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VIA HAND DELIVERY

June 30, 2006

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OFFICE OF CHILD DEVELOPMENT

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

Re: Proposed Rulemaking – Child Care Facilities
36 Pa. Bulletin No. 22, June 3, 2006
Regulation No. 14-506

Dear Ms. Lau:

We represent the Pennsylvania Catholic Conference (PCC), 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 has authorized us to submit the following comments regarding the proposed Child Care Facilities regulations submitted for publication by the Department of Public Welfare (the Department).

The proposed regulations would potentially affect hundreds of nonprofit, religious child care facilities and before- and after-school programs that are operated as religious ministries within PCC's constituent dioceses throughout the Commonwealth.

On behalf of PCC, this firm also represents four Roman Catholic facilities (and assists in the representation of a fifth Catholic facility) that have received cease and desist orders from the Department for the sole reason that they have not obtained Certificates of Compliance (i.e.,

licenses). Each of these religious facilities has been forced into the Department's administrative appeal process to defend against the Department's cease and desist orders. One of the facilities – St. Elizabeth's Child Care Center – has been involved in litigation with the Department since 1997. As discussed more fully below, the Commonwealth Court on April 3, 2006, ruled that St. Elizabeth's Child Care Center and all other nonprofit religious child care facilities subject to supervision under Article IX of the Public Welfare Code are not required to be licensed in order to operate.

We note that the proposed regulations contain the following principal deficiencies:

I. The Department failed to incorporate the recent Commonwealth Court decision of *St. Elizabeth's Child Care Center v. DPW*, which provided that 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.

On April 3, 2006, an *en banc* panel of the Commonwealth Court in *St. Elizabeth's Child Care Center v. DPW*, 895 A.2d 1280 (Pa. Commw. Ct. 2006), *petition for allocatur filed,* 284 MAL 2006 (Pa. April 24, 2006), ruled that the Department lacks the statutory authority under Article IX of the Public Welfare Code to promulgate regulations that require a nonprofit religious day care center to obtain a Certificate of Compliance (i.e., a license) in order to operate. See Exhibit A, *St. Elizabeth's* opinion, attached. As a result of this ruling, the Department is not authorized to require nonprofit religious facilities to comply with its regulations as a condition to operate.

The proposed regulations do not incorporate, or even note this ruling, but rather attempt to re-affirm the Department's long-held, erroneous position that it has the authority to require licensure and regulation of nonprofit religious child care facilities. That reaffirmation is in direct conflict with the Commonwealth Court's ruling. The proposed regulations do not amend the

pertinent, but now judicially superseded, regulatory provisions under Chapter 3270, which require all facilities, including nonprofit child care facilities, to obtain Certificates of Compliance in order to operate. Specifically, the regulations, at a minimum, should have amended § 3270.11(a) to incorporate the ruling that nonprofit facilities are not required to obtain a Certificate of Compliance as a condition of operation.

On April 24, 2006, the Department filed a Petition for Allowance of Appeal of the *St. Elizabeth's* decision with the Pennsylvania Supreme Court. In response, St. Elizabeth's Child Care Center filed a brief in opposition to the Petition. To date, the Supreme Court has not determined whether it will grant the Department's Petition. Thus, the Commonwealth Court's *en banc* decision in *St. Elizabeth's* is the current state of the law with respect to the Department's limits on its statutory authority under Article IX of the Public Welfare Code.[1]

We note that the Department neglected to cite *St. Elizabeth's* in its Regulatory Analysis Form as a relevant state court decision. Question #9 of the Form required the Department to: "State the statutory authority for the regulation and *any relevant state or federal court decisions*." (Emphasis added). In response, the Department simply stated: "The Department proposes to amend the regulations under the authority of Articles IX and X of the Public Welfare Code (62 P.S. §§ 901-922 and 1001-1807)." In failing to cite to the *St. Elizabeth's* decision, the Department appears to have failed to comply with the requirements of the Regulatory Review Act (71 P.S. § 745.5(a)) and the regulations of the Independent Regulatory Review Commission (1 Pa. Code § 305.1).

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[1] The Department's Petition for Allowance of Appeal does not operate as an automatic stay of the *St. Elizabeth's* decision because this matter arose as a Petition for Review of an agency decision. See Pa.R.A.P. 1781; see also, *Colston v. Dept. of Community Affairs*, 104 Pa. Commw. Ct. 165, 521 A.2d 513 (1987); and *Elizabeth Forward School Dist. v. Labor Relations Bd.*, 613 A.2d 68, 70 (Pa. Commw. Ct. 1992). The Department has not petitioned for a stay of the Commonwealth Court's decision under Pa.R.A.P. 1781. Even if the Department were to request a stay, the Department's attempt to promulgate regulations directly in conflict with a controlling state appellate court opinion is troubling and potentially misleading to the public.

PCC incorporates St. Elizabeth's objections to the Department's perceived statutory authority to require licensure and compliance with all of the Department's regulations as a condition to operate as detailed in its briefs before the Commonwealth Court. See Brief for Petitioner (Exhibit B) and Petitioner's Reply Brief (Exhibit C), attached. Those arguments are well-known to the Department and to the General Assembly, inasmuch as they represent the consistent, official public position of the Roman Catholic Dioceses of Pennsylvania since the very first occasion on which the Department issued proposed regulations attempting to eradicate the distinctions between Article IX and Article X of the Public Welfare Code.

These arguments are summarized below:

A. Neither Article IX nor Article X of the Public Welfare Code authorizes the Department to require that a nonprofit religious child care ministry be licensed in order to operate.

The General Assembly, in its deliberate judgment, passed two separate Articles of the Public Welfare Code dealing with child day care facilities. Article IX authorizes the Department to exercise supervisory powers over *non-profit* child care facilities. Article X authorizes the Department to license and fully regulate *for-profit* facilities and specifically prohibits the operation of such facilities without a license.

Religious child care ministries such as St. Elizabeth's are non-profit institutions governed by Article IX; they are not governed by Article X. As such, they are subject only to the Department's supervisory powers and need not be licensed. As set forth more fully in Exhibits B and C, there is no statutory authority whatsoever to support the Department's claimed authority to require licensure of a religious child care ministry through its regulations, and to seek to close

it, through its administrative procedures, solely because it has failed to obtain a license from the Department.

As the Commonwealth Court made clear in *St. Elizabeth's*, the Department has no statutory authority to require that Article IX facilities be licensed.[2] Moreover, the Department cannot usurp the legislative function of the General Assembly and require that Article IX *supervised* facilities be transformed into Article X *licensed* facilities simply by promulgating regulations to that effect. The General Assembly exercised its prerogative in 1967 to require separate treatment of nonprofit and for-profit child care facilities, and the Department is not authorized to substitute its judgment for that of the General Assembly. Accordingly, any regulations of the Department that purport to require that Article IX facilities obtain a license or certificate in order to operate are invalid as applied to nonprofit religious facilities.

Thus, the Department's proposed regulations should be amended to exempt nonprofit religious child care facilities from obtaining a Certificate of Compliance and from compliance with all of the Department's regulations as a condition to operate.

II. 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.

The Department's current and proposed regulations attempt to prohibit religious child care ministries from operating without its permission. Accordingly, the Department takes the position that it will only grant its permission to operate if the facilities comply with all of the

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[2] During the *St. Elizabeth's* litigation, Department officials admitted that the terms "licensed" and "certified" are used interchangeably and that the Department treats Article IX facilities the same as Article X facilities. That a "Certificate of Compliance" is actually a license cannot be doubted. In fact, the Department's own regulations define a "Certificate of Compliance" as a document issued to a legal entity "*permitting* it to operate." 55 Pa. Code § 20.4. A grant of permission to operate is the very essence of a license.

Department's substantive child care center regulations. The primary purposes of Catholic religious child care ministries, such as St. Elizabeth's, are to assist parents in raising their children and forming in them a Christian personality consistent with the values and beliefs of the Church and their parents. As set forth in greater detail in St. Elizabeth's Brief for Petitioner (Exhibit B) and St. Elizabeth's Reply Brief (Exhibit C), enforcement of the Department's licensing and regulatory scheme against religious child care ministries would significantly burden their religious mission.

Moreover, application of the Department's licensing and regulatory scheme to nonprofit religious child care ministries would seriously impair their ability to freely exercise their religious liberties and the right of parents to direct the upbringing of their children. The Department's licensing and regulatory scheme does not further a compelling governmental interest and is not narrowly tailored to achieve any such interest. Therefore, it violates the Religion Clauses of the First Amendment to the United States Constitution and Article I, Section 3 of the Pennsylvania Constitution. As such, the proposed regulations should be amended to exempt nonprofit religious child care facilities from the mandatory compliance with all of the Department's substantive regulations as a condition to operate.

In addition, the Department's proposed regulatory scheme would violate the Pennsylvania Religious Freedom Protection Act. ("RFPA") (71 P.S. §§ 2401, et seq.). RFPA requires at least thirty days advance notice prior to bringing an action to assert RFPA "in court." Thus, PCC, on behalf of the affected Catholic child care ministries in the Commonwealth of Pennsylvania, hereby provides notice of its assertion of a defense to the Department's actions under RFPA in Commonwealth Court, if any final form regulations are promulgated that would authorize the Department to enforce its licensing and regulatory scheme against religious child care ministries.

III. The Regulations relating to Specialized Day Care for Children with Disabilities and the administration of medications fail to incorporate the exemptions for religious entities operating day care facilities set forth in the Federal Americans with Disabilities Act (ADA).

Section 307 of the ADA (42 U.S.C. §12187) states as follows:

> The provisions of this subchapter [relating to the accessibility of public accommodations] shall not apply to private clubs or establishments exempted under Title II of the Civil Rights Act of 1964 … ***or to religious organizations or entities controlled by religious organizations, including places of worship.***

The Regulations issued by the United States Department of Justice under the authority of the ADA state, in pertinent part:

> The ADA's exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations. Religious organizations and religious entities have ***no*** obligations under the ADA. Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage. Thus if a church operates a ***day care center***, a nursing home, a private school, or a diocesan school system, the operations of the center, home, school, or schools would not be subject to the requirements of the ADA or this part. ***The religious entity would not lose its exemption merely because the services provided were open to the general public.*** The test is whether the church or other religious organization operates the public accommodation, not which individuals receive the public accommodation's services.

28 C.F.R., Part 36, Appendix B.

The Department would require every child care facility to make reasonable accommodations to enroll and provide care for children with special needs and to work with other persons who provide support services to the child and the child's family. See § 3270.17. According to the Department, these amendments are necessary to promote the inclusion of

children with special needs in all child care facilities and to comply with the ADA. However, the proposed regulations fail to incorporate the ADA exemptions for religious entities.

In addition, the Department's proposed regulations would require a child care facility to make reasonable accommodations to administer a prescribed medication or a special diet to a child with special needs. See § 3270.133. The current regulation exempts facilities from the requirement to administer medications or special diets. But, the Department claims that the refusal to administer medication may violate the ADA. As to religious child care facilities there would be no ADA violation upon refusal to administer medication. The proposed regulations ignore the clear exemption by not incorporating the ADA religious entity exemption.

IV. 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.

Under Article IX, the Department has legitimate supervisory authority over nonprofit religious child care facilities in a limited fashion. First, the Department is authorized to visit and inspect a nonprofit religious child care facility and to inquire into all matters relating to its operations. 62 P.S. §911(a). For these purposes, and to determine whether the nonprofit facility falls within the Department's supervisory or licensing authority, the Department is given "free and full access" to the facility premises, records, and all persons connected with the nonprofit facility. §911(b). Next, if the Department finds any conditions that are "unlawful, unhygienic, or detrimental," it is authorized to notify the facility of such conditions and "to direct the . . .institution to correct the said objectionable condition." 62 P.S. §911(c). Finally, if the facility fails to correct any such objectionable conditions, the Department is statutorily authorized to: 1) "request the Department of Justice [e.g., the Attorney General] to institute appropriate legal

proceedings to enforce compliance" with the Department's directions; or 2) "withhold any State money." 62 P.S. §911(c).

Despite the striking differences in the statutory framework of Article IX (nonprofit child care facilities subject to supervision) and Article X (for-profit facilities subject to licensure), the Department has treated and, by these proposed regulations, attempts to treat these two Articles as though they are virtually identical. It has promulgated a single set of regulations (allegedly pursuant to these two separate and distinct statutory provisions) that treats both Article IX *nonprofit,* and Article X for-*profit,* facilities in exactly the same way. Further, the Department is attempting to go beyond prior attempted control by promulgating additional amendments to its single set of regulations. This one set of regulations attempts to require *all* child care centers (supervised and licensed) to obtain a "Certificate of Compliance" in order to operate and requires all such facilities to comply with all of the Department's substantive and procedural child care center regulations in order to receive such a certificate. 55 Pa. Code §3270.11(a); 55 Pa. Code §20.1, *et seq*.

PCC acknowledges the authority of the Department to conduct unannounced inspections of nonprofit religious child care facilities and to direct the correction of "unlawful, unhygienic, or detrimental" conditions pursuant to its supervisory authority under Article IX. More importantly, PCC recognizes the critical importance of maintaining safe and healthy environments for children in care at religious facilities. Moreover, its affiliated religious child care facilities have continued to maintain healthy and safe facilities for children in care. However, the proposed regulations, and the attempt to re-affirm the existing licensing regulations, extend beyond necessary health and safety issues and attempt to require all child care facilities to adhere to subjective program-related regulations.

For example, the Department under § 3270.119 proposes to require each facility to develop a program plan specific to each child within 60 days following the child's first day of attendance. The program plan would need to incorporate any Individualized Education Plan, Individualized Family Plan or other "formal behavioral plan." Under the current regulations, a program plan is only required for children with special needs.

The program plan would need to include: (a) documented observation of the child's development; (b) identification the child's unique needs and recommendations, plans or referrals as appropriate; and (c) a plan to facilitate the child's continued development and participation in the "daily activities" of the facility (as required under current regulation § 3270.111). Child care facilities would need to review the program plans every 6 months for infants, toddlers and preschool children in care (ages birth to the date the child enters kindergarten). For school-age children, the program plans would need to be reviewed every 12 months.

The cross-referenced regulation § 3270.111, at subsection (c), requires the following:

> 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.**

PCC submits that the proposed program plan regulation is not directed to protecting the health and safety of children in care but is intended to dictate 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 on Article IX nonprofit facilities. Moreover, many of these child-development related programmatic areas that the Department seeks to oversee and regulate are religiously

sensitive.[3] As discussed above, the Department under its supervisory authority is limited to inspecting for and directing the correction of objectionable conditions that are "unlawful, unhygienic, or detrimental" to children in care pursuant to 62 P.S. §911(c). In this respect, the Department continues to ignore the limits of § 911(c), as well as the Commonwealth Court's ruling in *St. Elizabeth's*, supra. The Department refuses to alter its approach of applying one set of regulations to both Article IX and Article X facilities in spite of the clear *St. Elizabeth's* decision. This single-set approach causes confusion as to which regulations are legitimately necessary to protect the health and safety of children in care as opposed to which regulations the Department believes, in its subjective opinion, are merely helpful recommendations.[4]

PCC submits that it would be beneficial to religious providers, parents, and children if the Department would develop a separate, limited set of regulations which would be properly promulgated under Article IX and which would establish minimum standards *necessary* to protect the health and safety of children in care. Many of the current and proposed regulations, while they may be marginally related to "health and safety" of children, are not *necessary* to protect the health and safety of children in care.

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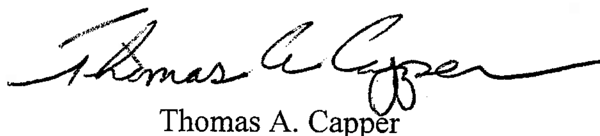
[3] Ominously, when asked at a meeting hosted by legislative staff for the pertinent oversight committees on June 15, 2006 whether the Department would be evaluating the *contents* of mandated program-related individual development plans, the Department's representatives replied, "Not at this time."

[4] It is also important for the Department, as well as for the legislative and independent regulatory oversight entities that review its proposed regulatory mandates, to consider the potential that issuance of unnecessary and *ultra vires* regulations may lead to the assertion of private rights of legal action, both at law and in equity, that will produce additional litigation brought by non-governmental parties. See, e.g., Restatement 2d, Torts, §874A; *Mahan v. Am-Gard, Inc.*, 841 A.2d 1052, 1058-1059 (Pa. Super. 2003).

V. Conclusion.

In the past, the Department invited PCC and other religious organizations to participate as "stakeholders" in helping to prepare proposed revisions to the child care facility regulations. Unfortunately, the Department did not invite PCC or other religious organizations to participate in the current round of stakeholder meetings. Thus, the interests of nonprofit religious providers were not properly represented. As a result, the Department has produced regulations that: 1) ignore the Commonwealth Court's decision in *St. Elizabeth's*; 2) exceed the statutory authority of Article IX of the Public Welfare Code; and 3) potentially infringe on the religious liberty of religious child care ministries. Thus, PCC objects to the proposed regulations and requests that the Department revise them to address the objections contained herein.

Very truly yours,



Thomas A. Capper

cc: Independent Regulatory Review Commission;
Dr. Robert J. O'Hara, Jr., Executive Director
Pennsylvania Catholic Conference;
Hon. Jerry Birmelin, Chair, House Committee on
Children and Youth (Majority Chair);
Hon. Michael C. Gruitza, House Committee on
Children and Youth (Minority Chair);
Hon. Jane C. Orie, Chair, Senate Committee on
Aging and Youth (Majority Chair);
Hon. LeAnna Washington, Senate Committee on
Aging and Youth (Minority Chair);
Hon. Thomas W. Corbett, Jr., Attorney General of
Pennsylvania

ST. ELIZABETH'S CHILD CARE CENTER, Petitioner

v.

DEPARTMENT OF PUBLIC WELFARE, Respondent.

Commonwealth Court of Pennsylvania.

Argued March 1, 2006.

Decided April 3, 2006.

Background: Religiously affiliated non-profit child care center filed petition for judicial review of order the Department of Public Welfare Bureau of Hearings and Appeals, No. 18-97-038, adopting recommendation of administrative law judge to deny center's appeal from department's order directing center to cease and desist operation due to its failure to obtain certificate of compliance from department.

Holding: The Commonwealth Court, No. 1751 C.D.2005, Friedman, J., held that center was not required to obtain certificate of compliance.

Reversed.

Pellegrini, J., concurred and filed opinion in which Cohn Jubelirer, J., joined.

Smith-Ribner and Cohn Jubelirer, JJ., dissented.

1. Infants ⇐17, 17.5

Section of public welfare code specifying that public welfare department had power to supervise, visit, examine, and inspect "children's institutions," including child care centers, did not mention power to prevent operation of center by requiring certificate of compliance, and thus religiously affiliated non-profit child care center was not required to obtain certificate of compliance from public welfare department in order to operate. 62 P.S. §§ 901, 902, 911; 55 Pa.Code § 3270.3(c).

2. Infants ⇐17.5

Sections of public welfare code giving public welfare department the authority to require certificate of compliance for operation of child day care center was limited to any "facility," which was defined as child care center operated for profit, and thus statute did not apply to religiously affiliated non-profit child care center. 62 P.S. §§ 1001, 1002, 1021; 55 Pa.Code § 3270.3(c).

3. Statutes ⇐195

The maxim expressio unius est exclusio alterius, teaches that, where certain things are specified in a law, omissions should be understood as excluded.

Philip J. Murren and Maura K. Quinlan, Camp Hill, for petitioner.

Howard Ulan, Sr. Asst. Counsel, Harrisburg, for respondent.

BEFORE: COLINS, President Judge, and SMITH-RIBNER, Judge, PELLEGRINI, Judge, FRIEDMAN, Judge, COHN JUBELIRER, Judge, SIMPSON, Judge, and LEAVITT, Judge.

OPINION BY Judge FRIEDMAN.

St. Elizabeth's Child Care Center (St. Elizabeth) petitions for review of the July 29, 2005, order of the Department of Public Welfare's (DPW) Bureau of Hearings and Appeals (Bureau), which adopted the recommendation of an Administrative Law Judge (ALJ) to deny St. Elizabeth's appeal from DPW's order directing St. Elizabeth to cease and desist operation of an uncertified child day care center. We reverse.

St. Elizabeth is a non-profit child day care center affiliated with the Roman Catholic Church. On January 24, 1997, a DPW field representative visited St. Elizabeth and learned that the child day care center did not have a Certificate of Compliance, which DPW regulations require

for the operation of such a facility.[1] On April 18, 1997, DPW issued an order directing St. Elizabeth to cease and desist the operation of the uncertified child day care center. St. Elizabeth filed an appeal, arguing that DPW lacks statutory authority to promulgate regulations requiring a non-profit religious child day care center to obtain a Certificate of Compliance in order to operate.[2] (ALJ's op. at 15.)

The matter was heard by an ALJ, who considered the Pennsylvania Supreme Court's discussion of Article IX of the Public Welfare Code[3] in *Hospital Association of Pennsylvania v. MacLeod*, 487 Pa. 516, 410 A.2d 731 (1980), and determined that DPW had statutory authority under Article IX to promulgate its regulations requiring a non-profit child day care center to obtain a Certificate of Compliance in order to operate. The ALJ recommended that St. Elizabeth's appeal be denied, and the Bureau adopted the ALJ's recommendation. St. Elizabeth now petitions this court for review.[4]

St. Elizabeth argues that DPW erred in concluding that it has authority under Article IX of the Public Welfare Code to promulgate regulations that require a non-profit religious day care center to obtain a Certificate of Compliance in order to operate. We agree.

[1, 2] Section 902 of the Public Welfare Code provides that DPW "shall have supervision" over all "supervised institutions" and all "children's institutions within the Commonwealth." 62 P.S. § 902. Section 901 of the Public Welfare Code defines "supervised institution" to include "all children's institutions .... within the Commonwealth"; section 901 defines "children's institutions" to mean "any incorporated or unincorporated organization, society, corporation or agency, public or private, which may receive or care for children ...." 62 P.S. § 901. Because St. Elizabeth is a private organization that cares for children, it is both a "children's institution" and a "supervised institution" over which DPW exercises supervisory power.

Section 911 of the Public Welfare Code sets forth DPW's powers and duties, in pertinent part, as follows:

> (a) [DPW] shall have the power, and its duty shall be:
>
> (1) To make and enforce rules and regulations for a visitation, examination and inspection of all supervised institutions and said visitation, examination or inspection may occur both before and after the beginning of operation of the supervised facility ....
>
> (c) Whenever upon the visitation, examination, and inspection of any ... supervised institution, any condition is found to exist therein which, in the opinion of [DPW] is unlawful, unhygienic, or detrimental to the proper maintenance and discipline of such ... supervised institution, or to the proper maintenance, custody, safety, and welfare ... of the per-

1. DPW's regulation at 55 Pa.Code § 3270.3(c) requires that a non-profit entity seeking to operate a child day care center apply for a Certificate of Compliance under Title 55, Chapter 20 of the Pennsylvania Code (relating to licensure or approval of facilities).

2. St. Elizabeth also argued that DPW's regulation of its religious child day care ministry interferes with St. Elizabeth's free exercise of religion. However, the ALJ stated that he may not rule on issues of constitutionality.

3. Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §§ 901–922.

4. Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication was in accordance with the law or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704.

sons . . . residing therein, to direct the officer or officers . . . in any way having or exercising the control, government, or management of such . . . supervised institution, to correct the said objectionable condition in the manner and within the time specified by [DPW]. . . . If such officer or officers shall fail to comply with such direction, [DPW] may request the Department of Justice [i.e., the Attorney General] to institute appropriate legal proceeding to enforce compliance therewith, or [DPW] may withhold any State money available for such institution until such officer or officers comply with such direction.

62 P.S. § 911.

[3] The maxim *expressio unius est exclusio alterius* teaches that, where certain things are specified in a law, omissions should be understood as excluded. *Finkelstein v. Commonwealth,* 61 Pa.Cmwlth. 91, 433 A.2d 146 (1981). First, section 911 of the Public Welfare Code specifies that DPW has the power to visit, examine and inspect a child day care center. Section 911 does not give, or even mention, the power to require a Certificate of Compliance in order to operate. Second, section 911 specifies that, whenever DPW visits, examines and inspects a child day care center before or after it begins to operate and finds an objectionable condition, DPW may refer the matter to the Attorney General to enforce compliance or withhold state money available to the institution. Section 911 does *not* authorize DPW to prevent the operation of a child day care center by requiring a Certificate of Compliance.

Article X of the Public Welfare Code, in contrast to Article IX, gives DPW the authority to promulgate regulations that require a *for-profit* child day care center to obtain a license in order to operate. Section 1002 of the Public Welfare Code states that no person shall operate any "facility, as defined herein, without having a license. . . ." 62 P.S. § 1002. Section 1001 indicates that the word "facility" includes a "child day care center," which means "any premises operated *for profit* in which child day care is provided simultaneously for seven or more children who are not relatives of the operator, except such centers operated under social service auspices."[5] 62 P.S. § 1001 (emphasis added). Finally, section 1021 provides that DPW may adopt regulations establishing minimum standards for the issuance of licenses. 62 P.S. § 1021.

Article X clearly allows DPW to promulgate regulations that require a *for-profit* child day care center to obtain a Certificate of Compliance in order to operate. However, St. Elizabeth is *not* a for-profit child day care center. Thus, Article X does not apply. As indicated above, Article IX applies to St. Elizabeth, but Article IX does not give DPW the power to require that a religious non-profit, or any non-profit, child day care center obtain a Certificate of Compliance in order to operate. DPW erred in concluding otherwise.

