better organize the regulation, come into compliance with statutory changes that have occurred since the regulation was enacted, and remove confusing out-dated language. The proposed revisions to Rule 2.0 are an attempt to better organize the regulation, clarify the information that must be provided at each phase of the application process, and conform more closely to the model rules. The proposed revisions Rule 3.0 are an attempt to update the requirements of a nursing refresher course to better reflect the needs of today's nurse. The proposed revisions to Rule 4.0 are an attempt to integrate the use of an alternative supervised practice plan as an option for nurses for whom a refresher course is not available within a reasonable distance or time. The proposed revisions to Rule 6.0 are an attempt to, among other things, remove the 90 day requirement for recent graduates to take the NCLEX, remove the requirement that applicants submit two copies of their application, change the amount of times the NCLEX exam may be taken and how often, and change the CE documentation audit to occur after renewal and not before. The proposed revisions to this Rule 7.0 are an attempt to reorganize the entire regulation, parsing out RN and LPN standards of practice, renumber the entire section, and change the use of the term "bone marrow aspiration" needle to "intraosseous" needle. The proposed revisions to Rule 9.0 among other things, increases the percentage of renewing applicants subject to CE audit from 1 to 3%, redefines contact hours to a 60 minute hour standard, and requires CE providers renew their approval every two years. The proposed revisions to Rule 14.0 update the regulations clarifying the Nurse Compact Act by including a requirement that any compact licensee successfully pass the NCLEX, allowing applicants from foreign countries to apply for compact licensure or single state licensure, and clarifying that suspension, revocation or surrender of a home state license still entitles an applicant to single state licensure in another state until such time as the home state restrictions are lifted.

The proposed changes to the regulations were published in the *Register of Regulations*, Vol. 15, Issue 1, on July 1, 2011. Notice of the August 10, 2011 hearing was published in the *News Journal* (Exhibit 1) and the *Delaware State News*. Exhibit 2.

**SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED**

The Board received identical written comments from Daniese McMullin-Powell, Chairperson for the State Council for Persons with Disabilities; (Exhibit 3); Harline Dennision from the Delaware Developmental Disabilities Council; (Exhibit 4); Terri Hancharick from the Governor's Advisory Council for Exceptional Citizens. Exhibit 5. These comments endorsed the proposed changes to Rules 2.4.1.7.1, Rule 2.4.1.7.2, Rule 2.4.1.9.4.1.1.3, Rule 7.3.1.7, and Rule 7.3.18.

The written comments requested reconsideration of Rule 4.3.1. No proposed change was published with regard to Rule 4.3.1. Nonetheless, the commentators requested reconsideration of the requirement that a refresher course participating facility must be no less than a skilled nursing facility.

The written comments requested retaining the term "record" instead of the proposed "document" in proposed change to Rule 10.4.2.4 as the term "document" may be read too narrowly to not include electronic or computer-based entries.

Finally, the written comments requested a paring down of the list of crimes listed in Rule 15.0 as substantially related to the practice of nursing.

The Board received verbal comments from Ms. Connie Bushy from the Beebe School of Nursing. Ms. Bushy commented that Regulation 6.1.5 deals with the deletion of the requirement of taking the exam within 90 days. She does not see anywhere in the Rules and Regulations where there is a time period. The Board struck this regulation because every person that ever asked for the waiver received it. The Board believes that the public interest is better served by addressing the number of fails it permits rather than regulating how quickly an applicant must take the exam. 6.3.4 states that applicants who fail the examination may retake the examination within one year from the date of the initial examination. 6.3.5 also now states that after one year, the applicant must petition the Board for specific authorization to retest.

Finally, Tammy Paxton from the Owens Campus of Delaware Tech provided verbal comments. With regard to 3.2.4, Ms. Paxton testified that her organization is in favor of the increase in clinical hours, but they ask that the effective date be delayed until the Spring of 2013.

### 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 rules and regulations.

2. The written comments requested reconsideration of Rule 4.3.1. No proposed change was published with regard to Rule 4.3.1. Nonetheless, the commentators requested reconsideration of the requirement that a refresher course participating facility must be no less than a skilled nursing facility. The Board has thoughtfully considered this suggestion. The Board finds that an out of practice nurse coming back into practice requires the broad range of exposure that a skilled nursing facility can provide and not the narrow exposure that can be gleaned from a group home, for example.

3. The written comments requested retaining the term "record" instead of the proposed "document" in proposed change to Rule 10.4.2.4 as the term "document" may be read too narrowly to not include electronic or computer-based entries. The Board finds that this suggestion has merit, and the final order will retain the use of the word "record" instead of the previously proposed "document." This is a non-substantive change that is reflected in the attached final regulations.

4. The written comments requested a paring down of the list of crimes listed in Rule 15.0 as substantially related to the practice of nursing. The Board did not propose any changes to Rule 15 in this publication and is not inclined to remove any substantially related crimes from its list at this time.

5. The Board received verbal comments from Ms. Connie Bushy from the Beebe School of Nursing. Ms. Bushy commented that Regulation 6.1.5 deals with the deletion of the requirement of taking the exam within 90 days. The Board struck this regulation because every person that ever asked for the waiver received it. The Board believes that the public interest is better served by addressing the number of fails it permits rather than regulating how quickly an applicant must take the exam. However, 6.3.4 states that applicants who fail the examination may retake the examination within one year from the date of the initial examination. 6.3.5 also now states that after one year, the applicant must petition the Board for specific authorization to retest. By removing the 90 day requirement, the Board also is allowing applicants to move toward licensure without holding them up waiting for a waiver. Nonetheless, the board will add the words "test or" before the words "retest" in Rule 6.3.4 so that all graduating students must take the exam within one year of graduation. This is a non-substantive change that is reflected in the attached final regulations.

6. Tammy Paxton from the Owens Campus of Delaware Tech provided verbal comments. With regard to 3.2.4, Ms. Paxton testified that her organization is in favor of the increase in clinical hours, but they ask that the effective date be delayed until the Spring of 2013. The Board is not inclined to memorialize a delay of the effective date in its regulations. However, it encourages Ms. Paxton to submit a request for special consideration regarding enforcement.

7. Pursuant to 24 **Del.C.** §1904(c) the Board has statutory authority to promulgate rules and regulations clarifying specific statutory sections of its statute.

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## DECISION AND EFFECTIVE DATE

The Board hereby adopts the changes to its rules and regulations to be effective 10 days following publication of this order in the *Register of Regulations*.

## TEXT AND CITATION

The text of the revised rules remains as published in the *Register of Regulations*, Vol. 15, Issue 1, July 1, 2011 with only the two non-substantive changes described above, as attached hereto as Exhibit A.

