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NOTICE OF FINAL-FORM RULEMAKING

DEPARTMENT OF PUBLIC WELFARE

OFFICE OF CHILD DEVELOPMENT

- [55 Pa. Code Chapter 3270, Child Day Care Centers]
- [55 Pa. Code Chapter 3280, Group Child Day Care Homes]
- [55 Pa. Code Chapter 3290, Family Child Day Care Homes]
- [55 Pa. Code Chapter 3300, Specialized Day Care Services for Children with Disabilities]

Child Care Facilities

### *Statutory Authority*

The Department of Public Welfare (Department), by this order, adopts the regulation set forth in Annex A pursuant to the authority of Articles IX and X of the Public Welfare Code (62 P. S. §§ 901--922 and 1001--1087). Notice of proposed rulemaking was published at 36 Pa.B. 2686 on June 3, 2006.

### *Purpose of Regulation*

The child care facility regulations in Chapters 3270, 3280 and 3290 provide standards to aid in protecting the health, safety and rights of children and to reduce risks to children in child day care centers, group child day care homes (GDCH) and family child day care homes (FDCH). The regulations identify the minimum level of compliance necessary to obtain the Department's certificate of compliance to operate a child care center or GDCH or certificate of registration to operate an FDCH.

The final-form rulemaking is needed to update the minimum standards for child care facilities. The current regulations were published at 22 Pa.B. 1651 (April 4, 1992) and must be updated to reference the current laws that directly impact the operation of child care facilities, to incorporate the Department's statements of policy issued since 1992, to implement changes in recommended health and safety practices, to clarify minimum standards and to reflect best practice in the field of child care.

### *Affected Individuals and Organizations*

Children are directly impacted by the final-form rulemaking. The minimum health and safety standards in Chapters 3270, 3280 and 3290 protect children who attend more than 9000 certified and registered child care facilities in Pennsylvania. Parents also are impacted by the final-form rulemaking. Parents want their children to be safe in child care facilities. At the same time, the cost of child care is of concern to parents and directly impacts the choices that parents make regarding child care. The final-form rulemaking may result in decreased costs to parents due to the decreased costs associated with providing updated child health reports to the facility. The final-form rulemaking also will facilitate inclusion of children with special needs in child care facilities.

Child care facilities and staff also are affected by the final-form rulemaking. The final-form rulemaking may increase costs to some facilities. The regulation provides 120 days for facilities to assess and plan for increased costs. In addition, a facility has 2 years to comply with the requirements relating to playground surfacing. The delay in implementation of the final-form rulemaking will afford the Department time to provide information and tools to assist in understanding and complying with the final-form rulemaking to facilities. The final-form rulemaking relating to staff health appraisals and tuberculosis testing will decrease costs to facilities and staff.

### *Accomplishments and Benefits*

The child care service regulations were last published in April 1992. Since 1992, many changes have occurred that affect the regulations and operation of a child care facility. The Department published 11 statements of policy clarifying or interpreting the regulations, including statements of policy regarding emergency plans, supervision of children, Syrup of Ipecac, release of children, posting inspection summaries, Departmental access and swimming pool accessibility. Laws that impact operating a child care facility have changed regarding certificate of occupancy, vehicle safety, childhood immunizations and children with special needs. New research has resulted in changes to health and safety recommendations regarding SIDS prevention, playground safety and tuberculosis testing. In addition, the Department noted areas in which facilities have difficulty complying with requirements and examined the reasons for noncompliance. When possible, the final-form rulemaking reflects changes that will assist facilities to comply with the regulations and continue to ensure minimum health and safety at a facility.

The final-form rulemaking improves health and safety standards for all children in care, facilitates inclusion of children with special needs, incorporates current statements of policy and corrects regulatory language to accurately reflect laws that impact facility operation.

### *Fiscal Impact*

### Kindergarten child as a young school-age child

Including a kindergarten child in the definition of young school-age child will result in cost saving for child care centers and GDCHs. A school-age child care center or GDCH that enrolls a kindergarten child will be able to maintain its status as a school-age facility and will realize cost savings relating to staffing and physical site (see 55 Pa. Code §§3270.241 and 3280.221 (relating to requirements specific to school-age programs)). A facility that transports kindergarten and school-age children to and from school will be able to count the driver in the staff:child ratio and will no longer have to supply an additional staff person on the vehicle to comply with ratio requirements related to transporting preschool children. The staff:child ratio for young school-age children is 1:12 and for preschool children is 1:10.

Changing the definition of young school-age to include kindergarten children may result in lower reimbursement rates for some facilities that participate in the child care subsidy program. On average, the subsidy reimbursement rate for a preschool child is \$3.03 higher per day than the reimbursement rate for a young school-age child. Using the average full-time child care center reimbursement rates of \$24.01 per day for preschool child and \$20.98 per day for young school-age child and the required staff:child ratio of 1:10 for preschool children and 1:12 for young school-age children, the income from each group of children is \$240.10 for one group of 10 preschool children and \$251.76 for one group of 12 young school-age children.

