

January 30, 2014

Elizabeth Timm
Office of Childcare Licensing
1825 Faulkland Road
Wilmington, DE 19805

RE: DFS Proposed Residential Child Care Facility and Day Treatment Program Regulation [17 DE Reg. 706 (January 1, 2014)]

Dear Ms. Timm:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Services for Children, Youth and Their Families/Division of Family Services (DFS)/Office of Child Care Licensing proposal to amend the *Delaware Requirements for Residential Child Care Facilities and Day Treatment Programs*. Council commented on earlier versions of this proposed regulation in June and August, 2013. A copy of the August 26, 2013 letter is attached for your reference. DFS is now reissuing a revised proposed regulation. Based on the "Summary of Proposed Changes" section (p. 707), there are only a few new changes to the 37-page regulation. The GACEC would like to share the following observations on the latest revisions to the regulation.

First, the Division amends §3.5.1.2.2 in the context of tuberculosis (TB) testing. The current standard envisions verification of the absence of TB every three years. The new version envisions verification only if specific concerns are raised or in accordance with current Division of Public Health (DPH) guidelines. DFS may wish to review the Department of Education TB standards at 14 DE Admin Code 905. The DOE standards contemplate completion of an employee questionnaire every five years. Licensees who require TB testing based on "specific concerns about the health of an employee or volunteer" could easily "run afoul" of the ADA. See attached EEOC guidance. Singling out an employee for medical testing should only be based on "a reasonable belief based on objective evidence" that the employee poses a direct threat due to a medical condition. As noted in the EEOC guidance, this standard can be met by a credible report:

Example A: Bob and Joe are close friends who work as copy editors for an advertising firm. Bob tells Joe that he is worried because he has just learned that he had a positive reaction to a tuberculin skin test and believes that he has tuberculosis. Joe encourages Bob to tell their

supervisor, but Bob refuses. Joe is reluctant to breach Bob's trust but is concerned that he and other editors may be at risk since they all work closely together in the same room. After a couple of sleepless nights, Joe tells his supervisor about Bob. The supervisor questions Joe about how he learned of Bob's alleged condition and finds Joe's explanation credible.

Because tuberculosis is a potentially life-threatening medical condition and can be passed from person to person by coughing or sneezing, the supervisor has a reasonable belief, based on objective evidence, that Bob will pose a direct threat if he in fact has active tuberculosis. Under the circumstances, the employer may make disability-related inquiries or require a medical examination to the extent necessary to determine whether Bob has tuberculosis and is contagious.

Contrast this illustration with a scenario in which an employee with a disability is sneezing frequently and an employer demands that the employee undergo tuberculin testing. This could violate the ADA since sneezing could be from allergies or a common cold. Adopting a "specific concerns" benchmark, rather than a "reasonable belief based on objective evidence" benchmark, will predictably lead to ADA violations.

Second, the Division notes that it did not modify its ban on the presence of any toy in a crib with a sleeping infant. See GACEC letter, "Third" paragraph, and DFS commentary at 706-707. The ban may be overbroad since the quoted American Academy of Pediatrics standard refers to "soft objects/toys" that pose a suffocation risk. The attached Academy guidance permits pacifiers in cribs. There may be rattles, teething aids, and "toys" which do not pose a suffocation risk.

Third, the Council shared a concern with the revised definition of "child" since House Bill No.163 authorizes extended services through age 21. See August 26, 2013 GACEC letter, "Fifth" paragraph. DFS acknowledges the comment but its response is not clear. At 707.

Thank you in advance for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

Sincerely,

Terri A. Hancharick
Chairperson

TAH:kpc

Attachments