

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF SUBSTANCE ABUSE AND MENTAL HEALTH
Statutory Authority: 21 Delaware Code, Section 4177D (21 **Del.C.** §4177D)

FINAL

ORDER

6003 DUI Programs

NATURE OF THE PROCEEDINGS

Pursuant to the *Administrative Procedures Act* (29 **Del.C.** Ch. 101) and under the authority of 21 **Del. C.** § 4177D, the State of Delaware Department of Health and Social Services ("the Department") initiated proceeding to adopt regulations governing driving under the influence programs.

On November 1, 2021, notice of the Department's proposed regulations was published in the *Delaware Register of Regulations* (25 **DE Reg.** 500) pursuant to the *Administrative Procedures Act* (29 **Del.C.** Ch. 101). The notice requested the public provide written submissions of suggestions, data, testimony, briefs, or other materials related to the Department's proposal to the Department no later than December 1, 2021, after which the Division would review the submissions.

The Department received public comment from the Governor's Advisory Council for Exceptional Citizens ("the Council") via a letter from Chairperson Fisher on November 29, 2021. The Council stated it "cannot support the proposed regulation because they do not contain a sliding scale or other options for possible waiver of fees for qualifying individuals."

The Department notes that no sliding scale has ever existed for DUI programs. The Department believes that these fees are necessary to ensure that providing these services remains a financially viable venture for programs. While the Department is supportive of a sliding scale fee based on the participant's ability to pay, the Department is unable to implement such a system as it lacks a funding source to reimburse programs the difference and the administrative capacity to determine financial eligibility for participants.

The Department did not receive any other written submissions on the proposal.

FINDINGS OF FACT

The Department made technical changes to improve the clarity of the published regulation. The Department has determined pursuant to 29 **Del.C.** §10118(c) that the changes are nonsubstantive and do not require reproposing of the regulation. The Department finds that the proposed regulation, 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 driving under the influence programs is adopted effective February 11, 2022 (10 days), after publication of the final regulation in the *Delaware Register of Regulations*.

Molly K. Magarik, M.S.
Secretary

1/14/2022
Date

6003 DUI Programs

1.0 Authority

The Division of Substance Abuse and Mental Health within the Department of Health and Social Services promulgates this regulation under the authority of 21 **Del.C.** §4177D.

2.0 Definitions

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

"Activity" means a program's appointment, class, meeting, or session with at least one participant.

"Blood alcohol concentration" or "BAC" means the grams of alcohol per 100 milliliters of blood or 210 liters of breath in a sample taken from a participant during a chemical test.

"Chemical test" means as defined under 21 **Del.C.** §4177.

"Defamatory language" means language that is defamatory towards a person or group based on age, creed, disability, familial status, ethnicity, gender, gender identity, national origin, sexual orientation, race, religion, or other protected classification.

"Division" means the Division of Substance Abuse and Mental Health.

"Driving under the influence" or "DUI" means a violation subject to punishment under 21 **Del.C.** §§4177, 4177B, 4177L, 4177M, or 23 **Del.C.** §§2305(2), 2305(3), or 2305(4).

"Drugs" means as defined under 21 **Del.C.** §4177.

"Governing body" means an individual, board, or other entity with ultimate responsibility for the management, operation, and control of a program.

"Instructor" means an employee of a program presenting educational classes to participants.

"License" means a license granted by the Division to provide substance use disorder treatment.

"Nonresident" means an individual that is not a resident of the State of Delaware.

"Participant" means an individual, 18 years or older, subject to 21 **Del.C.** §4177D or 23 **Del.C.** §2305(8).

"Program" means an entity providing services.

"Resident" means an individual living or attending school in Delaware or living within one hour's travel time of Delaware.

"Services" means screening and referral, educational, or treatment services.

3.0 Purpose

This regulation adopts rules and fees for programs providing services to participants.

4.0 Applicability

- 4.1 Except as otherwise provided under subsection 4.2 of this regulation, this regulation applies to programs and participants.
- 4.2 This regulation does not apply to the Court of Common Pleas Driving Under the Influence Treatment Program or the Program's participants.