The wages for child care staff vary according to position. The majority of staff in child care facilities are qualified as assistant group supervisor (AGS). An AGS is

permitted to be alone with children. According to the Pennsylvania Department of Labor and Industry (L&I) wage statistics, the average wage for a child care worker is \$8.50 per hour. Using an estimate of a 10-hour full day of care, the cost of a child care worker for 10 hours is \$85.00. The income produced from a group of 10 preschool children less the cost of the child care worker is \$155.10. The income produced from a group of 12 preschool children less the cost of the child care worker is \$166.76. The addition of two children to the staff:ratio offsets the lower rate for a young school-age child.

A child care center must have one group supervisor (GS) for every group of 45 enrolled children. A GS has more qualifications than an AGS, may supervise children alone and is often referred to as a “teacher”. According to the L&I wage statistics, the average wage for a preschool teacher is \$11.01 per hour. If a GS is counted as a staff person, the cost of a GS for 10 hours is \$110.10. The income produced from a group of 10 preschool children less the cost of the GS is \$130.00. The income produced from a group of 12 preschool children less the cost of the child care worker is \$141.66. Again, the addition of two children to the staff:ratio offsets the lower rate for a young school-age child.

Pre-certification orientation:

Pre-certification orientation may create costs to an individual who wants to apply for a certificate of compliance or registration. The training will require a full day including travel and training time. The individual’s costs will vary depending on the

distance the individual must travel to participate in training. Using the Commonwealth mileage rate, an individual who travels 200 miles round trip will incur a travel cost of \$97.00.

For individuals currently operating or working in child care facilities, attendance at pre-certification orientation training will be part of their job duties and they will be paid for the time to attend the training.

An individual who operates a FDCH or GDCH and who wants to open a new facility may have to arrange for staff to work at the facility while the individual attends orientation training. According to L&I wage statistics, the average wage for a child care worker is \$8.50 per hour. If substitute staff must be hired to cover an eight hour shift, the estimated cost is \$68.00.

An individual who is employed outside the child care field and who wants to open a facility may miss a day of work to attend orientation training and may lose wages for that day. Based on L&I's statistics regarding the average state wage for all workers in Pennsylvania, the individual may lose \$147 in wages to attend orientation training.

#### Indoor temperature of 82° F:

The final-form rulemaking requires mechanical air circulation at 82° F, instead of 85° F, which is the current standard. Many facilities already have a means of ventilation

in place. Ventilation may be provided through using a fan. If a facility has to purchase a fan, the cost of a fan will vary depending on the type of fan, such as a standing fan, window fan, wall fan or ceiling fan. The estimated costs would be anywhere from \$15.00 to \$100.00 depending upon the type of fan chosen by the provider.

Disposable, nonporous gloves in first aid kit:

The addition of disposable, nonporous gloves to the first aid kit represents increased cost to a facility. The use of gloves is a universal precaution to prevent the spread of disease transmitted via body fluids. The cost of a box of 100 gloves ranges from \$2.99 to \$8.99. The rate at which the gloves are used to administer first aid is unknown. The health and safety protection afforded to children and staff by using gloves outweighs the cost.

Protective surfacing under outdoor play equipment:

The final-form rulemaking relating to surface covering under outdoor embedded play equipment may result in increased costs for facilities that do not currently meet the United States Consumer Product Safety Commission (CPSC) recommendations. The previous regulation required at least six inches of loose-fill material under embedded play equipment. The CPSC recommendations state that six inches of uncompressed wood chips, the most common protective surface covering used at child care facilities, provides adequate protection from a fall height from seven feet. Six inches of loose-fill



material will be adequate for most child care facilities. If a facility must modify the protective surface to comply with the regulation, the cost will depend upon the fall height from the equipment, the type of surface covering used and the size of the area that must be covered.

A facility that has a unitary surface covering that meets the requirements in the Department's statement of policy at §§ 3270.102a, 3280.102a and 3290.102a (relating to condition of play equipment – statement of policy) at 27 Pa.B 2827 (June 14, 1997) is in compliance with the final-form rulemaking.

Progress checklist:

Facilities will incur added costs in preparing a progress checklist every six months for each infant, toddler and preschool child and for each school-age child who attends the facility more than 15 hours per week. The Department estimates that on average, a progress checklist will take 10 minutes to complete. The Department estimates the average costs of preparing progress checklists to be as follows: child care center - \$282.88; GDCH \$\$66.56; FDCH - \$\$33.28.

Staff health:

The final-form rulemaking changes the requirement for annual health appraisals to health appraisals every 2 years and eliminate bi-annual tuberculosis testing. These

changes will save each staff person \$75.00 to \$150.00 per year and an additional \$25.00 to \$75.00 every two years.

### *Paperwork Requirements*

Facilities must complete a progress checklist every six months for each infant, toddler and preschool child and for each school-age child who attends the facility more than 15 hours per week. The Department will develop a checklist form for facilities to use and will also provide a list of additional approved forms. The checklist will take approximately 10 minutes to complete.

