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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

August 2, 2006

Honorable Estelle B. Richman, Secretary
Department of Public Welfare
333 Health and Welfare Building
Harrisburg, PA 17120

Re: Regulation #14-506 (IRRC #2539)
Department of Public Welfare
Child Care Facilities

Dear Secretary Richman:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Jake Corman, Chairman, Senate Public Health and Welfare Committee
Honorable Vincent J. Hughes, Minority Chairman, Senate Public Health and Welfare Committee
Honorable George T. Kenney, Jr., Majority Chairman, House Health and Human Services Committee
Honorable Frank L. Oliver, Democratic Chairman, House Health and Human Services Committee

Comments of the Independent Regulatory Review Commission

on

Department of Public Welfare Regulation #14-506 (IRRC #2539)

Child Care Facilities

August 2, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the June 3, 2006 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Public Welfare (Department) to respond to all comments received from us or any other source.

1. Regulatory authority and nonprofit child care facilities. - Statutory authority.

We question the statutory authority of the Department to regulate nonprofit child care centers. Section 1001 of the Public Welfare Code (62 P.S. § 1001) defines a “child day care center” as:

...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....
(62 P.S. §1001) [Emphasis added.]

In *St. Elizabeth's Child Care Center v. Department of Public Welfare*, the Commonwealth Court held that Article IX (62 P.S. §§ 901-922) authorizes the Department to regulate both for-profit and nonprofit child care centers for the purpose of examination and inspection. However, Article X (62 P.S. §§ 1001-1087) does not give the Department oversight of nonprofit child care centers. Consequently, the Department has no authority to require nonprofit centers to obtain a certificate of compliance to operate.

We understand that the Department has filed a petition for allowance of appeal to the Supreme Court of Pennsylvania. However, our concern remains as we are required to consider pertinent opinions of Pennsylvania's courts in determining the statutory authority of an agency to promulgate a regulation (71 P.S. § 745.5b(1)).

2. Sections 3270.4, 3280.4 and 3290.4. Definitions. - Reasonableness; Consistency with other regulations; Clarity.

IEP and IFSP

The terms “Individualized Education Program (IEP)” and “Individualized Family Service Plan (IFSP)” are used repeatedly in the proposed regulation but are not defined. Existing regulations at 22 Pa. Code §§ 14.101 and 14.131-132 provide a definition for IEP. The term IFSP is defined

in 55 Pa. Code Chapter 4226. The final-form regulation should include definitions for these terms that cross-reference the existing regulations where they are defined.

Service Agreement

The Education Law Center and Disability Law Project recommend that the proposed regulation include a reference to a “Service Agreement” as described in 22 Pa. Code Chapter 15. This would assist in identifying children with disabilities who do not qualify for an IEP. However, it should be used only for identification. Child care facilities should not be required to implement the Service Agreement. The final-form regulation should be amended to include a definition for the term which cross-references the existing regulations which define the term.

Age level - Preschool child - and Young school-age child

Commentators expressed diverse reactions to the shift of kindergarten students from “preschool” to “young school-age” child. Although many expressed support for this change, others, including Representative Jerry Birmelin, Majority Chairman of the House Children and Youth Committee, expressed concern with the impact of this change on subsidies and costs. The Department should carefully examine the impact of this change on facilities that provide care primarily to “preschool” children. If they include a few kindergarten children, these facilities may not be able to take advantage of the less stringent staff-to-children ratios for “young school-age” children. At the same time, these facilities will receive less funding under the subsidized child care program for children in kindergarten.

Child with special needs

As noted above, a “Service Agreement” could be used to identify a child with a disability. This term should be added to Subparagraph (i).

The use of the word “formal” in the Subparagraph (ii) is unclear. It is our understanding that it will be replaced with the word “written” in the final-form regulation. In addition, the term “certified behavioral analyst” should be added to the list of clinicians in this subparagraph who are responsible for the behavioral plan.

3. Sections 3270.17, 3280.16 and 3290.15. Service to child with special needs. - Reasonableness; Implementation procedure; Clarity.

In response to Subsection (b), some commentators raised the concern that parents may not be willing to share IEPs or other plans with child care facilities. If an IEP, IFSP or Service Agreement is developed by other entities, what can a child care facility do to get a copy of the document? How can these facilities get involved in the team that develops the program or plan? If the availability of the documents or participation on the teams is contingent on parents or other entities, then the proposed regulation should acknowledge this fact and instruct child care staff that they will need the appropriate authorization. In Chapter 4226, are “early intervention services” providers required to include child care facilities on the teams for IFSPs?

Commentators, including parents and facility staffs, expressed concerns with the requirements in Subsection (c). Child care staffs are being asked to identify children who may need assessments

for special needs and give referral information to parents. For parents, receiving this type of information could be traumatic for a variety of reasons.

