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

August 30, 2006

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

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

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
kac
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 #14-505 (IRRC #2549)

Child Care

August 30, 2006

We submit for your consideration the following comments on the proposed rulemaking published in the July 1, 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. Section 168.2. Definitions. - Reasonableness; Consistency with other regulations; Clarity.

AMR--Agreement of Mutual Responsibility

This term is defined in detail in existing regulations at 55 Pa. Code § 165.2. This definition should be amended in the final-form regulation to include a reference to Section 165.2.

Co-payment

At the end of this definition, the phrase “child care that is subsidized” should be replaced with “subsidized child care.”

Employment Development Plan (EDP)

Commentators suggested adding the term “EDP” to this section. If it is added in the final-form regulation, it should refer to the definition of EDP in Chapter 165.

Household

The citation to a federal regulation, “7 CFR 273.1(a)(2),” in this definition is too specific. The Department has indicated that it is planning to broaden the reference to include additional paragraphs in 7 CFR 273.1(a), relating to household concept, in the final-form regulation. We agree.

Parent

The proposed regulation adds a new definition of the word “parent” to this section. There are two concerns. Community Legal Services, Inc. (CLS), and Pennsylvania Child Care Campaign (PCCC) suggest including the word “caretaker” and those responsible for “care and control” in the definition. The word “caretaker” is appropriate since the person responsible for the child

may not be a biological or adoptive parent. In addition, the word “caretaker” is also used in Chapter 165 (relating to “Road to economic Self-Sufficiency through Employment and Training (RESET) Program”). The phrase “care and control” is used in the existing provisions in Chapter 3041 relating to subsidized child care eligibility. We agree with the use of the words “caretaker” and “care and control” and recommend they be included in the definition in the final-form regulation.

Second, this definition uses the term “TANF [Temporary Assistance for Needy Families] specified relative” in its reference to Section 151.42. The word “TANF” does not appear in Section 151.42 but the term “specified relative” does appear. Department staff indicate that this definition will be amended to state “a specified relative as defined for the TANF program in 55 Pa. Code § 151.42.” We concur with this change in the final-form regulation.

Pre-expenditure approval

This definition and its explanation in the preamble are unclear. It is our understanding that the Department intends to delete this definition and related substantive provisions in the final-form regulation. If it is retained, its wording and intent will need to be reviewed and clarified.

Provider Agreement

What are the contents of the agreement? If it contains requirements that will be binding on child care providers, then the contents or basic requirements need to be set forth in the substantive provisions of the final-form regulation.

2. Section 168.11. General requirements. - Statutory authority; Fiscal impact; Reasonableness; Clarity.

This section identifies the type of child care providers that a parent may select when using subsidized child care. There are four concerns.

First, a group of commentators are concerned that the requirements in Subsection (a) may exclude them from the list of eligible providers that parents may select when receiving subsidized care. This group includes the Pennsylvania Catholic Conference, Keystone Christian Education Association, Pennsylvania Family Institute and Reach Alliance. They note a recent ruling by the Commonwealth Court in *St. Elizabeth's Child Care Center v. Department of Public Welfare*, that the Department does not have the statutory authority to license or certify nonprofit, religious child care facilities pursuant to the provisions in 55 Pa. Code Chapters 3270, 3280 or 3290.

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. However, we are required to consider pertinent opinions of Pennsylvania’s courts in determining the statutory authority of an agency to promulgate a regulation (see 71 P.S. § 745.5b(1)). In this case, the regulation may also limit parental choice and the availability of care. The Department needs to explain its plans for addressing eligibility for nonprofit providers who are not certified or registered under the existing child care facilities regulations.

Second, Subsections (a)(4) and (5) include the phrase “specifically exempt.” The word “specifically” is unnecessary and should be deleted since it is already used in the definitions of the terms in these subsections.

Third, CLS and PCCC expressed concern with the deletion of the phrase “shall have the right” in Subsection (b). The proposed regulation would simply state that a parent “may” choose any type of child care provider who meets the requirement of Chapter 168 rather than stating that a parent “shall have the right” to choose any provider. We agree with the suggestion to replace “may” with “shall have the right” and recommend this change be included in the final-form regulation.

