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VIA Email  
[jlau@state.pa.us](mailto:jlau@state.pa.us)  
and First Class Mail

June 29, 2006

Ms. Jennifer Lau  
Bureau of Certification Services  
Office of Child Development  
Department of Public Welfare  
1401 North Seventh Street  
P.O. Box 2675  
Harrisburg, PA 17105

INDEPENDENT REGULATORY  
REVIEW COMMISSION

2006 JUN 30 PM 4: 18

RECEIVED

RE: *Formal Comments on DPW's Proposed Rulemaking  
(Reference No. 14-506)*

Dear Mr. Lau:

Enclosed are the formal comments of the Education Law Center-PA and the Disabilities Law Project on the Department of Public Welfare's proposed rulemaking regarding 55 Pa. Code Chapters 3270, 3280, 3290 and 3300, having to do with child care facilities.

We strongly support these proposed regulations and believe child care facilities must accept and accommodate children with disabilities, work in cooperation with the early intervention system and other child serving agencies, and welcome the specialized staff who sometimes accompany them to their facilities. We applaud the Department for infusing these obligations into all applicable state licensing regulations rather than in separate Chapter 3300.

We respectfully offer our comments and in some cases recommend alternative language. Thank you for the opportunity to comment on these important regulations. We look forward to working with you throughout the regulatory process to support this important endeavor.

Very truly yours,

Janet F. Stotland, Co Director  
Nancy A. Hubley, Pittsburgh Director  
Education Law Center-PA

Rachel Mann, Senior Staff Attorney  
Disabilities Law Project

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JUN 29 2006

OFFICE OF CHILD DEVELOPMENT

**Comments of**  
**Education Law Center-PA and the Disabilities Law Project**  
**On**  
**DPW's Proposed Rulemaking**  
**Regarding Child Care Facilities**  
**[22 PA CODE CHS. 3270, 3280, 3290 and 3300]**  
**June 27, 2006**

INDEPENDENT REGULATORY  
REVIEW COMMISSION  
2006 JUN 30 PM 4:18

RECEIVED

The Education Law Center-PA (ELC) and the Disabilities Law Project (DLP) thank you for the opportunity to provide public comment on the proposed changes to the child care facility regulations in 22 PA Code Chapters 3270, 3280, 3290 and 3300. Although in these comments we refer specifically only to Chapter 3270, we are recommending the same changes to proposed Chapters 3280 and 3290.

Outside their homes and pre-kindergarten programs, child care facilities are the major “inclusive” environment for children with disabilities below school-age. Child care facilities must accept and accommodate these children, work in cooperation with the early intervention system and other child-serving agencies, and welcome the specialized staff who sometimes accompany children with significant disabilities and chronic health conditions to their facilities. DPW is taking the right course by infusing these obligations into all of the applicable state licensing regulations rather than in separate Chapter 3300.

ELC is a non-profit educational advocacy organization dedicated to ensuring that all Pennsylvania children, from birth through twenty-one, receive appropriate early intervention and special education services in the least restrictive environment. We also work collaboratively with advocates for early child care and education and with several statewide coalitions.

DLP is a non-profit statewide public interest law firm that provides legal assistance and other services to individuals with disabilities, their organizations, their families, and their advocates. DLP's main purpose is to advocate for the civil rights of persons with mental and physical disabilities, especially their right to live as integral parts of their communities. With respect to children, DLP works to ensure that young people with disabilities have equal and unhindered access to public accommodations, including child care facilities, and that they receive the disability-related healthcare that they need to thrive in their homes and communities.

In ELC's and DLP's more than thirty years of operation, we have helped many thousands of children with disabilities and their families. Our Comments to these proposed regulations are based on this extensive experience.

*Overview*

We are extremely pleased that the Department's proposed regulatory changes, including the deletion of Chapter 3300, reflect a commitment to inclusive non-exclusionary practices in child care settings and will help ensure that children with special needs receive the reasonable accommodations they need to enroll and be given care in child care facilities across Pennsylvania. We are particularly pleased with the Department's continuing commitment to encourage and support coordination and collaboration among those who provide support services to children with disabilities and their families through regulation, information sharing, training, and technical assistance. We believe Department leadership and guidance in this area is essential if children with special needs are to receive effective services within early child care programs.

We respectfully offer the following comments. Where we thought it might be helpful, we recommend and provide alternative language.