Each child day care center and GDCH must certify that no hazardous equipment is on the premises. The Department will provide a certification form for this purpose. The form will take no more than 10 minutes for the facility to complete.

### *Public Comment*

Following publication of proposed rulemaking, the Department received 46 comments during the 30-day public comment period and three comments within 30 days after the close of the public comment period. The comments received during the public comment period came from 18 child care providers, 13 advocacy organizations, seven medical professionals or organizations, three attorneys, three consumers, one Pennsylvania Key employee and one former Department employee.

The comments received within 30 days after the close of the public period came from two providers and one medical professional.

The Department also received comments from the House Children and Youth Committee and the Independent Regulatory Review Commission (IRRC).

Prior to publication of proposed rulemaking, the Department formed a regulation work group to gain input regarding the proposed rulemaking. The work group met twice. Work group participants represent a variety of stakeholders interested in child care including providers from all types of child care facilities, advocates, medical professionals, early intervention professionals and representatives of the Departments of Education and Health.

In February 2006, the Office of Child Development (OCD) conducted leadership forums regarding initiatives for fiscal year 2006-2007. The forums were held in several locations across the state. Approximately 500 people attended the forums. Participants were provided the option of attending several topic-specific sessions regarding upcoming initiatives, including an overview and discussion of the proposed regulatory amendments.

Following publication of proposed rulemaking, the Department held two additional work group meetings. During the 30-day public comment period, the work

group met once to discuss strategy to solicit comments regarding the proposed amendments. Following the close of the public comment period, the work group met to discuss the comments and possible revisions to the proposed rulemaking. In addition, Department staff contacted work group members who were unable to attend the meeting in order to get their input.

### *Discussion of Comments and Major Changes*

Following is a summary of the major comments received within the public comment period following publication of the proposed rulemaking and the Department's response to those comments. A summary of major changes from proposed rulemaking is also included.

### *Statutory authority.*

The IRRC, citing the Commonwealth's Court's opinion and order in St. Elizabeth's Child Care Center v. Dep't of Public Welfare, 895 A.2d 1280 (Pa. Commw. 2006), petition for allowance of appeal filed, 284 MAL 2006, has questioned the Department's authority to "regulate" Article IX nonprofit facilities. While it is true that St. Elizabeth's does stand for the proposition that the Department cannot require the nonprofit facility to secure a certificate of compliance as a condition of operation of the facility, the Department disagrees with the IRRC's characterization of the court's ruling in St. Elizabeth's. The case does nothing to diminish or in any way alter the

Department's authority under Article IX to require compliance with its regulations; it simply states that the Department cannot require a "piece of paper" as a condition of operation of a nonprofit facility under Article IX. The Department retains the right to enter, visit, inspect and supervise all "children's institutions" and "supervised institutions" in the Commonwealth, as well as to enforce compliance with its regulations through injunctive relief or through withholding of public funds to the facility. 62 P.S. 911(c).

In further response to the IRRC's concern, the Department disagrees with the Court's ruling in St. Elizabeth's. Instead, the Department finds that it has authority under Article IX of the Public Welfare Code to require that the nonprofit facility present a certificate of compliance as a condition of operation in the Commonwealth. (62 P.S. 901-922; 55 Pa.Code 20.) As a result, on April 24, 2006, the Department filed in the Pennsylvania Supreme Court a Petition for Allowance of Appeal in St. Elizabeth's. The filing of this Petition for Allowance of Appeal operates as an automatic stay of the St. Elizabeth's order of Commonwealth Court. Pa.R.A.P. 1736 (relating to exemption from security); Public Advocate v. Philadelphia Gas Comm'n, 646 A.2d 19 (Pa. Commw. 1994). Therefore, the Department did not amend the regulations in response to the comment.

*§§ 3270.4, 3280.4, 3290.4. Definitions--Preschool and young school-age child*

Fifteen commentators responded to the changed definitions of preschool and young school-age child. Seven commentators supported the change. Commentators stated the change will reduce operating costs. Another commentator stated that the change will increase opportunities for kindergarten children to participate in school-age child care programs, especially school-based, school-age care programs and that kindergarten children's access to regulated care will increase as a result. Another commentator stated that the change makes sense because the needs of children attending kindergarten are more similar to those of a school-age child as opposed to a preschool child.

Eight commentators opposed the change. Seven of the commentators opposed the change because the child care subsidy reimbursement rate is lower in their counties for a young school-age child than for a preschool child.

The House Children and Youth Committee opposed the change due to concerns that a lower child care subsidy reimbursement rate for young school-age children will negatively impact providers.

The IRRC also stated that the Department should carefully examine the impact of this change on facilities that provide care primarily to preschool children and provides care for only a few kindergarten children. Such a facility may not benefit from the less stringent staff:child ratio for young school-age children but will receive less subsidy reimbursement.

*Response*

The Department believes that including a kindergarten child in the definition of young school-age child will facilitate care for kindergarten children.

