

October 25, 2016

Kelly McDowell
Office of Child Care Licensing
3411 Silverside Road
Concord Plaza
Hagley Building
Wilmington, DE 19810

**RE: DFS Proposed Rules for Family Child Care Homes Regulation [20 DE Reg. 270
(October 1, 2016)]**

Dear Ms. McDowell:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Office of Child Care Licensing proposal to amend the DELACARE: Rules for Family Child Care Homes and DELACARE: Rules for Large Child Care Homes. Input on pre-publication drafts was obtained through public meetings in July 2016 followed by review by a task force. The Division is repealing separate standards for family homes and large family homes in favor of a single set of standards covering both. Council would like to share the following observations on family child care homes.

1. Section 3.1 includes preschool children living in the home in the calculation of the upper capacity limit. However, this section indicates that grandchildren, nieces, nephews, and stepchildren are not counted in calculating the limit. This is confusing. A grandparent licensee could have several co-habiting preschool grandchildren or a parent licensee could have several co-habiting preschool stepchildren. They should count towards a capacity limit on the same basis as a biological child. Relative caregivers are common. See 14 Del.C. §202.
2. Section 12.5 is "overbroad". Literally, a licensee could not hire an accountant or bookkeeper who works off-site and has no contact with children if such an employee ever had a child removed from his/her custody for even dependency. There is no time limitation, i.e., the removal could have occurred 50 years ago. Moreover, removals based on "dependency" do not implicate "fault", e.g., the caregiver may simply have lost a job or become so ill that care could not be provided. See, e.g., Title 10 Del.C. §901(8). The second sentence in §12.5 is puzzling.

If DFS intends to authorize an exception to the first sentence, it should be made clear.

3. Section 12.11 apparently requires the licensee to require all employees, even those working off site with no contact with children, to execute a blanket release of all medical and mental health records. This is overbroad and creates a conflict with federal laws exposing the licensee employer to liability. See summary of Equal Employment Opportunity Commission (EEOC) decision. Reliance on a state regulation is not a defense:

The ADA does not override State or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a State or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If such a "direct threat" exists, the employer must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer cannot rely on a State or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

EEOC and USDOJ ADA Q&A Guidance (2009), published at <https://www.ada.gov/q&aeng02.htm>.

4. Section 12.13 may violate the Americans with Disabilities Act (ADA): "A licensee shall ensure a staff member diagnosed or treated for mental illness that might create a significant risk of harm to children is not hired." The employer cannot simply decide to not hire an individual with a disability based on a perception that the applicant "might create a significant risk of harm". The employer would have to determine if the risk could be eliminated or reduced by reasonable accommodation. See above quotation. Moreover, the applicable standard is "direct threat to health or safety", not "risk of harm". Parenthetically, adoption of regulatory and policy standards based on stereotypical, judgmental views of mental illness are contrary to State public policy. See 19 Del.C. §§741 and 744.

5. Section 12.17 is overly restrictive and ill-conceived:

12.17. A licensee shall not provide care for a person recovering from a long-term illness or surgery requiring nursing care at home during the hours children are in care.

The categorical ban would apply even if the family child care home had two staff members "caring" for a single 14 year old child. The categorical ban would apply even if a private duty nurse were present to provide the nursing care. From a public policy perspective, the ban will create hardships for families with recovering family members who would like to recuperate at home. The ban will prompt the "recovering person" to unnecessarily enter institutional, nursing facility care. Finally, the ban is inconsistent with federal public policy discouraging discrimination against persons based on their "association" with someone with a disability. See 42 U.S.C. 12112(b)(4).

5. Section 15.0 omits notification to the Office of Child Care Licensing (OCCL) if a child is

“missing” or there is an attempted or actual abduction. Compare proposed Child Placement Agency regulation, §§13.0 and 46.4.3.

