

PENNSYLVANIA CATHOLIC CONFERENCE

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#2539

March 28, 2008

Mr. Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street
14th Floor
Harrisburg, PA 17101

INDEPENDENT REGULATORY
REVIEW COMMISSION

2008 APR -7 AM 9:45

RECEIVED

Re: DPW Final Form Regulation #14-506 (IRRC #2539) –
Child Care Facilities

Dear Mr. Coccodrilli:

The Pennsylvania Catholic Conference (PCC) is an association comprised of the eight Latin Rite Roman Catholic Dioceses of Pennsylvania and the two Byzantine Rite Catholic Dioceses whose territories include the Commonwealth of Pennsylvania. PCC submits the following comments regarding the Final Form Regulations filed by the Department of Public Welfare (the Department).

Although the Department has made revisions to its Proposed Rulemaking to address some prior concerns, PCC is compelled to re-submit objections to the Final Form Regulation on the following grounds:

1. The Department lacks the statutory authority under Article IX of the Public Welfare Code to require nonprofit religious child care facilities to be licensed by the Department and to comply with all of its regulations as a condition of operation.
2. Application of the Department's licensing and regulatory scheme to religious child care ministries would violate: the Religion Clauses of the First Amendment to the United States Constitution; Article 1, Section 3 of the Pennsylvania Constitution; and the Pennsylvania Religious Freedom Protection Act.
3. The Regulations exceed the Department's stated purpose of protecting the health and safety of children in child care facilities, but instead attempt to require all child care facilities to adhere to the Department's subjective, program-related regulations and thus exceed the statutory authority under Article IX.

PCC raised similar objections in its prior public comments (dated June 30, 2006). These issues have been argued and are now pending before the Pennsylvania Supreme Court in St. Elizabeth's Child Care Center v. Dep't of Public Welfare, 23 MAP 2007. See 591 Pa. 720, 919 A.2d 960 (Pa. 2007). (St. Elizabeth's Child Care Center has fully briefed the Court on these issues and the Court heard oral argument on March 5, 2008.)

The Department in the "preamble" to its Final Form Regulation states that it does not intend to enforce its regulations that require Article IX nonprofit child care facilities to obtain a Certificate of Compliance (i.e., a license) pending the outcome of the Supreme Court case. (See page 13 of Preamble). Nonetheless, PCC is compelled to formally object to the Final Form Regulation since the St. Elizabeth's litigation has not been decided. A Supreme Court ruling affirming the Commonwealth Court order or otherwise ruling in favor of St. Elizabeth's Child Care Center would likely supersede these regulations and directly affect the Department's perceived regulatory authority with respect to all religious nonprofit child care facilities in the Commonwealth.

In summary, the Department's Final Form Regulation is an attempt to re-promulgate its regulations that would mandate religious, nonprofit child care facilities to obtain a certificate of compliance in order to operate. Clearly, §3270.11(a) continues to mandate religious providers to obtain a license in order to operate.

The Department is also attempting to re-promulgate provisions to assure care that promotes social development of children in care at child day care facilities. A number of the Department's regulations refer to requirements that are designed to promote proper socialization of children, including development of "social competence" and "self-esteem." See, e.g., §§ 3270.1 (introduction), 3270.101 (type of play equipment), 3270.111 (daily activities), 3270.113 (supervision of children).

For example, the regulation would re-affirm the current regulation § 3270.111, which requires all facilities to have a written plan of daily activities. It provides that: "Daily activities shall promote the development of skills, **social competence** and **self-esteem**. Daily experiences shall recognize the child as an individual and give some choice of activities that respect **personal privacy, lifestyle and cultural background.**"

A mandatory written plan of "daily activities" is not directed to protecting the health and safety of children in care but dictates what types of programs children will receive while in care and how children must be taught. Since this is a programmatic and instruction-related regulation rather than a necessary health and safety regulation, it cannot be mandated to Article IX nonprofit facilities.

The regulations continue to place restrictions on the employment decisions of religious child care facilities. Former section §3270.11(b) would become §3270.11(c) which requires an application for a certificate of compliance to be submitted in accordance with the procedural requirements of Chapter 20 (55 Pa. Code Chp. 20). Appendix A to Chapter 20 prohibits a facility from making a hiring or employment related decision on the basis of "religious creed."

The non-discrimination provisions of the Chapter 20 regulations: 1) require all child care facilities to develop and implement a “nondiscrimination policy which states that . . . employment actions are provided without regard to . . . religious creed”; and 2) prohibit all child care facilities from discriminating on the basis of religion with respect to staff selection and children served. These requirements are *in addition to* the requirement that facilities comply with Federal and State Civil Rights Laws—both of which contain exemptions for religious entities (which DPW’s regulations do *not* contain). When asked whether these additional provisions applied to *religious* child care providers, the Department’s inspector in the St. Elizabeth’s litigation answered: “Yes.”