The majority of kindergarten children (52%) are participating in full-day kindergarten classrooms in Pennsylvania. School-age child care programs are established to meet the unique needs of children who need child care before and after school hours, including kindergarten children. The Department's regulation permits a child day care center or GDCH in which care is provided exclusively to school-age children to comply with fewer requirements than a facility that provides care for children of all age levels (see 55 Pa. Code §3270.241 and 3280.221 (relating to requirements specific to school-age programs)). In addition, a school-age child care program located in a school building is further exempt from physical site requirements in accordance with Section 7-776.1 of the Public School Code of 1949 (see 24 P.S. § 7-776.1). A facility that enrolls a kindergarten child cannot be considered a school-age program because the facility is not providing care exclusively to school-age children. As a result, the facility must comply with all the requirements in Chapters 3270 and 3280 and will incur higher costs.

Other school-age programs transport children between school and the child care facility. The Department's regulation relating to transportation of children states the

driver may not be counted in the staff:child ratio when preschool children are transported but may be counted in the ratio when only school-age children are being transported (see 55 Pa. Code §§3270.173(b) and (c) and 3280.173(b) and (c) (relating to transportation ratio)). When a kindergarten child is being transported, the facility cannot count the driver as part of the staff:child ratio and must provide more staff on the vehicle in order to meet the preschool staff:child ratio of 1:10 rather than the young school-age ratio of 1:12. The cost of transporting a kindergarten child is therefore higher than the cost of transporting a school-age child.

The fact that a kindergarten child was a preschool child under the Department's previous regulation created a disincentive for a school-age child care program to enroll a kindergarten child. By changing the definition of young school-age child to include a child in kindergarten, a school-age child care facility will be able to enroll a kindergarten child without incurring the higher costs of providing care to a preschool child. The final-form rulemaking will facilitate before- and after-school care for kindergarten children.

The child care subsidy reimbursement rate was the basis for comments opposing changing the definition to make a kindergarten child a young school-age child. The subsidy reimbursement rate is a separate issue from the child care facility regulations and is outside the scope of this final-form rulemaking. Therefore, the Department made no changes to the final-form rulemaking.

§§ 3270.4, 3280.4, 3290.4. *Definitions--Child with special needs*



Nine commentators addressed the proposed definition of child with special needs. Eight commentators supported the change in definition. One commentator made suggestions to include reference to a service agreement pursuant to 22 Pa.Code Chapter 15 (relating to protected handicapped students) as a document that identifies that a child has a special need. The same commentator objected to the term “formal behavioral plan” and suggested that a behavioral plan written by a certified behavior analyst should be accepted as indication that the child has a special need.

The IRRC commented that a service agreement pursuant to 22 Pa.Code Chapter 15 should be included as a document that identifies that a child has a special need. IRRC also objected to the use of the word “formal” in reference to the behavioral plan and suggested adding a certified behavior analyst to the list of professionals who may write a behavioral plan.

### *Response*

The Department agreed and incorporated the suggested changes into the final-form rulemaking. In addition, the Department made the editorial change of deleting “psychiatrist” from the definition at subparagraphs (ii) since “physician” already includes a “psychiatrist”. See 1 Pa.C.S. § 1991 (relating to definition).

*§§ 3270.4, 3280.4, 3290.4. Definitions--IEP, IFSP, service agreement.*

The IRRC suggested that adding the following definitions to the regulation will provide clarity:

- Define *individualized education program (IEP)* as in 22 Pa.Code §§14.01 (relating to definitions) and 14.131-133 (relating to IEP; ESY; and behavior support).
- Define *individualized family service plan (IFSP)* as in 55 Pa.Code Chapter 4226 (relating to early intervention services).
- Define *service agreement* as in 22 Pa.Code Chapter 15 (relating to protected handicapped students).

### *Response*

The Department added these definitions to the final-form rulemaking.

§§ 3270.17, 3280.16, 3290.15. *Service to child with special needs.*

Six commentators addressed the total proposed amendment to §§ 3270.17, 3280.17 and 3290.17. Five supported the amendment. One commentator opposed the amendment based on concerns about the need for staff training specific to a child's special need and providing a program tailored to a child's special need without additional supports or funding.

*Response*

Training in numerous topic areas relating to children with special needs is available through the Pennsylvania Key Professional Development System, the Department's contracted comprehensive statewide training system for child care providers. Over 70 such training opportunities were offered statewide in fiscal year 2005-2006. Individuals who provide specialized services to a child with special needs can come to the facility to provide those services. In addition, Federal and State laws relating to disability discrimination provide guidance and parameters regarding reasonable accommodations that a facility may be required to make in caring for a child with a special need.

*§§ 3270.17(a), 3280.16(a), 3290.15(a). Service to child with special needs.*

Four commentators supported the requirement to make reasonable accommodation to include a child with special needs but expressed concerns regarding the definition of reasonable accommodation and reference to the Americans with Disabilities Act (ADA) only.

*Response*

Federal and State laws establish requirements relating to reasonable accommodation. The requirements regarding reasonable accommodation are not

identical for all child care facilities and the regulation cannot address every situation. A facility should consult with legal counsel regarding how the laws apply to the provider's facility and specific situation. The Department changed the language to reference applicable Federal and State laws regarding disability discrimination. Consistent with other rulemaking (35 Pa.B.2499 (April 23, 2005)), the Department will not provide a list of applicable laws. A list of applicable laws is unnecessary since applicable laws apply independently of this final-form rulemaking.

