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September 26, 2006

Ms. Kim Kaufman
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

RE: Department of Public Welfare (DPW) Regulation
#14-505 (IRRC #2549)
Subsidized Child Care

RECEIVED
2016 SEP 28 AM 9:10
INDEPENDENT REGULATORY
REVIEW COMMISSION

Dear Ms. Kaufman:

Our firm represents the Pennsylvania Catholic Conference and St. Elizabeth's Child Care Center. We write in response to the Commission comments (dated August 30, 2006) submitted in response to the above referenced proposed rulemaking and published in the September 16, 2006, edition of the Pennsylvania Bulletin.

In the comments under "2. Section 168.11.—Statutory authority", the Commission noted the recent ruling of the Commonwealth Court in *St. Elizabeth's Child Care Center v. Department of Public Welfare*. In that case, the Commonwealth Court ruled that DPW 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.

In referencing the *St. Elizabeth's Child Care Center* decision, the Commission stated the following: "We understand that the Commonwealth Court's order has been stayed, as the Department has filed a petition for allowance of appeal to the Supreme Court of Pennsylvania." We write to clarify that the Commonwealth Court's order has *not* been stayed.

DPW's Petition for Allowance of Appeal in *St. Elizabeth's Child Care Center* does not operate as an automatic stay of the Commonwealth Court's order because the appeal before the Commonwealth Court arose as a Petition for Review of an agency

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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).

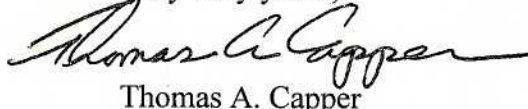
In filings on other appeals pending before DPW's Bureau of Hearings and Appeals, DPW has incorrectly cited to Pa.R.A.P. 1735 in support of its argument regarding an automatic stay of the Commonwealth Court's decision in *St. Elizabeth's*. However, Pa.R.A.P. 1731-1751 apply only to civil actions, while Pa.R.A.P. 1781-1782 apply to actions on Petitions for Review. See *Elizabeth Forward School Dist.*, *supra*, at 70. The appeal in *St. Elizabeth's* commenced as a Petition for Review, and, therefore, Pa.R.A.P. 1735 does not apply.

In order to obtain a stay, DPW is required to file a petition with the court pursuant to Pa.R.A.P. 1781. DPW has failed to file such a petition. Thus, the Commonwealth Court's decision in *St. Elizabeth's* is the current state of the law with respect to DPW's limits on its statutory authority under Article IX of the Public Welfare Code.

We note that the Commission correctly stated that it is required to consider *St. Elizabeth's* as a pertinent opinion in determining the statutory authority of DPW to promulgate a regulation. However, by this letter, we wish to correct any misperception that might be advanced by DPW that the Commonwealth Court's order in *St. Elizabeth's* has somehow been stayed and is somehow not binding on DPW.

Should you have questions regarding this matter, please feel free to contact us.

Very truly yours,



Thomas A. Capper

cc: Hon. Thomas W. Corbett, Jr.
Attorney General of Pennsylvania

Mary S. Wyatt, Esq.
Chief Counsel
Independent Regulatory Review Commission

Dr. Robert J. O'Hara, Jr.
Executive Director, Pennsylvania Catholic Conference