SO ORDERED this \_\_\_th day of September, 2011.

DELAWARE BOARD OF NURSING

Evelyn Nicholson, President

1900 Board of Nursing

**\*Please note that no changes were made to the regulation as originally proposed and published in the July 2011 issue of the *Register* at page 53 (15 DE Reg. 53). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**1900 Board of Nursing**

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## DEPARTMENT OF TRANSPORTATION

### DIVISION OF MOTOR VEHICLES

Statutory Authority: 21 Delaware Code, Sections 302, 2711 and 3102

(21 Del.C. §§302, 2711 and 3102)

2 DE Admin. Code 2217

## ORDER

### **2217 Driver License and Identification Card Application Procedures for Delaware Compliant and Delaware Non-Compliant Identification Documents**

Proposed revised Regulation 2217 establishes regulations and procedures used when issuing Delaware compliant and non-compliant driver licenses and identification cards based on 21 Del.C. §§302, 2711 and 3102 and the Department of Homeland Security's final regulation published in 6 CFR Part 37 or its equivalent, as amended from time to time. The proposed regulation was published in the Delaware *Register of Regulations* on September 1, 2011. The comment period remained open until September 30, 2011. There was no public hearing on proposed revised Regulation 2217.

### **Summary of the Evidence and Information Submitted**

The Department received a letter from the Governor's Advisory Council for Exceptional Citizens endorsing the proposed revised standards.

### **Findings of Fact**

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

1. The proposed revised regulation is not in conflict with Delaware law.
2. The proposed revised regulation is an appropriate exercise of the Department's responsibilities and authority.

**Decision and Effective Date**

Based on the provisions of 21 **Del.C.** §302, §2742, §2743, and §4177, and the record in this docket, I hereby adopt revised Regulation 2217 and as may more fully and at large appear in the version attached hereto to be effective on November 11, 2011.

**IT IS SO ORDERED THIS 13th day of October 2011.**

Shailen P. Bhatt, Secretary of Transportation

**2217 Driver License and Identification Card Application Procedures for Delaware Compliant and Delaware Non-Compliant Identification Documents**

\*Please note that no changes were made to the regulation as originally proposed and published in the September 2011 issue of the *Register* at page 971 (15 DE Reg. 322). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

**2217 Driver License and Identification Card Application Procedures for Delaware Compliant and Delaware Non-Compliant Identification Documents**

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<b>BOARD/COMMISSION OFFICE</b>	<b>APPOINTEE</b>	<b>APPOINTMENT/ REAPPOINT. DATE</b>
Advisory Council to the Division of Substance Abuse and Mental Health	Ms. Barbara J. Peterson	Pleasure of the Governor
Board of Cosmetology and Barbering	Ms. Lisa M. Aurand	Pleasure of the Governor
	Ms. Hillary R. Reid	Pleasure of the Governor
Board of Dentistry and Dental Hygiene	Ms. Bernadette Evans	Pleasure of the Governor
Board of Examiners of Psychologists	Wesley R. Bowman, Ph.D.	8/25/2011
Board of Medical Licensure and Discipline	Gregory D. Adams, M.D.	8/29/2011
	Mr. George E. Brown	8/29/2011
	Garrett H. Colmorgen, M.D.	Pleasure of the Governor
Board of Pilot Commissioner	Malvine Richard, Ed.D.	Pleasure of the Governor
	Captain Joseph E. Morrissey Captain Bradford F. Schell	8/29/2011 Pleasure of the Governor
Child Mental Health Study Group	The Honorable Colin Bonini	Pleasure of the Governor
	Ruth Briggs-King	Pleasure of the Governor
	The Honorable George H. Bunting, Jr.	Pleasure of the Governor
	Ms. Zaida I. Guajardo	Pleasure of the Governor
	The Honorable Valerie M. Longhurst	Pleasure of the Governor
Child Placement Review Board, New Castle	Ms. Lanette R. Edwards	Pleasure of the Governor
	Ms. Mary J. Wolfe	Pleasure of the Governor
Child Placement Review Board, Sussex	Mr. Neal E. Tash	Pleasure of the Governor
Council on Manufactured Housing	Ms. Susan B. Hairgrove	Pleasure of the Governor
	Ms. Patricia Kretchmer	Pleasure of the Governor
	Ms. Ashleigh L. Malloy	Pleasure of the Governor

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# GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	APPOINTMENT/ REAPPOINT. DATE
Council on Manufactured Housing	Mr. Richard E. Maly	8/29/2011
	Mr. John G. Walsh	8/29/2011
Council on Services for Aging and Adults with Physical Disabilities	Ms. Linda A. Smith	Pleasure of the Governor
	Ms. Barbara E. Willis	Pleasure of the Governor
Delaware Board of Nursing	Mary L. Lomax, Ed.D.	8/29/2011
Delaware Commission on Italian Heritage and Culture	Mr. Joseph T. Conaway	8/31/2011
	Mr. Michael Terranova	8/31/2011
Delaware Commission for Women	Ms. Sheila V. Barr	Pleasure of the Governor
	Mr. Brian J. Bartley	8/18/2011
	Ms. Ashley B. Biden	Pleasure of the Governor
	Ms. Sherese B. Carr	8/25/2011
	Ms. Belinda J. Criddell	8/25/2011
	Theresa Del Tufo, Ph.D.	8/18/2011
	Ms. Rebecca L. Evaristo	8/18/2011
	Ms. Gayle L. MacAfee	Pleasure of the Governor
	Ms. Raetta L. McCall	8/25/2011
	Ms. Barbara O. McCleary	Pleasure of the Governor
Delaware Economic and Financial Advisory Council	Ms. Lauren A. Pearce	Pleasure of the Governor
	Ms. Joni L. Silverstein	Pleasure of the Governor
	The Honorable Shailen P. Bhatt	Pleasure of the Governor
Delaware Guardianship Commission	The Honorable Patricia M. Blevins	Pleasure of the Governor
	Ms. Linda Brittingham	Pleasure of the Governor
	The Honorable Melanie George	Pleasure of the Governor
Delaware Health Care Commission	Mr. Dennis J. Rochford	8/23/2011
Delaware Health Resources Board	Mr. Kyle L. Hodges	Pleasure of the Governor
	Mr. Mark B. Thompson	Pleasure of the Governor