5.0 Programs

- 5.1 A program may provide services if the program ~~[meets all of the following requirements:~~ is authorized, contracted, and licensed by the Division to provide substance use disorder services.
 - ~~5.1.1 The program is licensed by the Division to provide treatment for substance use disorder.~~
 - ~~5.1.2 The program is authorized by the Division to provide services for substance use disorder.~~
 - ~~5.1.3 The program is contracted by the Division to provide services for substance use disorder.]~~
- 5.2 The Division may authorize and contract with a program to provide one or more of the following service types:
 - 5.2.1 Screening and referral.
 - 5.2.2 Education.
 - 5.2.3 Treatment.
- 5.3 A program must comply with the requirements of the program's license and other requirements issued by the Division.
- 5.4 A program's governing body must designate a program director responsible for the program's daily operation and administration. The program director must be a licensed chemical dependency professional.
- 5.5 A program must have written rules and policies for at least the following:
 - 5.5.1 Protection of participant rights including informed consent.
 - 5.5.2 Submission of grievances and appeals of program decisions.
 - 5.5.3 Confidentiality of participant records.
 - 5.5.4 Participant conduct.
 - 5.5.5 Attendance, including requesting and excusing absences.
 - 5.5.6 Leaves of absence.
 - 5.5.7 Rescheduling activities.
 - 5.5.8 Payments to the program.
- 5.6 A program must maintain a record for each participant.

6.0 Participant Conduct

- 6.1 A participant must comply with rules and policies adopted by a program and the requirements of this regulation.
- 6.2 Whenever participating in a program, a participant must do all of the following:

- 6.2.1 Be respectful of staff and other participants.
- 6.2.2 Attend scheduled program activities.
- 6.2.3 Pass required urine drug screenings.
- 6.2.4 Actively participate during program activities.
- 6.2.5 Dress and groom in a manner that falls within generally accepted definitions of neatness and cleanliness.
- 6.3 A participant must not do any of the following:
 - 6.3.1 Engage in aggressive, hostile, harassing, threatening, or violent behavior.
 - 6.3.2 Act in a manner that endangers the health and safety of staff or other participants.
 - 6.3.3 Be disruptive or distracting.
 - 6.3.4 Communicate using profanity or defamatory language.
 - 6.3.5 Commit a criminal or traffic offense.
 - 6.3.6 Except for prescribed medication taken according to a prescription, use or consume alcohol or drugs.

7.0 Attendance

- 7.1 Whenever a program schedules a participant to attend an activity, the program must provide the participant with notice at least five days before the activity. The notice must include the activity's start time and location. A program providing a participant with a schedule of all the participant's scheduled activities fulfills the requirements under this subsection.
- 7.2 To successfully attend an activity, a participant must do all of the following:
 - 7.2.1 Arrive before the activity starts.
 - 7.2.2 Sign in on the form provided.
 - 7.2.3 Be present for the entirety of the activity.
 - 7.2.4 Actively participate.
- 7.3 Except if excused, a participant is absent from an activity whenever the participant does not attend an activity.
- 7.4 A participant's absence is excused from an activity whenever any of the following occurs:
 - 7.4.1 The participant notifies a program during regular business hours at least 24 hours before the start of an activity ~~[they are unable to attend]~~ and requests ~~[a pre-arranged absence to be excused]~~.
 - 7.4.2 The participant's absence is due to events that are wholly beyond the participant's control, or the participant otherwise demonstrates good cause.
 - 7.4.3 The activity does not begin less than one hour after the scheduled start time.
 - 7.4.4 The program cancels the activity.
- 7.5 A participant may request that a program excuse an absence. The program may request reasonable documentation to support the participant's request.
- 7.6 If a participant is absent or excused, the participant must make up the missed activity no more than seven days after the initially scheduled date. If the participant fails to make up the missed activity, the absence counts towards the participant's limit.
- 7.7 A participant is allowed one absence from a screening and referral activity and two absences from an educational or treatment activity.
- 7.8 Except if a program grants a participant a leave of absence, the program may dismiss the participant from the program whenever a participant does not attend an activity for 21 consecutive days.
- 7.9 A participant may request a leave of absence from a program. ~~[The~~ Subject to the approval of the program's director, a] program may grant the participant's request if the participant does all of the following:
 - 7.9.1 Requests the leave in advance.
 - 7.9.2 Demonstrates good cause.
 - 7.9.3 Provides reasonable documentation to support the request.
 - ~~7.9.4 The program's director approves the request.~~