The regulation should indicate whether the Department will provide checklist forms or informational handouts that child care staffs could use when making observations that might lead them to suggest to a parent that their child should be assessed or evaluated by a trained professional in pediatric development or a related field. The Department should identify the level of training necessary to prepare child care staffs for these challenges. The regulation should also require child care staffs to complete the appropriate training before they are required to observe and assess for disabilities, and approach parents or families with referral information.

4. Sections 3270.27, 3280.26 and 3290.24. Emergency plan. - Protection of public safety; Reasonableness; Consistency with other regulations; Clarity.

The term “emergency” is not defined. Department staff referred Commission staff to an “Emergency Planning Guide” for child care facilities produced by the Pennsylvania Emergency Management Agency (PEMA). The term “emergency” as described by the PEMA document means any urgent situation which may directly impact the facility and may include severe weather conditions, fire and explosions, utility failures, hazardous materials and radiological emergencies, or acts of terrorism or civil unrest. The proposed regulation should include a similar definition in these sections related to an emergency plan or in Sections 3270.4, 3280.4 and 3290.4 related to definitions.

A second concern is that the list of requirements for the emergency plan is unclear and incomplete. Subsection (a) states the facility “shall have an emergency plan that provides for” four items which are described in a list format. There are two examples of this concern.

First, Subsection (a)(1) requires a facility emergency plan to provide for “shelter of children during an emergency.” This is an overly broad statement. According to the PEMA document, a child care facility needs to compile a listing of shelter areas or relocation areas for different types of emergencies. These areas could be inside the facility if dangerous conditions exist outside or could be outside if there is a need to evacuate. According to the descriptions in the PEMA document, these shelters are intended to be temporary and to consist of existing structures to provide protection. If the intent of the Department is that facilities will adopt the detailed plans and policies developed by PEMA, then the proposed regulation should reference the specific PEMA publications.

A second example is Subsection (a)(2) which requires that the facility plan provide for “evacuation of children during an emergency.” However, it is unclear when an evacuation would be necessary. According to PEMA, not all emergencies require an evacuation. Some dangers could require that the children be moved to a different area within a facility (such as away from windows) and not outside. PEMA indicates that it is the facility director who determines the appropriate response. This is another example of why the regulation should reference the PEMA documents rather than use broad statements that omit important details.

Finally, the proposed regulation should require that plans for evacuations during a fire cross-reference the existing regulations on “evacuation routes” and “evacuation plans” in Subsections

(f) and (g) of Sections 3270.94, 3280.94 and 3290.94 relating to fire drills. This will help facilities to avoid “re-inventing the wheel” in planning for these emergencies, and will prevent possible conflict or confusion with the routes and plans developed in response to the existing regulations.

5. Sections 3270.70, 3280.70 and 3290.68. Indoor temperature. - Protection of public health; Reasonableness; Clarity.

Even though the proposed regulation reduces the allowable temperature level, the Visiting Nurse Association of Central Pennsylvania (VNA) expressed concern that the rule does not factor in the “heat index.” This organization indicated that Temperatures in the 80 degree range with a relative humidity of 50 percent can be dangerous. The National Resource Center for Health and Safety in Child Care recommends the following standards for indoor temperature:

A draft-free temperature of 65 degrees F to 75 degrees F shall be maintained at 30% to 50% relative humidity during the winter months. A draft-free temperature of 68 degrees F to 82 degrees F shall be maintained at 30% to 50% humidity during the summer months. All rooms that children use shall be heated, cooled, and ventilated to maintain the required temperatures, humidity, and air exchange and to avoid accumulation of odors and fumes. Air exchange shall be a minimum of 15 cubic feet per minute (or 7.5 liters/second) per person of outdoor air.

(Source: http://nrc.uchsc.edu/CFOC/HTMLVersion/Chapter_5.html, Standard 5.028)
(*Caring for Our Children, 2nd ed.* - (Copyright 2002))

Since the VNA’s concerns with temperature and humidity mirror the limits prescribed by the recommended national standard, the Department should review its policy concerning the allowable high temperature.

6. Sections 3270.119, 3280.119 and 3290.118. Program plan. - Fiscal impact; Reasonableness; Implementation procedure.

Several commentators, including Representative Birmelin, raised a variety of concerns with the requirement for a program plan for each child. For example, one commentator expressed concern that subsections appeared to blend procedures and requirements for plans for children who have IEPs or IFSPs with the plans for children who don’t have IEPs or IFSPs. In these sections, it is difficult to identify which requirements apply to each situation. This blending also generated concern that child care staffs would be required to develop plans similar to IEPs and IFSPs for all children regardless of whether the child was receiving services from other institutions, educators or early intervention specialists.