Our supreme court's discussion of Article IX in *Hospital Association of Pennsylvania,* does not alter our view. In that case, a number of Pennsylvania hospitals contended that the Secretary and Department of Health[6] (DOH) lacked statutory

5. We note that the definition of "facility" in section 1001 specifically excludes child day care centers "supervised" by DPW. 62 P.S. § 1001. We also note that the words "social service auspices" includes non-profit agencies regularly engaged in child care. *Id.* Thus, it is clear that Article X licensing requirements do not apply to Article IX non-profit child care facilities.

6. With respect to supervision of hospitals, the legislature transferred all of the functions, powers and duties of DPW under Article IX of the Public Welfare Code to the Department of

authority to promulgate regulations governing the managerial practices of hospitals. Our supreme court disagreed, concluding that sections 902, 911 and 921 of the Public Welfare Code[7] provided such authority. However, our supreme court never specifically addressed whether Article IX authorizes a regulation requiring a Certificate of Compliance in order to operate. In fact, our supreme court noted, "We do not pass upon the reasonableness of any particular regulation. We hold only that [the state agency] possess[es] statutory authority to promulgate the challenged regulations." *Id.* at 524 n. 11, 410 A.2d at 735 n. 11.

Accordingly, we reverse.[8]

Judges SMITH-RIBNER and COHN JUBELIRER dissent.

ORDER

AND NOW, this 3rd day of April, 2006, the order of the Department of Public Welfare, dated July 29, 2005, is hereby reversed.

CONCURRING OPINION BY Judge PELLEGRINI.

While I agree with the majority's analysis that the Department of Public Welfare (Department) lacked statutory authority to require St. Elizabeth's Child Care Center (St. Elizabeth's) to obtain a license or certificate, I would not reach that issue, but instead reverse on the basis that the Department did not have jurisdiction to issue the order we are now reviewing.

In its April 18, 1997 notice, the Department ordered St Elizabeth's to "immediately CEASE AND DESIST operation" and then went on the state:

> You have a right to appeal the Department's decision within thirty (30) days of the mailing of this decision. Enclosed is a copy of the Department's Licensure/Approval Appeal. YOUR APPEAL MUST INDICATE THE REASONS FOR THE APPEAL AND YOU MUST BE SPECIFIC AS POSSIBLE REGARDING THE AREAS OF DISAGREEMENT WITH THE DEPARTMENT'S DECISION [55 Pa. Code] (§ 9003.11(C)).
>
> * * *
>
> If you do not appeal the decision of the Department it will become final.

Fearing that the decision would become final if it did nothing, St. Elizabeth's appealed the decision to the Department's Hearing and Appeals which rendered a decision after hearing eight years later.

As the majority points out, Article IX of the Public Welfare Code[1] does not give the Department the power to require a non-profit day care center to have a certificate of compliance to operate. Under Section 911 of the Public Welfare Code, 62 P.S. § 911, the Department is limited to visiting and inspecting non-profit centers and to inquiring into all matters relating to its operations; 62 P.S. § 911(a); and is given "free and full access" to the facility premises, records and all persons connected with St. Elizabeth's. 62 P.S. § 911(b). If

Health. *See Hospital Association of Pennsylvania.*

7. Section 921 of the Public Welfare Code requires that DOH establish standards for the safe and adequate care of individuals at institutions, like hospitals and nursing homes, which furnish food and shelter to three or more persons and which provide some care or service beyond the basic provisions of food, shelter and laundry. 62 P.S. § 921.

8. Because of our disposition of the first issue, we need not address the other issues raised by St. Elizabeth.

1. Act of June 13, 1967, P.L. 31, *as amended,* 62 P.S. §§ 901-922.

the Department finds any conditions that are "unlawful, unhygienic, or detrimental," it is authorized to notify the institution of such conditions and "to direct the ... institution to correct the said objectionable conditions." 62 P.S. § 911(c). If the institution fails to correct any such objectionable conditions, the Department, however, is not given the power to hold a hearing on whether the institution is in compliance or, as here, whether the institution is required to get a license.

62 P.S. § 911(c) is quite specific that the Department's only civil legal remedy is to request an attorney to bring the appropriate action to enforce compliance. It provides:

> If such officer or officers shall fail to comply with such direction, the department may request the Department of Justice to institute appropriate legal proceeding to enforce compliance therewith. ...[2]

As can be seen, nothing gives the Department the authority to adjudicate a cease and desist order.

The manner in which a "cease and desist order" is enforced is important because it determines the type of access an entity has to this Court. If a cease and desist order can be enforced through the Department's administrative process, an appeal would come before this Court and we would review the Department's order in our appellate jurisdiction and apply, as does the majority, the normal administrative agency scope of review.[3] If, however, the Attorney General accedes to the Department's request and brings an action to enforce its cease and desist order, then a court and not the agency would make its own findings of fact unencumbered by the effects of any action taken by the Department.

Because Section 911(c) of the Public Welfare Code, 62 P.S. § 911(c), only authorizes the Department to bring an action and the Department does not have the jurisdiction to enforce its cease and desist order through that basis, I would also reverse.

Judge COHN JUBELIRER joins in this concurring opinion.

COMMONWEALTH of Pennsylvania

v.

Alice HOLTZAPFEL, Appellant.

Commonwealth Court of Pennsylvania.

Submitted on Briefs Dec. 23, 2005.

Decided April 4, 2006.

Background: Property owner found guilty of violating borough property maintenance code and fined by magisterial district judge appealed to the Court of Common Pleas, Allegheny County, No. CL 2503-04, Gallo, J., which held a de novo hearing, found her guilty of violating code, and imposed fine. Property owner appealed.

Holding: On transfer, the Commonwealth Court, No. 1735 C.D. 2005, Simpson, J., held that property owner waived all claims on appeal by failing to file statement of

2. The Department's other remedy is to "withhold any state money available for such institution until such officer or officers comply with such direction." 62 P.S. § 911(a).

3. Our normal appellate administrative scope of review is whether the adjudication is in accordance with law, whether constitutional rights have been violated, or whether the findings of fact are supported by substantial evidence. 2 Pa.C.S. § 704.

IN THE COMMONWEALTH COURT

OF PENNSYLVANIA

NO. 1751 COMMONWEALTH DOCKET 2005

ST. ELIZABETH'S CHILD CARE CENTER

Petitioner

V.

DEPARTMENT OF PUBLIC WELFARE

Respondent

BRIEF FOR PETITIONER

Petition for Review of the July 29, 2005 Final Order of the Department of Public Welfare, Bureau of Hearings and Appeals, denying the appeal of St. Elizabeth's Child Care Center, Docket No. 18-97-038.

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STATEMENT OF JURISDICTION

The Commonwealth Court has jurisdiction of this appeal pursuant to 42 Pa.C.S. §763(a) (relating to direct appeals from government agencies).

ORDER IN QUESTION

The full text of the Order of the Department of Public Welfare Bureau of Hearings and Appeals from which this appeal is taken is as follows:

"AND NOW, this 29th day of July, 2005, after careful review and consideration of the Recommendation of the Administrative Law Judge, it is hereby ORDERED and DECREED that the Recommendation be adopted in its entirety.

"Either party to this proceeding has fifteen (15) calendar days from the date of this decision to request reconsideration by the Secretary of the Department. To seek reconsideration, you must fully complete the enclosed application/petition for reconsideration. The application/petition shall be addressed to the Secretary, but delivered to the Director, Bureau of Hearings and Appeals, P.O. Box 2675, Harrisburg, Pennsylvania, 17105-2675, <u>and must be received in the Bureau of Hearings and Appeals within fifteen (15) calendar days from the date of this Order.</u> This action does not stop the time within which an appeal must be filed to Commonwealth Court.

"The appropriate party(ies), where permitted, may take issue with this Adjudication, and Order, and may appeal to the Commonwealth Court of Pennsylvania, within thirty (30) days from the date of this order. The appeal <u>must be filed</u> with the Clerk of Commonwealth Court of Pennsylvania, Room 624, Irvis Office Building, Harrisburg, PA 17120.

"If you file an appeal with the Commonwealth Court, a copy of the appeal must be served on the government unit which made the determination in accordance with Pa.R.A.P. 1514. In this case, service must be made to: Department of Public Welfare, Bureau of Hearings and Appeals, 2330 Vartan Way, 2nd Floor, Harrisburg, Pennsylvania 17120."

Bureau of Hearings and Appeals
July 29, 2005
Final Order and Mailing Date

/s/
Thomas Cheffins
Chief Administrative Law Judge
Bureau of Hearings and Appeals

STATEMENT OF SCOPE OF REVIEW AND STANDARD OF REVIEW

On this appeal, this Court reviews the decision of the Bureau of Hearings and Appeals to determine whether the adjudication is in accordance with the law, does not violate constitutional rights and is supported by substantial evidence in the record. 2 Pa.C.S. §§ 703-704; *Sanner v. Department of Public Welfare*, 878 A.2d 947, 951, n.8 (Pa. Cmwlth. 2005). In addition, this Court may review the record evidence in order to determine whether, in omitting findings of fact requested by the appellant, the Hearing Examiner capriciously disregarded material, competent evidence that could have compelled a different conclusion. *Leon E. Wintermyer v. Workers' Compensation Appeal Board*, 571 Pa. 189, 812 A.2d 478, 487 (2002); *The Frog, Switch & Manufacturing Company v. Pennsylvania Human Relations Commission*, ___ A.2d. ____, 2005 WL 2778536 *10 (Pa. Cmwlth., Oct. 27, 2005).

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Department of Public Welfare has statutory authority to require that a religious child care ministry be licensed in order to be able to operate. (Answered in the Affirmative below.)

2. Whether the application of the Department of Public Welfare's licensing and regulatory scheme to a religious child care ministry would violate the Religion Clauses of the First Amendment to the U.S. Constitution. (Not ruled on below, due to lack of jurisdiction.)

3. Whether the application of the Department of Public Welfare's licensing and regulatory scheme to a religious child care ministry would violate the Religious Liberty Clause of the Pennsylvania Constitution (Article 1, Section 3). (Not ruled on below, due to lack of jurisdiction.)

4. Whether the application of the Department of Public Welfare's licensing and regulatory scheme to a religious child care ministry would violate the Pennsylvania Religious Freedom Protection Act (Act 2002-214). (Not ruled on below.)

STATEMENT OF THE CASE

1. Form of Action and Procedural History.

This is an appeal from a determination of an administrative agency of the Commonwealth of Pennsylvania under Chapter 15 of the Pa. Rules of Appellate Procedure.

On January 24, 1997, a representative of the Department of Public Welfare ("Department" or "DPW") visited St. Elizabeth Child Care Center ("St. Elizabeth's") and determined that the facility was operating without having obtained a Certificate of Compliance from the Department. On April 18, 1997, the Department issued an Order mandating that St. Elizabeth's immediately Cease and Desist operating an uncertified child day care facility.

St. Elizabeth's responded to the Cease and Desist Order by letter dated May 1, 1997. Appellant's Exhibit A-2 (Reproduced Record ("R"), p. 43a). That letter stated that St. Elizabeth's was a non-profit religious pre-school ministry of St. Elizabeth Roman Catholic Church and that the Department lacked statutory authority to require that religious ministry to be licensed or to prevent its continued operation for failure to obtain a certificate of compliance. The letter also cited the July 8, 1985 decision of Judge Colins in the case of *Commonwealth of Pennsylvania, Department of Public Welfare v. Ruff Edge Farms, Inc.,* (No. 164 C.D. 1985) for the proposition that an attempt to require a

license of such a ministry is clearly a violation of the First Amendment of the United States Constitution.

A hearing in this matter was commenced before the Department's Bureau of Hearings and Appeals on December 17, 1997 and continued until February 13, 1998, at which point it was concluded. At the outset of the hearing, Counsel for St. Elizabeth's requested and was granted leave to file a letter clarifying that, in addition to the statutory and federal constitutional issues raised in its appeal letter of May 1, 1997, St. Elizabeth's was also raising constitutional claims under the Religion Clauses of the Pennsylvania Constitution. R. 45a.

Testimony relating to both the statutory and constitutional issues was permitted at these hearings. After the close of the hearings, the hearing officer granted a motion filed by St. Elizabeth's to reopen and supplement the record with additional evidence that did not become known to Appellant until after the close of the hearing on this matter. R. 711a – 743a.

The matter was then continued pursuant to a Joint Motion of the Commonwealth and St. Elizabeth's until December 4, 1999. A status conference was held on January 19, 2000. Both parties thereafter submitted briefs that included requested Findings of Fact. Following the enactment of the Pennsylvania Religious Freedom Protection Act (Act 2002-214; 71 P.S. §2401, *et seq.*), the parties submitted statements of position regarding the applicability of that Act to the issues pending before the Hearing Examiner. R. 744a

– 753a. St. Elizabeth's took the position that the Religious Freedom Protection Act was applicable to its pending appeal, and provided an additional legal basis on which to object to DPW's cease-and-desist order. R. 744a.

On July 29, 2005, the Department's Bureau of Hearings and Appeals issued an Order (Appendix "A" to this Brief) adopting the recommendation of the Hearing Examiner that St. Elizabeth's appeal of the Department's Cease-and-Desist Order be denied. The Hearing Examiner acknowledged his lack of jurisdiction to rule on the constitutional claims presented by St. Elizabeth's, but nevertheless undertook to state his view that those claims were not meritorious. The Hearing Examiner expressed no opinion on the claim made by St. Elizabeth's under the Pennsylvania Religious Freedom Protection Act. St. Elizabeth's filed a Petition for Review of the determination of the Bureau of Hearings and Appeals in this Court on August 26, 2005.

2. Prior Determinations.

There have been no prior determinations of any court or other governmental unit in this case, other than the ruling from which this appeal is taken.

3. Judges Whose Determinations are to be Reviewed.

The Chief Administrative Law Judge of the Department's Bureau of Hearings and Appeals, who entered the order from which this appeal is taken, is Thomas Cheffins. The Department's Hearing Examiner, who made the recommendations on which the order on appeal was based is Administrative Law Judge Gerald C. Coleman.

4. Statement of Facts.

In 1967, the General Assembly adopted the Public Welfare Code (Act of June 13, 1967, P.L. 31, No. 21), 62 P.S. §§101, *et seq*. Included in that Act were two separate articles dealing with child care facilities: Article IX (relating to "Departmental Powers and Duties as to Supervision" of nonprofit facilities), and Article IX (relating to "Departmental Powers and Duties as to Licensing" of for-profit facilities).

At the hearing in this matter, then-Monsignor (now Bishop) Joseph Kurtz testified that the Pennsylvania Catholic Conference, in its authorized role as the official agency of all of the Catholic dioceses in Pennsylvania, had continuously objected (since prior to 1976, by his own personal knowledge) to the efforts of the Department of Public Welfare to apply its licensing power to the nonprofit child-care facilities that are operated as integral parts of the religious educational mission of the Catholic Church in Pennsylvania. R. 465a - 466a.

St. Elizabeth Roman Catholic Church is a nonprofit ecclesiastical entity that is part of the Roman Catholic Church within the Diocese of Allentown. R. 457a, 465a. As part of its religious ministry, St. Elizabeth Roman Catholic Church owns and operates St. Elizabeth's Child Care Center ("St. Elizabeth's"). R. 451a – 452a. St. Elizabeth Roman Catholic Church has not applied for nor obtained a "Certificate of Compliance" from the Department in order to operate its nonprofit child care/development ministries. R. 429a.

Church officials testified that, within the Catholic Church, catechesis is the process of educating and instructing people regarding the life of Jesus in order to make them disciples of Christ. R. 452a. That instruction is essential to the Church's mission of developing the Christian person. R. 452a. The Church believes that the roots of religious and moral life appear at a very early age in children and that the development of a Christian personality is merged with the emotional and social development of a child. It is not something separate. R. 453a, 465a – 466a.

Among the Church's documents that relate to development of the Christian personality is a document entitled "Catechesis and Human Development." With respect to early human development (ages birth to 5 years) it states:

> Life's beginning stages are of critical importance to individual growth and development. Here foundations are laid which influence the ability to accept self, relate to others, and respond effectively to the environment. Upon these foundations rests the formation of the basic human and Christian personality—and so also one's human capacity for relating to God.

R. 454a.

St. Elizabeth Roman Catholic Church views its mission in operating its child development ministries to be bringing the teachings of Christ to children and developing in them a Christian personality. R. 453a, 465a. Children begin learning about God and His love for them very early at St. Elizabeth's and are constantly learning about God's love and His expectations of them through the teaching and example of the caregivers at St. Elizabeth's. R. 456a. The Church's mission of forming the Christian personality extends across the continuum of children's programs that St. Elizabeth's Church

provides. It begins very early in life with the day care program and continues through the Church's preschool, and elementary school programs. R. 455a – 456a.

St. Elizabeth's Church chooses the staff for its child development ministries, in large part, based on their religious beliefs and their ability to transmit those beliefs to children in their care. The Church believes it must be free to choose caregivers and instructors who believe as it does and are committed to its religious mission to be able to fulfill the Church's goal of developing the Christian personality in the children entrusted to its care. R. 458a.

The vast majority of children at St. Elizabeth's are members of St. Elizabeth Parish, and first preference in admission is given to parishioners and to Catholics because religion is an integral part of the child care ministry. R. 428a, 458a. Parents whose children attend St. Elizabeth's testified that they had chosen that facility because of its religious character and teachings. R. 462a, 464a. They stated they were not concerned about the fact that this ministry is not licensed by DPW. R. 463a, 464a.

On January 24, 1997, Ms. Jean Lozinger, a field representative in the Department of Public Welfare's Bureau of Children, Youth and Families Day Care Division, visited St. Elizabeth's and was allowed to enter the facility and inspect the premises. R. 427a. She found the staff at St. Elizabeth's was very cooperative. R. 427a, 432a. Ms. Lozinger observed nineteen children receiving day care services at St. Elizabeth's. She estimated that the ages of the children observed were:

- two infants (from birth through 12 months of age);

- four young toddlers (from 13 through 24 months of age);

- three older toddlers (from 24 through 36 months of age); and

- ten preschool children (from 3 years of age up to the date of enrollment in first grade).

R. 427a – 428a.

The policy of the Department with respect to visiting an uncertified facility, at the time of Ms. Lozinger's visit to St. Elizabeth's, was to conduct an inspection of the facility to determine whether it had health and safety violations and to fill out a form listing any such violations. R. 429a, R. 46a. When Ms. Lozinger visited St. Elizabeth's on January 24, 1997, she did not observe any health or safety hazards at the facility. R. 432a – 433a, R. 49a. Ms. Lozinger did not find any conditions at St. Elizabeth's that were unlawful, unhygienic or detrimental to the safety or welfare of children cared for at St. Elizabeth's. R. 435a – 436a.

Following Ms. Lozinger's visit, DPW issued its "cease and desist" letter to St. Elizabeth's. The sole reason for the Department's attempt to close St. Elizabeth's is its failure to have applied for and obtained a certificate of compliance or license from the Department. R. 18a, 436a.

At least since the issuance of its Regulations in 1978, the Department has treated nonprofit child day care centers that are governed by Article IX of the Public Welfare

Code (62 P.S. §§901, *et seq.*) the same as it treats for-profit child day care centers that are governed by Article X of the Public Welfare Code (62 P.S. §§1001, *et seq.*). R. 431a. The Department requires both Article IX and Article X facilities to obtain a "Certificate of Compliance" in order to operate. It does not issue a "license" to an Article X facility which is different from the "Certificate of Compliance" required for Article IX facilities. R. 431a. The Department's inspectors use the terms "license" and "Certificate of Compliance" interchangeably. R. 431a. A Certificate of Compliance is the "license" issued by the Department pursuant to and in satisfaction of the "licensing" mandate under Article X for for-profit facilities. R. 445a – 446a. The Certificate of Compliance functions as a "license," in that a facility is not permitted to operate without it. R. 431a.

DPW's child day care regulations for Article IX facilities and Article X facilities, in effect since at least 1978, are identical and, according to the Department, both types of facilities must comply with the same regulations in order to obtain a Certificate of Compliance and to operate. R. 431a.

St. Elizabeth's was previously visited by a DPW inspector in October of 1996, at a time when it was unlicensed and had 15 children in care, but no Cease-and-Desist order was issued based on that inspection. R. 628a – 629a. At the hearing in this matter, Karen Kroh, an employee of DPW's Office of Policy Development, testified that the current Department policy with respect to uncertified or unlicensed religious child care providers is to enforce its certification requirements to the fullest extent possible. R. 558a. She was unable to state what the policy of the Department was from 1981 through 1995. R.

561a. Several officials and representatives of the Department testified that, in their understanding, prior to late 1996 or early 1997, the Department did not have an established policy with respect to enforcement of its regulations requiring licensing of religious child day care facilities. R. 433a, 445a. Legal counsel for the Department was quoted in an article published in June of 1996 in the *Pittsburgh Post Gazette* as stating that the Department's policy had been, as a general rule, "not to take on the religiously affiliated day care centers." R. 560a.

In 1995, an internal DPW memorandum discussing actions against uncertified religious facilities stated, in part, that when a facility operator objects to certification on religious grounds:

> [L]itigation cannot be conducted within the framework of the Department's administrative hearing process. Instead, the case must be pursued in Commonwealth Court through an application for injunctive relief to close the facility.
>
> When the Department chooses to pursue an injunction against an entity based on operation of a facility without a certificate of compliance, the Department is required to present the case to the Office of Attorney General (OAG) for court action.

See, Memorandum from Kathryn J. Holod to Jo Ann Lawer, dated December 7, 1995. R. 719a.

Jennifer Lau, DPW Child Care Policy Specialist, acknowledged that, up until 1995, the Department's practice with respect to enforcement of its claimed licensing authority over religious nonprofit child day care centers was to refer such cases to the Attorney General. R. 619a – 621a. However, the Attorney General's Office has not

instituted any legal action against any religious nonprofit child day care center for failing to obtain a Certificate of Compliance from the Department. R. 608a – 609a.

DPW witnesses testified that the Department's current regulations were promulgated, in part, to assure the provision of care that promotes social development of children at child day care centers. 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., 55 Pa. Code §§ 3270.1, 3270.101, 3270.111, 3270.113. R. 437a. Department inspectors are responsible for determining whether a facility is operating in a manner that promotes the appropriate social development of children. R. 437a.

DPW witnesses confirmed that there are varying opinions and views within the child care community and the community at large regarding what constitutes proper social competence and self-esteem in children. R. 437a. DPW witnesses also acknowledged that subjective judgments are made by individual Department inspectors as to whether children are being properly socialized in a particular child care facility. R. 437a - 438a. Both Msgr. Kurtz and DPW's expert witness, Dr. Richard Fiene, agreed that whenever a governmental determination is to be made regarding whether appropriate social development is taking place, that determination will be made based upon a particular world view or value system. R. 469a, 680a – 681a.

The Catholic Church believes that the teachings of Christ often run counter to the prevailing culture, and behaviors that are considered by Christians to be virtues might be viewed quite differently and negatively in secular circles. R. 468a. Dr. Fiene agreed in his testimony that a church might view social behavior which demonstrates humility as good social development, while a researcher, academic or other non-church professional may view the same behavior as lacking self-esteem or assertiveness. R. 682a.

The National Association for the Education of Young Children (NAEYC) is considered by Dr. Fiene to be a well-respected organization and a leader in the field of child care standards. R. 696a. Msgr. Kurtz testified that NAEYC publishes a book entitled the *Anti-Bias Curriculum* that encourages the training of children to develop social philosophies greatly at variance with those of St. Elizabeth's and the Roman Catholic Church. R. 468a – 469a.

Msgr. Kurtz also testified that allowing government to impose a value system that differs from that of the Church in determining what constitutes proper social development would seriously impede the Church's ability to further its religious mission. It would be intrusive on the part of government and exceedingly difficult for the Church to have its religious ministries, which are designed to develop a Christian personality in children, evaluated by governmental officials applying standards that are not part of the Church's teaching or which are at variance with it. R. 468a.

Dr. Fred Darnley testified as an expert witness on behalf of St. Elizabeth's. Dr. Darnley holds a Ph.D. in Child Development from the University of North Carolina. R. 636a. He has child care teaching experience at the University level and also has substantial actual day care experience, having primarily taught 2-5 year olds. R. 637a – 638a. At the time of the hearing, Dr. Darnley served as a Child Care Commissioner in North Carolina, an official governmental position to which he was appointed. R. 638a. The Commission is charged with promulgating rules and regulations for child care within the State of North Carolina. R. 638a. Dr. Darnley visited St. Elizabeth's and was impressed by the fact that it was a very fine center. R. 641a.

Dr. Darnley testified that North Carolina does not require religious child care providers to obtain a license before they may operate. R. 648a. Instead, religious facilities file a letter with the North Carolina Division of Child Development to inform the State that they are commencing operation within 30 days. R. 649a – 650a. Governmental oversight of religious facilities is limited primarily to health and safety areas. R. 649a – 650a. Additional requirements relating to areas such as staff qualifications, programming, curriculum and equipment are imposed on non-religious facilities in North Carolina, but are not imposed on religious facilities. R. 651a.

In Dr. Darnley's expert opinion, the regulatory provisions applicable to religious child care facilities in North Carolina are adequate to assure that children who receive care in unlicensed religious child care facilities are safe and that their health is not in danger. R. 653a. Dr. Darnley also testified that one of the most effective means of

attempting to exercise governmental regulatory control over the instructional and developmental program of a preschool facility would be to impose a uniform training model for staff. R. 653a – 654a. In Dr. Darnley's view, that step would assure that the staff would approach the provision of child care from the same perspective as the government and would prevent religious facilities from hiring like-minded people who might have a different perspective from that of the government. R. 654a.