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# GOVERNOR'S APPOINTMENTS

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BOARD/COMMISSION OFFICE	APPOINTEE	APPOINTMENT/ REAPPOINT. DATE
Delaware Health Resources Board	Mr. James P. Young	Pleasure of the Governor
Delaware Mentoring Council	Terry T. Yancey-Bragg, Ed.D.	Pleasure of the Governor
Delaware Open Space Council	Mr. Charles P. Schutt	Pleasure of the Governor
Delaware Police Accreditation Commission	Ward S. Collins James E. Hosfelt, Jr.	Pleasure of the Governor Pleasure of the Governor
Delaware Real Estate Commission	Mr. Christopher J. Whitfield	9/6/2011
Delaware Sentencing Accountability Commission	Major Martin Johnson	8/29/2011
Delaware STEM Education Council	Ms. Anne E. C. Norman, Ed.D. Deborah H. Zych, Ed.D	Pleasure of the Governor Pleasure of the Governor
Developmental Disabilities Council	Ms. Earline Bessix Mr. Vince A. Boehm, Jr. Mr. Mark A. DeVore Ms. Elizabeth A. McLaughlin	8/25/2011 8/25/2011 8/25/2011 8/25/2011
Governor's Commission on Community and Volunteer Service	Marianne B. Cinaglia, Ph.D.	8/25/2011
Governor's Commission on Employment of People with Disabilities	Ms. Michele A. Mirabella	Pleasure of the Governor
Governor's Supplier Diversity Council	Mr. Louis J. Nick Callazzo, III	Pleasure of the Governor
Greater Wilmington Convention and Visitors Bureau	Mr. Ronald Kosh	9/19/2011
Recycling Public Advisory Council	The Honorable Richard C. Cecil Marianne B. Cinaglia, Ph.D. Ms. Kelly L. Davis Ms. Brenna R. Goggin	8/25/2011 Pleasure of the Governor 8/25/2011 Pleasure of the Governor
School Libraries Council	Ms. Anne E. C. Norman, Ed.D.	Pleasure of the Governor

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# GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	APPOINTMENT/ REAPPOINT. DATE
State Emergency Response Commission	Captain Brian A. Wong	Pleasure of the Governor
State Employee's Charitable Campaign Steering Committee	Mr. John R. Painter	Pleasure of the Governor
State Examining Board of Physical Therapists and Athletic Trainers	Ms. Waheedah S. Shabazz	Pleasure of the Governor
Statewide Independent Living Council	Ms. Kathryn A. Bottner	Pleasure of the Governor
	Mr. Joseph B. Insley	Pleasure of the Governor
Statewide Labor Management Committee	Mr. Douglas R. Watts	Pleasure of the Governor
Tourism Advisory Board	Mr. George J. Fiorile	8/25/2011
Vocational Rehabilitation Advisory Council for DVI	Mr. Kevin P. McAllister	Pleasure of the Governor

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**STATE OF DELAWARE  
EXECUTIVE DEPARTMENT  
DOVER****EXECUTIVE ORDER  
NUMBER THIRTY-ONE**

**TO: Heads of All State Departments and Agencies**  
**RE: Improving Access To Public Records Through Uniform Procedures For Freedom Of Information Act Requests**

**WHEREAS**, it is the policy of this State and this administration that the business of government be performed in an open and public manner so that citizens can "observe the performance of public officials" and "monitor the decisions that are made by such officials in formulating and executing public policy," 29 Del. C. § 10001, and that policy is guaranteed and implemented by the Freedom of Information Act, 29 Del. C. ch. 100 (the "Act" or "FOIA"); and

**WHEREAS**, access to public records is a vital component of FOIA, and public bodies are instructed by the Act to develop policies and rules to implement its provisions faithfully; and

**WHEREAS**, in the thirty years since the Act became law, executive branch agencies have enacted their own policies to implement the Act, and, over time, those policies have evolved and been amended as the needs of each agency required; and

**WHEREAS**, as a result of those amendments, the policies of executive branch agencies now differ substantially from one another, leading to inconsistencies and disparities in the implementation of FOIA across agencies; and

**WHEREAS**, after a comprehensive review of executive branch agency policies, I have concluded that it is in the best interest of the citizens of this State that uniform FOIA policies be implemented by each executive branch agency, and that such uniform policies would help reduce the inconsistencies and differences across agencies while promoting access to public records; and

**WHEREAS**, standardized FOIA policies for executive branch agencies will also help aid in the implementation of Senate Bill No. 87, which requires the Attorney General to promulgate a standard form by which FOIA requests can be made; and

**WHEREAS**, a more uniform FOIA policy should help reduce the time and expense of making a FOIA request, and can do so by reducing the copying costs charged by the agency and ensuring that agencies collaborate to ensure that records are produced even when the request is made to the wrong agency; and

**NOW, THEREFORE, I, JACK A. MARKELL**, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby DECLARE and ORDER that:

1. All executive branch agencies shall implement and promulgate a policy for addressing requests made under the Freedom of Information Act substantially in the form attached hereto as Exhibit A. Executive branch agencies shall adopt such policy and rescind any existing FOIA policy no later than February 1, 2012.

2. All executive branch agencies shall develop a web portal for receiving FOIA requests through the Internet. Such portals shall utilize the standard request form required pursuant to Senate Bill No. 87 and promulgated by the Attorney General, and shall be available for use on Delaware.gov on or before December 1, 2011.

3. All executive branch agencies are reminded of their duty to provide reasonable assistance to the public in identifying and locating public records to which they are entitled access, and that all records held by the agency are "public records" to which the public should have access unless they fall within the scope of an enumerated exception in 29 Del. C. § 10002(g).

4. Agencies of state and local government outside the executive branch are encouraged to reevaluate their FOIA policies and consider whether, in light of Senate Bill No. 87, evolving technology, or recent FOIA authority, their policies might be updated or amended to improve access to public records and potentially standardize the procedures by which requests for public records are made.

5. This Executive Order is a directive from the Governor to Executive Branch agencies. It is not intended to and shall not create independent causes of action for or on behalf of persons who allege a lack of compliance with the Order.

**APPROVED** this 20th day of October, 2011

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# GENERAL NOTICES

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## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF AIR AND WASTE MANAGEMENT

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

#### State Implementation Plan Revision to address the Clean Air Act Section 110 Infrastructure Elements For the 2008 Lead NAAQS

**Secretary's Order No. 2011-A-0041**

**Date of Issuance: October 14, 2011**

**Effective Date: October 14, 2011**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control (Department), this Order approves the proposed revision to the State Implementation Plan (SIP), which is a statewide air management plan subject to the public notice and public hearing procedures in 7 Del.C. §6010(c).

