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PENNSYLVANIA CATHOLIC CONFERENCE

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July 27, 2006

Robert Frein, Director
Bureau of Subsidized Child Care Services
Office of Child Development
Room 521, Health & Welfare Building
P.O. Box 521
Harrisburg, PA 17105

RECEIVED
2006 AUG -3 AM 8:34
INDEPENDENT REGULATORY
HEALTH COMMISSION

Re: Proposed Rulemaking
Regulation No. 14-505 (#2549) - Subsidized Child Care

Dear Mr. Frein:

The Pennsylvania Catholic Conference (PCC) is an association comprised of the eight Latin Rite Roman Catholic Dioceses of Pennsylvania and the two Byzantine Rite Catholic Dioceses whose territories include the Commonwealth of Pennsylvania. The Catholic Dioceses in Pennsylvania provide a significant amount of quality religious child care within the Commonwealth.

The Department's proposed regulations would prevent parents from receiving subsidized child care if they send their children to nonprofit religious child care facilities that choose not to be licensed or certified by the Department. Despite the stated purpose of the proposed rulemaking, the regulations would have the effect of limiting or preventing the availability of religious child care options for parents. Moreover, the proposed regulations would unfairly punish nonprofit religious facilities that are statutorily exempt from the licensing/certification requirements of the Department.

§ 168.11. General Requirements – Lack of Statutory Authority.

The proposed regulations would amend § 168.11 pertaining to the eligibility requirements for child care providers. The amendment attempts to re-affirm the Department's position of preventing unlicensed/uncertified religious facilities from becoming eligible providers.

In response to Cease and Desist Orders issued by the Department to Catholic facilities, PCC has long argued that the Department does not have the authority to require licensure of nonprofit facilities. 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), agreed with PCC's arguments and ruled that the Department lacks the statutory authority under Article IX of the Public Welfare Code to promulgate regulations that require a nonprofit religious child care center to obtain a Certificate of Compliance (i.e., a license) in order to operate. This ruling corrected the Department's long-held, but erroneous position that it had the authority to require licensure of nonprofit religious child care facilities.

When promulgating prior subsidized child care regulations, the Department claimed that it could prevent unlicensed Article IX facilities from becoming eligible providers because they were not "legally" entitled to operate. See Attachment A – Notice of Final Rulemaking # 14-489 [55 Pa. Code Chapter 3041]. In that rulemaking the Department stated that it requires that "child care subsidy be provided in legally-operated child care facilities." See Attachment A, at Page 16. Furthermore, the Department stated that: "Selection of a child care facility that is specifically exempt from regulation and certification by the Department, including in-home care for one, two or three children, is permitted." See Attachment A at page 18.

St. Elizabeth's Child Care Center makes clear that nonprofit religious facilities are specifically exempt from the Department's licensing requirements and are therefore legally entitled to operate without a license. Also, the Department has admitted that for purposes of subsidized child care, parents may select child care facilities that are "specifically exempt" from certification by the Department. In light of *St. Elizabeth's Child Care Center* and in response to the Department's policy of permitting other exempt providers to participate in subsidized child care, the Department is, we submit, required to amend § 168.11 to permit nonprofit religious providers, which are exempt from licensure, to become eligible providers.

The commentary to the proposed regulations indicates that the subsidized child care benefits are funded through or in conjunction with Temporary Assistance for Needy Families (TANF), General Assistance (GA) and Food Stamp benefits. Federal law requires that child care funds submitted to the states under TANF be subject to the requirements and limitations of the Federal Child Care and Development Block Grant ("CCDBG"). See 42 U.S.C.A. § 618(c). It is quite clear that the CCDBG is designed to promote parental choice of child care, *including* religious child care. There is nothing in that law that requires child care providers to be licensed in order to provide care to eligible children. Indeed, the law specifically states that it is *not* to be construed "to require that licensing requirements be applied to specific types of providers of child care services." 42 U.S.C.A. §9858c(c)(2)(E)(i).

