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MEMORANDUM

DATE: October 24, 2016

TO: Kelly McDowell
Division of Family Services – Office of Child Care Licensing

FROM: Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

RE: 20 DE Reg. 271 [DFS Proposed Child Placing Agencies Regulation (10/1/16)]

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 conduct a complete overhaul of 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 proposed regulation was published as 20 DE Reg. 271 in the October 1, 2016 issue of the Register of Regulations. SCPD has the following observations.

First, in 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 apt term (e.g. adverse OCCL decision" or "adverse OCCL action") and substituting a conforming definition for the counterintuitive definition of "enforcement action".

Second, in Section 7.2.6, SCPD recommends deletion of the reference to "society's best interests". The concept is amorphous and one could posit that "society" is better off letting "high need" children with complex disabilities or short expected life spans expire.

Third, in 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.

Fourth, regarding, 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 1 business day.

Fifth, 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.

Sixth, 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.

Seventh, 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 attached EEOC guidance.

Eighth, 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.

Ninth, 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.

Tenth, 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.

Eleventh, 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.

Twelfth, 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.

Thirteenth, 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.

Fourteenth, 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 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 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.

Fifteenth, Section 29.2.2 should be expanded to include an IFSP. Compare §30.1.11.5. It could also be expanded to include a Section 504 plan.

Sixteenth, 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 IDEA-C services pursuant to 16 Del.C. §§210-218.

Seventeenth, 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.

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

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

Twentieth, 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; pit bulls). 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.

Twenty-first, in §50.5, the reference to “under Delaware Code” is vague. DFS may wish to adopt more specific references.

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. Shirley Roberts, DFS
Employment First Oversight Commission
Mr. Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

20reg271 dscyf-dfs child placing agencies 10--1-16



Overview

Laws

Regulations

Guidance

Memoranda of Understanding

Discrimination by Type

Prohibited Practices

Pre-Employment Inquiries and Medical Questions & Examinations

The ADA places restrictions on employers when it comes to asking job applicants to answer medical questions, take a medical exam, or identify a disability.

An employer may not ask a job applicant, for example, if he or she has a disability (or about the nature of an obvious disability). An employer also may not ask a job applicant to answer medical questions or take a medical exam before making a job offer.

An employer may ask a job applicant whether they can perform the job and how they would perform the job. The law allows an employer to condition a job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same job have to answer the questions or take the exam.



Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer has reason to believe an employee would not be able to perform a job successfully or safely because of a medical condition.

The law also requires that the employers keep all medical records and information confidential and in separate medical files.



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Workplace Privacy, Data Management & Security Report

ADA Violated When Employer Responds to State Subpoena and Discloses Former Employee's Medical Records

By Joseph J. Lazzarotti on March 23, 2011

The confidentiality of medical records requirement under the **Americans with Disability Act (ADA)** is violated when an employer discloses a current or former employee's medical records in response to a state court subpoena absent the employee's release or some other exception under the ADA, the **Equal Employment Opportunity Commission (EEOC)** recently held in **Bennett v. U.S. Postal Serv., 2011 WL 244217 (E.E.O.C.), Jan. 11, 2011.**

Companies frequently receive requests for information about current and former employees. These requests often come in the form of an attorney's demand letter or a subpoena and apply to the individual's medical records. Those receiving such requests typically feel compelled to respond without taking the time to think through issues such as:

- what kind of information is contained within the files being requested;
- what specific statutory or regulatory protections apply for some or all of the information being requested (see below);
- is a response appropriate without an authorization of the individual or giving an individual an opportunity to object;
- is a court order needed for some or all of the information being requested; and
- what safeguards should be taken to ensure the disclosure is secure.

As we have reported previously, failing to think through these issues can be a costly trap for the unwary.

[EEOC Analysis](#)

In the Bennett decision cited above, the EEOC sets out the basic ADA requirements concerning confidentiality of employee medical records:

“ Title I of the [ADA] requires that all information obtained regarding the medical condition or history of an applicant or employee must be maintained on separate forms and in separate files and must be treated as confidential medical records. [Citations omitted]. These requirements also extend to medical information that an individual voluntarily discloses to an employer. [Citations omitted]. The confidentiality obligation imposed on an employer by the ADA remains regardless of whether an applicant is eventually hired or the employment relationship ends. [Citations omitted]. These requirements apply to confidential medical information from any applicant or employee and are not limited to individuals with disabilities. [Citations omitted].

The decision goes on to explain the general exceptions to these requirements:

- supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
- government officials investigating compliance with this part shall be provided relevant information on request;
- employers may disclose medical information to state workers' compensation offices, state second injury funds, workers' compensation insurance carriers, and to health care professionals when seeking advice in making reasonable accommodation determinations; and
- employers may use medical information for insurance purposes.

The EEOC found that the Postal Service's disclosure of Mr. Bennett's medical records in response to the subpoena issued by the Galveston County 405th District Court did not fall into one of these exceptions. The EEOC held that while the ADA allows an employer to comply with the requirements of another federal statute or rule, even if in conflict with the ADA, "*it is not a valid defense to argue that the [Postal Service's] actions were required by state law,*" (emphasis added) unless one of the ADA exceptions applied. The Commission also noted the subpoena in this case was signed and issued by the Deputy Clerk, and did not qualify as an

"order" for purposes of the Privacy Act of 1974, on which the Agency attempted to rely to permit the disclosure.

Because of this violation of the ADA, the EEOC ordered the Postal Service (i) to start an investigation into compensatory and other damages that may be due to Mr. Bennett, (ii) to conduct training concerning the ADA's confidentiality requirements, and (iii) to prepare a report regarding corrective action. The Postal Service also may be responsible for Mr. Bennett's attorneys' fees, among other things.

Is the ADA the only concern?

In short, no, the ADA is only one protection for medical and other personal information that could trigger exposure for a company that improperly discloses such information. There is an increasing array of federal and state laws that need to be examined, as appropriate, before responding to a request:

- GINA: Regulations issued under Title II (GINA's employment provisions) provide that employers that possess genetic information must maintain the information in confidence and may not disclose that information except in limited circumstances, such as (i) at the request of the employee, (ii) in response to a court order, (iii) to respond to a request from a government official investigating GINA compliance, or (iv) in support of an employee's FMLA certification. The preamble to the GINA regulations provides that the court order exception "*does not allow disclosures in other circumstances during litigation, such as in response to discovery requests or subpoenas that are not governed by an order specifying that genetic information must be disclosed. Thus, a covered entity's refusal to provide genetic information in response to a discovery order, subpoena, or court order that does not specify that genetic information must be disclosed is consistent with the requirements of GINA.*" Additionally, the individual whose genetic information is disclosed may need to be notified.
- HIPAA: The privacy regulations under HIPAA likewise generally prohibit the disclosure of "protected health information" except in limited circumstances. HIPAA regulation 45 CFR 164.512 (e), among other exceptions to the general rule, provides an exception for disclosures in connection with administrative and judicial proceedings. But one of the first questions to ask is whether the information being sought is "protected health information." Very often, employee medical information in a personnel or medical file is not, in the hands of the employer, protected health information subject to HIPAA.
- 42 USC Part 2: Federal law provides very stringent protection for records relating to substance abuse treatment at certain federally funded facilities.

- **State law:** Many states have laws protecting certain classes of medical records from disclosure without taking appropriate safeguards to address confidentiality. This includes **application of the physician-patient privilege**, as well as statutes and regulations dealing with specific types of information, such as mental health records.

Because of these issues, businesses should develop a clear policy and procedure to direct employees on how to respond when they receive these requests.

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