#### Background

The United States Environmental Protection Agency (EPA) has delegated to the Department certain authority and duties under the federal Clean Air Act, as amended, 42 U.S.C. §§7401 et seq. (CAA). The delegation includes the administration over Delaware's SIP, which EPA requires in order to review the regulations, source specific requirements, plans and emission inventories on how Delaware will attain and maintain air quality that conforms to EPA's primary and secondary National Ambient Air Quality Standards (NAAQS). NAAQS are EPA regulations that set limits for air pollutants in order to protect the public health and the environment. Delaware's SIP is included in EPA's regulations at 40 C.F.R. Part 52, Subpart I.

In 2008, EPA revised its NAAQS for lead to lower the primary and secondary limits from 1.5 micrograms per cubic meter (J.Lg/m) to 0.15 J.Lg/m<sup>3</sup>. The states are provided three years to revise their SIPs in response to EPA's revised limits. The Division of Air Quality conducted a review of the Department's regulations to determine if any regulatory changes were needed in response to the EPA lead NAAQS change. The proposed revised SIP, as published in the September 1, 2011 Delaware Registration of Regulations, sets forth the Division of Air Quality's review of Delaware's Regulations Governing the Control of Air Pollution. The proposed revised SIP cites to the appropriate regulations in which the Department already regulates lead consistent with EPA's revised NAAQS for lead. Consequently, the Division of Air Quality reports in the revised SIP that no new regulation or amendment to an existing regulation is needed to comply with EPA's NAAQS revision for lead.

The Department held a duly noticed public hearing on the SIP revision on September 22, 2011 at the Department's Dover offices. At the public hearing, the Department's expert, Ronald A. Amirikian, developed the record to support adoption of the proposed SIP revision. The Department did not receive any public comments during the public comment period. The Department's presiding hearing officer, Robert P. Haynes, who recommended approval of the SIP revision in a Report attached hereto at Appendix A.

#### Reasons and Findings

I adopt the Report and find that approval of the proposed SIP revision in final is supported by the record and consistent with the Department's delegated duties under the federal Clean Air Act. In conclusion, the following findings and conclusions are entered:

1. The Department finds the proposed SIP revision is well supported by the record and hereby approves the revision as a final SIP revision as it was published in the September 1, 2011 Delaware *Register of Regulations*;
2. The final approved SIP revision and this Order shall be submitted to EPA for EPA's review in order that the SIP may be approved by EPA; and
3. The Department shall publish notice of this Order in the same manner as the notice of the proposed SIP revision.

Collin P. O'Mara, Secretary

**Implementation, Maintenance, And Enforcement of National Ambient Air Quality Standards (NAAQS)  
State Implementation Plan Revision to address the Clean Air Act Section 110 Infrastructure Elements For  
the 2008 Lead NAAQS  
August 11, 2011**

**1.0 Preamble, Introduction and Background**

On October 15, 2008, the Environmental Protection Agency (EPA) revised the primary and secondary lead National Ambient Air Quality Standard (NAAQS) from 1.5 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) to 0.15  $\mu\text{g}/\text{m}^3$ . Pursuant to sections 110(a)(1) and 110(a)(2) of the Clean Air Act (CAA), each State is required to submit a State Implementation Plan (SIP) to provide for the implementation, maintenance, and enforcement of a newly promulgated or revised NAAQS. This SIP fulfills this requirement relative to the 2008 lead NAAQS.

A SIP is a state plan that identifies how that state will attain and maintain air quality that conforms to each primary and secondary NAAQS. The SIP is a complex, fluid document containing regulations, source-specific requirements, and non-regulatory items such as plans and emission inventories.

Delaware's initial SIP was approved by the EPA on May 31, 1972. Since this initial approval, the Delaware SIP has been revised numerous times to address air quality non-attainment and maintenance issues. This was done by updating plans and inventories, and adding new and revised regulatory control requirements. Delaware's SIP is compiled in the Code of Federal Regulations at 40 C.F.R. Part 52 Subpart I.

Section 2.0 of this document is a revision to Delaware's SIP. The purpose of this SIP revision is to detail how Delaware meets all of the necessary implementation, maintenance, and enforcement measures required by the CAA, specifically, CAA §110(a)(2), relative to the 2008 lead NAAQS. Under the heading "Delaware's Plan" in Section 2.0 of this document Delaware provides a revision to its SIP to address those requirements of Section 110(a)(2)(A)-(M) of the CAA which have not been addressed in other SIP revisions. It is a compilation of certain elements that describe how Delaware demonstrates how the 2008 lead NAAQS is being implemented, maintained and enforced. The elements of this SIP revision, once approved by EPA, will provide a federally enforceable written confirmation that Delaware will continue to comply with the Section 110(a)(2) requirements of the CAA.

Legislative authority for the Delaware air quality program relating to the responsibilities in the CAA is codified in Title 7 "Conservation" of the Delaware Code, Chapter 60 – Delaware's comprehensive water and air resources conservation law, which gives the Delaware Department of Natural Resources and Environmental Control (DNREC) the power and duty to implement the provisions of the CAA in the State of Delaware.

Many of the miscellaneous requirements of Section 110(a)(2)(A)-(M) of the CAA relevant to the 2008 lead NAAQS are already contained in Delaware's SIP. The following Table identifies those SIP provisions. The following Table also identifies those infrastructure requirements which are not applicable to Delaware.

**Table - 110(a)(2)(A)-(M) Requirements Already Addressed in the Delaware SIP**

Section 110(a) element	Summary of element	Provisions in the Current Delaware SIP or recent SIP revisions Submittals	Where Codified or approved by EPA

## GENERAL NOTICES

§110(a)(2)(A)	Include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this Act.	For the 2008 lead NAAQS, the following emission limitations and schedules are contained in Delaware's approved SIP. 7 DE Admin. Code 1101, Definitions And Administrative Principles 7 DE Admin. Code 1104, Particulate Emissions From Fuel Burning Equipment 7 DE Admin. Code 1105, Particulate Emissions From Industrial Process Operations 7 DE Admin. Code 1107, Emissions From Incineration Of Noninfectious Waste 7 DE Admin. Code 1114, Visible Emissions 7 DE Admin. Code 1127, Stack Heights	40 CFR 52.420(c)
§110(a)(2)(B)	Provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to - (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.	7 DE Admin. Code 1103, Ambient Air Quality Standards, provides for the establishment and operation of procedures necessary to monitor, compile and analyze data related to ambient air quality.	40 CFR 52.420(c)
§110(a)(2)(C)	Include a program to provide for the enforcement of the measures described in subparagraph (A) and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D;	Delaware implements its Construction and Operation Permit Program requirements under 7 DE Admin. Code 1102 and 1125. These existing permitting programs ensure that the construction and modification of both major and minor stationary sources do not cause or contribute to a violation of the lead NAAQS.  7 DE Admin Code 1125 fulfills parts C and D of Title I of the CAA; governing preconstruction review and permitting of any new or modified major stationary sources of air pollutants. 1125 is approved in the DE SIP. Under 1125 any major source or modification that results in a net significant increase of lead (0.6 TPY or greater) must apply Best Available Control Technology (BACT) to reduce lead emissions, and must demonstrate that its emissions will not cause the violation of any NAAQS.  7 DE Admin. Code 1102 provides for the evaluation and necessary regulation of any stationary source that emit equal to or greater than 0.2 lb of any air contaminate, including lead, in any one day.  In addition, the measures described in CAA 110(a)(2)(A) are enforced, in part, through permits issued pursuant to 1102 and 1125.	40 CFR 52.420(c)