Fourth, Subsection (b) requires that a provider meet the requirements of this chapter and “meet the Department’s standards for provider participation.” However, the “requirements” and “standards” are not identified. According to the Department, requirements for providers are set forth in Sections 168.19 and 168.41(3) and standards for provider participation are also set forth in the provider agreement. Specific references to these sections and any other applicable requirements in other regulations should be added to Subsection (b) in the final-form regulation. In addition, if providers will be expected to meet other requirements in a written agreement and these requirements are not set forth in regulations in Chapter 168 or elsewhere, then these requirements should be set forth in the final-form regulation.

3. Section 168.17. Eligible children. - Clarity.

In Paragraph (2), the reference to 7 CFR 273.1(b) is incomplete. According to the Department, it should be “7 C.F.R. § 273.1(b)(1)(iii).” The Department should make this correction in the final-form regulation.

Paragraph (4)(iii) is not a component of Paragraph (4) and should be a separate paragraph. The Department should make it into a new and separate Paragraph (5) in the final-form regulation.

4. Section 168.18. Need for child care. - Reasonableness; Clarity.

The proposed regulation simplified Subsection (c) to state that child care will be considered as needed for entry into or during breaks in approved work activities for “up to 30 days.” The Department needs to clarify when the 30 days could begin and end.

CLS, PCCC and other commentators expressed concern with the requirement for a “face-to-face” interview in Subsection (f). Even though Subsection (f) provides for flexibility, CLS and PCCC make recommendations for additional flexibility. For example, the subsection includes this statement: “The Department may substitute a telephone contact for a face-to-face interview if a face-to-face interview cannot be scheduled without the parent having to take time off from work.” We have two concerns.

First, this subsection does not identify who will conduct the interview with the parent. This is in contrast to an existing provision at 55 Pa. Code § 3041.126(b) that states a face-to-face interview is with the “eligibility agency.” It is our understanding that the Child Care Information Services Agency (CCIS) will conduct the interview with the parent. The final-form regulation should be amended to indicate that the interview is with the CCIS.

Second, what happens if the parent cannot get transportation to the interview or experiences other legitimate problems in completing the interview that are beyond her or his control? What steps could be taken to avoid disruption in child care services?

5. Section 168.43. Verification of a child's disability. - Clarity.

The title of this section refers to a child's disability even though the definition of "disability" in Section 168.2 is limited to parents' impairments. It is our understanding that the Department will replace the word "disability" with "injury or impairment" in the title of this section in the final-form regulation. We agree with this change.

6. Section 168.43 and 168.44. Verification of a child's or parent's disability. - Clarity.

Both sections contain long sentences which end with the phrase "is required." It is unclear who needs to obtain the written statement from the physician or psychologist and to what office the statement should be submitted. It is our understanding that the Department will amend these sections to clarify that a parent is required to provide the written statement mentioned in these two sections to the "Department or its designated agent" in the final-form regulation. We agree that this revision will clarify these sections.

7. Section 168.61. Reporting requirements. - Clarity.

In this section, a parent is required to report changes in child care arrangements. However, it is unclear who should receive the parent's report. Department staff indicated that, as noted above, they plan to amend this provision in the final-form regulation to require parents to report "to the Department or its designated agent." We support this change.

9. Section 168.72. Determining monthly child care costs. - Protection of public welfare; Reasonableness; Clarity.

In Subsection (2), the Department is limiting payments to cover a charge for up to ten consecutive days when the child was not in attendance due to illness. The revision was helpful since it deleted existing language "vacation, and the like" which was vague. However, many child care providers require payments during a child's absence to maintain a space for when the child returns. There may be other legitimate reasons besides illness for a child's inability to be present at the child care facility. These reasons may include travel time to attend a funeral in the family or hospitalization for an injury. Maintaining a child's place in a facility is crucial to maintaining access and continuity in child care. We recommend that the Department review whether this provision should include other limited and specific reasons for absences beyond illness.

10. Section 168.82. Time frames for authorization of payment. - Clarity; Reasonableness.

Some of the CCIS agencies expressed concerns with the time frames in this new section. Based upon a recent review of this proposed section, the Department indicates that the provisions in this new section are not appropriate for Chapter 168 and it will delete this new section in its entirety from the final-form regulation. If the Department does not make this change, it needs to explain how the time frames in this section were determined and why they are reasonable.

Facsimile Cover Sheet



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Jennifer Whare, Assistant Counsel
Lisa Benedetto, Secretary to Ms. O'Brien
Stephanie Schubert

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Date: August 30, 2006
Pages: 6

INDEPENDENT REGULATORY
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Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Public Welfare's regulation #14-505 (IRRC #2549). 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: *S. Schubert* Date: 8/30/06