8.0 Screenings

- 8.1 As used in this section, "program" means a program providing screening and referral services.
- 8.2 Except if a program screens a participant, a program must not refer a participant to an educational course or treatment services.
- 8.3 A participant must contact a program to schedule a screening appointment. During the appointment, the program must screen the participant using a Division-approved standardized tool. After screening the

participant, the program must complete a screening report for the participant in the manner authorized by the Division.

8.4 Subject to Section 9.0 of this regulation, a program must refer a participant for appropriate services after completing a screening report.

8.5 A program may screen a participant remotely.

9.0 Referrals

9.1 A program must refer a participant younger than 18 years to a treatment program approved by the Department of Services for Children, Youth, and Their Families.

9.2 A program must refer a participant to a program for educational services whenever all of the following conditions exist:

9.2.1 The participant's DUI is the participant's first.

9.2.2 The participant's BAC was less than .15.

9.2.3 The participant's screening report identifies a low risk of substance use disorder.

9.3 A program must refer a participant to a program for ~~[Level 4]~~ treatment services whenever ~~[all any]~~ of the following conditions exist:

~~9.3.1 The participant's DUI is the participant's first.~~

~~9.3.2 The participant's BAC was less than .15.~~

~~9.3.3 The participant's screening report identifies a moderate or higher risk of substance use disorder.~~

9.3.1 The participant's DUI is the participant's first and any of the following conditions exist:

9.3.1.1 The participant's screening report identifies a moderate or higher risk of substance use disorder.

9.3.1.2 The participant's BAC was .15 or more.

9.3.1.3 The participant refused to submit to a chemical test.

9.3.1.4 The participant's DUI involved the use of drugs.

9.3.2 The participant's DUI is the participant's second within 10 years and the participant's BAC was .15 or less.]

9.4 A program must refer a participant to a program for ~~[Level 2 intensive]~~ treatment services whenever ~~[one any]~~ of the following conditions exist:

9.4.1 The participant's DUI is the participant's ~~[first second within 10 years]~~ and any of the following conditions exist:

9.4.1.1 The participant's BAC was .15 or more.

9.4.1.2 The participant refused to submit to a chemical test.

~~9.4.1.3 The participant's DUI involved the use of drugs.]~~

9.4.2 The participant's DUI is the participant's ~~[second within 10 years and the participant's BAC was .15 or less third or subsequent DUI]~~.

~~9.4.3 The participant's DUI is the participant's first DUI or second DUI within 10 years and the participant's DUI involved the use of drugs.~~

~~9.5 A program must refer a participant to a program for Level 3 treatment services whenever all of the following conditions exist:~~

~~9.5.1 The participant's DUI is the participant's second within 10 years.~~

~~9.5.2 Any of the following conditions exist:~~

~~9.5.2.1 The participant's BAC was .15 or more.~~

~~9.5.2.2 The participant refused to submit to a chemical test.~~

~~9.6~~ 9.5] Whenever a participant does not meet the criteria under subsections 9.2 through ~~9.5~~ 9.4] of this regulation, a program must refer the participant for appropriate treatment services based on the participant's risk of substance use disorder identified in the participant's screening report.

~~9.7~~ 9.6] Whenever a participant's screening report indicates co-occurring mental health or medical conditions, a program must provide the participant with a referral to appropriate services.