*§§ 3270.17(b), 3280.16(b), 3290.15(b). Service to child with special needs.*

Three commentators supported the requirement to permit service providers to come into the facility. One commentator suggested adding a reference to services specified in a service agreement under 22 Pa.Code Chapter 15 (relating to protected handicapped students) or by a licensed practitioner.

The IRRC commented that some parents may not share the IEP or IFSP with the facility and the regulation should acknowledge this by instructing child care staff that it is up to the parent to provide the document. The IRRC also asked whether Early Intervention must include a child care facility representative on an IFSP team pursuant to Chapter 4226 (relating to early intervention services).

*Response*

A service agreement applies only to a school setting; therefore, the Department did not add to the final-form rulemaking the suggested reference to a service agreement. The Department considers the reference to licensed practitioner to be covered by an IEP or IFSP and did not add to the final-form rulemaking the suggested reference to a licensed practitioner. At this time, the Department's regulation relating to Early Intervention does not require inclusion of a child care facility representative in development of the IFSP; however, participation of a child care facility representative is encouraged in Early Intervention policy. The Department will provide information to facilities regarding Early Intervention services and will include information that a parent is not required to provide a copy of an IEP or IFSP to the facility.

The Department made minor changes to this subsection to add clarity.

§§ 3270.17(c), 3280.16(c), 3290.15(c). *Service to child with special needs.*

Two commentators supported the requirement that the facility must provide information regarding resources for early intervention services to facility staff and to the parent of a child who staff believe may need an assessment for early intervention services. One commentator cautioned that child care staff should not make a diagnosis regarding whether a child has special needs.

The House Children and Youth Committee commented that the proposed rulemaking places the facility director in a difficult situation in which the director must

determine if parents have or have not had their child evaluated and if it is prudent to advise them to have the child evaluated. The Committee recommended changing this requirement to a suggestion.

The IRRC also expressed concern about training for child care staff to complete the developmental checklist and to talk with a parent regarding a child who may need an assessment. The IRRC recommended that child care staff should complete training before completing an observation of a child's development, assessing a child for a possible disability and approaching a parent with referral information.

#### *Response*

The Department believes that child care staff are in a unique position to observe a child's development, behavior and health. Child care staff interact with children in their care on a daily basis for an average of 10 hours a day. If a staff person has a concern about the development, behavior or health of a child in the staff person's care, that concern should be brought to the attention of the child's parent. The facility director, primary staff person or operator's role is not to diagnose a special need but to share observations with the parent and provide information regarding resources for assistance if the parent chooses to pursue an assessment.

Through the Pennsylvania Keys to Professional Development system, the Department provides professional development in numerous topic areas relating to children with

special needs and communication with parents (over 70 opportunities offered statewide in fiscal year 2005-2006). In addition, the Department will provide information and materials to facilities regarding community resources for children with special needs to share with staff and parents.

The Pennsylvania Training and Technical Assistance Network (PaTTAN) is an initiative of the Pennsylvania Department of Education, Bureau of Special Education. PaTTAN offers professional development that builds the capacity of local educational agencies to meet students' needs. PaTTAN also provides support for Early Intervention services to all children through professional development and assistance to child care staff. The Pennsylvania Early Intervention Technical Assistance (EITA) system, which is a part of PaTTAN, also provides staff professional development and family informational services that support Early Intervention programs.

The Department made minor changes this subsection.

*§§3270.27, 3280.26 and 3290.24. Emergency plan.*

The IRRC requested that the Department add a definition of emergency to the regulation and referred to the definition of emergency that appears in the child care emergency planning tool kit prepared by the Pennsylvania Emergency Management Agency (PEMA). The IRRC commented that the list of requirements regarding the information that must be included in the emergency plan is unclear and incomplete and

cited the requirements regarding shelter of children during an emergency and evacuation of children during an emergency. The IRRC also commented that the plans for evacuation during a fire should cross-reference the existing regulations regarding “evacuation routes” and “evacuation plans” at §§ 3270.94(f) and (g), 3280.94(f) and (g) and 3290.94(f) and (g) (relating to fire drills) to avoid conflict or confusion regarding evacuation routes.

*Response*

The Department incorporated into the final-form regulation the existing statement of policy at §§ 3270.21a, 3280.20a and 3290.18a (relating to emergency plan - statement of policy) requiring emergency plans that was published at 33 Pa.B 6428 (December 27, 2003) and has been in effect since June 2004. The definition of emergency has never been questioned during that time period. The Department did not add a definition of emergency because the Department intends for “emergency” to retain its dictionary definition.

The Department revised the language relating to shelter and evacuation of children in an emergency as per the IRRC’s comments.

