

October 25, 2016

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

**RE: DFS Proposed Child Placing Agencies Regulation [20 DE Reg. 271 (October 1, 2016)]**

Dear Ms. McDowell:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Office of Child Care Licensing (OCCL) proposal to completely revise its standards covering child placing agencies. Input on pre-publication drafts was obtained through public meetings in July, 2016 followed by review by a task force. The published regulation is comprised of 63 pages of deleted and proposed standards. Council would like to share the following observations.

1. Section 4.0, definition of "administrative hearing": The reference to "decision to place the facility on an enforcement action" is odd and counterintuitive. For example, a hearing is available to contest denial of a license application which is not conceptually "an enforcement action". See §10.1. DFS may wish to consider adopting a more appropriate term (e.g. adverse Office of Child Care Licensing (OCCL) decision" or "adverse OCCL action") and substituting a conforming definition for the counterintuitive definition of "enforcement action".
2. Section 7.2.6: Council recommends deletion of the reference to "society's best interests". The concept is vague and one could speculate that "society" is better off letting "high need" children with complex disabilities or short expected life spans expire.
3. Section 12.1: Consider substituting "state" for "State" since out-of-state adoption officials should have the same status as "international officials". The capital version of "state" could be interpreted to only apply to Delaware.

4. Section 13.0: DFS may wish to align the content of this section with analogous or overlapping sections, including §§26.11 and 46.0. For example, §13.0 requires notice to OCCL if a child is “absent without permission, runs away” or “is abducted”. In contrast, §46.4.3 requires a foster parent to alert a licensee to “unknown location of the child” for any reason and §46.4.4 requires such notice for even “an attempt to remove the child from the foster home”, not simply an actual “abduction”. Note also that the foster parent must notify the licensee of “involvement of the child with law enforcement authorities” (§46.4.5) but the licensee is not required to notify DFS (§13.0). Likewise, note that §26.11 has a different injury threshold for notice to DFS - “serious bodily injury” versus any injury correlated with “medical/dental treatment” (§13.3). It would be preferable to have a single, identical standard. Finally, time periods for reporting are also inconsistent. For example, §26.11 requires “immediate” reporting of injuries while §13.3 allows such reporting within one business day.

5. Section 16.1.5 requires that “permanent records” be kept “indefinitely”. There is no definition of “permanent record” which could result in a lack of retention of records DFS would characterize as “permanent”. The term “indefinitely” suggests that records must be maintained forever. This may be an unrealistic standard.

6. Section 19.1 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 §19.1 is “cryptic”. If DFS intends to authorize an exception to the first sentence, it should be made clear.

7. Section 19.4 is “overbroad”. It requires a licensee to “ensure a staff member provides documentation from a health care provider for the follow-up of known health conditions.” There is no definition of “known health condition”. That documentation is then shared with DFS. Employers cannot require an employee to disclose all “health conditions”. See Equal Employment Opportunity Commission (EEOC) guidance.

8. Section 19.6.1 could be improved by clarifying that the statute has time limitations on most offenses. Mere conviction of a “prohibited offense” is insufficient to disqualify a person from serving as an employee or volunteer in a child care context. Consider the following amendment:

19.6.1. Convicted of a prohibited offense [during a relevant time period] as defined in 31 Del.C. §309.

9. Section 19.6 would effectively require an employer to immediately terminate the employment of an employee whose child has been currently removed under even an ex-parte order with marginal due process. The respondent may not be accorded a hearing for weeks (10 Del.C. §1043) but will have been fired. Moreover, the termination would apply to off-site employees (e.g. accountants;

bookkeepers) who have no contact with children. This is overbroad.

10. Section 20.1.6 requires all licensee staff to “be physically and emotionally able to work with a child”. This is overbroad and discriminatory, especially when applied to staff who are not caring for children, e.g. janitor, receptionist, accountant, development director, or bookkeeper. Moreover, it is a violation of federal and State law to not provide reasonable accommodations to an employee with a disability, including reassignment of some duties to other employees. See 19 Del.C. §§722 and 724(a)(5). Finally, DFS adoption of such overbroad standards is inconsistent with 19 Del.C. §§741 and 744.

11. Section 20.1.11 contains the following ban: “possession of a controlled substance is prohibited while working”. Thus, an individual with 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.

12. Section 26.13 literally states that a child is allowed to have any “restriction” that is typical for a child of the same age. It is “odd” to say someone has a right to a restriction.

13. Section 26.15 requires a licensee to have a policy to ensure that a foster parent does not subject a child to “exploitation”. Since “exploitation” is a form of “child abuse” as defined in §4.0, it may be preferable to amend §26.15 to more broadly cover child abuse and neglect.

14. Section 26.17.4 authorizes imposition of “physical, chemical, or mechanical restraint” with child placing agency approval. This is extremely problematic. Compare proposed Family Child Care Home regulation, §41.6.7 (categorically disallowing mechanical restraints or “restraining a child by a means other than holding”). There is a statutory ban on the use of chemical and mechanical restraints in schools. See 14 Del.C. §4112F(b) which reflects a State public policy of disallowing their use. DHSS bans the use of chemical restraint in facilities such as AdvoServ. See 16 DE Admin Code 3320.20.11.11. DFS will not even be aware that mechanical and chemical restraints have been approved by a child placing agency or the frequency of use.

15. Section 29.2.2 should be expanded to include an Individualized Family Service Plan (IFSP). Compare §30.1.11.5. It could also be expanded to include a Section 504 plan.

16. Section 34.1 only contemplates enrollment of “school-age” children in an educational program. That term is defined in §5.0 to only include children of kindergarten age upwards. This ignores children with disabilities entitled to special education at birth or age 3. See 14 Del.C. §§3101(1) and 1703(l)(m). It also ignores infants and toddlers eligible for Individuals with Disabilities Education Act (IDEA) Part C services pursuant to 16 Del.C. §§210-218.

17. Section 39.2 requires a licensee to ensure that an applicant and adult household members are free of an “indictment”. An indictment is not a conviction. Federal guidance limits use of arrest records and non-convictions in the employment context. See EEOC Enforcement Guidance,

“Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, published at [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

18. Section 40.1.6 could be amended to include “power strips”. Compare proposed Child Care Home regulation, §21.10.

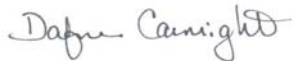
19. Section 40.1.13 should be amended to include “vaping” or “smoking (as defined in 16 Del.C. §2901)”. See 16 Del.C. §2903.

20. Sections 40.1.24 (foster care) and 51.3.25 (adoptive home) include a few pet references. However, while household member profiles/background checks are addressed in detail, there is no standard addressing dangerous animals (e.g. snakes; alligators). An applicant may not even have to affirmatively disclose the presence of such animals. A child could also be allergic to certain animals. A regulation addressing poisonous or aggressive animals is being deleted. See proposed superseded §111.2. A variation of the superseded standard should be retained.

21. In §50.5, the reference to “under Delaware Code” is vague. DFS may wish to adopt more specific references.

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