10.0 Educational Services

10.1 As used in this section, "program" means a program providing educational services.

10.2 A program must adopt a curriculum approved by the Division.

- 10.3 A program must present an educational course that consists of 16 hours of instruction.
- 10.4 An instructor presenting a class must have all of the following:
 - 10.4.1 Necessary training or certification on the curriculum.
 - 10.4.2 Relevant knowledge of the criminal justice system.
 - 10.4.3 Training or experience as an instructor.
- 10.5 A program's director shall review and approve each instructor's qualifications.

11.0 Treatment Services

- 11.1 As used in this section, "program" means a program providing treatment services.
- 11.2 A program must provide treatment services per the program's license and by a licensed chemical dependency professional.
- 11.3 Before providing treatment services to a participant, a program must assess the participant using standardized, evidence-based instruments approved by the Division.
- 11.4 After a participant's assessment, a program must create a written, individualized, and outcome-oriented treatment plan for the participant. The plan must do at least the following:
 - 11.4.1 Identify and respond to the evidence and determinations arising from the participant's assessment.
 - 11.4.2 State the specific interventions recommended by the program and the evidence supporting the interventions.
 - 11.4.3 State the requirements and expectations for the participant's satisfactory completion of treatment.
 - 11.4.4 State the consequences for the participant for failing to complete treatment.
- 11.5 A program must treat a participant according to the participant's treatment plan.
- 11.6 A program ~~[must may]~~ require a participant ~~[receiving Level 2 or 3 treatment services]~~ to submit to urine drug screenings as part of the participant's treatment plan. Subject to the Division's approval, a program administering urine drug screenings must adopt written policies and procedures for conducting the screenings.

12.0 Completion Requirements

- 12.1 A program may grant a certificate of completion to a participant receiving education services whenever the participant does all of the following:
 - 12.1.1 Attends 16 hours of educational activities.
 - 12.1.2 Attends a meeting of a mutual-help group.
 - 12.1.3 Has a DUI avoidance plan approved by an instructor.
 - 12.1.4 Pays the required fees.
- 12.2 A program may grant a certificate of completion to a participant receiving ~~[Level 1 or 2]~~ treatment services whenever the participant satisfies the requirements of their treatment plan, attends 16 hours of treatment activities, and pays the fees required by the program.
- 12.3 A program may grant a certificate of completion to a participant receiving ~~[Level 3 intensive]~~ treatment services whenever the participant satisfies the requirements of their treatment plan, attends 27 hours of treatment activities, and pays the fees required by the program.
- 12.4 A program may grant a certificate of completion to a nonresident participant if the participant substantially satisfies the requirements of this section in their home state. Subject to the Division's approval, the program must establish policies and procedures to assist a nonresident participant satisfactorily in complying with the requirements of this section.

13.0 Fees and Payments

- 13.1 Except as authorized under this section, a program may not charge a participant a fee.
- 13.2 A program may charge a participant any of the following administrative fees:
 - 13.2.1 \$50 or less per absence.
 - 13.2.2 \$30 or less for a late payment.
- 13.3 An education or treatment program may charge a participant any of the following administrative fees:
 - 13.3.1 \$150 or less for supervision and processing of a nonresident.
 - 13.3.2 \$50 or less for processing the participant's transfer to another program.
 - 13.3.3 \$50 or less for reinstating the participant after the participant's dismissal.
 - 13.3.4 \$50 or less for materials.

- 13.4 A program may charge a participant any of the following service fees:
- 13.4.1 \$150 or less for screening and referral services.
 - 13.4.2 \$35 or less per urine drug screen.
- 13.5 An education program may charge a participant a total program fee of \$400 or less for 16-hours of education activities.
- 13.6 A treatment program may charge a participant a total program fee of \$1,000 or less for 16-hours of ~~[Level 1 or 2]~~ treatment activities.
- 13.7 A treatment program may charge a participant a total program fee of \$1,700 or less for 27-hours of ~~[Level 3 intensive]~~ treatment activities.
- 13.8 If a program excuses a participant's absence, the program may not charge the participant a fee under subsections 13.2.1 or 13.2.2 of this regulation.
- 13.9 A program fee charged by a program under subsections 13.6 or 13.7 of this regulation is subject to the Department and Division's policies and the program's contractual agreements with the State.
- 13.10 A participant is responsible for paying fees charged by a program.
- 13.11 A program must provide participants with a receipt at the time of payment and maintain a record of payments made by participants. A program must provide a copy of the record to the Division upon request.
- 13.12 A program must accept participant payments made via cash, cashier's check, certified check, money order, or a third-party payer. A program may accept participant payments made via credit card, debit card, or personal check.
- 13.13 A program may require payment before providing services.
- 13.14 A program may establish payment agreements with participants.

