



Governor's Advisory Council for Exceptional Citizens (GACEC)
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August 29, 2023

Department of Education
Office of the Secretary
Attn: Regulation Review
401 Federal Street, Suite 2
Dover, DE 19901

RE: 27 DE Reg. 82 DE Admin. Code 105 DDOE Proposed Residential Child Care Facilities and Day Treatment Programs regulation (August 1, 2023)

Dear Secretary Holodick:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Delaware Department of Education (DDOE) proposal to transfer 9 DE Admin. Code 105 to 14 DE Admin. Code by creating 935 DELACARE: Regulations for Residential Child Care Facilities and Day Treatment Programs. In July 2020, the Office of Child Care Licensing (OCCL) moved from the Department of Services for Children, Youth, and Their Families to DDOE, and this section of regulations is the last, which were required to be transferred. DDOE previously proposed these regulations in the May 2023 Delaware Register of Regulations. Council provided commentary on those proposed regulations in a letter date 5-30-2023. These proposed regulations replace those proposed in May 2023.

Since Council previously provided commentary on these proposed regulations and the DDOE made changes based on some of those comments, this letter thanks the DDOE for the changes made and will only address those areas that Council has concerns at this time.

- 1. Definition of child** - The prior definition of "child" was: "A person who has not reached 18 years of age. A person in a facility or program who becomes 18 years of age while residing in the facility or participating in the program, and who has not attained the age of 25." Under the proposed regulations, DDOE is proposing to change the definition of "child" to the following: "a person who has not reached the age of 18 years or a person who becomes 18 while residing in the facility or participating in the program, who has not reached the age of 22. Child also includes a person enrolled in a State public school

or receiving a board extension to remain in care.” DDOE did not provide a reasoning for why it lowered the age of those covered under this definition. Council would like information from the DDOE on why this change was made, the purpose of the change and how the change fits with the definition of ‘child’ under special education.

2. **Definition of psychotropic drug** - The definition of “psychotropic drug” has changed from “a drug or substance that alters the chemical balance of neurotransmitters in the central nervous system” to “a chemical substance that changes brain function and alters perception, mood, or consciousness.” Consistent with definitions of psychotropic drug in other literature, Council would like to recommend that DDOE include in its definition, that a psychotropic drug is one that also generates changes to behaviors.
3. **Definition of facility** - DDOE defines “facility” as a “residential child care facility” and then subsequently states that a “residential child care facility is a “residential facility” in proposed section 4.3. Council would recommend that the DDOE be consistent in how it refers to the different facilities .
4. **Definition of physical restraint** - The proposed definition of physical restraint is “the non-punitive, age-appropriate, time-limited, and reasonable use of physical holding that is required to restrict the movement of a child for the purpose of preventing harm to the child or to others when the child fails to respond to other techniques.” This proposed definition fails to account for the severity of the child’s actions and whether there is a *serious and imminent* risk of bodily harm to self or others, which is the language currently used in Delaware when referring to physical restraints occurring in school settings. Council recommends that the DDOE use the definition of physical restraint that is used in 14 Del. C. 4112F and 14 Del. Admin. C. 610.
5. **Definition of seclusion** - The proposed definition makes it seem as though it only applies to children age six years or older; however there is no explicit mention of seclusion not being available for youth under the age of six or why it is not used for those under the age of six. The GACEC recommends that DDOE include specific language to explicitly state that seclusion is not an approved behavior modification technique used with children under the age of six.
6. **Proposed Section 4.3** - The language in proposed section 4.3 states that a psychiatric hospital is not considered a residential facility. Council would like additional information on the reasoning behind this statement. What is it if a psychiatric hospital is not considered a residential facility, especially since students experience long-term stays at psychiatric hospitals? Please supply more information on this.
7. **Proposed Section 5.0** - Proposed Section 5.0 mentions that officials from OCCL or other State and local agencies may interview youth as part of their authority to inspect the licensed facilities. However, there is no mention of whether OCCL or the licensed facility must notify parents or the referring agency when such interviews are taking place. The GACEC would recommend that DDOE include a requirement to ensure parents or the referring agency are notified when such interviews are taking place.
8. **Proposed Section 12.0** - Proposed Section 12.0 describes OCCL’s actions when it receives a complaint from a youth or parent of a youth at a licensed facility. No specific timeframe are noted by which licensed facilities are required to correct noncompliance found by OCCL as a result of a complaint. Council would therefore recommend that

DDOE include a timeframe by which a noncompliant licensed facility is required to correct the identified noncompliance.