§110(a)(2)(E)(ii)	(ii) requirements that the state comply with the requirements respecting state boards under section 128, and	The requirements of §110(a)(2)(E)(ii) are not applicable to Delaware because it does not have any board or body which approves air quality permits or enforcement orders.	
§110(a)(2)(E)(iii)	(iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision;	The requirements of §110(a)(2)(E)(iii) are not applicable to Delaware because it does not rely on localities for specific SIP implementation.	
§110(a)(2)(F)	Require, as may be prescribed by the Administrator— (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection;	§110(a)(2)(F)(i): Specific monitoring requirements are found in 7 DE Admin Codes 1103 and 1117. These requirements are included in Delaware's SIP.  §110(a)(2)(F)(ii): Specific reporting requirements are found in 7 DE Admin Codes 1103 and 1117. These requirements are included in Delaware's SIP.  These regulations in Delaware's approved SIP that are listed in 40 CFR 52.420(c) also apply to the 2008 lead NAAQS.	40 CFR 52.420(c)
§110(a)(2)(G)	Provide for authority comparable to that in section 303 and adequate contingency plans to implement such authority;	7 DE Admin. Code 1115, Air Pollution Alert and Emergency Plan, contains emergency episode plan provisions that are currently approved in Delaware's SIP.	40 CFR 52.420(c)
§110(a)(2)(I)	In the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D (relating to nonattainment areas);	Part D pertains to general requirements for nonattainment areas. This does not apply because no part of Delaware is designated nonattainment for the 2008 lead NAAQS.	
§110(a)(2)(J)	Meet the applicable requirements of ... part C (relating to prevention of significant deterioration of air quality and visibility protection);	Delaware's PSD requirements are promulgated in 7 DE Admin. Code 1125, Preconstruction Review.	40 CFR 52.420(c)

## 2.0 SIP Revision

This SIP revision addresses those requirements of Section 110(a)(2)(A)-(M) of the Clean Air Act (CAA) which have not been addressed in other SIP revisions for the 2008 lead NAAQS. Each of the requirements of §110(a)(2) of the CAA (Subparagraphs A–M) is presented below, along with a discussion of Delaware's plan revision to meet the requirement.

**(A) §110(a)(2)(A) Requirement:** Include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act.

**Delaware's Plan:** Delaware has established laws and regulations that include enforceable emissions limitations and other control measures, means or techniques, as well as schedules and timetables for compliance to meet the applicable requirements of the CAA, to include the requirements associated

with the 2008 lead NAAQS. Delaware may make changes to its laws and regulations that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

At present, Delaware's statutory authority is set out in Title 7 "Conservation" of the Delaware Code, Chapter 60 – Delaware's comprehensive water and air resources conservation law. Legislative authority giving the Secretary of the Delaware Department of Natural Resources and Environmental Control the authority to promulgate Regulations is codified at 7 **Del.C.**, Chapter 60. This authority is applicable to the 2008 lead NAAQS.

- (B) **§110(a)(2)(B) Requirement:** Provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

**Delaware's Plan:** Delaware has established and currently operates appropriate devices, methods, systems and procedures necessary to monitor, compile and analyze data on ambient air quality, and upon request, makes such data available to the Administrator. Delaware will continue to operate devices, methods, systems and procedures and may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware does this as follows for the 2008 lead NAAQS:

- Delaware maintains and operates a multi-station network of ambient monitors throughout the State to measure ambient air quality levels within Delaware for comparison to each NAAQS as required by 40 CFR Part 58. Delaware currently measures and reports lead concentrations from our monitoring site located in Wilmington near MLK Boulevard.
- All data is measured using U.S. EPA approved methods as either Reference or Equivalent monitors; all monitors are subjected to the quality assurance requirements of 40 CFR Part 58; Appendix A; and all samplers are located at sites that have met the minimum siting requirements of Part 58, Appendix E. The data is submitted to the EPA's Air Quality System (AQS) system, in a timely manner in accordance to the schedule prescribed by the U.S. EPA in 40 CFR Part 58.
- In order to keep EPA informed of changes to the sampling network Delaware provides EPA Region III with prior notification of any planned changes to the network. As needed, details of these changes and anticipated approvals of the changes are communicated to EPA. On an annual basis, Delaware sends EPA a monitoring network plan as required by 40 CFR Part 58 Section 10: Annual monitoring network plan and periodic network assessment. This plan contains all required information including site and monitor description, analysis methods, operating schedule, monitoring objectives and scale of representativeness, as well as information on any planned changes. Delaware submits data to the AQS system, in a timely manner, pursuant to the schedule prescribed by the EPA in 40 CFR Part 58.
- Delaware has and will continue to submit data to EPA's Air Quality System ("AQS") in a timely manner in accordance to the schedule prescribed by the U.S. EPA in 40 CFR Part 58.

- (C) **§110(a)(2)(C) Requirement:** Include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D.

**Delaware's Plan:** Delaware has established and currently operates a program to provide for the enforcement of the enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA and to regulate the modification and construction of any stationary source within areas covered by its SIP as necessary to assure the NAAQS are achieved, including permit programs required in parts C and D. At present, Delaware as part of its Division of Air Quality function exercises its programmatic authority to utilize the enforcement powers set out in 7 **Del.C.** §6005 entitled "Enforcement; civil and administrative penalties; expenses"; 7 **Del.C.** §6013 entitled "Criminal penalties"; and 7 **Del.C.** §6018 entitled "Cease and desist order." Delaware will continue to operate this program and may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

- (D) **§110(a)(2)(D) Requirement:** Contain adequate provisions – (i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will - (I) contribute significantly to non-attainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, (ii) insuring compliance with the applicable requirements of sections 126<sup>1</sup> and 115<sup>2</sup> (relating to interstate and international pollution abatement).