Dr. Darnley further testified that he knew of no compelling public necessity to require imposition of state control on religious child care facilities beyond that needed to assure that children are cared for in a physically safe and healthful environment. R. 655a.

Dr. Richard Fiene testified on behalf of the Department as an expert in the field of child development and research on day care. He holds a Ph.D in Psychology from Newport University in Newport Beach, California. R. 670a – 671a, R. 25a. Much of Dr. Fiene's research has attempted to determine the effectiveness of checklists used by inspectors of child care facilities to determine compliance with regulations. R. 677a. His research shows that the use of such checklists to conduct inspections will result in a more uniform application of the regulations if it is accompanied by specific questions to be asked. R. 678a – 679a.

The checklist used in child care inspections in Pennsylvania is not accompanied by any specific questions. R. 679a. Dr. Fiene acknowledged that, without such

questions, more subjective judgments will be made in determining whether a facility is in compliance with Department regulations. R. 679a.

Dr. Fiene testified to his belief that the social, emotional, and cognitive development of a child are all factors that relate to "quality" child care. R. 680a. In conducting his research, Dr. Fiene starts with the assumption, as his null hypothesis, that compliance with governmental regulations equates with the provision of quality care. He then attempts to support that hypothesis with his study. R. 679a – 680a. Dr. Fiene's research found that the "quality" of child care drops off when 100 percent compliance, rather than substantial compliance, with regulations is required. R. 682a. Studies done by Dr. Fiene in Pennsylvania showed that there was no empirical data to support the assumption that higher compliance with regulations related to enhanced children's development. R. 687a.

Dr. Fiene's studies also have found that the effect of an individual center's regulatable characteristics on children's development was statistically non-significant (R. 688a), and that a child's family background is the most salient determinant of development in children attending day care centers of even average quality. R. 688a. Dr. Fiene admitted that he had no studies that show a "cause and effect" relationship between the failure to have a particular governmental regulation and actual harm resulting to children from that failure. R. 692a – 693a.

Dr. Fiene further admitted that he knew of no studies that have been done which compare religious facilities that are unlicensed with religious facilities that are licensed, and he has no indication that unlicensed centers are operating in a less healthful or less safe manner than the licensed facilities. R. 695a. Dr. Fiene also admitted that, while the DPW regulations require that caregivers have certain educational credentials, a caregiver who lacks the credentials required by the Department's regulations may be a much better caregiver than someone who has the necessary credentials. R. 694a.

SUMMARY OF THE ARGUMENT

The General Assembly, in its deliberate judgment, passed two separate Articles of the Public Welfare Code dealing with child day care facilities. Article IX authorizes the Department to exercise supervisory powers over *non-profit* child care facilities. Article X authorizes the Department to license and fully regulate *for-profit* facilities and specifically prohibits the operation of such facilities without a license.

St. Elizabeth's child care ministry is a non-profit institution governed by Article IX; it is not governed by Article X. As such, it is subject only to the Department's supervisory powers and need not be licensed. There is no statutory authority whatsoever to support the Department's claimed authority to license St. Elizabeth's child care ministry through its regulations, and to seek to close it, through its administrative procedures, solely because it has failed to obtain a license from the Department.

Accordingly, the Department's regulations are invalid insofar as they are sought to be applied to St. Elizabeth's.

Moreover, application of the Department's licensing and regulatory scheme to St. Elizabeth's child care ministry would seriously impair the ability of St. Elizabeth's to freely exercise its religious liberties and the right of parents to direct the upbringing of their children. The Department's licensing and regulatory scheme does not further a compelling governmental interest and is not narrowly tailored to achieve any such interest. Therefore, it violates the Religion Clauses of the First Amendment to the United States Constitution and Article I, Section 3 of the Pennsylvania Constitution. In addition, it violates the Pennsylvania Religious Freedom Protection Act.

ARGUMENT

I. THE DEPARTMENT LACKS STATUTORY AUTHORITY TO REQUIRE THAT A NON-PROFIT RELIGIOUS CHILD CARE MINISTRY BE LICENSED IN ORDER TO OPERATE.

On June 13, 1967, the General Assembly enacted two separate and distinct Articles of the Public Welfare Code that deal with child day-care facilities. Article IX (entitled "DEPARTMENTAL POWERS AND DUTIES AS TO SUPERVISION") governs *non-profit* children's institutions, which include child day care providers. Article X (entitled "DEPARTMENTAL POWERS AND DUTIES AS TO LICENSING") governs *for-profit* child day care centers. (A "child day care center" under Article X is defined as "any premises *operated for profit* in which child day care is provided simultaneously to seven or more children . . ." 62 P.S. §1001 (emphasis added).)

As the Department has conceded and the Administrative Law Judge ("ALJ") correctly found, St. Elizabeth's is a *non-profit* entity that is governed solely by Article IX of the Public Welfare Code, and not by Article X. See, R. 10a; Administrative Law Judge Recommendation ("ALJR") at 15. Appendix A to this Brief .

Despite this fact, the Department is attempting to force St. Elizabeth's to cease operating its child care ministry solely because it has failed to obtain a license from the Department, in violation of its regulations. It has not sought to close St. Elizabeth's based on any specific conditions at St. Elizabeth's that are allegedly harmful to children.

In order to obtain a license and operate, St. Elizabeth's would be required to comply with all of the Department's child day care center regulations, including those directed at promoting what the Department considers to be appropriate social development in children, and those regarding the selection of staff.

St. Elizabeth's concedes that the Department's *regulations*, on their face, require it to obtain a license and comply with all of the Department's substantive requirements relating to child care centers in order to operate. However, as set forth in greater detail below, the Department clearly lacked statutory authority to promulgate these regulations under Article IX and they are invalid insofar as they are sought to be applied to St. Elizabeth's.

A. NEITHER ARTICLE IX NOR ARTICLE X OF THE PUBLIC WELFARE CODE AUTHORIZES THE DEPARTMENT TO REQUIRE THAT A NON-PROFIT RELIGIOUS CHILD CARE MINISTRY BE LICENSED IN ORDER TO OPERATE.

No provision of Article IX requires that non-profit religious child care providers be licensed. Instead, Article IX only provides that such entities are "children's institutions" subject to the Department's "supervision." 62 P.S. §902(3).

In stark contrast, Article X specifically provides that *for-profit* child day-care facilities *may not operate* without a "license." 62 P.S. §1002. Article X also provides for penalties where such facilities attempt to operate without a license. It is a summary offense punishable by fines and possible imprisonment. 62 P.S. §1031. In addition to these provisions, Article X contains specific sections that provide for: applications for a

license, *licensing* fees, issuance of *licenses*, and issuance of provisional *licenses*, the term and content of *licenses*, revocation of *licenses,* and actions against *unlicensed* institutions. See, 62 P.S. §§1003, 1006, 1007, 1008, 1009,1026, and 1052. Article IX has no similar provisions.

Despite these striking differences in the statutory framework of Article IX and Article X, the Department treats these two Articles as though they are virtually identical. R. 431a. It has promulgated a single set of regulations (allegedly pursuant to these two separate and distinct statutory provisions) that treats both Article IX, *non-profit,* and Article X, *for-profit,* facilities exactly the same. R. 429a, R. 473a. This one set of regulations requires *all* child care centers (supervised and licensed) to obtain a "Certificate of Compliance" in order to operate and requires all such facilities to comply with all of the Department's substantive and procedural child care center regulations in order to receive such certificate. 55 Pa. Code §3270.11(a); 55 Pa. Code §20.1, *et seq.*

Various Department officials confirmed, at the administrative hearing in this matter, that the terms "licensed" and "certified" are used interchangeably and that the Department treats Article IX facilities the same as Article X facilities. R. 431a, R. 445a. That a "Certificate of Compliance" is actually a license cannot be doubted. In fact, the Department's own regulations define a "Certificate of Compliance" as a document issued to a legal entity "*permitting* it to operate." 55 Pa. Code § 20.4. A grant of permission to operate is the very essence of a license.

No Department official who testified at the hearing in this matter was able to point to a single provision in Article IX that authorized the Department to *license* (or certify) a non-profit facility. Indeed, §1002 of Article X was the only *statutory* authority cited in the Department's Cease and Desist Order in support of the Department's assertion that operation of a child day care center without a certificate of compliance is prohibited. R. 18a. (While §1002 does prohibit operation of a child day care center without a *license*, it applies only to *for-profit* child day care facilities.) It is not surprising that the Department's Order failed to reference any provision of Article IX to support its alleged licensing authority. No such provision exists. Indeed, the words "license" and "certificate" are never used in Article IX. (Article X, as it relates to child day care centers, also does not contain the word "certificate," but the word "license" appears approximately 35 times.)

Thus, the only authority that the Department can rely upon in attempting to impose a licensing requirement on St. Elizabeth's is its own regulations. Those regulations do provide that a certificate of compliance must be obtained prior to commencement of operation. 55 Pa. Code §3270.11(a). However, it is axiomatic that the Department may not promulgate regulations that it is not *statutorily* authorized to promulgate. As this Court has stated:

> The rulemaking power of administrative agencies is limited by statutory grant of authority and can only be conferred by clear and unmistakable language setting the exact bounds of the statutory grant.

Campo v. State Real Estate Commission, 723 A.2d 260 (Pa.Cmwlth. 1998) (internal citations omitted). In addition, as the Superior Court recognized in *Commonwealth v. DeFusco*:

> It is well-settled that an administrative regulation must be consistent with the statute under which it was promulgated. Moreover, when there exists an apparent inconsistency or conflict between a statute and a regulation promulgated thereunder, the statute must prevail.

378 Pa. Super. 442, 445; 549 A.2d 140, 141 (1988) (internal citations omitted).

Article IX lacks any language whatsoever that confers licensing authority on the Department, and the assumption of such authority by the Department would conflict with the existing statutory provisions. Moreover, numerous general principles of statutory construction preclude any construction of Article IX which would authorize the Department to adopt a license requirement *by regulation.*

In *DeFusco*, the Court noted that "[o]ne such principle is encompassed in the legal maxim, *expressio unius est exclusio alterius*: that which is not included in the law shall be understood as excluded in the law." 378 Pa. Super. 442, 446; 549 A.2d 140, 141. The Court explained that "[u]nder this principle of interpretation, there is an inference that all omissions from a statute should be regarded as designated exclusions." *Id.* Therefore, the inclusion of express licensing language in Article X and its omission in Article IX surely evidences a clear intent on the part of the General Assembly to require licensing of one class of child care providers (those that operate for profit) while exempting another class (non-profit facilities) from the licensing requirement.

Another applicable principle of statutory construction is the presumption that the legislature does not intend any of its statutory language to exist as mere surplusage. See e.g., 1 Pa.C.S. §1921(a); *Bamber v. Lumbermen's Mutual Cas. Co.*, 451 Pa. Super. 548, 553; 680 A.2d 901, 904 (1996). In attempting to support its claimed licensing authority over both Article IX and Article X facilities, the Department must pretend that Article IX and Article X are indistinguishable and that both authorize it to provide for licensing of child care centers by regulation. However, if one were to accept this construction of Article IX and Article X, one or the other of those Articles would exist entirely as surplusage. The only way to give both Articles effect is to adhere to their plain language and construe them as creating very different frameworks for treating non-profit and for-profit facilities—with only the latter being licensed.

Finally, construing Article IX as authorizing the Department to require, by regulation, that religious child care ministries be licensed and require that they comply with numerous regulations that intrude upon their religious mission would subject the statute and regulations to serious constitutional challenge. (See Parts II and III of this Brief.) In such circumstances, statutes ordinarily are to be construed in a manner that will avoid constitutional problems. *Christian Schools Association v. Department of Labor*, 55 Commonwealth Ct. 555, 561, 423 A.2d 1340, 1343 (1980) ("rule of strict construction is superseded in instances where there is a strong possibility that the statute in question infringes upon a party's right to free exercise of religion"); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (because NLRB's exercise of jurisdiction presented "difficult and sensitive questions arising out of the guarantees of the First

Amendment" Religion Clauses, the Supreme Court declined to construe the statute in a way that would raise those issues "absent a clear expression of an affirmative intention of Congress in favor of such jurisdiction.").

From the foregoing, it is clear that the Department has no statutory authority to require that Article IX facilities be licensed. And, the Department cannot require that Article IX *supervised* facilities be transformed into Article X *licensed* facilities simply by promulgating regulations to that effect. The General Assembly exercised its prerogative in 1967 to require separate treatment of non-profit and for-profit child care facilities, and the Department is not authorized to substitute its judgment for that of the General Assembly. Accordingly, any regulations of the Department that purport to require that Article IX facilities obtain a license or certificate in order to operate are invalid as applied to St. Elizabeth's.

The sole reason for the Department's attempt to close St. Elizabeth's is its failure to apply for a license from the Department permitting it to exist. R. 436a. It is clear that the Department has no valid authority to require St. Elizabeth's to obtain a license in order to operate. Therefore, it may not legitimately seek to close St. Elizabeth's because it is operating without a license, and the Department's Cease and Desist Order must be dismissed.

B. Under the Statutory Framework of Article IX, The Department Has No Authority to Order St. Elizabeth's to Close.

As noted above, the Department lacked statutory authority to require St. Elizabeth's to obtain a license or certificate, and its regulations purporting to require licensing are invalid as applied to St. Elizabeth's. In addition, the Department clearly lacked statutory or regulatory authority to pursue this action against St. Elizabeth's through its Bureau of Hearings and Appeals.

Under Article IX, the Department's legitimate supervisory authority over St. Elizabeth's was as follows. First, it was authorized to visit and inspect St. Elizabeth's and to inquire into all matters relating to its operations. 62 P.S. §911(a). For these purposes, and to determine whether St. Elizabeth's falls within the Department's supervisory or licensing authority, the Department was to be given "free and full access" to the facility premises, records, and all persons connected with St. Elizabeth's. §911(b). Next, if the Department had found any conditions that were "unlawful, unhygienic, or detrimental," it was authorized to notify St. Elizabeth's of such conditions and "to direct the . . .institution to correct the said objectionable condition." 62 P.S. §911(c). Finally, if St. Elizabeth's had failed to correct any such objectionable conditions, the Department would have been statutorily authorized to: 1) "request the Department of Justice to institute appropriate legal proceedings to enforce compliance" with the Department's directions; or 2) "withhold any State money." 62 P.S. §911(c).

As clearly established at the hearing on this matter, St. Elizabeth's has been visited by Department inspectors on several occasions and, in each instance, St.

Elizabeth's was very "cooperative" with respect to allowing the Department's inspector to visit and inspect its child care ministry. R. 427a, R. 432a, R.435a. In January of 1997, Ms. Lozinger, a Department inspector, conducted what she described as a "mini" site inspection of St. Elizabeth's that entailed looking for "health and safety issues for the most part" that were listed on a Departmental checklist provided to her. R. 428a, R. 432a. She primarily checked "for the safety of the children." R. 429a. She found no health or safety problems. R. 432a-433a, R. 435a.

Ms. Lozinger, likewise, found no conditions that were "unlawful, unhygienic, or detrimental" to the safety or welfare of the children at St. Elizabeth's. R. 435a-436a. In fact, she never directed St. Elizabeth's to correct any objectionable conditions. R. 436a. Therefore, St. Elizabeth's never failed to correct any objectionable conditions or follow any recommendations made by the Department's inspector. R. 436a.

In short, the Department was allowed to fully exercise its legitimate *supervisory* authority over St. Elizabeth's. St. Elizabeth's willingly allowed the Department to visit and inspect its child care ministry and in no way attempted to limit the Department's access to its premises. The Department conducted an inspection to determine whether any health and safety issues existed at the facility and found none. Having found no objectionable conditions at St. Elizabeth's that were detrimental to children,[1] the Department had no authority to attempt to close St. Elizabeth's child care ministry.

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[1] The checklist used by the Department for its "mini" inspections is entitled "Health and Safety Hazards Observed" and lists a number of conditions that would clearly be detrimental to children. R. 50a. None of these were checked with respect to St. Elizabeth's.

Moreover, even if the Department had found objectionable conditions at St. Elizabeth's and St. Elizabeth's had failed to correct them, the Department's only recourse against St. Elizabeth's, at that point, would have been to request that the Attorney General initiate legal proceedings to force St. Elizabeth's to correct those conditions, or to withhold State money from St. Elizabeth's. 62 P.S. §911(c). Given that St. Elizabeth's does not receive State money, the Department was limited to requesting that the Attorney General initiate legal proceedings against St. Elizabeth's. There is no evidence that the Department ever requested the Attorney General to initiate any legal proceedings against St. Elizabeth's, and to date, no such proceedings have ever been initiated against St. Elizabeth's.

Having failed utterly to comply with the express language of Article IX which provides for its enforcement authority, the Department, *on its own*, has chosen to initiate an administrative proceeding against St. Elizabeth's to prevent its continued operation. [2] The Department's pursuit of this approach with respect to an Article IX institution is entirely illegitimate. [3]

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[2] It should be noted that no provisions of the Department's own regulations appear to authorize the Department to pursue actions based on a *failure to obtain* a license or certificate of compliance in an administrative hearing process. Nor do they appear to allow for an appeal where the facility does not seek licensure and does not object to the Department's *failure to issue* a license. Section 20.81 provides that a legal entity may appeal any one of seven listed Departmental actions. All of these items relate to the issuance or non-issuance of various types of licenses. None relate to an appeal from a Cease and Desist Order issued against a facility for operating *without* a license.

[3] This is in contrast to the provisions of Article X that provide that the Department, "*upon advice* of the Attorney General, may maintain an action in the name of the Commonwealth for an injunction or other process restraining or prohibiting any person from establishing, conducting or

Moreover, the Department apparently is aware of the illegitimacy of its current actions. According to the record evidence, as late as December of 1995, Department officials apparently understood Article IX to require that actions to close a non-profit religious child care facility can only be pursued by the Attorney General outside of the administrative hearing process. An internal Department memorandum from Kathryn J. Holod to Jo Ann Lawer, dated December 7, 1995, states in pertinent part:

> [L]itigation cannot be conducted within the framework of the Department's administrative hearing process. Instead, the case must be pursued in Commonwealth Court through an application for injunctive relief to close the facility. When the Department chooses to pursue an injunction against an entity based on operation of a facility without a certificate of compliance, the Department is required to present the case to the Office of Attorney General (OAG) for court action....

The testimony of Jennifer Lau at the hearing on this matter also demonstrates that the Department apparently knew that it was statutorily required to refer matters to the Attorney General instead of initiating administrative procedures on its own. R. 619a-621a, R. 608a-609a.

In short, contrary to the Department's claims, the current framework of Article IX does not remotely authorize Department bureaucrats to make unilateral decisions to close religious non-profit child care facilities for failure to become licensed and comply with all of its various regulations that it currently, or may in the future, promulgate. Rather,

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[fn.3, continued] operating any private institution" whenever a license has been refused, not renewed, or has been revoked. (A "private institution" is defined in §1051 to include a day care center "which is operated for profit and which requires a license issued by the Department.) See, 62 P.S. §1052. This ability to seek injunctive relief under Article X is in addition to the criminal actions that can be brought under §1031.

Article IX sets up a system whereby internal and external checks and balances are at work.

First, the Department must make a judgment as to whether conditions exist that are actually "unlawful, unhygienic, or detrimental" (i.e. harmful to children). If such conditions are identified and not corrected, the department must make another judgment as to whether they are significant enough to warrant a request to the Attorney General to initiate proceedings to enforce compliance. Next, the Attorney General has authority to exercise his prosecutorial discretion regarding the issues at hand. If the Attorney General determines that the identified conditions are, in fact, harmful to children and that the institution is wrongfully refusing to correct the objectionable conditions, he will surely institute legal proceedings against the facility. If, however, the Attorney General believes that the identified conditions are not actually harmful to children (i.e. they refer only to the failure to become licensed, or they involve staff qualifications relating more to "quality" of care than to harm to children) and/or potentially infringe upon the protected religious liberties of an institution, he may decide not to institute any legal proceedings against a facility.

While it is clear that the Department would prefer to be able to implement its will without any external checks on it, it simply may not disregard the plain language of the statute and pursue matters on its own whenever it is frustrated and not getting what it deems to be "satisfaction from the Attorney General's Office." R. 620a. Accordingly, its Cease and Desist Order must be dismissed.

C. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THE DEPARTMENT'S REGULATORY AUTHORITY UNDER ARTICLE IX INCLUDES LICENSING AUTHORITY AND BROAD REGULATORY AUTHORITY.

The ALJ addressed the licensing issue raised by St. Elizabeth's only in cursory fashion and seems to rely upon three different grounds in determining that the Department had statutory authority under Article IX to adopt regulations that require supervised institutions to be licensed and fully regulated. The first involves an interpretation of §911(a)(1), the second, an interpretation of §911(b), and the third is the Supreme Court's decision in *Hospital Ass'n of Pennsylvania v. MacLeod*, 487 Pa. 516, 410 A.2d 731 (1980). Each of these points is addressed below.

1. *Construction of §911(a)(1).* The ALJ apparently recognized that there must be some actual grant of statutory authority before the Department may issue regulations under Article IX. Accordingly, he notes:

> Section 911, Visitation and Inspection, gives the Department power to (1) "make and enforce rules and regulations for a visitation, examination and inspection of all supervised institutions" and these activities "may occur both before and after the beginning of operation of the supervised facility." [Emphasis added.]

ALJR at 15. From this observation, the ALJ concludes that "[t]he primary purpose of that provision must be to approve operations." *Id.* [4]

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[4] The amendment to House Bill 694, Legislative Session of 1975, which added the "before and after" language in §911(1), also added language to §911(b) which stated: "and for the purpose of determining whether or not a facility should be subject to the supervision of the department in accordance with section 902." See, Copy of House Bill 694 with pertinent amendments attached as Appendix B. When §911 is examined in the context of the these amendments, the references to visitations taking place before and after the beginning of operation appear to be related

Seemingly, the ALJ believes that the fact that the Department may *visit* a facility *before* it begins operation means that the Department has authority to license it and force it to comply with all of the Department's broad substantive child care regulations—regardless of whether they relate to conditions that are unlawful, unhygienic (unsanitary) or detrimental (harmful) to children.

In addition, the ALJ finds that the Department's right of "approval" also authorizes the Department to seek to close a supervised institution—through issuance of a Cease and Desist Order that can be enforced through its administrative process and appeal to this Court. In short, the ALJ concludes that the fact that the Department may *visit* a facility before it begins to operate authorizes the Department to require that the facility obtain its *permission in order to operate.*

In light of the explicit language of Article IX and the clear licensing mandate of Article X, this interpretation is wholly unreasonable and must be rejected. No reasonable reading of Articles IX and X would suggest that Article IX allows the Department to "license" as opposed to "supervise" St. Elizabeth's. See this Brief, Part I A. Likewise,

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primarily to allowing the Department to determine whether a facility actually falls within its supervisory authority or, perhaps, falls within its licensing authority. (These 1976 amendments also amended § 1016 of Article X which relates to the right to visit and inspect for-profit facilities, but does not refer to any substantive rule making authority.)

There is no legislative discussion or debate regarding the reason for adding these changes to §911(a)(1) and §911(b) contained in the House or Senate Legislative Journal. However, if these amendments were intended to dramatically change the existing supervisory and licensing scheme set forth in Articles IX and X, one would have expected at least some comment to that effect.

the ALJ's determination would allow the Department to operate in a manner directly contrary to the express language of §911(c). See this Brief, Part I B.

A more logical and reasonable reading of the language relied upon by the ALJ is that the rulemaking authority "*for* a visitation . . ." refers to the right of the Department to make *procedural* rules for the conduct of an inspection. Thus, it could promulgate a rule that requires all child care providers to register with the Department and inform it of their existence, place of operation, and non-profit status so that the Department can conduct its statutory duty to visit and inspect the facility. It could also require that the facility be open for inspection during normal hours of business (i.e., while children are on site), and have all of its papers available for inspection (i.e., its certificate of occupancy, background checks) etc.

It is clear that the General Assembly envisioned the promulgation of both substantive and procedural regulations in enacting §1021 of Article X (relating solely to for-profit institutions). That provision specifically refers to the right of the Department to "adopt regulations establishing *minimum standards* for building, equipment, operation, care, program and services" in licensed facilities. Such categories clearly anticipate substantive regulations. However, §1021 also authorizes the Department to adopt regulations "*for* the issuance of licenses." This anticipates regulations that are procedural in nature. Indeed, the Department apparently understood this distinction between substantive and procedural rules because it promulgated two separate sets of regulations. The regulations contained in 55 Pa Code, Chapter 3270 set forth substantive

standards for child care facilities, and the regulations contained in 55 Pa Code, Chapter 20 set forth the procedural requirements for licensing.

The reference to regulations "*for* a visitation, examination and inspection" in §911(a)(1) is analogous to the reference to regulations "*for* the issuance of licenses" in §1021. This parallel language indicates that regulations referred to in §911(a)(1) are intended to be procedural in nature; not substantive. Thus, the most reasonable interpretation of this language is that the Department is authorized under §911(a)(1) to promulgate procedural regulations relating to the conduct of a visitation, examination and inspection of a supervised facility. Indeed, the fact that there is no parallel language in §911(a)(1) authorizing the Department to adopt substantive "regulations establishing *minimum standards*" for supervised institutions strongly suggests that no such authority exists.