**DEFINITIONS**

**§3270.4 Definitions**

**What is the problem?**

We support changing the definition of "child with a disability" to a "child with special needs," and applaud the Department for including children with behavioral and chronic health care needs among those protected by these regulations. But we are concerned that there are children with special needs who need reasonable accommodations and the other protections in these proposals who are not included in the proposed definition.

Under §3270.4(i), a child must have an IEP or IFSP to be considered a child with "special needs." Some families do not want to use the special education or early intervention system to meet their child's needs, and in fact the early intervention system, and to some extent the special education system, entirely voluntary. Children with disabilities who attend private schools usually do not have IEPs. Those children will not have an IEP or and IFSP. However, in most cases these children are being served by licensed specialists who have documented the child's disability or developmental delay. These children also need to be included in the definition.

Second, there are children whose disability and special needs have been documented in a Service Agreement, pursuant to 22 Pa Code Chapter 15 rather than an IEP or IFSP. Chapter 15 governs children with disabilities who need accommodations in the school environment, but who do not need special education and are not entitled to an IEP. Without an explicit reference to a "Service Agreement," these children are not included in the proposed definition.



Finally, although we support the inclusion of children who have behavior plans developed by licensed physicians, psychiatrists and psychologists in the definition of children with special needs, we object to the requirement that the behavior plan be "formal." For one thing, it is not at all clear what is meant by a "formal" plan. In addition, the best behavioral plans for children are often developed informally between parents and their child's physician, psychologist or psychiatrist and are reflected in a letter or a report. The word "formal" seems unnecessarily to require more.

**What do we recommend?**

We have added "Service Agreements under 22 PA Code Chapter 15" to the list of plans in this regulation, and we have eliminated the requirement that the behavior plan be "formal." Finally, under our proposed language, if a child's developmental delay or disability has been documented by a licensed professional, the child would qualify as a child with special needs even if the child does not also have an IEP, an IFSP, or a Service Agreement.

Thus, we recommend the following changes to the definition of a child with special needs:

A child who has one or more of the following:

(i) a disability or developmental delay identified on an Individualized Education Program, [or] an Individualized Family Service Plan, or a Service Agreement under 22 Pa. Code Chapter 15, or a disability or a developmental delay identified by a licensed practitioner that results in a need for services and accommodations for the child beyond that required by children generally.

(ii) a [formal] behavioral plan that has been determined by a licensed physician, psychiatrist or licensed psychologist.

(iii) a chronic health condition diagnosed by a licensed physician, physician's assistant or CRNP that requires health and related services of a type or amount beyond that required by children generally.

\* \* \* \* \*

## GENERAL REQUIREMENTS

### § 3270.17 Services to Child with Special Needs

#### *Subsection (a):*

#### **What is the problem?**

We commend the Department for acknowledging that the Americans with Disabilities Act (ADA) governs child care facilities that are “public accommodations” and that such facilities must make reasonable accommodation for children with disabilities. But not all child care facilities are covered by the ADA because religious entities are exempt. We believe that all child care facilities that are licensed by the Department should be obligated to accept and make reasonable accommodations for children with disabilities, not just those technically covered by the ADA. Also, the proposed language includes only the ADA, which is only one of the laws that protects persons with disabilities.

#### **What do we recommend?**

Our proposal would require all child care facilities licensed by the Department to make reasonable accommodations for children with disabilities. In addition, our proposal refers to all applicable state and local discrimination laws, not just the ADA.

We recommend the following changes to Subsection (a):

- (a) [The operator shall make reasonable accommodation to include a child with special needs in accordance with the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C.[A.] §§ 12101--12213).] The operator shall make reasonable accommodation to include a child with special needs and shall comply with all other applicable state and federal laws regarding disability discrimination.

If the Department is not willing to do this, we would recommend that the language be amended better to inform providers of the breadth of their obligations as follows:

- (a) The operator shall provide an equal opportunity, including reasonable accommodation, effective communication, auxiliary aids and services and the removal of architectural barriers, for children with special needs, in compliance with the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101—12213) and its implementing regulations, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and its implementing regulations, and applicable state law and regulations mandating the reasonable accommodation of persons with disabilities.

*Subsection (b):*

**What is the problem?**

We are pleased to see language in this subsection that requires child care facilities to permit adults onsite to provide services to children with special needs. This provision will ensure that therapeutic staff support (TSS), nursing staff, and other support service personnel needed to ensure that children are receiving consistent and coordinated support have access to the facility. We also believe that, when these other adults have the opportunity to spend time in child care facilities and with child care staff, all children will benefit from broader access to their knowledge and skills.