Some also expressed concern with the prospect of child care staffs taking the lead in developing comprehensive plans for children. When the child has an IEP or IFSP, the educators or specialists providing the special education or early intervention services are responsible for developing the plan. In addition, child care staff members need permission from a parent or guardian to get a copy of the plan or other information from special education or early intervention staffs. Some commentators also noted that schools are not required to develop plans for students without “special needs.” Administrators and educators at public schools have years

of experience and expertise in developing IEPs. We question whether child care staff will have sufficient experience, training and education to develop program plans for children and families who have never been exposed to this process.

Finally, many questioned the cost of this requirement. Facilities may need to hire additional staff to maintain the required staff-to-child ratios while staff members spend time developing and writing plans, and meeting with parents and others to seek input on plans.

It is our understanding that the Department intends to significantly reduce these sections by removing the requirements for a program plan. It will replace the provisions in the proposed regulation with a mandate for a semi-annual statement for each child concerning the use of child care services and the child's developmental progress. We suggest that the Department carefully consider the contents of this statement and give serious consideration to developing a form with prescribed contents that can be used by the facilities. If the Department retains the requirement for a program plan for each child, then it will need to address the costs to facilities and operators in the Department's written response to comments received and in the Regulatory Analysis Form. In addition, the Department will need to amend the final-form regulation to identify the appropriate training requirements for facility staff, family cooperation in accessing IEPs and IFSPs, and adequate coordination with special education and early intervention staffs.

7. Sections 3270.120, 3280.120 and 3290.119. Infant sleep position. - Protection of public health and safety; Reasonableness; Implementation procedure; Clarity.

Many commentators expressed support for this new provision. In addition, the Allegheny County Health Department and others suggested that the regulation should include other recommendations from the American Academy for Pediatrics (AAP) for preventing sudden infant death syndrome. We agree and recommend that this provision reference the APP recommendations and provide information on how facilities can obtain copies.

8. Sections 3270.131, 3280.131 and 3290.131. Health information. - Protection of public health; Reasonableness; Consistency with other state programs.

Although it is maintaining requirements for periodic health reports for each child and proof of immunizations, the Department is deleting the requirement for the health assessments recommended by the AAP. The AAP Pennsylvania Chapter, VNA, Allegheny County Health Department, child care providers, and health care practitioners expressed serious concerns with the changes in this provision.

Several commentators indicated that the AAP recommended policy for health assessments provides critical information necessary to monitor the development of infants and children. This information is necessary to help pediatricians and others react quickly to potential health problems that could interfere with healthy growth and development. In addition, the AAP Pennsylvania Chapter contended that the deletion of the AAP recommendations for health assessments would be inconsistent with the policies for Head Start, the treatment schedule for Early and Periodic Screening, Diagnosis and Treatment program in Medicaid, and the goals of the Department of Health.

There are improvements in the proposed regulation since the Department is requiring new and useful information in the health reports. However, by deleting the AAP recommendations, the Department is eliminating requirements for health screenings at one month, two months, four months, nine months, and 15 months. We understand the concerns with enforcement for child care facilities, and the difficulties for parents related to health care access and affordability, limited insurance coverage, and privacy issues. However, the Department could readily address these situations by allowing for exceptions when families are unable to meet the requirement or have privacy concerns. By acknowledging and documenting exceptions, the Department can gather useful information, provide facilities with relief from enforcement complications, and still encourage families to obtain the recommended screenings for their children. We request that the Department further explain the benefits of the approach taken in the proposed regulation.

9. Sections 3270.133, 3280.133 and 3290.133. Child medication and special diets. - Public health and safety; Consistency with other regulations; Clarity.

Comments from the Early Childhood Education Linkage System recommended training in medication administration for facility staff members that provide medications to children. This type of training is required for staff in personal care homes (see 55 Pa. Code § 2600.190). The Department should amend the final-form regulation to require training for medication administration or explain why such training should not be required for child care staff. This concern is especially important for staff working with children with special needs who may need regular access to medications.

These sections should include a specific citation to the pertinent section of the ADA requiring “reasonable accommodation.” In addition, the generic reference to a “medication or special diet” could be interpreted to require that facility persons administer any and all medications or special diets prescribed for children with special needs. It is our understanding that the intent of the Department is for this requirement to apply only to medications or special diets prescribed for special needs. The final-form regulation should be amended to clearly state this intent.



Facsimile Cover Sheet

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INDEPENDENT REGULATORY
REVIEW COMMISSION

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Public Welfare's regulation #14-506 (IRRC #2539). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: C Klein Date: 8-2-06
cc Ruth/Jen W.