Reading §911(a)(1) to allow for limited rulemaking authority related to the *conduct* of a visitation and inspection is completely consistent with the plain language of Article IX and would not conflict with the statute's provisions regarding enforcement of actions under §911(c). The ALJ's overly expansive reading of §911(a)(1) (which allows the Department to make rules requiring licensing and regulation of Article IX supervised facilities in the same manner as Article X licensed facilities) is at odds with the statutory framework of Article IX as a whole, and the specific language of §911(c). It also makes Article X entirely superfluous.

The ALJ's discussion completely ignores the existence of §911(c), and his interpretation would allow the Department to completely ignore its express statutory duties and the limited enforcement authority set forth under §911(c). In addition, it would authorize the Department to promulgate regulations that are completely contrary to the plain language of §911(c). Accordingly, his interpretation must be rejected.

2. Construction of §911(b). The ALJ also appears to rely on the language of §911(b) that refers to "duly ordained rules and regulations" to support his determination that the Department has licensing and broad regulatory authority over supervised facilities. ALJR at 15. However, when read as a whole, §911(b) is far more consistent with the narrow construction described above than a broader one. That section states:

> For these purposes [the visitation and inspection referred to in §911(a)] and for the purpose of determining whether or not a facility should be subject to the supervision of the department [i.e., whether it is nonprofit and within the covered categories] . . . the department shall have free and full access [to the facility] . . .
>
> and all persons connected with any such . . .supervised institution. . . are hereby directed and required to give to . . .the department, *such means*, facilities *and opportunity* for such visitation, examination, inquiry and interrogation, *as is* hereby provided and *required*, or as the department, *by its duly ordained rules or regulations*, may require."

62 P.S. §911(b) (emphasis added).

Section 911(b) contains two aspects: 1) the Department is provided with a right to have *free and full access* to the supervised facility in order to conduct a visitation and inspection of the facility and to determine whether it is, in fact, a supervised facility; and 2) the supervised facility is required to provide the Department with such "*means*" and

"*opportunity*" for this authorized visitation as set forth in the Department's duly ordained rules and regulations.

The only "rules and regulations" previously referred to as being authorized were regulations "for a visitation, examination and inspection" mentioned in §911(a)(1). As noted above, properly construed, such rules refer only to *procedural* rules for the conduct of the visitation and inspection. The fact that supervised institutions are to provide "the means" and "opportunity for" such visitation as required by the department's "rules or regulations" adds further support to such a limited construction. The use of the words "means" and "opportunity for" are procedural in nature; not substantive.

In short, there is nothing in the language of §911(b) that suggests that the Department has any broad substantive regulatory authority, let alone any authority to make the leap to mandating licensing through regulation. Rather, the language is quite consistent with the reasonable construct proposed above—the authorized rules and regulations are to be procedural in nature. And, that construct does not conflict with the framework of Article IX as a whole. Nor does it make Article X superfluous or redundant.[5]

3. Reliance on HAP v. MacLeod. In finding that the Department had statutory authority to promulgate regulations requiring St. Elizabeth's to be licensed and comply

[5] Although the Department apparently has had statutory authority to promulgate procedural regulations governing the conduct of a visitation and inspection of supervised facilities under §911(a)(1) since 1967, it has chosen not to do so. Instead, it has chosen to promulgate a single set

with broad regulations, the ALJ also relied on the Supreme Court's decision in *Hospital Ass'n of Pennsylvania v. MacLeod*, 487 Pa. 516, 410 A.2d 731 (1980). That decision, however, is clearly distinguishable and not particularly relevant to the issues in this matter.

In *MacLeod* the Court held that, under §921(c) and §921(e), the Department of Health had authority to issue fairly broad regulations governing *hospitals*. *Id.* at 522-523. Section 921 does not apply to all supervised institutions. It only applies to certain institutions defined in §921(b). Hospitals and other facilities providing overnight or "living-in" arrangements are covered under §921. However, providers of child day care such as St. Elizabeth's, which do not provide such "living-in" arrangements, are not covered by §921. Therefore, whether the Department of Health had authority to promulgate rules and regulations under §921 with respect to hospitals and certain other overnight care facilities is irrelevant. There is no provision under Article IX that allows the Department to promulgate broad substantive rules and regulations governing non-profit child day care facilities. This is in contrast to §921 (dealing with hospitals) and §1021 (dealing with for-profit facilities) which specifically allow the Department to issue such regulations.

Moreover, the *MacLeod* decision provides no instruction whatsoever with respect to the central issues in this case. First, the procedural posture of that case was not at all similar to this one. The Department of Health in *MacLeod* had not issued a Cease and

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of broad substantive and procedural licensing rules that are clearly authorized by §1021 solely and exclusively for for-profit facilities, but are not authorized by any provision of Article IX.

Desist Order against a hospital and did not seek to force a hospital to resort to its Bureau of Hearings and Appeals. Nor did the Department of Health seek to bring an action against a hospital on its own, without requesting that any such action be initiated by the Department of Justice as required by §921(e). Instead, the Hospital Association initiated that action challenging the Department's authority to enact certain regulations prior to their effective date. *MacLeod*, 487 Pa. at 519.

In short, there was no attempt to close a hospital for failure to obtain a license under the Public Welfare Code. Nor was the Department seeking to enforce regulations in a manner that was clearly in conflict with the express language of Article IX.

Thus, the *MacLeod* Court in no way held that the Department had statutory authority under Article IX to promulgate rules and regulations that require that *supervised* facilities obtain a *license* or certificate in order to operate. That issue was not before the Court, and nothing in the Court's decision would suggest that the Department has any authority whatsoever to transform a *supervised* facility into a *licensed* facility through the promulgation of regulations.

Instead, the Court simply held that the Department of Health regulations governing managerial practices at hospitals were authorized under §921(c) and §921(e)—provisions that expressly direct the Department to "establish standards" relating to ten specified substantive categories and refer to violations of those "rules and regulations."

Accordingly, the ALJ's findings with respect to the alleged statutory authority for the Department's regulations must be rejected. His reading of §911(a)(1) and §911(b) are unreasonable and would allow the Department to act in a manner clearly prohibited by §911(c). And, his reliance on *MacLeod* was misplaced.

II. APPLICATION OF THE DEPARTMENT'S LICENSING AND REGULATORY SCHEME TO THE RELIGIOUS CHILD CARE MINISTRY OF ST. ELIZABETH'S WOULD VIOLATE THE RELIGION CLAUSES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Department has asserted that St. Elizabeth's religious child care ministry may not operate without its permission, and that it will only grant it permission to operate if it complies with all of its substantive child care center regulations. The primary purpose of St. Elizabeth's child care ministry is to assist parents in raising their children and forming in them a Christian personality consistent with the values and beliefs of the Church and their parents. As set forth in greater detail below, enforcement of the Department's licensing and regulatory scheme against St. Elizabeth's would significantly burden its religious mission. The Department lacks a compelling interest to support imposition of its licensing and regulatory scheme on St. Elizabeth's and the legitimate governmental interests that are at stake can be adequately furthered by less intrusive means.

A. Applicable Legal Standards.

Prior to the United States Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon, et al. v. Smith*, 494 U.S. 872 (1990), the "compelling interest" test was generally applied to religious liberty claims. The

"compelling interest" test held that government may not burden the free exercise of religion, even indirectly through the application of neutral laws, unless: 1) it does so in furtherance of a compelling governmental interest; and 2) it demonstrates that no alternative form of regulation was available to combat the abuses sought to be remedied by the law. *Sherbert v. Verner*, 374 U.S. 398, 406-407 (1968); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). As the Court stated in *Yoder*, a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U.S. at 220.

Once it has been shown that a law substantially burdens the free exercise of religion, the burden shifts to the governmental entity to prove that the law furthers a "compelling" interest and that it cannot protect that interest through less burdensome means. *Id.* The *Sherbert* Court stated that a showing of a rational relationship to some colorable interest would not suffice:

> [I]n this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

Sherbert, 374 U.S. at 406.

In *Yoder*, the Court noted that even where the government interest in support of a law requiring compulsory school attendance is "high" or "paramount," it must yield to the right of parents to provide for education in a private religious school. *Yoder*, 406 U.S. at 213. Noting that the Supreme Court had previously struck down an Oregon statute that required attendance at public schools because it "unreasonably interfered with the interest of parents in directing the rearing of their offspring," the *Yoder* court stated:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.

406 U.S. at 214.

In *Smith*, the Supreme Court held that the *Sherbert/Yoder* "compelling interest" test set forth above is inapplicable in some instances where laws of neutral applicability burden religious exercise. However, the *Smith* Court clearly did not overrule either *Sherbert* or *Yoder*. Instead, it took care in distinguishing those decisions so as not to disturb them by its holding. *Smith*, 494 U.S. at 881-884. Noting that the Court had never before used the *Sherbert* test to invalidate "an across-the-board *criminal prohibition* on a particular form of conduct," the Court simply held that the *Sherbert* test is "inapplicable to such challenges." 494 U.S. at 885 (emphasis supplied). Likewise, the *Smith* Court noted that its prior decisions in which the compelling interest test had been applied "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881. The *Smith* Court distinguished *Yoder* (and numerous other cases) by stating: "The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.* at 882. Thus, the *Sherbert/Yoder* compelling interest test continues to apply in circumstances involving the Free Exercise Clause in conjunction with other constitutional rights such as parental rights.

As set forth below, application of the Department's licensing and regulatory scheme to St. Elizabeth's involves both: 1) the right of St. Elizabeth's to pursue its religious mission through the teaching of young children (by word and example); and 2) the traditional interest of parents with respect to the education and upbringing of their children. Thus, this case presents hybrid rights—a free exercise claim connected with communicative activity and parental rights—and the *Sherbert/Yoder* "compelling interest" test applies to it.

Accordingly, under the *Sherbert/Yoder* test, St. Elizabeth's must demonstrate that its free exercise rights are burdened by the Department's licensing and regulatory scheme. If it does this, the burden shifts to the Department to establish that its regulations are necessary to further an interest of compelling necessity and that there is no other less burdensome means to accomplish that goal. As set forth below, St. Elizabeth's has met its burden, but the Department cannot meet its burden.

B. APPLICATION OF THE DEPARTMENT'S LICENSING AND REGULATORY SCHEME BURDENS THE RELIGIOUS LIBERTIES OF ST. ELIZABETH'S AND INFRINGES UPON THE RIGHT OF PARENTS TO DIRECT THE RELIGIOUS UPBRINGING OF THEIR CHILDREN.

As set forth in Part I of this Brief, St. Elizabeth's believes that the Department clearly lacked statutory authority to apply its licensing and substantive child care regulations to St. Elizabeth's. The only regulatory authority granted to the Department under Article IX was *procedural* in nature—with respect to the manner in which visitations and inspections would be conducted. It is St. Elizabeth's view that the

Department was not authorized to promulgate any broad set of substantive regulations governing all aspects of St. Elizabeth's child care ministry, as it has done. Moreover, §911(c) only authorizes the Department to direct a supervised child care facility to correct those conditions which are "unlawful, unhygienic or detrimental." Thus, assuming, *arguendo,* that the Department had statutory authority to promulgate some substantive regulations, its regulations would have to be limited to those that relate to unlawful, unhygienic (unsanitary) or detrimental (harmful) conditions.

Because of its understanding of the law, and space constraints, St. Elizabeth's does not herein attempt to provide an exhaustive and detailed discussion of each and every way in which the Department's voluminous regulations burden its religious ministry. Instead, by way of example, it sets forth below a few ways in which the regulations impose significant burdens on St. Elizabeth's.

The record evidence in this case demonstrates that St. Elizabeth Roman Catholic Church has established its religious child care ministry to assist parents in exercising their parental right and responsibility to raise their children according to their own religious beliefs and values and to form in them a Christian personality. R. 451a-452a, R. 453a-454a. Both Msgr. Muntone and Msgr. Kurtz also testified that the development of a Christian personality in children is merged with and integral to the emotional and social development of a child. R. 453a; R. 465a-466a. They based their testimony on documents setting forth Church doctrine that were issued by the Holy Father and the Sacred Congregation for the Clergy in Rome. R.452a-453a.

The Department's regulations were promulgated, in part, to assure that child care centers provide care that promotes what DPW deems to be the proper social development of children. R.437a-439a. A number of its regulations are designed to promote "social competence" and "self-esteem." See, e.g., 55 Pa Code §§ 3270.1, 3270.101, 3270.111, 3270.113; R.437a. There are varying opinions within the child care community and the community at large regarding what constitutes proper social competence and self-esteem. R. 437a. Subjective judgments must be made by Department inspectors in attempting to enforce these regulations. R. 437a-438a. Both Msgr. Kurtz and the Department's witness, Dr. Fiene, agreed that these subjective judgments regarding what constitutes appropriate social development will be based on the particular world view or value system of the government's inspector. R. 468a; R.680a-681a.

Governmental or secular world views frequently may be at odds with the Church's view of what constitutes proper social development. Indeed, Msgr. Kurtz testified that the teachings of Christ often run counter to the prevailing culture, and behaviors that are considered by Christians to be virtues might be viewed quite differently and negatively in secular circles. R. 468a. Dr. Fiene agreed that a church might view social behavior which demonstrates humility as good social development, while a researcher, academic or other non-church professional may view the same behavior as lacking self-esteem or assertiveness. R 682a.

Msgr. Kurtz testified that allowing government to impose on the Church a value system or world view that differs from that of the Church with respect to what constitutes proper social development would seriously burden the Church's ability to develop a Christian personality in the children entrusted to its care. R. 468a. It would be exceedingly difficult and intrusive for the Church to have its religious ministries, which are designed to develop a Christian personality in children, evaluated by governmental bureaucrats applying standards that are not part of the Church's teaching or are at variance with it. It also impermissibly entangles government in the essential catechetical mission of the Church.[6]

The Department's regulations also place restrictions on the employment decisions of the Church. For example, the non-discrimination provisions of its 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. See, "Appendix A Civil Rights Compliance—Statement of Policy," subsections (c) and (d) attached hereto as Appendix C; These requirements are *in addition to* the requirement that facilities comply with Federal and State Civil Rights Laws—both of

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6 The Supreme Court of the United States has repeatedly held that any substantial involvement of government in religious institutions is violative of the Establishment Clause. In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court warned against governmental involvements with churches that produced a "kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.* at 674. The Court was particularly concerned over the introduction of any "element of governmental evaluation and standards." The Court warned against legal policies that can lead to "confrontations and conflicts" between government and churches. *Ibid.*

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, Ms. Lozinger answered: "Yes." R. 442a-443a. This pre-disposition toward imposing extra-statutory mandates is characteristic of DPW's entire licensing/regulatory scheme, as applied to nonprofit religious ministries.

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, 55 Pa. Code §§3270.34-3270.37; R. 440a. Yet, as Dr. Darnley testified, requiring such uniform training for staff would be one of the most effective means of attempting to exercise governmental regulatory control over the instructional and developmental program of a preschool facility. R. 653a-654a. This is because it would assure that the staff approach the provision of child care from the same perspective as the government and would prevent religious facilities from hiring like-minded people who might have a different perspective from that of the government. R. 654a. Ms. Lozinger admitted that requiring these various degrees is not necessary to protect the health and safety of children. R. 440a.

St. Elizabeth's chooses its staff based on their religious beliefs and their ability to transmit those beliefs to children in their care. In this highly sensitive area, it must be free to choose employees who believe as it does and are committed to its religious mission to be able to fulfill the Church's goal of developing the Christian personality in

children entrusted to its care. R. 458a. Attempts to regulate whom St. Elizabeth's may hire to carry out its catechetical function strike at the heart of its religious mission.

Indeed, the entire concept of requiring governmental permission, by way of licensing, before a religious ministry may engage in its catechetical function is deeply offensive to principles of religious liberty. A requirement that any religion first have a license, such as the Department seeks to require, prior to preaching the Gospel to young children, is clearly a violation of the Free Exercise Clause of the federal Constitution.

In *Cantwell v. Connecticut,* 310 U.S. 296 (1939)[7] and several other cases, the Supreme Court has held that requiring a person to first obtain a permit from the government in order to go door-to-door to hand out religious material violates the First Amendment to the Constitution. The *Cantwell* Court noted that requiring such a permit, and allowing government officials "to issue [a certificate] or refuse it [based upon] appraisal of facts, the exercise of judgment, and the formation of an opinion" constituted a prior restraint on free speech and the free exercise of religion. *Id.* at 305. See also, *Largent v. Texas,* 318 U.S. 418, 422 (1942) (ordinance that leaves the grant or withholding of permits for the distribution of religious literature to the discretion of government official, based on whether he "deems it to be proper or advisable," constitutes an extreme form of "administrative censorship" and "abridges the freedom of religion, of the press and of speech").

[7] *Cantwell,* like *Yoder*, was specifically mentioned in *Smith* as constituting a hybrid rights case.

The Department's licensing and regulatory scheme similarly requires that St. Elizabeth's obtain governmental permission in order to teach young children and form in them a Christian personality. And, it grants governmental officials authority to issue or deny such permission based upon the exercise of subjective judgments as to whether its teachings develop appropriate social attitudes and behaviors. Like the ordinances in *Cantwell* and *Largent*, the regulations act as a prior restraint on St. Elizabeth's free exercise of religion. Such prior restraints invariably constitute substantial burdens.

Not only do the Department's regulations burden the child care ministry of St. Elizabeth's, they also burden the constitutionally protected right of parents to direct the religious upbringing of their children. See, *Pierce v. Society of Sisters*, 268 U.S. 570 (1925). Parents testified that they chose to send their children to St. Elizabeth's because of its religious character and teachings. R. 462a; R. 464a. If the government, rather than the Church, is allowed to determine how those children are developed socially, then parents will be effectively deprived of their ability to direct the religious and social development of their children.

From the foregoing, it is clear that the Department's regulations that require licensing and compliance with all of its substantive requirements seriously burden the constitutionally protected religious liberties of St. Elizabeth's and also significantly interfere with the rights of parents to direct the upbringing of their children.

Although the ALJ acknowledged that he lacked authority to address the constitutional issues raised by St. Elizabeth's, he made a recommendation to the effect that there is no constitutional violation of St. Elizabeth's religious liberties. ALJR at 18. In support of this recommendation the ALJ states:

> [T]he Department, at the time of the hearing, had currently issued Certificates of Compliance to approximately fifty (50) Roman Catholic affiliated day care facilities. (F.F. 50) The Department had received no complaints from these religiously affiliated day care centers that had Certificates of Compliance that the Department was interfering with the religious practices of the facilities. (F.F. 52) Thirdly, forty one (41) of the United States require a licensure process and regulation of religiously affiliated and operated child care facilities. (F.F. 59)

ALJR at 16. Though not entirely clear, it appears that the ALJ believes that these "facts" demonstrate that the religious liberties of St. Elizabeth's are not burdened.

No such inference can be drawn from these "facts." First, there is abundant *unrebutted* testimony in the record of *this case* to demonstrate the burden on St. Elizabeth's religious mission. Second, there is no competent evidence in the record to establish whether or not the religious mission of the facilities that are currently licensed is being burdened, despite their accession to DPW's assertion of governmental power over them. Ms. Lau did not identify any of the facilities in question, and no representatives of any of those facilities were called by the Department to testify with respect to whether their religious ministries were burdened by the Department's regulations. Therefore, *no* Catholic day care operators have testified that the regulations do *not* conflict with their religious ministries. Third, as the Department's witness conceded, the Department has never informed any of the facilities that it has licensed that they do not have to be licensed. R. 629a-630a. Just because a facility believes itself to be required to comply

with the Department's regulations in order to operate and does not file a formal complaint with the Department does not mean that its religious ministry is not being burdened. Fourth, Msgr. Kurtz testified that the Pennsylvania Catholic Conference (which speaks for *all* of the Catholic dioceses in Pennsylvania) had consistently and continuously opposed the Department's assertion of any authority to license Catholic child care ministries since prior to the beginning of his service on the Conference in 1976. R. 465a – 466a.

Thus, at best, the record in this case only shows that a few Catholic facilities have become licensed because the Department told them that they must be licensed in order to operate. No further inferences may properly be drawn from these facts.

Likewise, there is no competent record evidence to support the accuracy of Ms. Kroh's assertion that 41 states require licensing and regulation of religious child care facilities. None of the states are identified, none of the statutes allegedly requiring such licensing and regulation are referenced or set forth for review. Moreover, it is apparent from her testimony that Ms. Kroh believes that the Pennsylvania laws at issue in this case require licensure and broad regulation of religious child care facilities. However, as set forth above, Article IX clearly does not require such licensing and regulation of nonprofit religious facilities. Given Ms. Kroh's erroneous understanding with regard to the licensing requirements of Pennsylvania, the accuracy of her assessments of other state laws is highly questionable.

Thus, the ALJ's recommendation relies entirely on the above questionable "facts," while totally disregarding the actual *unrebutted* record testimony of Msgr. Muntone and Msgr. Kurtz regarding the religious nature of St. Elizabeth's child care ministry and the significant burdens imposed on that ministry. Accordingly, it is not supported by substantial evidence in the record.

In addition, the ALJ's determination that a religious exemption exists under Title VII's prohibition against religious discrimination in employment ignores the fact that the Department's regulations go well beyond this federal provision and impose additional independent requirements that also prohibit such discrimination. See this Brief at 46-47.

For these reasons, the ALJ's recommendation as it relates to St. Elizabeth's constitutional claims must be disregarded.

C. The Department's Licensing and Regulatory Scheme Are Not Supported by a Compelling Interest and Do Not Represent the Least Restrictive Means of Furthering the Government's Legitimate Interests.

The Department has failed to demonstrate, by competent record evidence, that it has a compelling interest in seeking to impose its licensing and regulatory scheme upon St. Elizabeth's. It has acknowledged that a number of its regulations are unrelated to health and safety. R. 515a-517a. Even with respect to its regulations that ostensibly relate to health and safety, the Department has provided no evidence to demonstrate that the failure to impose such regulations will result in harm to children. R. 692a-693a.

Indeed, the Department appears to believe that it need not even justify its regulations—they must be followed just because it says so. For example, in responding to questions concerning the staff qualification regulations, Department representatives conceded that children were not unsafe in the care of persons who failed to meet the necessary criteria, but stated that such persons were not allowed to act as staff because "those are just our standards." R. 440a-442a. Likewise, with respect to questions concerning the necessity of the Department's regulations in general, it was stated: "because they are regulations, they're necessary." R. 524a.

Finally, it should be noted that the Department imposes much less stringent requirements on family day care providers. R. 689a-690a. Despite this fact, family day care homes frequently provide the best care for children. R.691a. St. Elizabeth's, although unlicensed, is not unsafe for children, as demonstrated by the fact that the Department's inspector found no health or safety problems at the facility. In fact, the child care expert who testified on behalf of St. Elizabeth's—the only child care expert to have actually visited the facility—was very impressed with its child care program. R.641a. Dr. Darnley testified that he knows of no compelling reason to require that religious child care providers be licensed and comply with broad regulatory requirements. R. 655a.

From the foregoing, it is clear that the Department has failed utterly to demonstrate any compelling need to require that St. Elizabeth's be licensed and comply with all of its regulations. The registration type of process available to religious facilities

in North Carolina, and the supervisory approach of Article IX itself (if properly construed and applied), represent more than adequate means of protecting the health and safety of children. They are also far less burdensome than imposing licensing and intrusive regulatory provisions on St. Elizabeth's. Accordingly, the Department's attempt to require that St. Elizabeth's be licensed and fully comply with its child care center regulations violates the First Amendment to the United States Constitution.

III. APPLICATION OF THE DEPARTMENT'S LICENSING AND REGULATORY SCHEME TO THE RELIGIOUS CHILD CARE MINISTRY OF ST. ELIZABETH'S WOULD VIOLATE ARTICLE 1, SECTION 3 OF THE PENNSYLVANIA CONSTITUTION.

Article I, Section 3 of the Pennsylvania Constitution contains expansive language respecting both freedom of conscience and religious practice:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatsoever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Pa. Const. Art. I, §3. This expansive language is far more specific in its protections than the First Amendment Religion Clauses.

Subsequent to the U.S. Supreme Court's decision in *Smith*, the Pennsylvania Supreme Court specifically took note of the fact that states may read their own constitutions more expansively than the United States Supreme Court reads the Federal Constitution. *Commonwealth v. Edmunds,* 586 A.2d 887, 894 (Pa. 1991) (citing *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-82 (1980) for the proposition that

the federal constitution only sets minimum standards and that states may construe their own constitutions to be more protective).

Indeed, in the wake of *Smith,* numerous appellate courts from other states have read their state constitutions to be more protective of religious freedoms. See, *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *In re Browning*, 476 S.E.2d 465 (N.C. Ct. App. 1996); *State v. Miller,* 549 N.W.2d 235 (Wis. 1996); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994); *Rourke v. N.Y. State Dep't of Corr. Servs.*, 603 N.Y. S.2d 647 (N.Y. Sup. Ct. 1993), aff'd by 615 N.Y.S.2d 470 (N.Y App. Div. 1994); *Davis v. Church of Jesus Christ of Latter Day Saints*, 852 P.2d 640 (Mont. 1993); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *Society of Jesus of New England v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990); *State v. Evans*, 796 P.2d 178 (Kan. Ct. App. 1990); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

Given Pennsylvania's long history of religious protection, it is unlikely that the Supreme Court will follow *Smith*. Accordingly, the legal standard for religious liberty claims brought under the Pennsylvania Constitution should be the "compelling interest" test.