§ 3290.31(a).; § 3290.213. *Age and training.*



The Department received 13 comments regarding the requirement that an FDCH operator submit to the Department at the time of first certificate renewal proof that the operator has a high school diploma or general educational development (GED) certificate. Twelve commentators support the proposed rulemaking, including two family child care provider associations. Four of the twelve commentators suggested that the Department extend the timeline to get a GED, provide financial assistance for an operator to get a GED and grandfather all current operators at any location.

The House Children and Youth Committee stated that a family child care home operator does not need a high school diploma or GED to operate a quality family child care program and recommended deletion of the requirement.

### *Response*

Currently, 97% of registered FDCH operators have a high school diploma or GED. As of the effective date of the final-form rulemaking, a newly registered FDCH operator who does not have a high school diploma or GED will have 2 years, which is one full registration period, to obtain the credential and must demonstrate compliance at the time of the first registration renewal. GED classes are offered free of charge statewide in 150 locations. The cost of taking the examination to obtain a GED is \$40.00 to \$60.00. The Department maintains that 2 years is sufficient time to obtain a GED and did not change the timeline in the final-form rulemaking.

The FDCH registration system is a self-certification system. The applicant for a registration certificate submits to the Department a signed statement certifying that the applicant has read and is in compliance with the FDCH regulation. By requiring the operator to have a high school diploma or GED at the time of certificate renewal, the Department is requiring a minimum level of literacy sufficient to comply with the regulation and operate a small business. This requirement will increase the health and safety of children in FDCHs and will also codify what already is the minimal educational background of 97% of current FDCH operators.

Further, this final-form regulation aligns staffing requirements across all child care settings since primary staff in child care centers and GDCHs are required to have a high school diploma or GED. In fact, any staff in centers or GDCHs who do not meet this educational requirement must be supervised at all times by a staff person with the required educational background.

In the final-form rulemaking, the Department permanently grandfathered all currently registered FDCH operators even if the operator moves to a new location.

*§§ 3270.70, 3280.70 and 3290.68. Indoor temperature.*

One commentator opposed the proposed rulemaking as it does not address the heat index.

The IRRC noted the comment regarding factoring in the heat index and the standard published in Caring for Our Children: National Health and Safety Performance Standards: Guidelines for Out-of-Home Child Care, 2nd Edition which references maintaining the humidity in a child care space at 30%-50%. The IRRC suggested that the Department should review its policy concerning allowable high temperature.

### *Response*

The Department researched the impact of referencing the heat index in the final-form regulation. The National Weather Service defines “heat index” as an accurate measure of how hot it really feels when the relative humidity is added to the actual air temperature. In order to determine the heat index, one must measure the relative humidity. Hygrometers are the instruments that measure relative humidity. The price for one hygrometer ranges from approximately \$30.00 to hundreds of dollars. In order to monitor relative humidity, the facility would need a hygrometer in each child care space and would incur significant costs.

The National Health and Safety Performance Standards represent state-of-the-art child care facility standards. The Department reviewed the child care facility regulations of the adjacent seven states which have climates similar to Pennsylvania. None of the seven states’ regulations reference indoor humidity. Only three of the

seven states' regulations establish a maximum indoor temperature and require ventilation above the maximum temperature.

The Department did not change the final-form regulation.

*§§ 3270.102(c), 3280.102(c) and 3290.102(c). Condition of play equipment; §§ 3270.233, 3280.215, and 3290.212. Play surfaces.*

Twenty-two commentators addressed the requirement that the surface covering under outdoor play equipment that requires embedded mounting must meet the guidelines for loose-fill or unitary playground protective surface covering established by the United States Consumer Product Safety Commission (CPSC). Ten commentators supported the change.

Twelve commentators did not support the change. Eight commentators cited cost as the reason for opposing the change. Four commentators do not believe that FDCH and GDCH facilities located in residences should have to comply with the requirement. One commentator felt that two years was not sufficient time to come into compliance. Another commentator opposed the requirement because public schools are not required to comply.

*Response*

The CPSC guidelines for loose-fill and unitary surface coverings reflect the fall height of the equipment and the type and depth of surface covering required to protect a child from injury if the child falls from the highest point of the equipment. The CPSC standards state that six inches of uncompressed wood chips, the most common protective surface covering used at child care facilities, provides protection up to a fall height of seven feet. The previous requirement for six inches of loose-fill material will be adequate for most child care facilities; thus, the majority of facilities are not likely to incur additional costs associated with implementation of the final-form rulemaking. Facilities that do not meet this requirement have two years to comply.

The Department did not change the final-form regulation.

*§§ 3270.119, 3280.119 and 3290.118. Program plan (redesignated as progress checklist).*

Thirty-one commentators addressed the proposed rulemaking to require a program plan for each child in care. Five commentators supported the proposal. Twenty-six commentators opposed the proposal.

The House Children & Youth Committee also commented on the proposed rulemaking. The Committee perceived a lack of clarity in the proposed rulemaking and were concerned about licensing repercussions if the plan was not followed, the burden of paperwork and costs to the provider, whether a provider is qualified to develop a

program plan, the provider's inability to access a child's IEP or IFSP and have information regarding early intervention services being provided to the child, difficulty in writing program plans for school-age children who are in care for short periods of time and a complaint system for parents who disagree with the program plan.