We note that this federal law previously allowed states to impose "more stringent standards and licensing or regulatory requirements on child care providers within the

State that provide services for which assistance is provided under this subchapter.” (See, prior §9858c(c)(2)(E)(i)). However, that language was deleted altogether in the 1996 amendments to the law. Thus, the law no longer allows States to impose more stringent licensing or regulatory requirements on child care providers that provide care to children receiving federal governmental assistance thereunder.

As noted above, there is no state statutory licensing/certification requirement for nonprofit religious entities as a condition of lawful operation. Given the subsequent changes in the federal law, the State no longer may require more stringent licensing/certification of such entities as a precondition for the provision of services subsidized by these federal funds. Accordingly, under TANF and the CCDBG, it is impermissible for the Department to prohibit families that are eligible for subsidized child care from choosing these lawfully operating providers.

The explanatory commentary also claims that the proposed rulemaking supports families and children “by providing parents with a broad range of child care options and empowering them to make their own decision on the child care that best meets the needs of the child and the family.” However, under the framework established by these proposed regulations, families and children are actually *denied* a broad range of choice. They may not choose child care from lawfully operating, convenient, and trusted church-run day cares located in their own neighborhoods. Thus, the proposed regulations are contrary to both the spirit and letter of the law.

In addition, the exclusion of religious providers serves no legitimate or rational purpose. It should be noted that the proposed regulations would allow parents to choose a relative or a neighbor provider or an in-home provider “specifically exempt from certification or registration.” § 168.11(a)(4) and (5). This means that the Department would provide subsidies if parents choose to send their children to a family day care provider who may have several of her own children in care, and has three unrelated children in care. Yet, it would not allow parents to receive subsidies if they choose to send their child to a religious child care provider where children are cared for by persons with background checks, under the oversight of church administrators, and subject to the Department’s supervisory authority (including unannounced inspections) and numerous other regulations promulgated by other government agencies.


In short, the proposed regulations are punitive toward religious providers that seek to protect their religious child care ministries from unwarranted interference by the Department into sensitive areas such as program, curriculum, teaching and instruction. They are also punitive toward poor families that wish to have their children cared for in religious facilities where they will be taught values consistent with their own religious beliefs.

As a final matter, 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

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 exclude religious facilities – that have not become licensed due to the religiously burdensome nature of the licensing regulations – from becoming eligible subsidized child care providers.

If you have any questions, please contact me for further information.

Very truly yours,



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

cc: Mr. Alvin C. Bush, Chairman
Independent Regulatory Review Commission;

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. Orié, 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

ATTACHMENT A

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>By: _____ (Deputy Attorney General)</p> <p>_____ Date of Approval</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>DEPARTMENT OF PUBLIC WELFARE</u> (Agency)</p> <p>LEGAL COUNSEL: <u>Jean E. Graybill</u></p> <p>DOCUMENT/FISCAL NOTE NO. <u># 14-489</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <u>Estelle B. Pickman</u></p> <p>TITLE: <u>SECRETARY OF PUBLIC WELFARE</u> (Executive Officer, Chairman or Secretary)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u>[Signature]</u> ANDREW C. CLARK</p> <p><u>4.5.05</u> Date of Approval</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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NOTICE OF FINAL-FORM RULEMAKING

DEPARTMENT OF PUBLIC WELFARE

OFFICE OF CHILD DEVELOPMENT

[55 Pa.Code Chapter 3040]

Subsidized Child Day Care Eligibility

[55 Pa.Code Chapter 3041]

Subsidized Child Care Eligibility

Response

The upper age limit for receipt of subsidized child care cannot be changed. The age limit is dictated by Federal regulation that establishes the upper age limit at 13 years, unless the child has a special physical or mental limitation and needs child care.

Consistent with the Federal Child Care and Development Block Grant, subsidized child care will continue to be available to a child who is 13 years of age or older but under 19 years of age and who is incapable of caring for himself.

§ 3041.12(c). Provision of subsidized child care

The Pennsylvania Child Care Campaign suggests that the verification requirement appear in a separate verification section.

Response

The proposed requirement for documentation of a child's physical or mental inability to care for himself was relocated at § 3041.76 (relating to verification of a child's inability to care for self).