In *Green Appeal*, the Pennsylvania Supreme Court carefully examined the concept of what constitutes a compelling state interest sufficient to override religious liberty. 448 Pa. 338; 292 A.2d 387 (1972). In that case, spinal surgery had been recommended by doctors to correct a child's medical condition. The child's mother,

however, would not consent to the surgery due to her religious beliefs, and a petition was filed to declare the child "neglected" so that a guardian could be appointed to consent to the surgery. The Court presented the question as:

> [W]hether the state may interfere with a parent's control over his or her child in order to enhance the child's physical well-being when the child's life is in no immediate danger and when the state's intrusion conflicts with the parent's religious beliefs.

448 Pa. at 345. The Court answered that question in the negative:

> [A]s between a parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is *not immediately imperiled* by his physical condition.

448 Pa. at 348 (emphasis in original).

As set forth in Part II (B) of this Brief, the Department's licensing and regulatory scheme substantially burdens St. Elizabeth's religious ministry. The Department has failed to demonstrate by record evidence that it has any compelling interest in imposing that scheme on St. Elizabeth's, let alone one that satisfies the above *Green Appeal* standard. See Part II (C) of this Brief. Nor has the Department demonstrated that its licensing and regulatory scheme is narrowly tailored to further a compelling interest. *Id.*

Thus, the Department's attempt to require that St. Elizabeth's be licensed and fully comply with its child care center regulations also violates Article I, Section 3, of the Pennsylvania Constitution.

IV. APPLICATION OF THE DEPARTMENT'S LICENSING AND REGULATORY SCHEME TO THE RELIGIOUS CHILD CARE MINISTRY OF ST. ELIZABETH'S WOULD VIOLATE THE PENNSYLVANIA RELIGIOUS FREEDOM PROTECTION ACT.

Subsequent to the United States Supreme Court's decision in *Smith,* the General Assembly enacted the Religious Freedom Protection Act ("RFPA"). 71 P.S. § 2401, *et seq*. The RFPA was intended to assure that a compelling state interest test will be applied to religious liberty claims in Pennsylvania. It provides, in pertinent part, that governmental agencies "shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability," unless it proves by a preponderance of the evidence, that the burden is in furtherance of a "compelling interest" of the agency and that its actions constitute the "least restrictive means of furthering the compelling interest." 71 P.S. § 2404. This act was intended to apply to all existing laws and regulations. *Id.* at § 2402(2).

The protections set forth in this statute are not intended to create a substitute for the protections provided under the Pennsylvania Constitution. Rather, they afford an additional statutory basis for protecting religious liberty. *Id.* at §2407.

The Department has asserted that the RFPA does not apply to this matter because it excludes provisions of the Public Welfare Code, which "prevent[ ] the endangerment of the health or safety of individuals in facilities which are licensed or supervised under the Public Welfare Code." R. 753a. The Department claims that Article IX of the Public Welfare Code and 55 Pa Code, Chapter 20 and Chapter 3270, all prevent the

endangerment of the health and safety of children, and that the exception expressly contained in the RFPA is applicable here. *Id.*

Article IX, properly construed, may prevent the endangerment of the health and safety of children in that it authorizes the Department to direct facilities to correct conditions that are "unlawful, unhygienic, or detrimental" (i.e., conditions that may endanger the health and safety of children). However, as noted previously, many of the regulations contained in Chapter 3270 do not prevent the endangerment of the health and safety of children. Instead, they purportedly promote better *"quality"* child care. The phrase "prevent the endangerment of the health and safety of children" is a narrow construct. It refers to laws that actually *prevent* harm to children; not those that in some unspecified way might simply *relate to*, or even, *promote* health or safety, or *improve* the quality of child care.

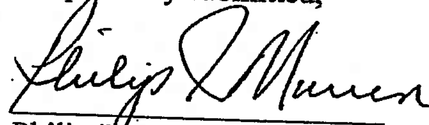
As set forth in Parts II B and II C of this Brief, application of the Department's licensing and regulatory scheme to St. Elizabeth's would substantially burden its religious liberties, and the Department has shown no compelling interest in imposing these types of regulations. Accordingly, as the Department's regulations substantially burden St. Elizabeth's religious liberties, are not supported by a compelling governmental interest, and are not narrowly drawn to further such interest, they violate the Religious Freedom Protection Act.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to: 1) declare that the Department lacked statutory authority under Article IX of the Public Welfare Code to promulgate its licensing (Chapter 20) and substantive (Chapter 3270) regulations; 2) declare that the Department lacked authority under Article IX of the Public Welfare Code, and its regulations, to attempt to bring this administrative action against St. Elizabeth's; and 3) dismiss the Department's Cease and Desist Order and allow St. Elizabeth's to continue to operate its religious child care ministry without further unauthorized interference by the Department.

Dated: December 5, 2005

Respectfully submitted,



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Counsel for Petitioner,
St. Elizabeth Child Care Center

APPENDIX A

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
BUREAU OF HEARINGS AND APPEALS

APPEAL OF: St. Elizabeth's Child Care Center
Day Care Licensure
Docket No.: 18-97-038

ORDER

AND NOW, this 29th day of July, 2005, after careful review and consideration of the Recommendation of the Administrative Law Judge, it is hereby ORDERED and DECREED that the Recommendation be adopted in its entirety.

Either party to this proceeding has fifteen (15) calendar days from the date of this decision to request reconsideration by the Secretary of the Department. To seek reconsideration, you must fully complete the enclosed application/petition for reconsideration. The application/petition shall be addressed to the Secretary, but delivered to the Director, Bureau of Hearings and Appeals, P.O. Box 2675, Harrisburg, Pennsylvania, 17105-2675, and must be received in the Bureau of Hearings and Appeals within fifteen (15) calendar days from the date of this Order. This action does not stop the time within which an appeal must be filed to Commonwealth Court.

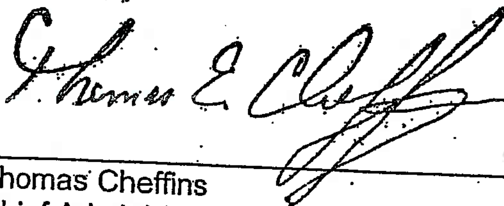
The appropriate party(ies), where permitted, may take issue with this Adjudication, and Order, and may appeal to the Commonwealth Court of Pennsylvania, within thirty (30) days from the date of this order. This appeal must be filed with the Clerk of Commonwealth Court of Pennsylvania, Room 624, Irvis Office Building, Harrisburg, PA 17120.

If you file an appeal with the Commonwealth Court, a copy of the appeal must be served on the government unit which made the determination in accordance with Pa. R.A.P. 1514. In this case, service must be made to: Department of Public Welfare, Bureau of Hearings and Appeals, 2330 Vartan Way, 2nd Floor, Harrisburg, Pennsylvania 17120.

Bureau of Hearings and Appeals

JUL 29 2005

Final Order and Mailing Date



Thomas Cheffins
Chief Administrative Law Judge
Bureau of Hearings and Appeals

cc: Appellant
Phillip J. Murren, Esquire, Counsel for Appellant
Maura Quinlan, Esquire, Counsel for Appellant
Howard Ulan, Esquire, OGC, DPW
Carol Ulichney, Esquire, OGC, DPW
Jennifer Lau, OCYF, Bureau of Child Day Care, DPW
File

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
BUREAU OF HEARINGS AND APPEALS

APPEAL OF: St. Elizabeth's Child Care Center
Day Care Licensure
Docket No.: 18-97-038

RECOMMENDATION

It is hereby **Recommended** that the appeal of the Appellant be denied.

July 29, 2005
Date

Gerald C. Coleman, Esquire
Administrative Law Judge

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
BUREAU OF HEARINGS AND APPEALS
Administrative Hearing Appeal

APPEAL OF: St. Elizabeth's Child Care Center
Day Care Licensure
Docket No.: 18-97-038

ADJUDICATION

Opening

This is an administrative hearing on the appeal of St. Elizabeth's Child Care Center from a decision of the Office of Children, Youth, and Family, and the Department of Public Welfare (Department) concerning the filing of an order to cease and desist operation of an unregistered child day care facility.

An administrative hearing was held on December 17, 1997 from 10:03 a.m. to 3:37 p.m. and continued on February 13, 1998 from 10:05 a.m. to 4:26 p.m. at the Bureau of Hearings and Appeals, Reading, Pennsylvania. A Joint Motion of Continuance until publication of changes to 55 Pa. Code Chapter 3270 was granted on November 3, 1998. A status hearing was conducted by telephone on January 19, 2000. The parties submitted positions regarding the application of Act 2002 – 214, on June 3, 2003 by Appellant and June 17, 2003, by Appellee. Upon review of the testimony, exhibits, and briefs, the undersigned prepared this Recommendation and Order.

Gerald C. Coleman, Administrative Law Judge, presided.

Appearances

For the Department of Public Welfare:
Howard Ulan, Esquire, OGC, DPW
Carol Ulichney, Esquire, OGC, DPW
Jennifer Lau, OCYF, Bureau of Child Day Care, DPW

For the Appellant:
Phillip J. Murren, Esquire, Appellants' Counsel
Maura Quinlan, Esquire, Appellants' Counsel

Exhibits

For the Commonwealth:
C-1 Department's Pre-Hearing Memorandum dated 12/17/97
C-2 Letter dated 4/18/97, from Jo Ann Lawer, Esquire, to Kathy Garcia
C-3 C.V. for Karin Elaine Kroh
C-4 C.V. for Doctor Richard Fiene

For the Appellant:

- A-1 Letter dated 5/1/97 from Maura Quinlan, Esquire, to Jo Ann Lawer
- A-2 Letter dated 12/16/97, from Philip Murren, Esquire, to Howard Ulan, Esquire
- A-3 Discovery Item No. 6, Uncertified/Unregistered Facility Checklist Form
- A-4 Uncertified/Unregistered Facility Checklist Form, dated 1/24/97
- A-5 Complaint investigation Form
- A-6 3/18/97 Report
- A-7 Memo dated 4/24/97 from Jennifer Lau to Lorraine Bartholomew
- A-8 Copy of Apostolic Exhortation of His Holiness Pope John Paul II
- A-9 Copy of General Catechetical Directory
- A-10 Copy of Sharing The Light of Faith
- A-11 Copy of Preschool Manual, Diocese of Allentown
- A-12 I Am Special Preschool Activity Book
- A-13 Discovering God's World
- A-14 St. Elizabeth's Child Care Center Daily Schedule
- A-15 Occupancy Permit
- A-16 Copy of Chapter II Section 8A, Day Care Service for Children Day Care Centers
- A-17 Copy of Pennsylvania Bulletin, Volume 19 No. 44, 11/4/89
- A-18 Copy of Anti-Bias Curriculum, Tools for Empowering Young Children (Exhibit not accepted into evidence)
- A-19 Article, dated 12/31/96
- A-20 Job Announcement for Licensing Rep.
- A-21 Notice of unlicensed facility
- A-22 Memo dated 11/12/96 from Marylou Bray to Jennifer Lau
- A-23 Document
- A-24 Child Care Center Inspection Checklist

Issue

The issue in this case is whether the Department was correct in directing Appellant to cease and desist operation of its child day care center because it was operating the center without having received a Certificate of Compliance from the Department.

Findings of Fact

1. Jean Lozinger, a field representative for the Day Care Division, Bureau of Children, Youth and Families (C.Y.F.), Department of Public Welfare, who has twenty-two (22) years experience in conducting licensing and supervising visits to child care centers, had occasion as part of her duties to make an unannounced visit to Appellant's facility on January 24, 1997. (N.T. 20 - 22)

2. Ms. Lozinger arrived at St. Elizabeth's Child Care Center between 11:00 a.m. and noon on the morning of January 24, 1997, and spoke with the

director of the center, Ms. Kathy Garcia, who was "very cooperative and affable." (N.T. 23)

3. St. Elizabeth's Child Care Center is located at 431 North Pershing Boulevard, Whitehall, Pennsylvania, in Lehigh County. (N.T. 22, 23)

4. Ms. Lozinger walked through the center with Ms. Garcia and discussed "things that perhaps they could do to improve service to children." (N.T. 23)

5. Ms. Lozinger observed nineteen (19) children in care that day, January 24, 1997, which included two (2) infants up through twelve (12) months in age, four (4) young toddlers from thirteen (13) months through twenty-four (24) months in age, three (3) older toddlers from twenty-five (25) months through thirty-six (36) months in age, and ten (10) preschool children between three (3) years of age and up. (N.T. 24, 25)

6. Ms. Lozinger observed the infants in high chairs eating, the young toddlers preparing for an activity, the older toddlers and preschool children were "coloring" and doing some "arts and craft activity." (N.T. 25, 26)

7. Ms. Lozinger considered the activities she observed during her visit to St. Elizabeth's Child Care Center to be routine and similar to what she had observed in her visits to other child care centers at the time. (N.T. 27)

8. Ms. Lozinger did a "mini sight inspection," observing no toxic substances at the children's level or the changing areas, and inquired about the children's medications. (N.T. 28)

9. Ms. Lozinger did determine that the center "will take people from the community" in addition to children from the parish. In fact, two (2) of the nineteen (19) children in care on January 24, 1997 were non-parish members. (N.T. 28, EX. A-4, A-6)

10. On January 24, 1997, St. Elizabeth's Child Care Center did not possess a Certificate of Compliance from the Department to operate a child day care center. (N.T. 29, EX. A-5)

11. Ms. Lozinger, in performing her inspection duties of child care centers, treats non-profit facilities and for profit facilities "equally," the same. (N.T. 37)

12. Both types of facilities, if in compliance with applicable regulations, receive a Certificate of Compliance. (N.T. 38)

13. Both types of facilities, non-profit or for profit, would be subject to a cease and desist order if such facilities are not in compliance with pertinent regulations. (N.T. 39, 40)

14. Ms. Lozinger was directed by higher authority to return to St. Elizabeth's Child Care Center to conduct a follow-up inspection. (N.T. 54, EX. A-7)

15. Ms. Lozinger returned for a follow-up inspection of St. Elizabeth's Child Care Center on or about May 20, 1997 and was permitted access to the facility, but "didn't look as closely the second time as I did the first time." No negative findings were made. (N.T. 55 - 57)

16. Ms. Lozinger, in her capacity as a field representative for the Department would be called upon to make judgments as to whether the activities of the facility undergoing inspection meet the requirements of the promulgated regulations, such as whether the activities promote the development of social competence and self-esteem of the children. (N.T. 63)

17. Lorraine Bartholomew, the Regional Day Care Director for the Northeast Region, Division of Day Care Services, Department of Public Welfare, located in Scranton, Pennsylvania, is familiar with St. Elizabeth's Child Care Center. (N.T. 88)

18. Ms. Bartholomew indicated that the Department does not institute sanctions calling for fines against non-profit facilities governed by Article IX of the Public Welfare Code. (N.T. 89)

19. Monsignor Anthony Muntone, pastor of St. Elizabeth's Parish located in Whitehall, PA, and Vicar General of the Diocese in Allentown, is responsible to guide the people of his parish and to ensure that the activities of the parish are consistent with the teachings, laws and commandments of the Church. (N.T. 119, 120)

20. Monsignor Muntone explained that the activities of his parish, including the operation of the child care center, are guided by the concept of catechesis, that is, the need to educate and instruct people in accordance with the precepts of the church. (N.T. 122, 123, EX. A-8)

21. Within the concept of catechesis, as viewed by Monsignor Muntone, the early initiation of young children, including infants, in the teachings of the church, is critical. (N.T. 124, EX. A-8)

22. Monsignor Muntone further elaborated, that within the doctrine of the church, it is important to ensure that in the development of a child, including social development, the child is presented with norms that will guide the child's activities. (N.T. 127, EX. A-9)

23. Monsignor Muntone believes that the child care ministry at St. Elizabeth's begins with infancy. (N.T. 131)

24. The early childhood daycare program at St. Elizabeth's was begun in 1993. (N.T. 147)

25. Appellants concede that the Department has the right to regulate those matters "necessary to assure the health and safety of the children in a religious child care." (N.T. 150)

26. Virginia A. Downey, Director of St. Elizabeth's Child Care Center, has served in that position since April 1997. (N.T. 153)

27. There are eight (8) staff members employed at St. Elizabeth's Child Care Center, five (5) full-time employees and three (3) part-time employees. (N.T. 153)

28. On a normal day, St. Elizabeth's facility would have approximately twenty (20) children in care: no more than four (4) infants; four (4) young toddlers; five (5) older toddlers; and ten (10) preschool children. (N.T. 154)

29. The documents entered as Exhibits A-12 and A-13 are not utilized in the day care center but are used in the preschool program which is separate. (N.T. 160)

30. Theresa A. Gutshall, an integrator of computer information solutions for Pennsylvania Power and Light, is a member of St. Elizabeth's Parish and has one (1) child, Ryan, born on January 27, 1996. (N.T. 162)

31. Ms. Gutshall enrolled Ryan at St. Elizabeth's Day Care Center because it was her parish and the original center she picked, closer to her residence, had "no room." (N.T. 162, 163)

32. Ms. Gutshall is "really happy" with the care Ryan receives and the influence of religion at the center. (N.T. 163)

33. Susan E. Collier, a wraparound coordinator in the Northampton Junior High School, is a member of St. Elizabeth's Parish and has two (2) children, Andrew and Matthew with dates of birth January 4, 1991 and October 14, 1994 respectively. (N.T. 167, 168)

34. Ms. Collier's children are enrolled at St. Elizabeth's, Andrew in the elementary school and Matthew in the child care center. (N.T. 168, 169)

35. Ms. Collier chose St. Elizabeth's programs because of the affiliation with the church and is very pleased with the "religious care and training" her children receive. (N.T. 169)

36. Monsignor Joseph Kurtz, director of Catholic Charities, explained that the Pennsylvania Catholic Conference is the public service arm of the Catholic Church in the Commonwealth of Pennsylvania and he has been involved with the Conference since 1977. (N.T. 174)

37. Monsignor Kurtz stressed that the Catholic Church is a non-profit religious and charitable institution in Pennsylvania and is covered under Article IX of the Public Welfare Code. (N.T. 176)

38. Monsignor Kurtz acknowledges that "we [the Church] always recognize under Title 9 [Article IX, Title 62] the responsibility of the State to ensure the safety and health [of the children in care], . . . we recognize that." But the Church objects to regulating the ministry of the Church and the ability "to give us prior approval to exist." (N.T. 179)

39. Monsignor Kurtz objects to State regulation related to the social development of the child and to the "nondiscrimination" clause [See, 55 Pa. Code 3270.26] in the regulations, because he believes the Church must be permitted to hire those who support their ministry. (N.T. 186)

40. Karen E. Kroh, licensing manager for the Cross Systems Licensing Project, Office of Policy Development, the Department, makes policy decisions with respect to broad enforcement of procedures dealing with human services, including child care. (N.T. 217, 218)

41. Ms. Kroh believes safety, as used in Department Regulations, can be reasonably accepted as being injury prevention while health is viewed in the sense of physical health. (N.T. 225, 226)

42. Ms. Kroh indicated that certain regulations based on a broader definition of health, such as mental health and emotional health, are being identified for "potential regulatory revision" such as 55 Pa. Code § 3270.101, 3270.111, and 3270.116. (N.T. 227, 228)

43. Ms. Kroh believes the regulatory standards for staff to child ratios, staff qualifications are now "minimum," "fairly minimal" but these would be discussed and researched. (N.T. 229, 230)

44. Ms. Kroh emphasized that one of the basic things the Department teaches and practices is the normal and routine revision of all regulations in a process that takes place about every five or six years. (N.T. 233)

45. There is no exemption in Articles IX or X for religious child care facilities. (N.T. 242)

46. Jennifer Lau, a policy specialist with the Bureau of Child Day Care Services of the Department, drafts and researches regulation policy and prepares enforcement actions for the Department. (N.T. 283)

47. Ms. Lau was familiar with the checklist used by the Department's regional child day care offices in performing their inspections of local child day care centers. (N.T. 285)

48. The regions conduct their own training using Departmental material for their licensing representatives. (N.T. 286)

49. The Department has approximately fifty-five (55) licensing representatives for child day care center inspections. (N.T. 289)

50. Ms. Lau recalled that the Department has currently issued Certificates of Compliance to approximately fifty (50) Roman Catholic affiliated day care facilities. (N.T. 333)

51. About seventy (70) percent of these Roman Catholic affiliated day care facilities have had a Certificate of Compliance for more than five (5) years. (N.T. 333)

52. The Department has not received any complaints from the Roman Catholic affiliated day care facilities that have Certificates of Compliance that Department regulations are interfering with the religious practices of the facilities. (N.T. 334)

53. Doctor Fred Darnley, who holds a doctoral degree in child development, currently serves as a North Carolina child care commissioner, a body which oversees that state's Department of Public Welfare, and was accepted as an expert witness on child development. (N.T. 348)

54. Doctor Darnley has an opportunity in his regular operations to visit and observe day care facilities including religiously operated day care facilities. (N.T. 350)

55. On February 12, 1998, Doctor Darnley visited the child care facilities at St. Elizabeth's and found it to be a "finely-run" facility. (N.T. 351)

56. Doctor Darnley observed that North Carolina does not require religious affiliated child care centers to obtain a license before they operate. (N.T. 358)

57. Doctor Darnley conceded that North Carolina does require a religious affiliated child care center to "file a letter" with the State Division of Child Development to inform that agency that they are commencing operations and they must adhere with regulations "everything clustered around the health and safety parameters." (N.T. 360)

58. Doctor Darnley was "not aware of any studies [dealing with daycare facilities] that broke out religious centers from non-religious based centers." (N.T. 366)

59. Karen Kroh, a Department official, was recalled as a witness and based on her position as president of the National Association of Regulatory Administrators (NARA) explained that forty-one (41) of the United States

require a licensure process and regulation of religiously affiliated and operated child care facilities. (N.T. 373)

60. Nine states provide exemption for religious affiliated facilities and several states, including New Jersey, moved from exemption to no exemption as late as the 1980s. (N.T. 373)

61. Doctor Richard Fiene, a consultant with the Department and a research psychologist and assistant professor of psychology and education, Pennsylvania State University, was accepted as an expert witness in the field of child development and research on day care. (N.T. 380, 381, EX. C-4)

62. Doctor Fiene was familiar with a research project started in the 1970s dealing with the National Child Care Study done to look at the impact of regulation on children's development, health, safety, and overall program quality, and research on the same subjects which has continued to the present. (N.T 381, 382)

63. Doctor Fiene summarized the major findings of such research as: a) staff/child ratio is a key determinant of overall quality; b) group size is another key indicator of quality; and c) staff qualification and training in early childhood development is vital to high quality. (N.T. 382, 383)

64. These factors correlate with how well children are doing in child care programs both from a health and safety standpoint as well as a child development standpoint. (N.T. 384)

65. Doctor Fiene conceded that in studying the effectiveness of child care regulations in the development of children "you can't do a cause and effect directly." In other words, other factors than prescribed regulations, such as family influences and socioeconomic background, for instance, would have to be considered. (N.T. 403, 404)

66. Doctor Fiene, in his research, did not find any statistically significant difference between religious and non-religious facilities that are licensed, in their compliance with regulations. (N.T. 405)

67. Doctor Fiene found in his research that day care centers scored higher than family day care homes, as to overall quality of care, on a nationwide basis. (N.T. 407, 408)

68. The Department sent the Appellant facility a Cease and Desist Order to cease operation of an uncertified child day care facility, on April 18, 1997.

69. Appellant filed their appeal with the Department on May 1, 1997.

Discussion

Appellant appeals the decision of the Department to issue a Cease and Desist order to cease operation of an uncertified child day care facility on the basis that the Department has no legal right to require Appellant to secure a Certificate of Compliance.

The Department's Position

The Appellant is a day care center and as such is required to possess a Certificate of Compliance to operate. Title 55 Pa. Code Chapter 20 and Chapter 3270 are lawfully promulgated regulations authorized by Article IX of the Public Welfare Code. Appellant has no constitutional, statutory, or regulatory exemption from such regulations due to their religious affiliation.

The Appellant's Position

The Department lacks statutory authority to require that a non-profit religious affiliated child care center obtain a Certificate of Compliance in order to operate. Also, they argue that under the statutory framework of Article IX of the Public Welfare Code, the Department has no authority to order the Appellant to close its child care facility. Further, Appellant argues that application of the Department's licensing and regulatory scheme to St. Elizabeth's Child Care Center would violate the "religious clauses" of the United States Constitution and the religious liberty clauses of the Pennsylvania Constitution.

Applicable Law

PENNSYLVANIA STATUTES –
TITLE 62. POOR PERSONS AND PUBLIC WELFARE
CHAPTER 1, PUBLIC WELFARE CODE
ARTICLE IX. DEPARTMENTAL POWERS AND DUTIES AS TO SUPERVISION

62 P.S. § 901 (2004)

§ 901. Definitions

As used in this article–

"CHILDREN'S INSTITUTIONS" means any incorporated or unincorporated organization, society, corporation or agency, public or private, which may receive or care for children, or place them in foster family homes, either at board, wages or free; or any individual who, for hire, gain or reward, receives for care a child, unless he is related to such child by blood or marriage within the second degree; or any individual, not in the regular employ of the court or of an organization, society, association or agency, duly certified by the department, who in any manner becomes a party to the placing of children in foster homes, unless he is related to such children by blood or marriage within the second degree, or is the duly appointed guardian thereof. The term

shall not include a family day care home in which care is provided in lieu of parental care to six or less children for part of a twenty-four hour day. [Emphasis added]

62 P.S. § 902 (2004)

§ 902. Supervisory powers

The department shall have supervision over:

(1) All State institutions;

(2) All supervised institutions;

(3) All children's institutions within this Commonwealth; . . .