Likewise, the Department’s substantive child care center regulations require all staff to have certain governmentally-designated educational degrees before they may be employed in various positions. See §§ 3270.34-3270.37.

Religious providers, such as St. Elizabeth’s Child Care Center, choose its staff based on their ability to transmit those beliefs to children in their care. They must be free to choose employees who believe as they do and are committed to their religious mission.

In addition, the Department is attempting to promulgate the following new provisions that are not in the current regulations and which, in PCC’s view, are unrelated to legitimate health and safety concerns of children in care:

1) §3270.11. – Application for and issuance of certificate of compliance.

§3270.11(b) – (relating to mandatory pre-certification orientation training before a certificate of compliance can be issued). It would require a child care facility representative to participate in an “orientation training” provided by the Department within 12 months prior to “commencing operation of the child day care center.” The orientation training would not count toward the annual minimum of 6 hours of child care training required under § 3270.31 of the current regulation. Currently, the orientation training is optional.

2) §3270.31. – Age and training.

§3270.31(d) – (relating to staff qualifications). PCC does not believe that only those who have training in early childhood development are competent to provide loving care for children. Moreover, religious facilities seek to promote religious and moral values in children. In order to fulfill this mission, they must be free to hire those who they feel are best qualified to do this. Teachers in religious elementary schools are not required to obtain state certification, and PCC believes that teachers and caregivers in preschools and day care settings should be similarly unencumbered.

3) §3270.52. – Mixed age level.

(Relating to maximum group size in mixed age levels.) This cross-references §3270.51 (relating to maximum age group size) and the rigid staff to child ratios for children over 3 years old. The current and proposed regulations propose rigid staff-to-child ratios for children over 3 years old. The current Department ratio for 3, 4, and 5 year olds is 1-10 (the draft regulations would permit kindergarten age children to be included in the 1-12 ratios as "young school age" children). These are much more restrictive than the current ratios governing private academic schools, which is 1-20 for this age group. (22 Pa. Code §53.26). Given these wide discrepancies PCC believes that there should be flexibility for religious preschool programs. Many of these programs have been operating successfully for long periods of time without any such rigid ratios.

4) §3270.61. – Measurement and use of indoor child care space.

- a) §3270.61(h) – (relating to indoor space capacity).
- b) §3270.61(i) – (relating to maximum capacity stated on facility's certificate of compliance).

PCC questions whether these provisions address a legitimate health and safety concern, given that the Department is proposing that the requirements may be relaxed during certain timeframes each day. For example, under some circumstances capacity limitations may be exceeded for older toddlers, preschool and school age children participating in program related activities for up to two separate ½ hour time periods each day. If something is permitted or safe during two time periods each day, what makes the same activities "dangerous" or unhealthy if the activities happen to exceed the ½ hour period? This regulation appears to address space limitations that would already be covered under the occupancy permit standards required of all facilities.

5) §3270.113. – Supervision of children.

§3270.113(a)(2) – (cross references rigid staff to child ratio provision). See the response to the child ratio limits discussed under 3), above.

6) §3270.123. – Agreement.

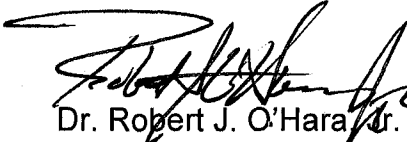
(Relating to provision of approved forms pertaining to "growth and development" for each child in care.) A facility would be required to evaluate each child for purposes of completing a Department-approved form about the child's "growth and development in the context of the services provided." The form must be provided to each family and updated every 6 months. The Department circulated a copy of its proposed "Child's Report" which requires a facility to evaluate a child's strengths areas to be worked on including: "age-appropriate social emotional skills"; "age-appropriate acquisition and use of knowledge and skills" and "age-appropriate use of appropriate behaviors to meet needs." The "Child's Report" is purportedly based on the guidelines of the American Public Health

Association, the American Academy of Pediatrics, and the Maternal and Child Health Bureau of the U.S. Department of Health and Human Services.

The completion of a "Child's Report" does not address legitimate health and safety concerns but relates to the Department's view of what is proper social development for a child. The "Child's Report" is not being proposed as a regulation or as an appendix to the regulation. Thus, the Department could simply revise the form without submitting the change under the Regulatory Review Process. Additional "progress benchmarks" relating to what the Department deems to be "proper social development" could simply be added without public comment or regulatory oversight.

For the above reasons, PCC must object to the Department's Final Form Regulation.

Very truly yours,



Dr. Robert J. O'Hara Jr.
Executive Director

cc: Linda Warren
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