



STATE OF DELAWARE
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MEMORANDUM

DATE: April 29, 2015

TO: Ms. Kelly McDowell, DFS
Office of Child Care Licensing

FROM: Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: 18 DE Reg. 778 [DFS Proposed Early Care & Education & School-Age Centers Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Services for Children, Youth and Their Families/Division of Family Services (DFS)/Office of Child Care Licensing's proposal to amend its *DELACARE Rules for Early Care and Education and School-Age Centers* regulation. The proposed regulation was published as 18 DE Reg. 778 in the April 1, 2015 issue of the Register of Regulations. SCPD commented on earlier proposed versions of this regulation published in June [17 DE Reg. 1156 (6/1/14)] and December, 2014 [18 DE Reg. 438 (12/1/14)]. DFS has now incorporated changes into a new proposed regulation. SCPD has the following observations on the proposed regulations.

First, Section 3.3.7 identifies certain school-based programs as exempt. However, §7.2 requires school-based programs operated by non-employees of the school to be licensed. For clarity, a reference to §7.2 should be included in §3.3.7. Otherwise, someone reviewing the exemption section could interpret §3.3.7 as exempting school-based programs regardless of operation by non-employees of the school. For example, the reference to "(t)his exclusion shall include all programs operated by these schools" could be interpreted as covering a situation in which the school contracts with a third party to provide the child care program.

Second, in §4.0, definition of "Section 504 Plan", SCPD recommends inserting "with a disability" between "child" and "to".

Third, Section 13.3.2 requires a licensee to notify OCCL if a child is injured “while in the care of the center when the center is informed the child required medical/dental treatment”. See also §61.3. SCPD has a few concerns with this standard.

A. It provides an incentive to “hide” or “not treat” an injury since reporting is not required if the child does not receive medical treatment. Concomitantly, it provides an incentive not to ask a parent if a child were treated “off-site” since that would “trigger” the reporting requirement.

B. The term “medical treatment” is unclear and a licensee who wishes to avoid attention/scrutiny may interpret the reference to only apply to treatment by a physician. The regulations note that some centers will have a registered nurse (§55.0). If the R.N. treats a wound or injury, does this qualify as “medical treatment” triggering the reporting requirement? Licensees are required to provide “first aid” (§§34.0 and 61.0). Does provision of “first aid” qualify as “medical treatment”? Section 61.1.2 appears to differentiate between “first aid” and “medical care”.

Fourth, Sections 13.3.5 and 60.5 require licensees to report medication errors (including administering drug to wrong child or administering the wrong dose) only if the error “results in medical treatment”. This is an imprudent approach. Comparable regulations require reporting of errors which result in discomfort or jeopardize health. See, e.g. 16 DE Admin Code 3310.2.0 (definition of “reportable incident”); 16 DE Admin Code 3301, 2.0 (definition of “reportable incident”). Adopting a “medical treatment” “trigger” for reporting also provides a licensee with a disincentive to refer a child for medical treatment to avoid attention/scrutiny. By analogy, §60.5 requires immediate reporting of medication errors to a parent regardless of manifest harm or need for medical treatment. Finally, §§13.3.5 and 60.5 are not consistent. The former requires a written report within 3 business days while the latter does not.

Fifth, in its June and December commentary, the Council recommended adding extended physical restraint to the list of reportable “events”. This has not been incorporated into the latest proposed regulation. For example, while mechanical restraint is banned (§65.5.6), there are no standards for “physical” restraint which could theoretically last for extended periods without triggering a report to the OCCL. Obviously, some immediate physical restraint to prevent injury or elopement may be appropriate. However, use of physical restraint for extended periods should be reportable.

Sixth, there is no limit on certain forms of physical restraint. By analogy, IBSER regulations ban prone (face-down) restraint and seated basket holds. See 16 DE Admin Code 3320.20.11. Some limits could be included in §65.0.

Seventh, DFS added a reference to the ADA and DEAL to §14.2 per the Councils’ earlier recommendations. SCPD endorses this provision.

Eighth, Section 27.3.3 refers to the “GED Test”. The Department of Education changed its

“GED” regulation and the current reference is “secondary credential assessment” which encompasses a GED and alternatives. See 17 DE Reg. 469 (11/1/13) (proposed); 17 DE Reg. 724 (1/1/14) (final). In other sections, the regulation refers to “high school diploma or equivalent recognized by Delaware Department of Education”. See, e.g., §§27.7.1 and 77.2.1.

Ninth, Section 27.10.1 has a plural pronoun (they) with a singular antecedent (intern). Consider substituting “the intern is” for “they are”.

Tenth, SCPD endorses Section 28.6 since it deters staff participating in “personal activities which would interfere with providing care to children”. One of the most prevalent sources of “inattention” may be cell phone use. At a minimum, the regulation could be amended to explicitly require licensees to adopt a policy on cell phone use. For example, the following third sentence could be added to §28.6: “Without limitation, each licensee shall adopt and implement a written policy on direct-care staff cell phone use during hours of operation.”

Eleventh, Section 36.13 categorically bans use of “portable wading pools”. The rationale for such a ban is not intuitive. If it’s hot, toddlers and pre-schoolers would ostensibly benefit from playing in a small inflatable or soft-sided pool. It would be helpful if the Division could explain the rationale regarding the categorical ban regarding “portable wading pools”. In addition, the Division may want to consider additional language which would require staff to be present in this context.

Twelfth, in §36.17, last sentence, the reference should be to “below 60 degrees F and above 90 degrees F”.

Thirteenth, the Council previously objected to allowing children to ride bikes with wheels below 20 inches in diameter without a helmet. Section 41.0 could still be interpreted as exempting children from wearing a helmet if the wheels are less than 20 inches in diameter. This would violate Title 21 Del.C. §4198K.

Fourteenth, the Council previously objected to the ratio of toilets to children/staff. The new regulation (§43.2) is worse than the December version. For school age children, the December regulation had a toilet to child ratio of 1:15. The latest regulation has a toilet to child ratio of 1:25. As noted previously, the ratio should be lowered.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

cc: Ms. Vicky Kelly
Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council