62 P.S. § 911 (2004)

§ 911. Visitation and inspection

(a) The department shall have the power, and its duty shall be:

(1) To make and enforce rules and regulations for a visitation, examination and inspection of all supervised institutions and said visitation, examination or inspection may occur both before and after the beginning of operation of the supervised facility. [Emphasis added]

(2) To visit and inspect, at least once in each year, all state and supervised institutions; to inquire and examine into their methods of instruction, discipline, detention, care or treatment, the care, treatment, government or management of their inmates or those committed thereto, or being detained, treated or residing therein, the official conduct of their inspectors, trustees, managers, directors or other officer or officers charged with their management by law or otherwise, or having the management, care, custody or control thereof, the buildings, grounds, premises, and equipment thereof, or connected therewith, and all and every matter and thing relating to their usefulness, administration, and management, and to the welfare of the inmates thereof, or those committed thereto or being detained, treated or residing therein.

(b) For these purposes and for the purpose of determining whether or not a facility should be subject to the supervision of the department in accordance with section 902, the secretary, or other officer, inspector or agent of the department, shall have free and full access to the grounds, premises, and buildings of and to all the records, books or papers of or relating to any such State or supervised institution, and full opportunity to interrogate or interview any inmate thereof, or any person or persons committed to or being detained, treated or residing therein, and all persons connected with any such State or supervised institution as officers, or charged with the management, thereof, by law or otherwise, or in any way having the care, custody, control, or management thereof, or connected therewith as employees, are hereby directed and required to give to the secretary, or to such officer, inspector or agent of the department, such means,

facilities and opportunity for such visitation, examination, inquiry and interrogation, as is hereby provided and required, or as the department, by its duly ordained rules or regulations, may require.

GENERAL PROVISIONS

55 PA. CODE

§ 20.1. Purpose.

The purpose of this chapter is to specify:

(1) Procedures for the application for a certificate of compliance.

55 PA. CODE

§ 20.2. Applicability.

(a) This chapter applies to facilities and agencies subject to licensure or approval under Articles IX and X of the Public Welfare Code (62 P.S. § § 901—922 and 1001-1080).

55 PA Code

§ 20.3. Legal Base.

The legal authority for this chapter is Articles IX and X of the Public Welfare Code (62 P.S. § § 901—922 and 1001—1080).

55 PA Code

§ 20.4. Definitions.

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

Approval—Certification of compliance with program regulations promulgated under Article IX of the Public Welfare Code (62 P.S. § § 901—922).

Certificate of compliance—A document issued to a legal entity permitting it to operate a specific type of facility or agency, at a given location, for a specific period of time, and according to appropriate Departmental program licensure or approval regulations.

55 PA Code

§ 20.11. Responsibility.

In addition to complying with the procedural regulations set forth in this chapter, the legal entity shall comply with the Department's program licensure or approval regulations for the particular type of facility or agency which the legal entity operates.

55 PA Code

§ 20.21. Application form.

(a) The legal entity responsible for a facility or agency subject to approval under Article IX of the Public Welfare Code (62 P.S. § § 901—922) shall submit an application for a certificate of compliance prior to the inspection and issuance of a certificate of compliance by the Department.

CERTIFICATE OF COMPLIANCE

55 PA Code

§ 20.51. Issuance.

A certificate of compliance will be issued to the legal entity by the Department if, after an inspection by an authorized agent of the Department, it is determined that requirements for a certificate of compliance are met.

55 PA Code

§ 20.35. Regular certificate of compliance.

A regular certificate of compliance is issued if the facility or agency is in compliance with applicable statutes, ordinances and regulations.

55 PA Code

§ 3270.2. Purpose.

The purpose of this chapter is to provide standards to aid in protecting the health, safety and rights of children and to reduce risks to children in child day care centers. This chapter identifies the minimum level of compliance necessary to obtain the Department's certificate of compliance.

55 PA Code

§ 3270.3. Applicability.

(a) This chapter applies to facilities in which out-of-home care is provided, at any one time, for part of a 24-hour day to seven or more children, 15 years of age or younger, including:

(2) Care provided in private or public, profit or nonprofit facilities.

(3) Care provided before or after the hours of instruction in nonpublic schools and in private nursery schools and kindergartens.

(c) A legal entity seeking to operate a child day care facility as defined in this chapter shall apply for an initial or renewal certificate of compliance in accordance with the requirements established in Chapter 20 (relating to licensure or approval of facilities and agencies).

55 PA Code

§ 3270.4. Definitions.

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

Certificate of compliance—A document issued by the Department to a legal entity permitting the entity to operate a specific type of facility at a specific location for a specific period of time according to applicable Department regulations. A certificate of compliance approves the operation of a facility subject to Article IX of the act (62 P.S. § § 901—922) or licenses the operation of a facility subject to Article X of the act (62 P.S. § § 1001—1087).

Child day care center—The premises in which care is provided at any one time for seven or more children unrelated to the operator.

GENERAL REQUIREMENTS

55 PA Code

§ 3270.11. Application for and issuance of a certificate of compliance.

(a) A legal entity shall obtain a valid certificate of compliance to operate at a specific location. The certificate of compliance will be issued by the Department to a legal entity prior to commencement of operation at a specified location.

Cross References

This section cited in 55 Pa. Code § 3270.241 (relating to requirements specific to school-age programs).

55 PA Code

§ 3270.13. Waivers.

(a) A waiver excuses an operator from meeting a regulatory standard and substitutes another standard which the operator shall meet. The substituted standard has the same legal effect as the regulatory standard.
(b) The operator shall submit the request for waiver to the regional office before the facility is inspected for issuance or renewal of a certificate of compliance.
(c) An operator may request a waiver of only the regulatory standards in the following sections:
(1) Accreditation requirements which apply to § § 3270.34—3270.36 (relating to director qualifications and responsibilities; group supervisor qualifications and responsibilities; and assistant group supervisor qualifications and responsibilities.)
(2) Physical site requirements in § § 3270.61—3270.82 (relating to physical site).
(3) Equipment requirements in § § 3270.101—3270.108 (relating to equipment).
(4) Program requirements in § § 3270.111—3270.118 (relating to program).
(d) The Department will grant a waiver only if the following conditions are met:
(1) The waiver is not requested as a substitute for correcting a Departmental citation of noncompliance.
(2) The request for waiver does not alter the applicability or purpose of a regulation.

55 PA Code

§ 3270.24. Departmental access.

(a) A staff person shall provide to agents of the Department immediate access to the facility and, upon request, to the children and the files and records.

(b) An inspection will be conducted during normal business hours except when there is reasonable cause to believe that inspections at other times are necessary to detect violations of applicable laws and regulations.

55 PA Code

§ 3270.24a. Departmental access—statement of policy.

Agents of the Department will inspect the safety of all areas of the child day care facility premises that are accessible to children.

<u>Administrative Law Judge's Opinion</u>

In the instant hearing the Administrative Law Judge is constrained by the provisions of Title 1 Pa. Code § 35.187(10) to take such action necessary or appropriate to the discharge of his duties consistent with the statutory or other authorities under which the Agency functions and with the regulations and policies of the Agency. In this regard the Administrative Law Judge may not set aside regulations or rule on issues of

Constitutionality. However, it is the duty of the Administrative Law Judge to permit the parties to raise and support such issues, where pertinent, and to make recommendations as to their disposition.

Appellant is a non-profit child care center affiliated with the Roman Catholic Church which receives children for care, thus covered within the provisions of Title 62, Chapter 1, Public Welfare Code, Article IX, § 901. (supra) (See also Title 55 Pa. Code § 3270.4, Definitions)

On January 24, 1997, a field representative of the Department of Public Welfare (Department) made an unannounced visit to Appellant facility on an unrelated matter, was received very cordially by the Director of the center, observed nineteen (19) children in care and then learned that St. Elizabeth's Child Care Center did not possess a Certificate of Compliance from the Department to operate a child day care center. (F.F. 1-10) The Department sent Appellant a Cease and Desist order to cease operation of an uncertified child day care facility on April 18, 1997. (EX. C-2) Appellant filed their appeal with the Department on or about May 1, 1997.

The Appellant claims that the Department lacks statutory authority to require that a non-profit religious affiliated child care center obtain a Certificate of Compliance in order to operate. (Appellant's Brief) While the Appellant concedes that the Department has the right to regulate those matters "necessary to assure the health and safety of the children in a religious child care" facility, the Appellant does not believe Article IX of the Public Welfare Code gives the right to the Department to order the cessation of the day care operations for failure to obtain Department approval to operate. (N.T. 25, Appellant's Brief)

The Administrative Law Judge, upon close examination of Article IX of the Public Welfare Law, Departmental Powers and Duties as to Supervision, believes that statute provides sufficient basis for the Department's position:

a. Section 901, Definitions, includes child care facilities in its definition of children's institutions as any organization, society, corporation or agency, public or private, which may receive or care for children. 62 P.S. § 901.
b. Section 902, grants Supervisory Powers to the Department over (2) all supervised institutions and (3) all "children's institutions within the Commonwealth."
c. Section 911, Visitation and Inspection, gives the Department power to (1) "make and enforce rules and regulations for a visitation, examination and inspection of all supervised institutions" and these activities "may occur both <u>before</u> and after the beginning of operation of the supervised facility." [Emphasis added.] The primary purpose of that provision must be to approve operations. Subsection (2)(b) of this section, in giving authority to the Department to carry out its supervisory duties, states, in the disjunctive, "or as the Department, by its duly ordained rules or regulations, may require," clearly a grant of authority to promulgate rules and regulations that the Department requires to carry out its duties.

The Supreme Court of Pennsylvania had occasion to examine Article IX of the Public Welfare Code, as amended, in Hospital Association of Pennsylvania v. Secretary of Health and the Department of Health of the Commonwealth of Pennsylvania, 410 A. 2d 731, (Pa. 1980), when the Hospital Association of Pennsylvania and others, contended that state regulations governing "general and special hospitals" were promulgated without statutory authority by the Appellees. The Supreme Court agreed with Appellees and the Commonwealth Court "that ample basis for the challenged regulations is provided by Article IX of the Public Welfare Code." (Id., opinion of the court, p. 732) While this decision dealt with hospitals, the Supreme Court examined with approval the supervisory powers of § 902, and the powers of enforcement in § 911. The Appellant's attempt to distinguish this case because it dealt with hospitals and with amendments to the Public Welfare Code dealing with hospitals (to conform to the Social Security Act). But the comments of the Supreme Court dealing with § 902 and § 911 of Article IX are very clear and convincing as to the powers of the Department as set forth in the Public Welfare Code.

The provisions of 55 Pa. Code § 20.1 et. seq. and 55 Pa. Code § 3270.1 et. seq., are clear and unambiguous. In their brief Appellant states "St. Elizabeth's concedes that the Department's regulations, on their face, require it to obtain a license and comply with all of the Department's substantive requirements relating to child care centers in order to operate." (Brief of Appellant, Page 26) However, as set forth above, the Appellant questions the authority of the Department to "license" a non-profit religious affiliated child care center. In approaching this issue it is significant to note that regulations having the scope and effect of Chapter 20, and Chapter 3270 were first promulgated in 1978--this is undisputed. Secondly, the Department, at the time of the hearing, had currently issued Certificates of Compliance to approximately fifty (50) Roman Catholic affiliated day care facilities. (F.F. 50) The Department had received no complaints from these religiously affiliated day care centers that had Certificates of Compliance that the Department was interfering with the religious practices of the facilities. (F.F. 52) Thirdly, forty one (41) of the United States require a licensure process and regulation of religiously affiliated and operated child care facilities. (F.F. 59)

As pointed out in Appellant's brief, Appellants also claim that the Department's regulations will interfere with their hiring practices.

The Appellee's correctly respond on this issue that concern regarding staff and hiring decisions and compliance with the civil right statutes is unfounded as a matter of law. Section 702 of the Civil Rights Act of 1964, 78 Stat. 155, as amended 42 U.S.C. 2000e-1, exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion.

> Section 702 provides in relevant part: "This subchapter [i.e., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq.] shall not apply . . . to a religious corporation, association, educational institution, or society

with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." § 702 Civil Rights Act of 1964, 72 Stat. 255, as amended, 42 U.S.C . § 2000e-1.

Accordingly, Appellant's staffing and hiring decisions fall within the 702 exemption of the Civil Rights Act. It should also be noted that any liability there may be for discrimination claims against Appellant would be the same with or without the Department's certification.

The main objection of the Appellant is that government regulation of their child care facility interferes with the free exercise of their religion and thus violates the First Amendment of the United States Constitution and Article 1, Section 3, of the Constitution of the Commonwealth of Pennsylvania. At the time of hearing, Appellants took the position that state regulations that burden the free exercise of religion must be evaluated under a balancing test and supported by a compelling interest and that the state regulations do not represent the least restrictive means of furthering the government's legitimate interests. (Appellants' brief p. 45) However, in Employment Division v. Smith, 494 U.S. 872.110 S. Ct. 1595 (1990), the United States Supreme Court concluded:

> [We] conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [Balancing] test inapplicable to such challenges. [To] make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds*—contradicts both constitutional tradition and common sense. (Id. 110 S. Ct. at 1603)

The Department argues that the free exercise claim is irrelevant to this case and further, that Appellant failed to include their religious claims under the Constitution of the Commonwealth of Pennsylvania in a timely manner. The Administrative Law Judge believes Appellant has a right to include both claims, (i.e. including those under the Constitution of the Commonwealth of Pennsylvania) as amendments to pleadings, 1 Pa. Code § 33.41 and 1 Pa. Code § 35.48, and as implicit in the matters raised by Appellant. Also, it appears the Supreme Court of the Commonwealth considers all religious claims within the framework of both the U.S. and Pennsylvania Constitutions.

As noted above, Appellant accepts those regulations dealing with health and safety. Appellant does not accept the regulations dealing with daily activities, 55 Pa. Code § 3270.111 or "child development." It must be indicated that the regulations are subject to appeals and waivers (55 Pa. Code § 3270.12 and 3270.13) and undergo continuing scrutiny by the Department with changes as necessary.(F.F. 44) The regulations are written to cover all child care centers in the Commonwealth that fall under the provisions of the Public Welfare Law and must be viewed in that perspective. The regulations apply to centers which would probably require very little scrutiny and

also to centers that might require a great deal of supervision. The fact of the matter is that the regulations deal with matters pertaining to health and safety and only incidentally to other matters essential to a well run child day care facility. Also, no complaint of interference by the Commonwealth in the religious aspects of Appellant's child day care center was submitted by the Appellant or the other Catholic child day care facilities similarly situated and presently covered by Certificates of Compliance.(F.F. 52)

The Administrative Law Judge has respectfully and carefully considered all matters raised by the parties to this hearing and finds that Appellant is a child day care center and is required to possess a Certificate of Compliance to operate; Title 55 Pa. Code Chapter 20 and Chapter 3270 are lawfully promulgated regulations authorized by Article IX of the Public Welfare Code; and there is no constitutional or statutory or regulatory exemption for religiously affiliated child day care centers.

Therefore, for the foregoing reasons, the Administrative Law Judge recommends that the appeal of the Appellant be denied.

APPENDIX B

SENATE AMENDED

PRIOR PRINTER'S NOS. 785, 3023, 3217, 3269

Printer's No. 3409

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 694 Session of 1975

INTRODUCED BY MRS. A. P. KELLY, MESSRS. DiCARLO, USTYNOSKI, McLANE, DIETZ, FEE, REED, BERLIN, McCLATCHY AND HILL, MARCH 11, 1975

SENATOR CIANFRANI, APPROPRIATIONS, IN SENATE, RE-REPORTED AS AMENDED, JUNE 8, 1976

AN ACT

1 Amending the act of June 13, 1967 (P.L.31, No.21), entitled "An
2 act to consolidate, editorially revise, and codify the public
3 welfare laws of the Commonwealth," ADDING A DEFINITION AND
4 FURTHER PROVIDING FOR ADMINISTRATION OF, ELIGIBILITY FOR, <--
5 QUALIFICATIONS OF AND ALLOWANCES TO RECIPIENTS OF ASSISTANCE
6 PROVIDING FOR THE PREPAYMENT OF CONTRACTED MEDICAL SERVICES
7 AND further providing for the right to inspect facilities. <--

8 The General Assembly of the Commonwealth of Pennsylvania
9 hereby enacts as follows:

10 SECTION 1. SECTION 402, ACT OF JUNE 13, 1967 (P.L.31, <--
11 NO.21), KNOWN AS THE "PUBLIC WELFARE CODE," AMENDED DECEMBER 12, <--
12 1973 (P.L.403, NO.143), IS AMENDED ~~BY ADDING A DEFINITION~~ TO <--
13 READ:

14 SECTION 402. DEFINITIONS.--AS USED IN THIS ARTICLE:

15 * * *

16 "ASSISTANCE" MEANS MONEY, SERVICES, GOODS, SHELTER, BURIAL <--
17 AND MEDICAL, CHIROPRACTIC AND OTHER HEALTH CARE, INCLUDING
18 NURSING HOME CARE PROVIDED FROM OR WITH STATE, FEDERAL, COUNTY,
19 COUNTY INSTITUTION DISTRICT OR MUNICIPAL FUNDS, FOR NEEDY

1 STATEMENT IN CONNECTION WITH ANY DISCLOSURE REQUIRED BY SAID
2 SECTION, SHALL BE GUILTY OF A MISDEMEANOR, AND UPON CONVICTION
3 THEREOF, SHALL BE SENTENCED TO PAY A FINE NOT EXCEEDING ONE
4 THOUSAND DOLLARS ($1000).
5 SECTION 911. VISITATION AND INSPECTION.--(A) THE DEPARTMENT <--
6 SHALL HAVE THE POWER, AND ITS DUTY SHALL BE:
7 (1) TO MAKE AND ENFORCE RULES AND REGULATIONS FOR A
8 VISITATION, EXAMINATION AND INSPECTION OF ALL SUPERVISED
9 INSTITUTIONS AND SAID VISITATION, EXAMINATION OR INSPECTION MAY
10 OCCUR BOTH BEFORE AND AFTER THE BEGINNING OF OPERATION OF THE
11 SUPERVISED FACILITY.
12 (2) TO VISIT AND INSPECT, AT LEAST ONCE IN EACH YEAR, ALL
13 STATE AND SUPERVISED INSTITUTIONS; TO INQUIRE AND EXAMINE INTO
14 THEIR METHODS OF INSTRUCTION, DISCIPLINE, DETENTION, CARE OR
15 TREATMENT, THE CARE, TREATMENT, GOVERNMENT OR MANAGEMENT OF
16 THEIR INMATES OR THOSE COMMITTED THERETO, OR BEING DETAINED,
17 TREATED OR RESIDING THEREIN, THE OFFICIAL CONDUCT OF THEIR
18 INSPECTORS, TRUSTEES, MANAGERS, DIRECTORS OR OTHER OFFICER OR
19 OFFICERS CHARGED WITH THEIR MANAGEMENT BY LAW OR OTHERWISE, OR
20 HAVING THE MANAGEMENT, CARE, CUSTODY OR CONTROL THEREOF, THE
21 BUILDINGS, GROUNDS, PREMISES, AND EQUIPMENT THEREOF, OR
22 CONNECTED THEREWITH, AND ALL AND EVERY MATTER AND THING RELATING
23 TO THEIR USEFULNESS, ADMINISTRATION, AND MANAGEMENT, AND TO THE
24 WELFARE OF THE INMATES THEREOF, OR THOSE COMMITTED THERETO OR
25 BEING DETAINED, TREATED OR RESIDING THEREIN.
26 (B) FOR THESE PURPOSES AND FOR THE PURPOSE OF DETERMINING
27 WHETHER OR NOT A FACILITY SHOULD BE SUBJECT TO THE SUPERVISION
28 OF THE DEPARTMENT IN ACCORDANCE WITH SECTION 902, THE SECRETARY,
29 OR OTHER OFFICER, INSPECTOR OR AGENT OF THE DEPARTMENT, SHALL
30 HAVE FREE AND FULL ACCESS TO THE GROUNDS, PREMISES, AND

1 BUILDINGS OF AND TO ALL THE RECORDS, BOOKS OR PAPERS OF OR
2 RELATING TO ANY SUCH STATE OR SUPERVISED INSTITUTION, AND FULL
3 OPPORTUNITY TO INTERROGATE OR INTERVIEW ANY INMATE THEREOF, OR
4 ANY PERSON OR PERSONS COMMITTED TO OR BEING DETAINED, TREATED OR
5 RESIDING THEREIN, AND ALL PERSONS CONNECTED WITH ANY SUCH STATE
6 OR SUPERVISED INSTITUTION AS OFFICERS, OR CHARGED WITH THE
7 MANAGEMENT, THEREOF, BY LAW OR OTHERWISE, OR IN ANY WAY HAVING
8 THE CARE, CUSTODY, CONTROL, OR MANAGEMENT THEREOF, OR CONNECTED
9 THEREWITH AS EMPLOYES, ARE HEREBY DIRECTED AND REQUIRED TO GIVE
10 TO THE SECRETARY, OR TO SUCH OFFICER, INSPECTOR OR AGENT OF THE
11 DEPARTMENT, SUCH MEANS, FACILITIES AND OPPORTUNITY FOR SUCH
12 VISITATION, EXAMINATION, INQUIRY AND INTERROGATION, AS IS HEREBY
13 PROVIDED AND REQUIRED, OR AS THE DEPARTMENT, BY ITS DULY
14 ORDAINED RULES OR REGULATIONS, MAY REQUIRE.
15 * * *
16 Section ~~1-7.~~ ~~8.~~ 9. Section 1016 OF THE act ~~of June 13, 1967~~ <--
17 ~~(P.L.31, No.21), known as the "Public Welfare Code,"~~ is amended
18 to read:
19 Section 1016. Right to Enter and Inspect.--For the purpose
20 of determining the suitability of the applicants and of the
21 premises or whether or not any premises in fact qualifies as a
22 facility as defined in section 1001 of this act or the
23 continuing conformity of the licensees to this act and to the
24 applicable regulations of the department, any authorized agent
25 of the department shall have the right to enter, visit and
26 inspect any facility licensed or requiring a license under this
27 act and shall have full and free access to the records of the
28 facility and to the individuals therein and full opportunity to
29 interview, inspect or examine such individuals.
30 An authorized agent of the department shall also confer with

1 the operators of facilities regarding the minimum standards of
2 the department, encourage the adoption of higher standards and
3 recommend methods of improving care and services.

4 SECTION ~~8. 9.~~ 10. (A) ~~SUBSECTION (B) OF SECTION~~ SECTION 3, <--
5 ACT OF JUNE 24, 1937 (P.L.2045, NO.397), KNOWN AS "THE SUPPORT
6 LAW," IS REPEALED IN SO FAR AS IT IS INCONSISTENT HEREWITH.

7 (B) ALL OTHER ACTS AND PARTS OF ACTS, GENERAL, LOCAL AND
8 SPECIAL, ARE REPEALED IN SO FAR AS THEY ARE INCONSISTENT
9 HEREWITH.

10 SECTION ~~9. 10.~~ 11. IF ANY PROVISION OF THIS ACT SHALL BE <--
11 HELD INVALID, THE REMAINDER OF THIS ACT SHALL NOT BE AFFECTED
12 THEREBY.

13 SECTION ~~10. 11.~~ 12. THIS ACT SHALL APPLY ALSO TO THOSE <--
14 FACILITIES TRANSFERRED TO THE DEPARTMENT OF HEALTH BY
15 REORGANIZATION PLAN NO. 3 OF 1975.

16 Section ~~2 11. 12.~~ 13. This act shall take effect in 60 days. <--

APPENDIX C

APPENDIX A
CIVIL RIGHTS COMPLIANCE—STATEMENT OF POLICY

(a) A facility shall comply with the following statutes and regulations thereunder that prohibit discrimination on the basis of race, color, religious creed, disability, handicap, ancestry, national origin, age or sex:

(1) The Pennsylvania Human Relations Act (43 P. S. §§ 951—962.2).

(2) The Age Discrimination Act of 1975 (42 U.S.C.A. §§ 6101—6107).

(3) Title VI of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000d—2000d-4), if applicable.

(4) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. § 794), if applicable.

(5) Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e—2000e-17), if applicable.

(b) A Certificate of Compliance will not be granted to a provider unless there has been compliance with civil rights laws and applicable regulations.

(c) Applicants, clients or staff will not be discriminated against because of race, color, religious creed, disability, handicap, ancestry, national origin, age or sex and shall observe applicable State and Federal statutes and regulations.

(d) The facility shall develop and implement civil rights policies and procedures for clients and staff in accordance with applicable civil rights laws and regulations which include the following:

(1) A nondiscrimination policy which states that admissions, referrals, services and employment actions are provided without regard to race, sex, color, national origin, ancestry, religious creed, disability, handicap or age.

(2) Reasonable physical accommodations and program accessibility to staff or clients with physical disabilities.

(3) A procedure by which staff and clients can file complaints alleging discrimination and have their complaints investigated and resolved objectively which includes the name of the person assigned to investigate the complaint.

Source

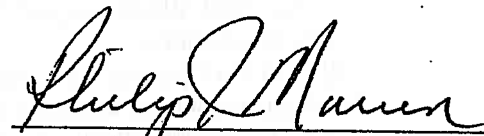
The provisions of this Appendix A adopted March 16, 1990, effective March 17, 1990, 20 Pa.B. 1516.