**Delaware's Plan:** Delaware's SIP presently contains adequate provisions prohibiting sources from emitting air pollutants in amounts which will contribute significantly to non-attainment or interfere with maintenance with any NAAQS and to prevent interference with measures related to preventing significant deterioration of air quality or which have to date proved adequate to protect visibility and to address interstate and international pollutant abatement; however, Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware's legal authority is contained in the following:

- Delaware Code Title 7, Chapter 60 § 6010(c). Rules and regulations; plans. The Secretary may formulate, amend, adopt and implement, after public hearing, a statewide air resources management plan to achieve the purpose of this chapter and comply with applicable federal laws and regulations. Since 110(a)(2)(D) is in the CAA, and thus a law, Delaware has the legal authority to regulate sources of interstate transport to areas in nonattainment, or in those areas maintaining the NAAQS, if they were previously nonattainment.
- 110(a)(2)(D)(i)(I): The physical properties of lead prevent lead emissions from experiencing a significant degree of travel in the ambient air. No complex chemistry is needed to form lead or lead compounds in the ambient air; therefore, concentrations of lead are typically highest near lead sources. More specifically, there is a sharp decrease in lead concentrations as the distance from a lead source increases. According to EPA's last published *Latest Findings on National Air Quality* report, lead concentrations for sites that are not near a source of lead are approximately 10 times less than the typical concentrations near the source ([http://www.epa.gov/airtrends/2007/report/trends\\_report\\_full.pdf](http://www.epa.gov/airtrends/2007/report/trends_report_full.pdf)). An example of the degree to which lead concentration decreases with distance in ambient air is characterized in the EPA memo *Selection of Airports for the Airport Monitoring Study*: "The Santa Monica airport monitoring study... reported a three- to four-fold decrease in ambient lead concentrations over a distance of 80 meters between two monitors sited to evaluate the lead gradient downwind from the runway" (<http://www.epa.gov/otaq/regs/nonroad/aviation/memo-selc-airport-mon-stdy.pdf>).

Accordingly, in order for a source to emit lead that may contribute significantly to nonattainment in, or interfere with maintenance by, any other state, the source would need to be a very large source

1. §126(a) - Each plan shall (1) require each major proposed new or modified source (A) subject to Part C or (D) which may significantly contribute to pollution in excess of the NAAQS in any AQCR outside the State in which such source intends to locate or modify, to provide written notice to all nearby States the pollution levels of which may be affected by such source 60 days prior to the date on which commencement of construction is to be permitted by the State, and (2) identify all major existing stationary sources which may have the impact described in (1) with respect to new or modified sources and provide notice to all nearby States of the identity of such sources. (b) Any State may petition EPA for a finding that any major source or group of stationary sources emits or would emit any pollutant in violation of the prohibition of §110(a)(2)(D)(ii) or this section. (c) Notwithstanding any permit which may have been granted by the State, it shall be a violation of this section and the plan - (1) for any major proposed new or modified source with respect to which a finding has been made under subsection (b) to be constructed or to operate in violation of this section and the prohibition of §110(a)(2)(D)(ii) or this section, or (2) for any major existing source to operate more than 3 months after such finding has been made. EPA may permit the continued operation of a source beyond the expiration of the 3-month period if the source complies with the emission limitations and compliance schedules as may be provided by EPA to bring about compliance with the requirements of §110(a)(2)(D)(ii). Nothing shall be construed to preclude any such source from being eligible for an enforcement order under §113(d) after the expiration of such period during which EPA has permitted continuous operation.

that is located in close proximity to state boundaries. Delaware does not have any existing sources of lead that are very large (i.e., none with emission greater than 0.5 TPY). In fact, the emission of lead from Delaware's entire point source inventory (2008), in the aggregate, is less than one (1) ton per year of lead, and only two sources (Evraz Claymont Steel and Indian River Generating Station) have emissions greater than 0.3 ton of lead per year (0.34 and 0.31, respectively). Further, even though Delaware's largest two lead emitting sources are relatively small, lead reductions are anticipated due to unit shut downs, and as a co-benefit to required mercury and sulfur dioxide reduction measures.

All major stationary sources are subject to Prevention of Significant Deterioration (PSD) permitting programs under the PSD of 7 **DE Admin. Code** 1125, Preconstruction Review. The requirements of 1125 ensure no new or modified lead emitting source will cause or contribute to non-attainment in any area.

- 110(a)(2)(D)(i)(II): The requirements of CAA 110(a)(2)(D)(i)(II) are met by new major sources and major modifications in Delaware being subject to the PSD requirements which are contained in Section 3.0 of 7 **DE Admin. Code** 1125, Preconstruction Review.
- 110(a)(2)(D)(ii): Nothing in Delaware's statutory or regulatory authority prohibits or otherwise interferes with Delaware's ability to exercise sections 126 and 115 of the CAA.

**(E) §110(a)(2)(E) Requirement:** Provide (i) necessary assurances that the state (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the state or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under state (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of federal or state law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 128,<sup>3</sup> and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision.

The elements of §110(a)(2)(E)(ii) and (iii) are not applicable to Delaware as discussed in Section 1.0 of this document.

**Delaware's Plan:** With respect to the remaining obligations under this section, Delaware has adequate authority under state law pursuant to 7 **Del.C.** Chapter 60 to carry out its SIP obligations with respect to the 2008 lead NAAQS. DNREC does not believe that there is any prohibition in any federal

2. §115(a) - Whenever EPA, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any pollutants emitted in the US cause or contribute to pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests it to do so, EPA shall give formal notification to the Governor of the State in which such emissions originate. (b) The EPA notice shall be deemed to be a finding under §110(a)(2)(H)(ii) which requires a plan revision with respect to so much of the applicable plan as is inadequate to prevent or eliminate the endangerment. Any foreign country so affected by such emission of pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable plan. (c) This section shall apply only to a foreign country which EPA determines has given the US the same rights with respect to the prevention or control of air pollution occurring in that country. (d) Recommendations issued following any abatement conference conducted prior to CAA 1977 shall remain in effect with respect to any pollutant for which no NAAQS has been established under §109 unless EPA, after consultation with all agencies, which were party to the conference, rescinds any such recommendation.

3. §128 (a) each plan shall contain requirements that - (1) any board or body which approves permits or enforcement orders shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders, and (2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be disclosed. A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of (1) and (2).

or state law that would prevent it from carrying out its SIP or any portion thereof. Further, DNREC assures EPA that it has, through the State of Delaware General Fund and through the Title V fee program, and will continue to have, funding to carry out its SIP obligations. Further, DNREC believes its funding sources are sufficient to provide adequate personnel for those purposes; however, Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

At present Delaware fulfills this obligation by virtue of having adequate personnel and funding through the CAA §105 grant process (federal grant funds), the State of Delaware general fund (state tax revenues), and appropriated special funds collected by the State of Delaware from application fees, permit fees, renewal fees, and civil or administrative penalties or fines. The Division of Air Quality is responsible for developing, implementing, and enforcing the SIP. Delaware does not anticipate the need for additional resources beyond those to be appropriated in the above manner to carry out its SIP requirements.