The IRRC expressed the same concerns as the House Children and Youth Committee with regard to lack of clarity, particularly regarding a child who has an IEP or IFSP and a child who does not. The IRRC expressed concern regarding whether child care staff have sufficient experience, training and education to develop plans similar to IEPs and IFSPs. The IRRC suggested that if the Department reduces the requirement and instead requires a semi-annual statement of the child's use of child care services and the child's developmental progress, then the Department should develop a form and prescribe the contents of the form.

### *Response*

The Department changed the final-form rulemaking to require the completion of a semi-annual progress checklist for each infant, toddler and preschool child and for each school-age child who attends the facility more than 15 hours per week. The Department will provide a checklist form and will also provide a list of approved checklist forms developed by other entities. The facility must give the child's parent an opportunity to sign and receive a copy of each progress checklist. If the facility participates in the development of the child's IEP or IFSP and has a copy of the IEP or IFSP on file in the child's record, the facility is not required to complete the semi-annual progress checklist.

§§ 3270.120, 3280.120 and 3290.119. *Infant sleep position.*

Fifteen commentators supported the proposed rulemaking to require infants be placed on their backs to sleep in accordance with the current American Academy of Pediatrics (AAP) policy relating to Sudden Infant Death Syndrome (SIDS) prevention. Three commentators wanted to expand the requirement to include the entire content of the AAP policy relating to items in a crib. Three commentators suggested changing the language to reference the current AAP recommendation regarding infant sleep position so that the regulation would not have to be amended if the policy changed.

The IRRC suggested changing the language to reference the AAP recommendation for preventing SIDS and to inform providers how they may obtain copies of the AAP recommendation.

#### *Response*

The Department revised this section to require facilities to comply with the current AAP recommendation on infant sleep position. The Department also added language at §§ 3270.106(j), 3280.105(j) and 3290.105(j) (relating to rest equipment) to prohibit toys, bumper pads and pillows in a crib while an infant is sleeping in the crib as per the AAP recommendation. The Department previously provided facilities with information regarding SIDS prevention, including brochures and materials regarding the AAP recommendation, and will continue to do so.

§§ 3270.131(a)-(d), 3280.131(a)-(d) and 3290.131(a)-(d). *Health information.*

Nine commentators supported the proposed changes related to the frequency and content of child health reports. Five of those commentators were providers and three commentators represented advocacy organizations.

Twelve commentators opposed the changes regarding the frequency and content of child health reports. Seven of those commentators were medical professionals or representatives of medical organizations and two were providers. Six of the twelve commentators specifically opposed the deletion of the requirement that health reports must include a review of age-appropriate screenings according to the standards of the AAP. One commentator who opposes deletion of the screening requirements understood that a child care provider cannot control the child's health care but believed the requirement reminds parents to get health assessments and screenings.

The IRRC commented that the Department should retain current requirements relating to the AAP recommended schedule for health examinations and screenings but should provide for exceptions when families cannot meet the requirement or have privacy concerns. The IRRC further commented that by doing so, the Department can gather useful information, provide facilities with relief from enforcement complications and encourage families to obtain recommended screenings. The IRRC also asked for further explanation of the benefits of the changed requirements. The IRRC also noted



that a commentator said that the changed requirements would be inconsistent with the policies for Head Start; the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program in Medicaid and the goals of the Department of Health.

*Response*

The Department added to the final-form rulemaking two requirements relating to the content of the child health report, which is to be completed by the child's health care professional. First, the health report must include specific information regarding abnormal results of vision, hearing and lead screenings. This will provide the facility with valuable information regarding the child's health that may impact on the child within the context of the child care program. Second, the health report must also include a statement indicating whether AAP recommended screenings were conducted since the date of the child's previous health report. This statement will serve as the requested reminder to parents and health care providers about AAP recommended screenings.

Due to the variations in the source of a child's health insurance, and in some instances, the lack of health insurance, by requiring the facility to have on file child health reports and health screening information that comply with the AAP recommendations, the Department would be making the facility responsible for actions that can only be performed by the child's parent and may far exceed the scope of the insurance coverage available to the family. If the facility does not comply, the Department cites the facility for noncompliance with the regulation and requires the

facility to correct the violation. If the parent cannot or will not provide the very broad health information required in accordance with the AAP recommendations, a facility has to deny participation in child care regardless of whether the child had accurate health information on file that pertains directly to the ability to be a safe participant in a group setting. In the public school setting, such an instance would result in the school being able to access Department of Health funding to provide the required health assessments and screenings (see 28 Pa. Code §§23.21-23.28). Unlike the public school setting, this option is not available to facilities or to parents.

Parents may incur added costs to comply with the AAP schedule if their insurance plan does not cover all the examinations and screenings included in the AAP schedule. In addition, some physicians charge parents to complete the health report required by regulation. In some areas of the state, facilities report that parents must wait months for well-child appointments and cannot meet the timelines due to lack of availability of qualified physicians.