Certificate of Service

I hereby certify that I am this day serving the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Sevice by first class mail addressed as follows:
John A. Kane, Esquire
Chief Counsel
Department of Public Welfare
3rd Floor West, Health and Welfare Bldg.
Harrisburg, PA 17120

Dated: Dec. 5, 2005



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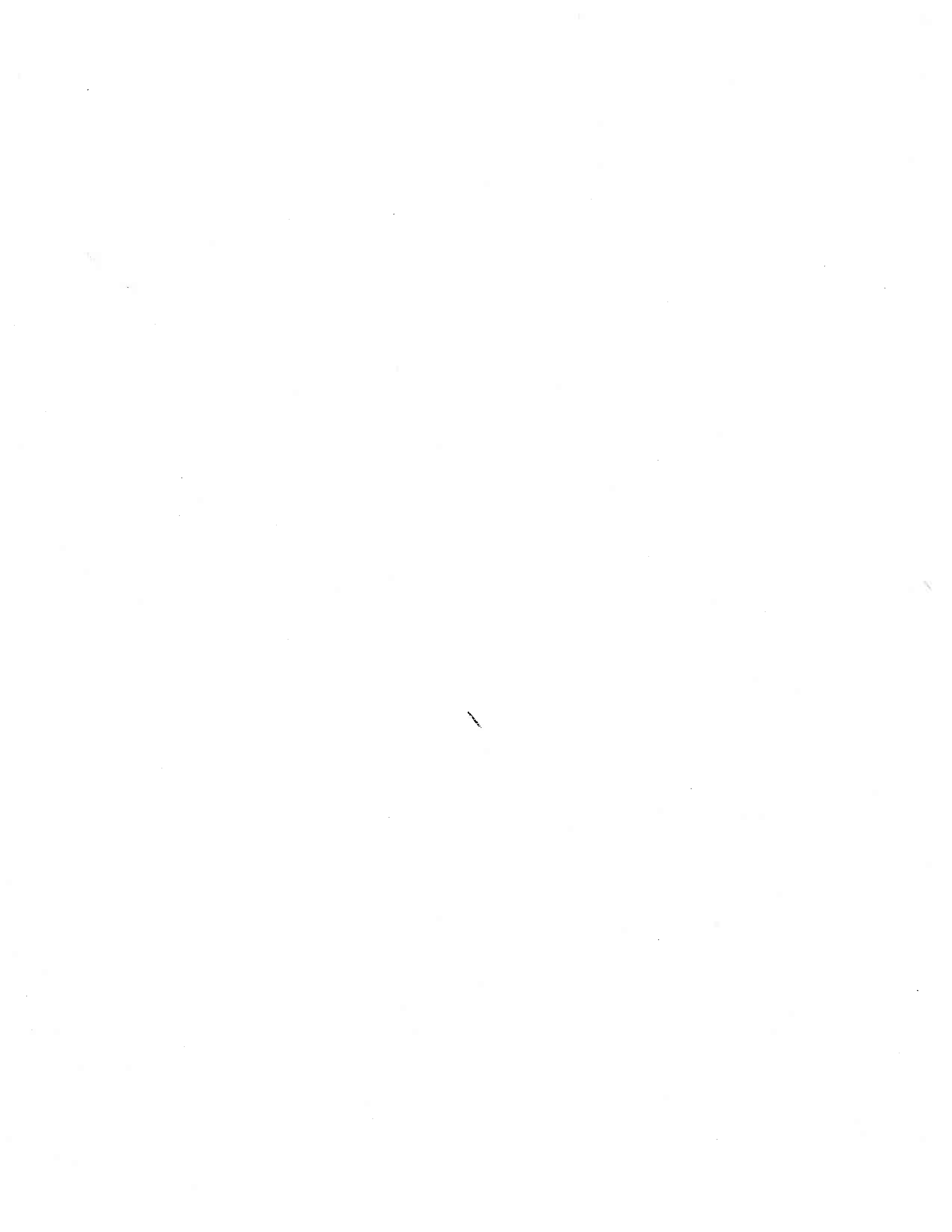

IN THE COMMONWEALTH COURT

OF PENNSYLVANIA

NO. 1751 COMMONWEALTH DOCKET 2005

ST. ELIZABETH'S CHILD CARE CENTER

Petitioner

V.

DEPARTMENT OF PUBLIC WELFARE

Respondent

REPLY BRIEF FOR PETITIONER

Petition for Review of the July 29, 2005 Final Order of the Department of Public Welfare, Bureau of Hearings and Appeals, denying the appeal of St. Elizabeth's Child Care Center, Docket No. 18-97-038.

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ARGUMENT

I. NO STATUTE PERMITS DPW TO REQUIRE, BY REGULATION, THAT A NON-PROFIT RELIGIOUS CHILD CARE MINISTRY BE LICENSED AND IN COMPLIANCE WITH ALL OF DPW's SUBSTANTIVE REGULATIONS IN ORDER TO OPERATE.

As set forth in St. Elizabeth's opening brief ("Petitioner's Brief"), it is well-settled that regulations must be authorized by statute in order to be valid, and that a regulation may not conflict with a provision of the statute pursuant to which it was allegedly promulgated. See, Petitioner's Brief at 23-24. See also, cases cited by DPW at 13-14, which state that regulations are valid if they are within the scope of their statutory authority, were issued pursuant to proper procedures, and are not clearly erroneous.

Specifically, St. Elizabeth's made the following statutory arguments: 1) There is no express language in Article IX which authorizes the Department to license religious child care ministries or to require compliance with its broad substantive regulations as a condition of operation; 2) Construing Article IX to allow DPW to license religious child care ministries and require compliance with all of its regulatory requirements in advance of operation would make Article X (which provides for licensing of for-profit facilities) superfluous and would conflict with numerous general principles of statutory construction; 3) Section 911(c) sets forth the enforcement authority of the Department and the process to be followed in an enforcement action against an Article IX non-profit facility; 4) The Department's actions in this enforcement action are directly contrary to the plain language of § 911(c) and are wholly unauthorized; and 5) Where claimed

regulatory authority conflicts with the plain language of a statute, it cannot be deemed to have been duly promulgated.

In response to St. Elizabeth's arguments, the Department appears to argue as follows: 1) The *MacLeod* Court held that § 921(c) of Article IX granted the Department substantive rule-making authority over hospitals, and § 911(a)(1) granted the Department similar substantive rule-making authority over non-profit child day cares; 2) Presuming that DPW is statutorily authorized to require regulatory compliance of child cares in advance of operation, it would be absurd to conclude that it is not also authorized to require issuance of a license prior to operation; 3) Having been duly promulgated, the regulations have the full force and effect of law and DPW's regulatory interpretations are controlling unless clearly erroneous; 4) The Department's regulations have been in effect for twenty-eight years without having been disturbed by the legislature and they, therefore, accurately reflect the legislative intent and are not clearly erroneous; and 5) To require that the Department ensure compliance with its regulatory requirements "in the first instance only by seeking judicial relief. . .runs counter to accepted concepts of administrative law."

Noticeably absent from the Department's brief is any reference to or quotation from a specific provision of Article IX which authorizes the Department to: 1) require that a supervised facility obtain a license in order to operate; 2) make substantive rules and regulations and require compliance with those rules as a condition of operation; or 3) seek to close a supervised facility on its own rather than pursuant to the express enforcement procedure set forth in §911(c) of Article IX—i.e. requesting that the

Attorney General institute an action against the facility or withholding state monies from the facility. Indeed there is not a single reference to § 911(c) in the Department's entire brief.

This is not surprising, however, given the fact that no provision of Article IX mentions the words "license" or "certificate of compliance," let alone remotely authorizes the Department to require that a supervised facility obtain such a document as a condition of operation. Likewise, the Department's lack of response with respect to its utter failure to follow the express language of § 911(c) is not surprising. The testimony of its own witnesses and the existence of other documentary evidence demonstrate that the Department itself apparently knows that the statutory provisions of Article IX direct it to proceed in a very different manner from the one in which it is currently and illegitimately attempting to proceed. See generally, Petitioner's Brief at 27-31.

A. NEITHER THE *MACLEOD* DECISION NOR SECTION 911(A)(1) SUPPORTS DPW'S CLAIMED AUTHORITY TO PROMULGATE REGULATIONS REQUIRING ST. ELIZABETH'S TO BECOME LICENSED AND COMPLY WITH ALL OF ITS SUBSTANTIVE REGULATIONS AS A CONDITION OF OPERATING ITS CHILD CARE MINISTRY.

1. The Department notes that the *MacLeod* Court held that § 921(c) authorized it to make substantive rules and regulations governing the operation of hospitals and suggests that § 911(a)(1) does likewise with respect to non-profit child day cares. DPW Brief at 11. However, the language of § 911(a)(1) does not remotely resemble the language of § 921(c). (Relevant portions of §911 and § 921 are set forth side-by-side for ease of comparison at Appendix B of this brief.)

Section 921(c) specifically provides the Department with authority to "establish standards for the safe and adequate care of individuals" in certain residential or "living-in" facilities identified in § 921(b). The *MacLeod* Court, held that this language constituted a broad[1] grant of substantive rule-making authority to DPW over the covered institutions. However, St. Elizabeth's is not governed by § 921, and this section cannot be cited as granting DPW any statutory authority to promulgate substantive regulations governing the operation of its religious child day care ministry.

2. Apparently aware of the fact that *MacLeod* fails to support its claim, the Department notes that § 911(a)(1) "authorizes DPW 'to make and enforce rules and regulations for a visitation, examination and inspection of all supervised institutions. . both before and after the beginning of operation of the supervised facility.'" DPW Brief at 11. It then leaps to the conclusion that this provision "not only gives DPW the authority to promulgate regulations governing the *operation* of non-profit day care centers, but also allows DPW to require compliance with those regulations before the facility is permitted to operate." DPW Brief at 11.

The Department's assertions must be rejected because its proffered reading of the statute violates several principles of statutory construction. Although the language of § 921(c) expressly authorizes the Department to make substantive rules by referring to the establishment of "standards for the safe and adequate care of individuals," § 911(a)(1) lacks any similar language. Thus, it cannot be claimed that § 911(a)(1) is like § 921(c) or

[1] The basic dispute in *MacLeod* revolved around how broad the actual statutory grant was, with four Justices considering it to have been quite broad and two Justices viewing it as a narrower grant. But, all agreed that §921(c) expressly granted some substantive rule-making authority to DPW by specifically mandating the department to establish "standards for the safe and adequate care of individuals."

that it grants substantive rule-making authority to the Department with respect to the operation of facilities that do not fall within the categories specified in § 921(b).

Given the express language of § 921(c), it is clear that the General Assembly is quite capable of granting substantive rule-making authority when it wants to. The fact that it has done so under Article IX only with respect to certain institutions specifically identified in § 921(b) indicates that it did not intend to grant such broad substantive rule-making authority to the Department with respect to other Article IX supervised institutions.

Moreover, § 911(a)(1) applies to "all supervised institutions" and is broader than § 921 which applies only to *certain* supervised institutions. If § 911(a)(1) already authorized DPW to make broad substantive rules governing the operation of "all supervised institutions," as the Department claims, there would have been no need for the General Assembly to have enacted § 921(c) at all.

3. The language of § 911(a)(1) is procedural in nature; not substantive. See, Petitioner's Brief at 34-35. (Relevant portions of the provisions of Articles IX and X are set forth side-by-side for ease of comparison at Appendix A of this brief.) However, the Department persists in claiming that the fact that § 911(a)(1) allows a visit and inspection "before" the beginning of operation of the facility, necessarily indicates that the General Assembly authorized it to "require regulatory compliance in advance of operation," and that it would be "absurd to conclude that DPW may not correspondingly require certification of compliance [licensure] as well." DPW Brief at 12.

However, there is a far more reasonable interpretation of this language which, unlike the Department's interpretation, is completely consistent with the provisions of Article IX and Article X and does not conflict with § 911(c). As noted in St. Elizabeth's opening brief, the "before and after" language was added to § 911(a)(1) by House Bill 694 of the 1975 Legislative Session. Petitioner's Brief at 32, n. 4. That bill also added language to § 911(b) which stated: "and for the purpose of determining whether or not a facility should be subject to the supervision of the department in accordance with section 902." See, Appendix B of Petitioner's Brief. The amendment of these two sections in H.B. 694 strongly suggests that the purpose of adding the "before" operation language is linked to the concept of allowing DPW to determine which article of the Public Welfare Code covers the facility.

Article IX is broader in its application than Article X. It draws within the Department's supervisory powers all "children's institutions," including child day care facilities, whether non-profit or for-profit. Article X, however, governs only a subset of these children's institutions—those child day care centers operated for-profit. Given the broader scope of Article IX, the Department has authority to visit and inspect *all* child day care centers. However, its authority to require regulatory compliance in advance of licensing and to prevent operation without a license only extends to the smaller class of for-profit child day care centers. Section 1007 of Article X provides that the Department may only issue a license "[w]hen, after investigation, the department is satisfied that [the facility] meet[s] all the requirements of this act and of the applicable statutes, ordinances and regulations." And, § 1002 prohibits a for-profit facility from operating without a license issued by the Department.

Allowing the Department to visit and inspect all supervised facilities in advance of operation enables it to determine "whether or not a facility should be subject to the supervision of the department." § 911(b). If it should find that the facility does not operate for-profit, it should follow the requirements under § 911. If, however, it should find that the facility does operate for-profit and falls within the narrower class of Article X facilities, it would then be required to follow the requirements of § 1007 (which requires regulatory compliance in *advance* of the issuance of a license) and § 1002 (which requires licensing in *advance* of operation).

Thus, it is far more reasonable to treat the language allowing the Department to visit and inspect a supervised institution "before" it begins operation, as simply providing the Department with the opportunity to determine whether it qualifies as an Article IX or Article X facility and allowing the Department the means with which to more easily comply with its more stringent duties under § 1007 and § 1002 of Article X.

Furthermore, if § 911(a)(1) were read to already require regulatory compliance in advance of issuance of a license and licensing in advance of operation, as DPW claims should be done, there would have been no need for the General Assembly to enact §§ 1007 or 1002.

B. THE DEPARTMENT IS CLEARLY ERRONEOUS IN CLAIMING THAT IT HAS STATUTORY AUTHORITY TO ENFORCE REGULATORY COMPLIANCE AND LICENSING OF ST. ELIZABETH'S AS A PRECONDITION TO OPERATING.

The licensing enforcement authority claimed by DPW includes both a regulatory

compliance aspect as a precondition to licensing, and an enforcement component which allows the Department to act unilaterally to close a facility for failure to seek and obtain a license and/or comply with its regulations. The enforcement provisions of § 911 and § 921 are contained in § 911(c) and § 921(e), respectively. When the actual statutory language of § 911(c), is contrasted with § 921(e), it is apparent that the Department's claimed licensing enforcement authority is clearly erroneous. (See, Comparison Chart at Appendix B.)

Section 911(c) makes no mention of compliance with rules and regulations as part of DPW's enforcement authority with respect to supervised institutions, generally. In contrast, Section 921(e) provides that "[w]henever, the department shall upon inspection. . . *find any violation in any institution of rules or regulations* adopted by the Department. . .it shall [direct the institution] to correct the said objectionable condition. . ." The existence of regulatory compliance language in § 921(e) and its absence in § 911(c) indicates that the General Assembly did not intend to provide the Department with any regulatory compliance enforcement authority in general. Instead, the authority to promulgate substantive regulations and seek to ensure compliance with those regulations exists only for the subset of § 921 facilities. This demonstrates that the Department's claimed authority with respect to requiring regulatory compliance is clearly erroneous.

Moreover, neither § 911(c) nor § 921(e) authorize the Department to act unilaterally to close a facility for failure to seek and obtain a license and/or comply with its regulations. Instead, both require the Department to request the Attorney General to institute appropriate legal proceedings to enforce compliance. In the case of § 911(c), the action would be one to

enforce compliance with the Department's direction to correct any identified "unlawful, unhygienic or detrimental" condition. With respect to § 921(e), the action would be one to enforce compliance with the "rules or regulations adopted by the department."

C. NONE OF THE CASES CITED BY THE DEPARTMENT SUPPORT ITS POSITION.

As noted above, DPW's claim of statutory authority to require regulatory compliance and licensing of St. Elizabeth's and to seek to unilaterally close it for failure to comply is clearly erroneous. None of the cases cited by DPW hold that a governmental agency may promulgate regulations without statutory authority to do so. Nor do they remotely suggest that a governmental agency may promulgate regulations that allow it to proceed in a manner directly contrary to the plain language of the statute pursuant to which they were allegedly promulgated. Those cases stand only for the unremarkable propositions that, where regulations are duly promulgated pursuant to statutory authority and fall within the scope of that statutory authority, they will be given the full force and effect of law, if not clearly erroneous.

Despite this fact, the Department claims that because its regulations (in some form) have been on the books for twenty-eight years and have not been disturbed by the General Assembly, they cannot be clearly erroneous. DPW Brief at 13. The Department cites to *Wettach v. Commonwealth*, 620 A.2d 730, 736 (Pa. Commw. Ct. 1993) which, in turn cites to footnote 10 of *MacLeod*, to support this argument.

However, this argument must be rejected. First, any regulation which the Department is not *statutorily* authorized to promulgate has no force and effect regardless

of how long it has been on the books, and one that conflicts with the plain language of a statute is *per se* clearly erroneous. Neither *Wettach* nor *MacLeod* hold otherwise.

In *Wettach*, taxpayers challenged the Department of Revenue's regulations (which prohibited any setoff between and among different classes of income) as exceeding the authority granted to the Department by the Tax Reform Code ("TRC"). In rejecting this challenge, the court noted that the TRC broadly "empowers the Department to promulgate and enforce rules and regulations relating to the Personal Income Tax," and that its rules were adopted according to proper procedure. 620 A.2d at 736. It also stated that "the TRC imposes a tax on eight enumerated classes of income *and does not unambiguously either prohibit or permit setoffs among the classes.*" *Id.* (emphasis supplied). Therefore, the court deferred to the administrative agency's interpretation. It also noted that "administrative interpretations, not disturbed by the Legislature, are appropriate guides to legislative intent." *Id.* (citing *MacLeod*).

MacLeod, like *Wettach*, does not hold that a regulation that is directly contrary to a statute can ever be upheld because it has been on the books for a long period of time. Instead, the *MacLeod* Court held that DPW's challenged regulations fell *within* the scope of Article IX because § 921(c) "expressly directs the department to set 'standards for the safety and adequate care of individuals,' making adequate and proper provision [] for . . . (x) humane care." 487 Pa. at 516. It continued:

> That managerial practices of hospitals are within the legislatively-defined competency of the department *under section 921* is demonstrated by an analogous provision of article IX. Section 911 of the Code expressly contemplates the department's review of the managerial practices of "supervised institutions." . . . We are convinced, therefore, that the Legislature has given the tribunal with experience and expertise over managerial practices of "supervised

institutions" similar authority to supervise the managerial practices of hospitals subject to departmental standards *under section 921.*

Id. at 516-517. (emphasis supplied)

Thus, the Court determined that the specific references in § 921(c) to standards for "humane care" and the broad inspection rights envisioned under § 911, when taken together, provided sufficient statutory authority for the promulgation of broad regulations governing hospital management. The dissenting Justices disagreed with this holding, and asserted that § 921(c) *alone* must be viewed as the proper authorizing authority. Because that provision did not specifically list hospital management among the areas in which the Department could establish standards, those regulations were impermissible.

In any event, neither the majority nor the dissent, in *MacLeod*, would have held the challenged regulations to be valid in the absence of § 921(c), or if they had been contrary to the plain language of the statute itself. And, there is nothing in footnote 10 of the Court's decision to suggest otherwise. The same is true of *Wettach.*

Furthermore, as amply demonstrated by the record evidence in this case, the Department has not had a consistent policy of attempting to enforce its regulations (licensing or otherwise) against objecting religious child care facilities. See Petitioner's Brief at 11-13. Given the Department's non-enforcement policy, there would not have been any reason for the General Assembly to enact new legislation. This is especially true because the existing statute does not authorize the Department to license non-profit religious child care ministries. The Department's argument is akin to suggesting that the General Assembly should have passed a new law stating: "Article IX does not authorize

the Department to license non-profit religious child care ministries AND WE MEAN IT!"

II. THE RELIGIOUS FREEDOM PROTECTION ACT DOES NOT AUTHORIZE DPW TO REQUIRE ST. ELIZABETH'S TO OBTAIN A CERTIFICATE OF COMPLIANCE IN ORDER TO OPERATE ITS CHILD CARE MINISTRY.

The heading of Part II B of DPW's brief states that the Religious Freedom Protection Act ("RFPA") authorizes DPW to require that St. Elizabeth's obtain a license in order to operate its child care ministry. Seemingly, DPW views the exemption contained in 71 P.S. § 2406(b)(4) as somehow granting it regulatory authority over child care providers. However, nothing in DPW's short argument following this heading remotely supports its claim. And, such an understanding is clearly misplaced.

The RFPA does not grant any substantive right or rule-making authority to the Department whatsoever. From its text and the legislative debate, it is quite clear that the RFPA was intended simply to make clear that the "compelling interest" test is to be used as the applicable legal standard when a law is claimed to violate a person's religious liberties. The exemptions are just that—exemptions from the application of the compelling interest test. They are not grants of regulatory authority.

Moreover, the exemptions much more apparently reflect the legislative judgment that the specific exempted categories are ones in which the General Assembly believes

that it has a compelling interest. Accordingly, it has removed them from its statutorily created compelling interest test. [2]

Having stated this, however, in no way suggests that the Department's regulations and licensing scheme are exempt from application of the compelling interest test. First, the General Assembly was careful to craft the exemption only in very narrow terms. Only those provisions of Article IX and Article X which actually "*prevent* the endangerment of the health and safety of children" are deemed to be exempt because they have been legislatively determined to involve compelling interests.

Thus, it is clear that many of the Department's regulations governing child cares which do not actually "prevent the endangerment" of children, but merely promote health or safety in some unspecified way, or promote "quality" care, continue to be subject to the RFPA and the compelling interest test.

The Department does not address the compelling state interest test as it applies under the RFPA. Instead, it notes only that "the test under the RFPA is the same as the compelling interest balancing test of *Sherbert/Yoder,*" discussed in Part I.B.2 of its brief, and that it must fail for the same reasons set forth therein. DPW Brief at 15. St. Elizabeth's agrees that the test is the same under each, but for the reasons set forth in

[2] Representative Josephs offered an amendment (No. A6328) which would delete the phrase "prevent the endangerment" and insert in lieu thereof the word "promotes" because the existing language "establishe[d] a very high threshold for exemption." House Legislative Journal, November 27, 2002, at p. 2385. (She stated: "[o]nly when there is an imminent risk of the individual's life being severely threatened or harmed are we exempting these programs, services, and facilities from the Religious Freedom Protection Act. My amendment reduces that standard.") *Id.* Despite Rep. Josephs arguments, her amendment failed by a vote of 165-28. *Id.* at p. 2386.

Parts II B and II C of its opening brief and in Part III of this brief, it asserts that Department's regulations violate the RFPA and the compelling interest test.

III. CONTRARY TO THE DEPARTMENT'S ASSERTIONS, THE BURDEN ON ST. ELIZABETH'S RELIGIOUS CHILD CARE MINISTRY IS SUBSTANTIAL AND NOT SPECULATIVE, AND APPLICATION OF THE DEPARTMENT'S LICENSING AND REGULATORY SCHEME TO ST. ELIZABETH'S WOULD VIOLATE THE RELIGION CLAUSES OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

As set forth in St. Elizabeth's opening brief, this case involves "hybrid" constitutional rights and the compelling state interest test continues to apply. See, Petitioner's Brief at 40-43. In addition, St. Elizabeth's has demonstrated through ample record evidence that the Department's licensing and regulatory scheme, if allowed to be applied to its child care ministry, would substantially burden its right to freely exercise its religious liberties through speech and action, and the right of parents to direct the upbringing of their children. See, Petitioner's Brief at 44-49.

St. Elizabeth's also argued that the Department failed to meet its burden of demonstrating that its challenged regulations are necessary to further a compelling state interest. Petitioner's Brief at 52-54. Nor are they narrowly tailored to further any such interest. Id.

In response, the Department argued the following: 1) This is not a "hybrid rights" case; 2) Even if it were, there is no burden on St. Elizabeth's religious liberties or the rights of parents; and 3) Even if there were a burden on St. Elizabeth's religious liberties, the challenged regulations further a compelling governmental interest in the protection of

children and they are the least restrictive means of furthering that interest. Each of these arguments is addressed below.

A. THIS IS A "HYBRID RIGHTS" CASE WHICH IS GOVERNED BY THE COMPELLING INTEREST TEST OF SHERBERT AND YODER.

In support of its assertion that this is not a "hybrid rights" case, the Department cites two cases: *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp.2d 1186 (D. Wyo. 2002), *aff'd*, 427 F.3d 775 (10th Cir. 2005); and *Health Serv. Div. v. Temple Baptist Church,* 814 P.2d 130 (N.M. Ct. App. 1991). As discussed below, *Grace United Methodist* is clearly distinguishable. And, the court's analysis in *Temple Baptist Church* is flawed with respect to what is necessary to constitute a hybrid right.

1. *Grace United Methodist* applied for and was denied a zoning variance that would have permitted it to open a child day care center. It then challenged the ordinance on the grounds that it violated its Federal Free Exercise rights. The church claimed that the compelling interest test should apply to it under the "hybrid rights" test, claiming that, in addition to its Free Exercise rights, its Free Speech, Assembly and Association rights were implicated. The Tenth Circuit rejected the church's claims based on the factual record of that case which is strikingly different from the record in this case.