- (F) **§110(a)(2)(F) Requirement:** Require, as may be prescribed by the Administrator - (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection.

**Delaware's Plan:** Delaware requires that owners or operators of stationary sources monitor and submit periodic reports on the nature and amounts of lead emissions and emissions related-date emissions from the sources. This may include the installation, maintenance and replacement of equipment, where appropriate. This information submitted to DNREC is available to the public at reasonable times for public inspection pursuant to Delaware law. Delaware will continue to require reporting of emissions but may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

Except as specifically exempted by the Delaware Freedom of Information Act, 29 **Del.C.** Chapter 100, Delaware makes all records, reports or information obtained by the Department or referred to at public hearings available to the public pursuant to the provisions of the Delaware Freedom of Information Act, 29 **Del.C.** Chapter 100.

- (G) **§110(a)(2)(G) Requirement:** Provide for authority comparable to that in section 303 and adequate contingency plans to implement such authority;<sup>4</sup>

**Delaware's Plan:** Delaware has authority comparable to that in section 303 and adequate contingency plans to implement such authority but may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

7 **Del.C.** §6003(a)(1) requires a permit from the Secretary prior to discharging any air contaminant. 7 **Del.C.** §6002(2) defines air contaminant essentially as any substance other than uncombined water. 7

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4. Sec. 303- Notwithstanding any other provisions of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States District court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

**Del.C. §6005** allows the Secretary to seek a preliminary or permanent injunction or temporary restraining order for any discharge of an air contaminant without a permit, and issue cease and desist orders for violations (7 **Del.C. §6018**). Thus, it necessarily follows that any discharge of an air contaminant, including lead, that would cause imminent & substantial endangerment to the health, safety and welfare of the people of the State of Delaware or the environment would constitute a sufficient basis for the Secretary to seek an injunction or temporary restraining order to halt the violation.

- (H) **§110(a)(2)(H) Requirement:** Provide for revision of such plan - (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this Act.

**Delaware's Plan:** Delaware will review and revise its SIP from time to time as may be necessary to take account of revisions of such primary or secondary NAAQS or the availability of improved or more expeditious methods of attaining such standard and whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements established under the CAA.

- (I) **§110(a)(2)(I) Requirement:** In the case of a plan or plan revision for an area designated as a non-attainment area, meet the applicable requirements of part D (relating to non-attainment areas).

**Delaware's Plan:** This does not apply because no part of Delaware is designated nonattainment for the 2008 lead NAAQS.

- (J) **§110(a)(2)(J) Requirement:** Meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection).<sup>5</sup>

**Delaware's Plan:** Delaware will meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection); but may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware does so utilizing the following:

- **7 DE Admin. Code 1132**, Transportation Conformity, provides a legal platform for the various consultation procedures that have been developed between DNREC, DELDOT, and the Metropolitan Planning Organizations (MPOs). The MPOs provide a forum for consultation with local governments. Delaware's MPOs are: WILMAPCO, Kent County MPO, and the Salisbury-Wicomoco MPO. Regional planning organizations provide the forum for inter-state consultations. Additionally, consultations with Federal Land Managers are on-going in accordance with EPA Rules. All SIP

5. §121. - In carrying out requirements for plans to contain - (1) any transportation controls, air quality maintenance plan requirements or preconstruction review of direct sources of pollution, or (2) any measure referred to - (A) in part D), or (B) in part C, and in carrying out the requirements of §113(d), the State shall provide a satisfactory process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any FLM having authority over Federal land to which the State plan applies. Such process shall be in accordance with regulations promulgated by EPA. Only a general purpose unit of local government, regional agency, or council of governments adversely affected by action of EPA approving any portion of a plan may petition for judicial review.

§127. (a) - Each plan shall contain measures to regularly notify the public of when any NAAQS is exceeded or was exceeded during the preceding year, to advise the public of health hazards associated with such pollution, and to enhance awareness of measures which can be taken to prevent the standards from being exceeded and ways in which the public can participate in regulatory and other efforts to improve air quality.

revisions and new/amended regulations undergo public notice and hearing, pursuant to 7 DE Code Chapters 29 and 60, which include publication in the newspapers and in the Delaware Register, and which have allowed for comment by the both the public and local political subdivisions. Delaware believes the public notice and hearing processes also fulfill the section 121 consultation process. The submitted attainment plans and regulations in the approved Delaware SIP specify the organizations responsible for implementing and enforcing the plans.

- DNREC makes real-time and historical air quality information available on its Web site.
- PSD requirements relative to the 2008 lead NAAQS are SIP approved and implemented through the requirements of 7 **DE Admin. Code** 1125, Preconstruction Review.
- With regard to visibility protection, there are no new applicable visibility protection obligations under section 110(a)(2)(J) as a result of the 2008 lead NAAQS. Delaware is complying with, and will continue to comply with the visibility protection and regional haze program requirements under Part C of the CAA.

- (K) **§110(a)(2)(K) Requirement:** Provide for - (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

**Delaware's Plan:** Delaware has the authority and technical capability to conduct air quality modeling in order to assess the effect on ambient air quality of relevant pollutant emissions, and will continue to perform modeling as necessary, but may makes changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. Delaware will continue to submit to the EPA the Air Quality modeling data as part of Delaware's relevant SIP submissions, permit actions, and through federal grant commitments or in other ways that EPA may request.

- (L) **§110(a)(2)(L) Requirement:** Require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Act, a fee sufficient to cover - (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under Title V.

**Delaware's Plan:** In a manner consistent with Delaware law, Delaware will continue to require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Act, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V pursuant to Delaware law. Delaware currently fulfills this under the enabling authority of 7 **Del.C.** §§6095 to 6099 and fee legislation that currently is renewed every three years. Delaware has a fully approved Title V operating permits program. See paragraphs (b) and (c) under "*Delaware*" in Appendix A to 40 CFR Part 70—Approval Status of State and Local Operating Permits Programs. Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

- (M) **§110(a)(2)(M) Requirement:** Provide for consultation and participation by local political subdivisions affected by the plan.