We suggest only minor changes to this subsection, consistent with our recommendations in the definition section.

**What do we recommend?**

We recommend that this subsection include a reference to a Chapter 15 Service Agreement, and we would delete the word "formal" before the words "behavior plan." We also suggest adding language that allows for a licensed practitioner to prescribe the services of an individual who shall be permitted to provide services on the premises of the child care facility.

Our proposed the following changes to subsection (b):

(b) The operator shall permit an adult individual who provides specialized services to a child with special needs to provide those services on the facility premises as specified in the child's Individualized Education Program, Individualized Family Service Plan, [formal] behavioral plan, program plan as defined in § 3270.119 (relating to program plan), Service Agreement under 22 PA Code Chapter 15, or as prescribed by a licensed practitioner.

*Subsection (c):*

**What is the problem?**

We applaud the Department's inclusion of language requiring operators to make staff aware of community resources for the family of a child with special needs, but the section does not explicitly acknowledge that, for young children with disabilities, early intervention and special education are the most important service systems. While families of school-age children may learn about special education services from educational agencies, families of young children often rely on child care providers for information about how to access special services for children with disabilities or developmental delays.

**What do we recommend?**

We recommend that this subsection, and each of its subparts, explicitly require operators, directors, and staff to provide families with information about early intervention and special education.

We propose the following changes to Subsection (c):

(c) The operator is responsible to make staff persons aware of community resources for the family of a child with possible special needs, including information and resources about the early intervention and special education systems.

(1) When the director believes a child may need an assessment due to developmental, behavioral or health concerns, the director shall inform the child's parent of the concern and provide information to the parent regarding resources for referral and assistance, including information and resources about the early intervention and special education systems

(2) When a staff person believes a child may need an assessment due to developmental, behavioral or health concerns, the staff person shall inform the director. The director shall inform the child's parent of the staff person's concern and provide information to the parent regarding resources for referral and assistance, including information and resources about the early intervention and special education systems.

**FACILITY PERSONS**

**§ 3270.31 Age and Training**

**What is the problem?**

If children with special needs are to be accommodated and cared for in child care facilities, it is essential that the responsible child care personnel have the necessary training or experience in child development, and especially children's social, emotional and cognitive development. The proposed regulations require at least six hours of training, but allow the facility to choose from a range of topics to meet the mandatory "6 clock hours" of mandatory annual training. Thus staff training in "child development, early childhood education, and special education" (§ 3270.31(e)(2)(ii)) is purely optional.

**What do we recommend?**

Our proposal is that the regulations require at least two of the six hours of mandatory annual training be focused on this now optional topic. Such a requirement will benefit all children, not just those with special needs.

We propose the following revision to sub-section (e)(2).

(e)(2) Acceptable training topics include the following, and training must include at least two hours of training in the area of child development (including cognitive, social and emotional development), early childhood education and special education:

- (i) Child or staff health
- (ii) [delete this section]

**PROGRAM**

**§ 3270.113. Supervision of children**

**What is the problem?**

We commend the Department for including language that prohibits the use of “bonds, ties or straps” to restrict a child’s movement or putting a child in a “confined space, closet, or locked room.” 55 PA Code §3270.113(e). These protections are important for all children, but especially for children with disabilities including behavioral disabilities. Because of its importance, we believe that each facility should have a written policy regarding the treatment of children with challenging behaviors that favors positive approaches and that identifies the necessary staff training. This is the thrust of the “behavior support” regulation that governs school districts. See 22 PA Code §14.133.

Finally, while we agree that equipment prescribed for children with special needs should not be prohibited so long as the equipment is being used “as prescribed,” but that clarification is missing from the proposed regulation.

**What do we recommend?**

We recommend adding to §3270.113(e) a requirement that each facility have a plan for handling children with challenging behaviors, not only those identified as having special needs, that the plan direct the use the positive approaches, and that it identify appropriate staff training. We also recommend clarifying that prescribed equipment for children with special needs must be used as prescribed.



Our proposed changes to subsection (e) are:

(e) Facilities shall develop a written plan to guide staff in addressing children's negative behaviors. The plan shall require staff to use positive rather than negative measures and shall prohibit the use of aversive techniques. A facility person may not restrain a child by using bonds, ties, or straps to restrict a child's movement or by enclosing the child in a confined space, closet or locked room. The prohibition against restraining a child does not apply to the use of adaptive equipment as prescribed for a child with special needs.