With respect to the Church's Free Exercise claim, the Court of Appeals affirmed the jury determination that the Church had failed to demonstrate that its proposed child care venture constituted a sincere exercise of religion. 427 F.3d at 797. In that case, the Court had found that: 1) the Church intended to charge a fee for its day care services which was commensurate with fees charged by for-profit day care centers in the area; 2)

it did not intend to make staffing decisions based on whether they were members of the Church or had any religious affiliation or training; 3) it did not intend to cater to members of its own faith; and 4) the Presiding Bishop of the Church stated that he viewed the day care more as a commercial venture than a religious one. 427 F.3d at 780, 801-802. The record evidence in this case demonstrates unequivocally and overwhelmingly that the child care ministry of St. Elizabeth's is primarily religious, and not a commercial venture. See, Petitioner's Brief at 8-9.

With respect to the Church's other claimed rights, the Court of Appeals noted the following: 1) That the Church need only demonstrate a "colorable claim" of a violation of another constitutional right in order to meet the "hybrid rights" test 427 F.3d at 788; 2) On its face, the zoning regulation was unrelated to freedom of expression, and the Church presented no evidence that it affected the ability of the Church members to speak, assemble, or associate with one another within the applicable zone *Id.* at 790; 3) Therefore, the "hybrid rights" test did not apply to the Church.

Moreover, no parental rights were alleged to have been violated in *Grace United Methodist*—presumably because the Church did not claim that its child care program would be religiously based, and it was open to the general public without regard to religion. Accordingly, *Grace United Methodist* is clearly distinguishable and of little relevance to the issues raised by St. Elizabeth's.

2. In *Temple Baptist Church,* the New Mexico Court of Appeals correctly noted that under the Supreme Court's *Smith* decision, the compelling interest test continues to apply in cases involving "hybrid rights." However, it erroneously stated:

"In each of the cases cited by the Supreme Court in support of its hybrid rights theory, the party claiming the right was personally injured by the deprivation of the right." 814 P.2d at 136. It then held that the Temple Baptist Church could not have its case treated as a hybrid rights case and reviewed under the compelling interest test because there were "no individuals with children in the child care center claiming a deprivation of a parent's right to direct his or her children's religious education." *Id.*

It is clear, however, that some of the cases cited by the *Smith* Court as involving "hybrid rights" did *not* have a party before the court who raised an independent claim based on the violation of a separate constitutional right and who had suffered personal injury. For example, the *Smith* Court cited *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as a hybrid rights case implicating both religious liberties and parental rights issues. 494 U.S. 872, 881 (1990). In *Pierce,* a religious order which operated Catholic schools challenged an Oregon statute that required all children of school age to attend public schools. In addition to its own rights, it claimed that the statute "unreasonably interferes with the liberty interest of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-535. The Court ruled in favor of the Society of Sisters and struck the statute despite the fact that no parents were parties to the litigation.

Thus, it would appear that the Court does not deem it necessary to have parents as parties who separately claim a violation of their parental rights in order to qualify for "hybrid rights" status. Instead, as long as the party claiming a violation of his religious liberties can demonstrate that the challenged actions also would implicate the right of

parents to direct the upbringing of their children, the case should be given hybrid rights status and the compelling interest should apply.[3]

Moreover, as set forth in St. Elizabeth's opening brief, in addition to claiming hybrid rights on the basis of parental rights, this case also implicates St. Elizabeth's freedom of expression—its right to teach the gospel to children by word and example. Petitioner's Brief at 43. Accordingly, DPW's assertion that hybrid rights are not implicated in this case is erroneous and must be rejected.

B. THE BURDENS ON ST. ELIZABETH'S ARE SUBSTANTIAL AND REAL.

The Department seems to be claiming that St. Elizabeth's has not met its burden of demonstrating that its religious liberties are burdened because: 1) its religious claims are not "sincere," i.e., its child care ministry is not really part of its religious mission; and 2) its claims are speculative and not yet ripe for review. DPW Brief at 8-9. In support of these claims, DPW cites *Antrim Faith Baptist Church v. Dept. of Labor and Indus.*, 75 Pa. Commw. 61, 460 A. 2d 1128 (1983); *Forest Hills Early Learning Center v. Lukhard*, 661 F. Supp. 300 (E.D. Va. 1987), *rev'd on other grounds*, 846 F.2d 260 (4th Cir. 1988); *Hoolick v. Retreat State Hosp.*, 24 Pa. Commw. 218, 354 A.2d 609 (1976); and *Kansas v. Heritage Baptist Temple, Inc.*, 693 P. 2d 1163 (Kan. 1985). These cases are discussed below.

1. *Antrim* involved a challenge to a Department of Labor and Industry regulation requiring that fire-safety precautions, such as installing smoke detectors and

[3] Parents did attend the hearing in this matter and testified that they chose St. Elizabeth's because of its religious character and teachings. R. 462a, R464a.

conducting fire drills, be met by a religious school. The Court stated that "the record shows no way in which these fire safety regulations warp the free exercise of this church's religion." *Id.* at 68. There is little similarity between the regulations sought to be imposed in *Antrim* and those sought to be applied in this case. St. Elizabeth's has not claimed that the Department has no authority to protect the health and safety of children in its care and has been very cooperative in allowing the Department to visit and inspect its child care ministry. However, St. Elizabeth's has strenuously objected to the Department's unwarranted and unauthorized attempts to require that it apply for a license and, in order to obtain such license, subject itself to numerous regulations that directly affect and intrude upon the core of its religious child care ministry. Petitioner's Brief at 44-45.

The Department also relies heavily on a trial court decision in *Forest Hills.* However, that case involved a challenge to a Virginia law which *exempted* religious child care providers "from licensing and compliance with many regulations, . . [but required that they] still meet basic health and safety standards." 846 F. 2d at 262. It was challenged by secular child care providers who argued that the exemption for religious providers placed them at a competitive disadvantage, and thus benefited religion in violation of the Establishment Clause of the First Amendment. *Id.*

The trial court held that the Establishment Clause was violated because it did not believe that religious providers could establish a viable Free Exercise claim which would provide the basis for a valid secular purpose for the law. The Court of Appeals reversed

the trial court and held that the exemption for religious providers did not violate the Establishment Clause pursuant to the Supreme Court's recent decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1997).

Although DPW quotes liberally from the *Forest Hills* trial court's opinion, DPW Brief at 8-10, the Court of Appeals disparaged a number of the same passages cited by the Department, noting that they were examples of how requiring compliance with the licensing scheme would have burdened the rights of religious child care providers. 846 F.2d at 263-264.

3. The Department also contends that St. Elizabeth's is claiming burdens which are only speculative, citing *Hoolick*.[4] Nothing could be further from the truth. This is not a pre-enforcement action where St. Elizabeth's has argued that the Department might at some future date seek to license it and force it to comply with all of its regulatory requirements. Rather, it is an enforcement action, brought by the Department, seeking to close St. Elizabeth's for its failure to obtain a license—the issuance of which is preconditioned upon compliance with regulations that place government bureaucrats in the position of making evaluative determinations with respect to the appropriateness of the Church's education, training and formation of a Christian personality in children entrusted to St. Elizabeth's care.

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[4] *Hoolick* involved a claim by a patient in a mental health institution that the government might in the future attempt to close the facility in which she was residing and that this might violate her due process rights. The *Hoolick* Court noted that there were virtually no facts in the record to indicate when, in the future, the facility might be closed. *Id.* at 220-221.

4. St. Elizabeth's also has asserted that DPW's licensing and regulatory scheme acts as a prior restraint on its free speech and the free exercise of religion and is impermissible under *Cantwell v. Connecticut*, 310 U.S. 296 (1939). Petitioner's Brief at 48. The only major difference between the door-to-door permit cases involving Jehovah's witnesses and St. Elizabeth's is one of modality. Jehovah's witnesses preach door-to-door, while St. Elizabeth's preaches through its child care ministry. In each case a permit or license to engage in preaching or teaching the gospel of Christ is required. Petitioner's Brief at 48. Prior restraints, by their very nature, constitute substantial burdens on protected liberties.

Thus, St. Elizabeth's has amply demonstrated that its free exercise and free speech rights are substantially burdened by the Department's licensing and regulatory scheme. It has also demonstrated that the rights of parents are burdened. Therefore, the burden shifts to the Department to prove that it has a compelling interest in imposing this burden upon St. Elizabeth's.

C. THE DEPARTMENT HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT ITS REGULATIONS FURTHER A COMPELLING INTEREST OR THAT THEY ARE THE LEAST RESTRICTIVE MEANS OF FURTHERING THAT INTEREST.

As noted above, St. Elizabeth's has shown that a number of DPW's regulations significantly burden its religious liberties. See also, Petitioner's Brief at 44-49. Yet, the Department has not even attempted, through record evidence or legal argumentation, to demonstrate that those regulations actually prevent the endangerment of the health or safety of children (i.e., further a compelling state interest). Instead, it simply baldly asserts that because its regulations deal with children they are an exercise of its police

powers and are supported by a compelling state interest. DPW Brief at 9-10. It makes this claim despite the fact that its own witnesses acknowledged that a number of its existing regulations "go beyond basic health and safety issues." (R. 515a) Among the specific examples of such regulations given by Ms. Kroh was § 3270.111 which requires that facilities conduct programs that promote proper social development in children. (R. 517a-518a).

Moreover, the Department's blanket assertion of a compelling interest based on a vague claim of police power does not remotely satisfy the requirements necessary to establish a compelling interest under the Supreme Court's most recent case dealing with what a governmental entity must demonstrate to meet its burden. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, ___ S. Ct. ___, 2006 WL 386374 (Feb. 21, 2006), a religious sect used tea, brewed from plants that contain a hallucinogen regulated under the Controlled Substance Act, for sacramental purposes. The Act bars all use of the hallucinogen, and the sect sued to block the enforcement of the Act with respect to its sacramental use of the tea. The government claimed that it had "a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *Id.* at *4. The trial court held that, on the record evidence before it, the government had not met its burden to establish a compelling interest in applying the Act *against the sect* and issued a preliminary injunction prohibiting the government from enforcing the Act against the sect. The Supreme Court affirmed.

In so holding, the Court stated that applications of the compelling interest test under the Religious Freedom Restoration Act ("RFRA") "should be adjudicated in the same manner as constitutionally mandated applications of the test." *Id.* at *8. The Court then noted that, in *Sherbert* and *Yoder,* it had "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions *to particular religious claimants.*" *Id.* at *9. (Emphasis supplied.)

The Department has not come close to meeting its burden of demonstrating a compelling interest in imposing its licensing and regulatory scheme against St. Elizabeth's. See, Petitioner's Brief at 52-54. And, any compelling interest that the Department may have in preventing harm to children is adequately protected by the visitation and inspection process already set forth in Article IX (as properly interpreted).

IV. ST. ELIZABETH'S CLAIMS UNDER THE PENNSYLVANIA CONSTITUTION ARE PROPERLY BEFORE THIS COURT.

The Department states that "[t]his Court should not consider St. Elizabeth's separate claim under the Pennsylvania Constitution" because this issue was not set forth in St. Elizabeth's initial letter of appeal. DPW Brief at 6, f.n.1. DPW argues that despite the timely filing of this appeal, "[a]dministrative tribunals have no jurisdiction to consider issues raised after the time period to appeal has expired." Id. St. Elizabeth's raised its claims under the Pennsylvania Constitution before the commencement of the hearing on this matter, (R. 424a), and the Administrative Law Judge properly permitted

St. Elizabeth's to include this issue in its appeal. ALJR at 17. See, *Emerick v. Department of Public Welfare*, 47 Pa. Commw. 285, n.6, 407 A.2d 1378 (1979).

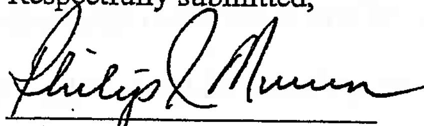
Aside from claiming that this issue is not properly before this Court, the Department also argues that the "religious freedom protection guarantee in the Pennsylvania Constitution does not exceed its counterpart in the United States Constitution." DPW Brief at 6, f.n.1. It cites *Weist v. Mt. Lebanon Twp. Sch. Dist.,* 457 Pa. 166, 174, 320 A.2d 362, 366 (1974) for this proposition. At the time that the *Weist* Court determined that religious liberties established by Article I, Section 3 of the Pennsylvania Constitution were co-extensive with the Free Exercise rights under the Federal Constitution, the "compelling interest" test was solidly established in Federal law by *Sherbert* and *Yoder*.

CONCLUSION

For the foregoing reasons, and those set forth in St. Elizabeth's opening brief, this Court is respectfully requested to grant the relief requested in Petitioner's Opening Brief and to permit it to operate its religious child care ministry without further unauthorized interference by the Department.

Dated: February 24, 2006

Respectfully submitted,



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APPENDIX A

ARTICLE IX. DEPARTMENTAL POWERS AND DUTIES AS TO SUPERVISION.

§ 901. Definitions.

"Children's institutions" means any. . . organization. . .which may receive or care for children. . .

"Supervised institution" means. . .all children's institutions. . .

§ 902. Supervisory powers.

The department shall have supervision over:

. . .

(3) All children's institutions;

. . .

ARTICLE X. DEPARTMENTAL POWERS AND DUTIES AS TO LICENSING.

(a) LICENSING PROVISIONS

§ 1001. Definitions.

"Child day care center" means any premises ***operated for profit*** in which child day care is provided simultaneously for seven or more children who are not relatives of the operator. . .

§ 1002. Operation and maintenance without license prohibited.

No person shall maintain, ***operate*** or conduct any facility, as defined herein, ***without having a license*** therefore issued by the department.

§ 1007. Issuance of license.

When, after investigation, ***the department is satisfied that the applicant[s]. . .meet all the requirements*** of this act and ***of the applicable*** statutes, ordinances and ***regulations, it shall issue a license. . .***

§ 911. Visitation and inspection.

(a) The department shall have the power, and its duty shall be:

(1) To make and enforce rules and regulations ***for a visitation, examination and inspection*** of all supervised institutions. . .[which] may occur both before and after the beginning of operation of the supervised facility.

(2) To ***visit and inspect*** . . . all supervised institutions; to ***inquire and examine into*** [virtually all aspects of their operation].

(b) For these purposes, and to determine whether or not a facility should be subject to the supervision of the department. . ., ***the department shall have free and full access to*** [the premises, records, personnel, and persons cared for, etc] . . .and . . .the supervised institution . . . [is] hereby directed and required to give [the department] ***such means, facilities and opportunity for such visitation, examination, inquiry and interrogation, as is hereby provided and required, or as the department, by its duly ordained rules or regulations may require.***

§ 1016 Right to enter and inspect.

For the purpose of determining the suitability of the applicants and of the premises or whether or not any premises in fact qualifies as a facility. . .or the ***continuing conformity*** of the licensees to this act and ***to the applicable regulations of the department, . . .*** the department shall have the right to enter, visit and inspect any facility licensed or requiring a license under this act. . .

§ 1021. Regulations.

The department is hereby authorized and empowered to ***adopt regulations establishing minimum standards for*** building, equipment, operation, care, program and services ***and for the issuance of licenses.***

(c) *Whenever* upon visitation, examination, and inspection. . . ***any condition is found to exist*** therein ***which***, in the opinion of the department, ***is unlawful, unhygienic or detrimental. . .[the department is] to direct the . . .[institution] to correct the said objectionable condition. . .***, whereupon it shall be the duty of [the institution] to comply with the direction of the department. ***If [the institution] shall fail to comply with such direction, the department may request the [Attorney General] to institute appropriate legal proceedings to enforce compliance therewith, or the department may withhold any State money available for such institution until [it] compl[ies] with such direction.***

§ 1026. Refusal to issue license; revocation; notice.

(a) ***Whenever the department*** upon inspection or investigation, ***shall learn of a violation*** of this act or ***of regulations adopted by the department pursuant to this act, it*** shall give written notice thereof to the offending person. Such notice ***shall require the offending person*** to take action to ***bring the facility into compliance with*** this act or with ***the relevant regulations. . .***

(b) ***The department shall refuse to issue a license*** or shall revoke a license ***for any of the following reasons:***

(1) ***Violation of or non-compliance with the*** provisions of this act or of ***regulations pursuant thereto***;

(2) . . .

§ 1031. Violation; penalty.

Any person operating a facility. . . without a license required by this act, ***shall upon conviction thereof in a summary proceeding be sentenced to pay a fine*** of . . . , and in default of the payment thereof to undergo imprisonment. . . . ***Each day of operating*** a facility ***without a license*** required by this act ***shall constitute a separate offense.***

(b) Injunctions Against Unlicensed Activities; Procedures

§ 1051 Definition.

As used in this subarticle—

"Private institution" means any of the following facilities. . .day care center. . .which is ***operated for profit*** and which requires a license issued by the department.

§ 1052. Actions against unlicensed institutions.

Whenever a license is required by law for the establishment, operation or conduct of a private institution, ***the department*** responsible for issuing such license, ***upon advice of the Attorney General, may maintain an action in the name of the Commonwealth for an injunction*** or other process restraining or ***prohibiting any person from*** establishing, conducting or ***operating any private institution*** during any period after a license to engage in such activity has been refused, has not been renewed or has been revoked by the department.

§1053. Actions against violations of law and rules and regulations.

Whenever any person, regardless of whether such person is a licensee, ***has violated the laws. . . relating to licensing of a private institution or the rules and regulations adopted pursuant to such laws*** by the department, ***the department, upon advice of the Attorney General, may maintain an action*** in the name of the Commonwealth ***for an injunction. . . prohibiting such person from engaging in such activities.***

§ 1054. Venue

An action authorized under this subarticle shall be instituted in the court of common pleas in the county where the alleged unauthorized activity is committed.

§ 1055. Injunction or restraining order when appeal is pending.

Whenever the department shall have refused to grant or renew a license, . . . required by law to operate. . . a private institution, or the department has ordered the institution to refrain from conduct violating [its] rules and regulations. . ., and the [institution]. . . [has] appealed the action. . ., the court may. . .issue a restraining order or injunction upon proof that the operation of the private institution. . .adversely affects the well-being and safety of the patients or inmates of the private institution.

§ 1056. Injunction or restraining order when no appeal is pending.

Should a person, who is refused a license. . . to operate. . .a private institution. . . fail to appeal or should such appeal be decided finally favorably to the department, then the court shall issue a permanent injunction ***upon proof that the person is operating or conducting a private institution without a license as required by law, or has continued to violate the rules and regulations of the department.***

§ 1059. Law supplementary.

The provisions of this subarticle are supplementary to all other provisions dealing with the same subject matter. No action brought under this subarticle shall prevent the prosecution or institution of any civil or criminal action otherwise provided by law for violation of any law providing for licensing or departmental rules or regulations.

§ 911. Visitation and inspection.

(a) The department shall have the power, and its duty shall be:

(1) To make and enforce rules and regulations ***for a visitation, examination and inspection*** of all supervised institutions. . .[which] may occur both before and after the beginning of operation of the supervised facility.

(2) To ***visit and inspect***. . .all supervised institutions; ***to inquire and examine into*** [virtually all aspects of their operation].

(b) For these purposes, and to determine whether or not a facility should be subject to the supervision of the department. . ., ***the department shall have free and full access to*** [the premises, records, personnel, and persons cared for, etc] . . .and . . .the supervised institution . . . [is] hereby directed and required to give [the department] ***such means, facilities and opportunity for such visitation, examination, inquiry and interrogation, as is hereby provided and required, or as the department, by its duly ordained rules or regulations may require.***

§ 921 Additional provisions respecting certain institutions; purpose; definitions; standards; inspection.

(a) The purpose of this section is to comply with Federal law . . .and to promote the public health, safety and welfare, ***by providing for the establishment, enforcement and application of standards*** for the safe and adequate care of individuals ***in institutions herein defined.***

(b) As used in this section, "institution" means an establishment which furnishes . . .food and shelter. . .[such as nursing homes, boarding homes, hospitals and other facilities providing living-in arrangements.]

(c) ***The department shall establish standards for the safe and adequate care of individuals.*** . . which standards shall make adequate and proper provision for . . . [ten listed areas].

(d) The department shall be responsible for the maintenance of the standards herein provided; ***and for that purpose the department.*** . .shall have free and full access to the premises and records. . .[of the institution]. . .

APPENDIX B

§ 911. Visitation and inspection. (cont'd.)

(c) ***Whenever*** upon visitation, examination, and inspection. . . ***any condition is found to exist*** therein ***which***, in the opinion of the department, ***is unlawful, unhygienic or detrimental. . .[the department is] to direct the . . .[institution] to correct the said objectionable condition. .*** .whereupon it shall be the duty of [such institution] to comply with the direction of the department. ***If [the institution] shall fail to comply with such direction, the department may request the [Attorney General] to institute appropriate legal proceedings to enforce compliance therewith, or the department may withhold any State money available for such institution until [it] compl[ies] with such direction.***

§ 921 Additional provisions respecting certain institutions; purpose; definitions; standards; inspection. (cont'd)

(e) ***Whenever the department shall*** upon inspection, investigation or complaint ***find any violation in any institution of rules or regulations adopted by the department***, . . . it shall give immediate written notice thereof, to [the institution], . . .***to correct the said objectionable condition. . .***, whereupon it shall be the duty of [the institution] to comply with the direction of the department. ***If [the institution] fail[s] to comply with such direction, the Department may request the [Attorney General] to institute appropriate legal proceedings to enforce compliance therewith, and . . . may withhold . . .any State money available for such institution until [it] compl[ies] with such direction.***

Certificate of Service

I hereby certify that I am this day serving the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Sevice by first class mail addressed as follows:
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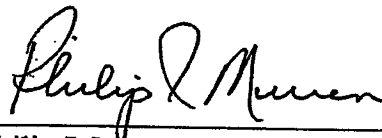
Dated: 2/24/06



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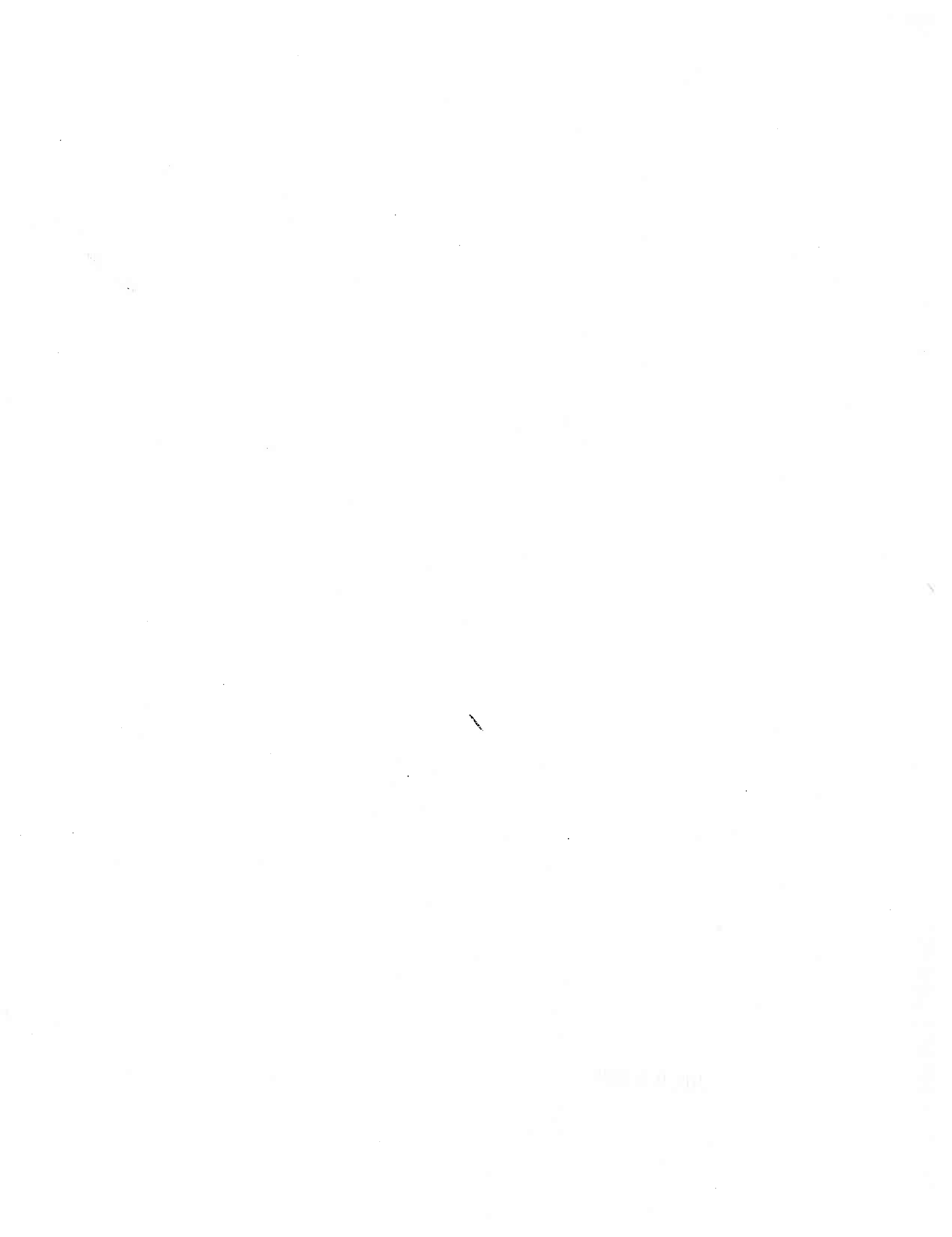

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