6. Section 15.3.5 requires a licensee to notify OCCL if any household member or staff member “develops a serious health condition or is diagnosed with a mental illness” and submit documentation/medical clearance to the OCCL. The requirement would apply to even employees who are off-site and have no contact with children. It is indicative of a pervasive, hysterical and pejorative view of mental illness and health conditions throughout the regulation. This standard presumes that anyone with a serious health condition or any mental health diagnosis poses a significant risk to children unless “cleared” by medical personnel. Employers are barred from asking employees about mental illness unless the employer has a reasonable belief, based on objective evidence, that the employee poses a direct threat. It is impermissible to adopt a legal presumption that everyone with a mental health diagnosis is dangerous until medically cleared.

7. Section 18.3 authorizes exemption from immunization based on religion. DFS may wish to review 14 Del.C. §131 and 20 DE Reg. 227 (10/1/16) and/or consult DPH to determine if more prescriptive standards should apply than a simple recital “documentation is required”. For example, the statutory form of affidavit for students disallows an exemption if based on “political, sociological or philosophical view of a merely personal code”. Section 18.3 does not require an affidavit and suggests that the objection could be relatively informal.

8. Section 21.18 requires only a single toilet irrespective of the size of the household and number of children in care. This should be reconsidered. For example, if a household member is taking a shower in the bathroom, children may have no access to a toilet. Compare 16 DE Admin Code 3230.5.9 (1 toilet per 4 residents).

9. Section 21.24 should be amended to include “vaping” or “smoking (as defined in 16 Del.C. §2901)”. See 16 Del.C. §2903.

10. Sections 241.0 and 25.0, disallowing trampolines and requiring children to wear helmets when riding bikes merit a strong endorsement since correlated with Traumatic Brain Injury (TBI) prevention.

11. In Section 32.3, DFS may wish to further define “notify OCCL”. For example, the analogous proposed Child Placement Agencies regulation includes a definition of “direct voice contact” (§4.0) and otherwise refers to “call OCCL and speak to someone” (§13.0) as juxtaposed to leaving a message.

12. Historically, the Department of Health and Social Services (DHSS) reported that some child care providers refused to cooperate with Individuals with Disabilities Education Act (IDEA) Part C service providers (e.g. speech therapists; occupational therapists) by disallowing or discouraging on-site services. See 16 Del.C. §§210-218. Under federal law, IDEA Part C services are to be provided in “natural environments”, including day care settings. It would be

preferable to include a requirement of licensee cooperation with IDEA Part C service providers in §39.0.

13. Section 41.6.7 contains appropriate restrictions on use of some forms of restraint. It could be embellished by a general ban on “mechanical restraint”. By analogy, there is a statutory ban on the use of mechanical restraints in schools. See 14 Del.C. §4112F(b) which reflects a State public policy of disallowing their use.

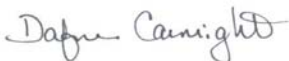
14. Section 41.6 could be improved by disallowing chemical restraint. There is a statutory ban on the use of chemical restraints in schools. See 14 Del.C. §4112F(b). DHSS bans the use of chemical restraint in facilities such as AdvoServ. See 16 DE Admin Code 3320.20.11.11.

15. Section 41.0 could be improved by disallowing “seclusion”. Seclusion is distinct from “time-out” and a licensee could argue that there are no limits on seclusion, including locking a child in a room. Compare 14 Del.C. §4112F(a)(5)(6). There is a statutory ban on seclusion in schools. See 14 Del.C. §4112F(b). DHSS bans the use of seclusion in facilities such as AdvoServ. See 16 DE Admin Code 3320.20.11.13 and 14. Moreover, definitions of “time-out” and “seclusion” should be added to §4.0.

16. Section 58.1.11 includes the following ban: “possession of a controlled substance is prohibited while working”. Thus, an individual with Attention Deficit Hyperactivity Disorder (ADHD) could not have prescribed Ritalin or Adderall on his person. An individual with depression could not have a remedial medication on his person. In many cases this would amount to discrimination based on disability. Indeed, literally, a licensee could not employ a nurse to administer medications that would qualify as a controlled substance.

Thank you for your consideration of our observations on the proposed regulations. Please contact me or Wendy Strauss at the GACEC office if you have questions on our comments.

Sincerely,



Dafne A. Carnright
Chairperson

DAC:kpc

CC: Shirley Roberts, Division of Family Services
Dan Madrid, Employment First Oversight Commission
Ann Woolfolk, Interagency Coordinating Council