The Department is concerned about creating a regulation that provides for exceptions whereby a parent can simply document that the parent cannot get health information or has a privacy concern and not submit health information that is necessary to protect all children in care or to deal with a medical emergency involving a child.

The final-form rulemaking provides for submission of health information on a regular schedule, requires the child care facility to know if the AAP recommendations

have been fulfilled, and focuses on submission of information that the facility needs to protect the health and safety of the child and all other children in the facility. The modifications in the final form regulations also serve as a reminder and incentive to parents to have their children receive primary pediatric care in accordance with the AAP recommendations.

*§§ 3270.131(e), 3280.131(e) and 3290.131(e). Health information.*

Eight commentators specifically addressed the proposed immunization requirements which match the Department of Health requirements at 28 Pa. Code § 27.77 (relating to immunization requirements for children in child care group settings). Seven commentators supported the change. One commentator did not support the requirement to exclude a child who did not get immunizations within the time prescribed in the regulation.

## Response

Currently, the Department's immunization requirements differ from the Department of Health's requirements. The differing requirements create confusion to providers and parents. The final-form rulemaking creates consistency in immunization requirements by adopting the Department of Health's immunization requirements for children who attend child care facilities (see 28 Pa. Code § 27.77 (relating to immunization requirements for children in child care group settings)).

The Department did not change the final-form regulation.

§§ 3270.133, 3280.133 and 3290.133. *Child medication and special diets.*

Eleven commentators supported the proposed rulemaking. One commentator stated the Department should reference other laws regarding disability discrimination that may impact on providing medication related to child's special need. Two commentators supported adding a requirement for medication administration training.

The IRRC recommended that the Department add a requirement for medication administration training like that required for staff in Personal Care Homes at 55 Pa. Code §2600.190(relating to medication administration training) and include a citation to the pertinent section of the ADA requiring reasonable accommodation. The IRRC also noted that the language of the regulation could be interpreted to require administration of any and all medications or special diets to a child with a special need rather than only medications or special diets related to a child's special need and, if this is not the Department's intent, the final-form regulation should be reworded to clearly state the intent.

*Response*

The ADA is not the only statute regarding disability discrimination. The Department changed the final-form rulemaking to reference all applicable Federal and State laws regarding disability discrimination. The Department also changed the final-form regulation to specify that the requirement to administer medication or a special diet pertains only to a medication or special diet related to a child's special need.

The Department will not require medication administration training. Medication administration training is currently available to providers through the Pennsylvania Keys to Professional Development system. At this time, the Department does not know how many children with special needs will require medication during the time they are in care. Child care is provided for only a portion of the day; thus, medication schedules may not include the hours a child is in care. In order to meet the needs of some children with special needs, staff persons may need specialized training or instruction in administration that can be provided by the child's parent or a service provider or medical professional who works with the child. In addition, service providers who come on-site to provide services to the child may be responsible for administering medication. The Department will monitor medication administration in child care facilities to determine whether it is necessary to require medication administration training for facility staff persons.

In addition to the major changes discussed previously, the Department made several changes in preparation of the final-form rulemaking including reformatting to

enhance readability, revising language to enhance clarity and conforming to the changes previously discussed.

*Regulatory Review Act*

Under § 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)), on the Department submitted a copy of this regulation to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Children and Youth and the Senate Committee on Public Health and Welfare. In compliance with the Regulatory Review Act the Department also provided the Committees and the IRRC with copies of all public comments received, as well as other documentation.

In preparing the final-form regulation, the Department reviewed and considered comments received from the Committees, the IRRC and the public.

In accordance with § 5.1 (j.1) and (j.2) of the Regulatory Review Act, this regulation was [*deemed*] approved by the Committees on . The IRRC met on and approved the regulation.

In addition to submitting the final-form rulemaking, the Department has provided the IRRC and the Committees with a copy of a Regulatory Analysis Form prepared by the Department. A copy of this form is available to the public upon request.

*Order*

The Department finds:

- (a) The public notice of intention to amend the administrative regulation by this Order has been given pursuant to §§ 201 and 202 of the Commonwealth Documents Law (45 P.S. §§ 1201 and 1202) and the regulations at 1 Pa. Code §§ 7.1 and 7.2.
- (b) That the adoption of this regulation in the manner provided by this Order is necessary and appropriate for the administration and enforcement of the Public Welfare Code.

The Department acting pursuant to the authority of Articles IX and X of the Public Welfare Code (62 P. S. §§ 901--922 and 1001--1087) orders:

- (a) The regulation of the Department is amended to read as set forth in Annex A of this Order.
- (b) The Secretary of the Department shall submit this Order and Annex A to the Offices of General Counsel and Attorney General for approval as to legality and form as required by law.

- (c) The Secretary of the Department shall certify and deposit this Order and Annex A with the Legislative Reference Bureau as required by law.
  
- (d) This order shall take effect 120 calendar days after publication in the **Pennsylvania Bulletin** except for §§ 3270.102(c) and (e), 3280.102(c) and (e), and 3290.102(c) and (e) (relating to condition of play equipment) which shall take effect two years after the effective date of the regulation.