14.0 Disciplinary Actions

- 14.1 A participant commits a violation whenever the participant does not comply with the requirements of Section 6.0 of this regulation or exceeds the allowed number of absences under subsection 7.7 of this regulation. Each absence beyond the permitted number of absences counts as a new violation. A program may determine that a participant has committed multiple violations as part of one incident.
- 14.2 Whenever a participant commits a violation, a program may impose sanctions on the participant.
- 14.3 A participant is subject to disqualification from receiving services under this regulation whenever the participant does any of the following:
- 14.3.1 Commits three or more violations.
 - 14.3.2 Commits a criminal or traffic offense.
 - 14.3.3 Threatens or engages in violence.
 - 14.3.4 Acts in a manner that the program believes requires the participant's disqualification.
- 14.4 A program must maintain a record of a participant's violations.
- 14.5 Whenever a program determines that a participant commits a violation, the program must inform the participant in writing. A violation constitutes an adverse action.
- 14.6 If a program disqualifies a participant, the program must notify the participant, the Division, and the court.
- 14.7 Whenever a program disqualifies a participant, the participant may not participate in activities under this regulation.
- 14.8 A participant may appeal a violation or disqualification under Section 15.0 of this regulation.

15.0 Appeals

- 15.1 Whenever a program takes adverse action against a participant, the participant may appeal the adverse action to the program's director by submitting a written request on the form approved by the Division no more than 10 days after receiving written notice of the adverse action from the program.
- 15.2 Except if submitted according to subsection 15.1 of this regulation, a program must not consider an appeal.
- 15.3 A program director must review an appeal no more than five days after receiving the appeal. The program director's review must be based on the form submitted under subsection 15.1 of this regulation and contemporaneous documentation and records. A program is not required to conduct a hearing.
- 15.4 No more than 10 days after receiving an appeal, and after conducting a review under subsection 15.3 of this regulation, a program director must issue a written decision that contains at least the following:
- 15.4.1 A concise statement of the adverse action.
 - 15.4.2 A concise statement of the appeal.

15.4.3 If applicable, a summary of the evidence.

15.4.4 The decision of the program director to take one of the following actions:

15.4.4.1 Dismiss the appeal.

15.4.4.2 Grant the appeal.

15.4.4.3 Partially grant the appeal and modify the adverse action.

15.5 Notice of a decision issued under subsection 15.4 of this regulation must be given to a participant. The notice must include a copy of the written decision. A program must maintain a copy of a decision.

15.6 If a program director does not issue a decision within the time provided under subsection 15.4 of this regulation, the appeal is automatically granted and the adverse action is void.

15.7 A participant may appeal a program director's decision by submitting a written request on the form approved by the Division no more than 10 days after receiving notice of the decision under subsection 15.5 of this regulation.

15.8 Except if submitted according to subsection 15.7 of this regulation, the Division must not consider an appeal.

15.9 The Division Director shall appoint a review committee consisting of three Division staff to consider appeals made under subsection 15.7 of this regulation. The committee must meet at least monthly.

15.10 The committee's members must review the available record. The Division is not required to conduct a hearing. At the meeting, the committee must, by majority vote, make one of the following determinations:

15.10.1 To dismiss the appeal.

15.10.2 To grant the appeal.

15.10.3 To partially grant the appeal and modify the adverse action.

15.11 The Division must notify the participant and the program in writing of the review committee's determination under subsection 15.10 of this regulation.

15.12 The determination of the review committee is final.

25 DE Reg. 783 (02/01/22) (Final)