9. **Proposed Section 17.0** - Proposed 17.1.2 states that “A photo, video, or recording that reveals a child's identity shall not be used for research, fundraising, or public relations without the written consent of the child's parent or referring agency.” It is unclear why the referring agency would (or should) have the authority to consent to the releasing of a young person's identity in such a public manner. Council recommends removing “referring agency” from this section.
10. **Proposed Section 17.0 (continued)** - Proposed 17.1.8.7 states that a licensee is prohibited from “[p]unishing the group for misbehaviors of a child or a group of children unless the policies and procedures clearly list the specific circumstances and safeguards when this would be allowed.” This form of discipline, known as “collective punishment” is “fundamentally at odds with the theories of individual responsibility in western, liberal societies.” The GACEC recommends removing this proposed section in its entirety.
11. **Proposed Section 17.0 (continued)** - There is a typo in proposed 17.1.9.3 – should be “self-control” and it currently says “self-contro,”.
12. **Proposed Section 17.0 (continued)** Proposed 17.1.10.8 provides additional requirements for reporting and addressing situations where a child is in time-out more than fifteen times in a 24-hour period. This number seems excessively high. Council recommends that these requirements and actions kick in when a young person has been in time-out for more than five times in a 24-hour period.
13. **Proposed Section 25.6** - Proposed Section 25.6 states that “[w]hen a licensee declines to admit a child, a licensee shall provide the child's parent or the referring agency with a written explanation of the reasons for refusal, if requested.” It should not be a burden of the parent to request an explanation for why a licensee refused to admit the young person. **Council recommends removing the words “if requested”. This would ensure that every time a licensee declines to admit a young person, it is required to provide a written explanation for why.**
14. **Proposed Section 29.0** - Proposed Section 29.0 describes the certification requirements for teachers in a licensed facility, which is providing in-facility education services. The current language requires only that the teacher be certified for the age range of youth to whom the facility is licensed to provide services. It is not specific to the youth the teacher is educating. Therefore, there may be a situation where a licensee is providing services to youth aged 6-13 and it employs an elementary certified teacher to provide education. It would not be appropriate for that teacher to provide education to youth who are middle school aged. Council recommends that the certification requirement relate to the age of the children the teacher is teaching rather than to the age of the youth to whom the licensee is providing services.
15. **Proposed Section 49.5.12** - Current proposed 49.5.12 states that “A written schedule of monthly planned recreation, physical exercise, and leisure time activities be posted in a

noticeable location on the premises, and be maintained on file for at least 90 days.” Council would like to recommend that DDOE include language that this written schedule also be provided directly to the parent or referring agency as well.

- 16. Proposed Section 49.8** - Proposed Section 49.8 states the following: “A licensee shall have and follow written policies and procedures governing preventative, routine, and emergency dental and medical care, including provisions for effective coordination of such dental and medical care with those responsible for the child's aftercare.” Although it lists a number of requirements for these written policies and procedures, it does not include any notification to the parent or referring agency. Council recommends that DDOE include an additional requirement that the licensee notify and receive consent from the parent or referring agency to any dental or medical procedure.
- 17. Proposed Section 52.8** - Proposed Section 52.8 states that “A licensee shall make provisions with the referring agency for a child to receive any needed eyeglasses, hearing aids, prosthetic devices, or other corrective devices, as deemed medically necessary by a licensed physician.” The current language makes this list an exhaustive one. Council would like to recommend that DDOE also include in this list any assistive technology or any other health-related device. We would also recommend that DDOE include language such as “including” which would make the list non-exhaustive.
- 18. Proposed Sections 66.0-76.0** - Proposed Sections 66.0-76.0 govern the requirements for Parenting Adolescent Facilities. The proposed regulations do not contain a requirement related to any specific qualifications for staff at these facilities outside of the general requirements included in the regulation, which apply to all facilities, unless specifically exempted. Because of the special nature of this population, staff is tasked with supporting not only the parenting young person, but with supporting the child of the young person as well. Council recommends the DDOE include additional qualifications for staff employed to work at these facilities, such as being training in pediatric care or early childhood education.
- 19. Proposed Section 93.0** - Proposed Section 93.0 governs the use of restrictive procedures, such as physical and chemical restraints and seclusion. Proposed 93.2 requires that licensees have and follow written policies and procedures related to the use of restrictive procedures. Proposed 93.2.2 states that these restrictive procedures are to be permitted only where (1) a trauma-informed treatment model is used; (2) the child is a danger to self or others; (3) the child's behavior is seriously disruptive; (4) other ways to manage the child's dangerous behavior have failed; and (5) staff members administering a restrictive procedure were trained to administer that procedure. Council has several concerns in reference to the use of physical and chemical restraints on children with disabilities. First, we would like the DDOE to explain and provide clarification on what is meant by “seriously disruptive” because neither word is defined anywhere in the regulations and whether something is disruptive (or seriously disruptive, or mildly disruptive) is an exceptionally subjective determination. Council would also recommend that DDOE add the additional missing requirements to the use of physical restraint as provided in 14 Del. Admin. C. 610.
- 20. Proposed Section 93.0 (continued)** - Proposed Section 93.2.8 would prohibit several aversive punishment procedures. Council recommends including the use of prone restraint to this list of prohibited procedures.
- 21. Proposed Section 93.0 (continued)** - Proposed Section 93.2.17 requires that the licensee’s policies or procedures include a requirement that “a physical restraint [is] to be

applied for the minimum time necessary to accomplish the purpose. It shall not exceed 10 minutes without documentation on attempts made to release the child from the hold if more than 10 minutes is required. A licensee shall ensure a child is released from a physical restraint as soon as the child gains control, or before 10 minutes have elapsed, whichever occurs first[.]” 14 Del Admin. C. 610 contains additional requirements for when physical restraints must be ended. Council recommends including those requirements in this section as well.

We do appreciate this effort to improve conditions and standards for our children and hope that the DDOE will consider our request to revisit the items of concern and questions listed above.

Thank you for this opportunity to share our observations with you. Please contact Pam Weir or me at the GACEC office if you have any questions on our comments.

Sincerely,

Ann C Fisher

Ann C. Fisher
Chairperson

ACF: kpc

CC: Shawn Brittingham, State Board of Education
Kathleen Smith, State Board of Education
Dale Matusevich, Department of Education
Emily Cunningham, Department of Education
Caitlin Gleeson, Department of Education
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