§ 3041.13(a). Parent choice

The House Children and Youth Committee and two commentators question if this provision limits parent choice and prohibits a parent from sending a child to a faith-based or another child care facility that is operating without a certificate of compliance, but which is not exempt from certification in Pennsylvania.

The House Children and Youth Committee and one commentator state that the requirement for non-profit child care facilities to receive a certificate of compliance from the Department exceeds the Department's statutory authority.

One commentator states that this provision is inconsistent with Federal law that promotes parent choice and recent Federal law changes regarding references to state licensing.

One commentator suggests that to permit the selection of child care in a family home serving one, two or three children that legally operates without Departmental regulation and certification is not consistent with the requirement to require selection of a certified child care center.

Response

Under current regulation, as well as under this rulemaking, families may choose and use child care programs that are operated by religious schools and other faith-based entities. Parental selection and use of faith-based child care is permitted and encouraged in the Head Start expansion and the prekindergarten programs, as well as in all child care subsidy services. There is no restriction or regulation as to the religious, spiritual or programmatic nature of the child care program. Parent choice is fully afforded within the provisions of Pennsylvania's governing statutes and regulations.

The Department does not exceed its statutory authority in requiring a certificate of compliance for non-profit child care centers. The Department requires that child care subsidy be provided in legally-operated child care facilities. In accordance with

62 P.S. §§ 901-922 and 1001-1080 and 55 Pa.Code § 20.21(a) (relating to application form), both profit and non-profit child care facilities must be certified to operate in Pennsylvania. Given the health and safety risks in both profit and non-profit child care facilities, the same substantive regulations have applied to profit and non-profit child care facilities in Pennsylvania since 1978. Furthermore, 62 P.S. §§ 901-922 does not exempt faith-based facilities, whether providing child care or any other type of health or human service. Of the 3,897 certified child care centers in Pennsylvania, there are 1,777 for-profit centers (46%) and 2,120 non-profit centers (54%). Thus, the majority of Pennsylvania certified child care centers are non-profit centers. Of the 2,120 non-profit child care centers, many are operated by faith-based organizations.

This provision is consistent with the Federal statutory requirements at 42 U.S.C.A. § 9858c(c)(2)(A) regarding parental choice. As stated previously, this rulemaking permits families to choose a child care program that is legally operated by a faith-based entity. There is no restriction or regulation as to the religious, spiritual or programmatic nature of the child care program. The Federal statutory requirements at 42 U.S.C.A. § 9858c(c)(2)(E) and (F) in no way limit a state's right and responsibility to regulate child care facilities. Rather, the language prohibits a state from funding child care programs that are not certified in accordance with State law. This language clarifies that the authority for State regulation and certification is not under Federal jurisdiction, but a matter for the states to govern.

The decision to permit the choice of family care in a home serving one, two or three children is entirely consistent with the decision to prohibit the use of non-certified child care centers. In accordance with 62 P.S. §§ 1070-1080 the General Assembly

has explicitly expressed that family homes serving one, two or three children operate legally without a certificate of registration from the Department. There is no such statutory exemption for non-profit or faith-based child care centers. Selection of a child care facility that is specifically exempt from regulation and certification by the Department, including in-home care for one, two or three children, is permitted.

§ 3041.14(a). Subsidy benefits

One commentator requests that the terms "payments for child care" be replaced by "child care benefits". Three commentators, including the Pennsylvania Child Care Campaign, support allowing subsidized child care for the parent during hours of travel time and uninterrupted sleep time when the parent's shift ends between midnight and 9 a.m. One commentator opposes allowing subsidized child care during hours of uninterrupted sleep time.

Response

This section was revised to clarify that a family may receive child care benefits during the hours that the child needs care if the parent or caretaker is employed or attending education or training.

Subsidized child care may occur during travel time and uninterrupted sleep time that is necessary to retain work or attend education or training. This permits consistency with the TANF program since families who formerly received TANF benefits may receive subsidized child care during hours of travel and uninterrupted sleep time.

§ 3041.14(b). Subsidy benefits