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### **§ 3270.119 Program Plan**

#### **What is the problem?**

We strongly support the concept of a program plan for every child. Many children with special needs come to the child care facility with an existing plan from another system. As discussed in our comments above, these plans include IEPs or IFSPs, behavior plans, service agreements and other documented plans from licensed practitioners. The current language could leave to a misconception that the child care facility is expected to provide the services contained in the plan; that is incorrect, implementation is the responsibility of the service system that developed the plan. However, in developing its plan for the child, it is critical that the child care facility takes into account and supports the goals and services of any other plan the child's family has in place and that there is planned coordination and collaboration about service providers.

This section also omits the services agreement and requires that behavior plans be "formal." We describe above these problems with respect to other sections of the proposed regulations. And again, the proposed regulation does not acknowledge the role of recommendations from licensed practitioners in the planning and review process.

#### **What are we recommending?**

Our proposed changes to subsections (a) and (b) reflect our previous comments that a service agreement be included in the list of plans and that the word "formal" be deleted from the description of the behavior plan. We also seek to clarify the obligations of child care providers – namely that they must consider and cooperate with the plans created by other systems to benefit the child with special needs.

We recommend the following language:

(a) The director or group supervisor shall develop a program plan specific to the child no later than 60 days following the child's first day of attendance at the facility. [The program plan for a child with special needs must incorporate the Individualized Education Program, Individualized Family Service Plan or formal behavioral plan if that plan is reviewed and implemented within the 60 days.] The program plan for a child with special needs must take account of and support any Individualized Education Program, Individualized Family Service Plan, Service Agreement under 22 PA Code Chapter 15, behavioral plan, or other recommendations of licensed professionals.

(b) The child's program plan must include the following:

(3) For a child with special needs, the program plan shall also be reviewed according to the schedule specified in the Individualized Education Program, Individualized Family Service Plan, Service Agreement under 22 PA Code Chapter 15, or [formal] behavioral plan, or when recommended by a licensed practitioner.

\* \* \* \* \*

(e) The director or group supervisor shall provide to the following individuals an opportunity to provide input into the development of the child's initial program plan and each review of the child's program plan:

\* \* \* \* \*

(3) Other individuals who provide or prescribe early intervention or special education services, treatment, therapy or other specialized services to the child.

If the program plan provisions for all children are deleted from the final regulations, there should be a separate provision requiring child care facilities to cooperate with and support IEPs, IFSPs, behavior plans, service agreements and other recommendations of licensed professionals which are presented to them by families of children with special needs. If that option is chosen, this language would fit best in §3270.17.

\* \* \* \* \*

**§ 3270.133. Child medication and special diets**

**What is the problem?**

We support this provision, but again are concerned that it references only the ADA.

**What are we recommending?**

We recommend that the provision refer to the range of federal and state laws that prohibit discrimination against persons with disabilities.

We proposed the following change to this section:

The operator shall make reasonable accommodation in accordance with the Americans With Disabilities Act of 1990 (ADA) (42 U.S.C.A. §§ 12101--12213) and other applicable state and federal laws, to facilitate administration of medication or a special diet prescribed by a physician, physician's assistant or CRNP for a child with special needs. Facility persons are not required to administer medication or special diets which are requested or required by a parent, a physician, a physician's assistant or a CRNP to a child who does not have special needs. When medication or special diets are administered, the following requirements apply:

\* \* \* \* \*

Thank you for this opportunity to comment on these important regulations. We look forward to working with you throughout the regulatory process to support this important endeavor.

**Lau, Jennifer**

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**From:** Hubley, Nancy [nhubley@elc-pa.org]

**Sent:** Thursday, June 29, 2006 9:47 AM

**To:** jlau@state.pa.us

**Subject:** Formal Comments of ELC and DLP on Child Care Facility Regulations (14-506)

Ms. Lau:

Attached to this email is a cover letter and the formal comments the Education Law Center-PA (ELC) and the Disabilities Law Project (DLP) submit to you regarding the child care facility regulations (reference #14-506), 55 Pa Code Chapters 3270,3280, and 3300.

I have also faxed a copy and mailed you an original today.

Thank you for your consideration of our comments.

Nancy A. Hubley