**Delaware's Plan:** Delaware will continue to provide for consultation and participation by local political subdivisions affected by the SIP pursuant to the public notice laws found in 7 **Del.C.** §§6006 and 6010 and 29 **Del.C.** Chapters 10003, 10004 and 10115, as applicable. Furthermore, all SIP revisions undergo public notice and hearing which have allowed for comment by the public which includes local political subdivisions. We believe the public notice and hearing processes fulfill the requirements for consultation with local political subdivisions affected by the SIP.

**3.0 Conclusion**

Based on the information provided above, Delaware fully complies with the requirements of §110(a)(2)(A) through §110(a)(2)(M).

**15 DE Reg. 382 (09/01/11)**



**DEPARTMENT OF EDUCATION**  
**PUBLIC NOTICE**

The State Board of Education will hold its monthly meeting on Thursday, November 17, 2011 at 1:00 p.m. in the Townsend Building, Dover, Delaware.

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF LONG TERM CARE RESIDENTS PROTECTION**  
**3225 Assisted Living Facilities**  
**PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 29 of the Delaware Code, Section 7971(d)(1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection is proposing revisions of Regulation 3325, Assisted Living Facilities.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Susan Del Pesco, Director, DHSS, Division of Long Term Care Residents Protection, 3 Mill Rd, Suite 308, Wilmington, DE 19806 by December 1, 2011.

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

**DIVISION OF LONG TERM CARE RESIDENTS PROTECTION**  
**3320 Intensive Behavioral Support and Educational Residences (IBSER)**  
**PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 29 of the Delaware Code, Section 7971, (d), (1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection is proposing the creation of Regulation 3320, Intensive Behavioral Support and Educational Residences (IBSER) to regulate facilities within this new licensure category.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Susan Del Pesco, Director, DHSS, Division of Long Term Care Residents Protection, 3 Mill Rd, Suite 308, Wilmington, DE 19806 by December 1, 2011.

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

**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**  
**Coverage of Emergency Services and Labor and Delivery**  
**PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Division of Social Services Manual regarding *Coverage of Emergency Services and Labor and Delivery*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by November 30, 2011.

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

**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**  
**Qualified Long-Term Care Insurance Partnership Program**  
**PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Delaware Title XIX Medicaid State Plan and the Division of Social Services Manual regarding implementation of a *Qualified Long-Term Care Insurance Partnership Program*.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by November 30, 2011.

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

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL  
CONTROL**  
**DIVISION OF FISH AND WILDLIFE**  
**3553 River Herring Creel Limit**  
**PUBLIC NOTICE**

Amendment 2 to the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fisheries Management Plan for Shad and River Herring prohibits commercial and recreational river herring fisheries in state waters beginning January 1, 2012 unless a state or jurisdiction can demonstrate that their alewife and/or blueback herring stock(s) can support a commercial and/or recreational fishery that will not diminish potential future stock reproduction and recruitment. The lack of reliable, system-specific data prevents Delaware/New Jersey (Delaware River & Bay) and Delaware/Maryland (Nanticoke River) from providing reliable targets that would satisfy this mandate. Therefore, Delaware must close its recreational and commercial river herring fisheries.

Prior to the adoption of Amendment 2, Delaware adopted a 25 fish per day recreational possession limit in 2005 to discourage the development of a live-bait river herring fishery to support a growing recreational striped bass fishery. In 2008, this regulation was amended from a 25 fish per day possession limit to a 10 fish per person daily creel (harvest) limit. These actions were consistent with the management objectives of Amendment 1 to reduce fishing mortality on river herring.

River herring was listed as a "species of concern" in 2006 by the National Marine Fisheries Service. In addition, the commercial catch of river herring has been declining coastwide to very low levels. Only 300lbs of river herring were reported from Delaware commercial fishermen in 2011 which is the lowest amount reported since mandatory reporting began in 1985. The majority of commercial river herring landings in Delaware have originated from the Nanticoke River and its tributaries. The Maryland portion of the Nanticoke River will be closed to recreational and commercial fishing as part of a statewide river herring closure planned for the State of Maryland. New Jersey plans

The hearing record on the proposed changes to the river herring regulation will be open November 1, 2011. Individuals may submit written comments regarding the proposed changes via e-mail to Lisa.Vest@state.de.us or via the USPS to Lisa Vest, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901 (302) 739-9042. A public hearing on the proposed amendment will be held on November 28, 2011 beginning at 7 pm in the DNREC Auditorium, located at the Richardson & Robbins Building, 89 Kings Highway, Dover, DE 19901.

**DEPARTMENT OF STATE**  
**DIVISION OF PROFESSIONAL REGULATION**  
**1100 Board of Dentistry and Dental Hygiene**  
**PUBLIC NOTICE**

The Board of Dentistry and Dental Hygiene ("the Board") in accordance with 24 Del.C. §1106 (a)(1) has proposed amendments to its regulations governing Continuing Professional Education. The proposed amendments add a requirement that two (2) of the fifty (50) credit hours of continuing education required for dentists and two (2) of the twenty-four (24) credit hours required for hygienists must be in courses covering infection control. The regulations are also being modified to require that licensees renew their license online and to enable licensees to attest to the completion of continuing education at the time of renewal. Finally, the regulations delineate the audit and hearing process for non-compliance with the continuing education requirements.

A public hearing will be held on December 15, 2011 at 3:15 p.m. in the PSC Hearing Room located on the first floor 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 Board of Dentistry and Dental Hygiene, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

**DIVISION OF PROFESSIONAL REGULATION**  
**2600 EXAMINING BOARD OF PHYSICAL THERAPISTS**  
**PUBLIC NOTICE**

Pursuant to 24 Del.C. §2604(a)(1), the Examining Board of Physical Therapists and Athletic Trainers has proposed revisions to its rules and regulations.

The public hearing has been rescheduled to December 6, 2011 at 5:15 p.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 Examining Board of Physical Therapists and Athletic Trainers, 861 Silver Lake Boulevard, Dover, Delaware 19904. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board proposes the re-organization of the rules and regulations for greater clarity for both licensees and members of the public. Rules 1.2.3 and 1.2.8 are modified with respect to the requirements for supervision. Rule 12.1.23 is added to state that a licensee is required to report to the Division of Professional Regulation any licensee who is in violation of the Board's laws or rules. Rule 13.0, pertaining to continuing education, is amended to add requirements for ethics hours and completion of a CPR course. In addition, Rule 13.2.2 specifies that course approval is good for three years, unless the course is modified. Rule 13.4.4 is added to make explicit that the Board has the authority to conduct continuing education audits and sanction licensees not in compliance with continuing education requirements. Finally, the revisions correct typos and grammatical errors.

The Board will consider promulgating the proposed rules and regulations at its regularly scheduled meeting following the public hearing.