



**STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES**

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The Honorable John Carney
Governor

John A. McNeal
Director

MEMORANDUM

DATE: January 30, 2019

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

FROM: J. Todd Webb - Chairperson
State Council for Persons with Disabilities

RE: 22 DE Reg. 574 [DFS Proposed Early Care, Education & School-Age Center Regulation (1/1/19)]

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 (OCCLs) proposal to amend the Delaware regulations concerning the health, safety, well-being, and positive development of children who receive care in early care and education and school-age centers. The proposed regulation was re-published as 22 DE Reg. 574 in the January 1, 2019 issue of the Register of Regulations.

OCCL made a number of revisions in response to Council's comments on the November 2018 version of these proposed regulations. Some of the most notable improvements include new requirements mandating that at least one staff member with a valid Administration of Medication certificate be present at all times to provide medications (Subsection 26.6), including during field trips and routine program outings (Subsection 63.1). These changes help make clear that child care centers should be prepared to administer medications on both a routine and emergency basis and during field trips.

SCPD certainly appreciates that the OCCL implemented amendments based on Council's comments. However, SCPD still has the following recommendations which would further strengthen the proposed regulations.

Written Policies on Administration of Medication and Need for Statement about Reasonable Accommodations

Concerns still remain about how OCCL will ensure that licensees develop and consistently implement a written policy on administration of medication. Although OCCL requires policies on medication administration to be included in the parent/guardian handbook (Subsection 23.1.13), the proposed regulations do not indicate that these policies must be approved by OCCL. Nor do they provide any guidelines on what the policies in the parent/guardian handbook must convey. As was previously recommended, policies on medication administration should clearly state that the child care center will provide reasonable accommodations for children with medication needs, including medication by non-intravenous injections. New Jersey, for example, requires child care centers to inform parents and guardians that the center “will provide reasonable accommodations for the administration of medication or health care procedures to a child with special needs, if failure to administer the medication or health care procedure would jeopardize the health of the child or prevent the child from attending the center.”¹ Such a statement of non-discrimination is critical because parents and guardians are often unaware of their rights with regard to medications and reasonable accommodations.² This lack of awareness is likely even more of a problem in Delaware because the state previously did not allow laypersons at child care centers to provide medication by injection. A formal non-discrimination statement related to medications will also promote child care centers’ compliance with federal and state anti-discrimination laws and enhance centers’ public accountability.

Notice to Licensees that Administering Medication via Injections May Be Mandatory Under State and Federal Laws

As explained in prior comments, another major concern is that child care centers may interpret the language in Subsection 63.6 as meaning that they have complete discretion over whether or not to deliver medication by injection. SCPD sought a subsection to Section 63.0 that clarified that medication administration – including administration via injections – must be part of the reasonable accommodations that child care facilities must make under the ADA in order to provide equal services to children with disabilities. In response, OCCL added Subsection 63.8, which states: “The administration of medication is encouraged, but not mandated pursuant to these regulations. However, if an agency, administrative body, court, or other entity responsible for enforcing Federal, State, and local laws and regulations (including but not limited to the Americans with Disabilities Act and the Delaware Equal Accommodations Law) makes a finding that the refusal of a licensee to administer medication is a violation of the law, OCCL shall take appropriate enforcement action consistent with subsection 12.5, due to licensee’s failure to

¹Manual of Requirements for Child Care Centers at 70-71 (Subchapter 3A:52-7.5), State of New Jersey Department of Children and Families, *available at* <https://www.nj.gov/dcf/providers/licensing/laws/CCCmanual.pdf> (effective March 6, 2017).

²To the extent that OCCL does not want to mandate medication administration, it should be noted that a non-discrimination statement committing to provide *reasonable* accommodations (as required under the Americans with Disabilities Act) does not mean the child care center must administer medications in all cases (i.e. cases where providing medication would not be reasonable).

comply with subsection 15.2³.”

The effect of the wording in Subsection 63.8 is to highlight that OCCL will not mandate the administration of medication by injection and will only take enforcement action in limited circumstances. While it is true that OCCL does not enforce the ADA or the Delaware Equal Accommodations Law (DEAL), child care facilities frequently misunderstand their obligations under these anti-discrimination laws. Therefore, SCPD urges OCCL to revise Subsection 63.8 to explicitly note that medication administration may be required under state and federal laws even though it may not be mandatory under OCCL’s own regulations. This extra emphasis and clarification are especially critical because OCCL’s new regulations on administering medication by injection are a significant departure from longstanding policies. Thus, child care centers may resist modifying their own policies and practices around this issue. Yet under the ADA, child care facilities must, as a general rule, provide medication by injections when parents or guardians request them to.

Comprehensive Referrals and Tracking for Complaints

The new Subsection 12.5, referenced in the above Subsection 63.6, explains how OCCL will refer complaints relating to the laws of other governmental entities, including but not limited to the ADA and DEAL, to appropriate enforcement authorities for investigation. Subsection 12.5 also states that OCCL will request a report of the findings. Two concerns regarding this Subsection are ensuring that referrals are comprehensive and that OCCL actually follows up with the complaining party or enforcement authority for a report. Families have faced problems in the past with trying to file complaints with OCCL. For example, given SCPDs working relationship with the Disabilities Law Program (DLP), Council is aware of a family who was referred by OCCL to the US Department of Justice but not the Division of Human Relations (DHR) for a case involving reasonable accommodations for a child with a disability. Because an equal accommodations complaint in Delaware must be filed within 90 days of the alleged incident, it is important that OCCL promptly refer complaining parties to DHR when appropriate and advise parties to be mindful of deadlines. It is also unclear whether and how OCCL will receive the results of any investigation arising from a complaint to other agencies. OCCL must have a process for tracking complaints so that it can follow up on the outcome of investigations and prevent the burden from always falling on complaining parties to report back to OCCL for further enforcement activity. Moreover, for disability-related complaints, OCCL should not only refer complaining parties to the relevant enforcement authorities, but also to Community Legal Aid Society for advice or possible representation. As Delaware’s Protection & Advocacy agency, CLASI is willing and able to help families and individuals who wish to pursue ADA and DEAL complaints.

In conclusion, SCPD endorses the amendments to the DELACARE regulations covering early care and education and school-age centers based on previous Council recommendations, but still requests further revisions based on the aforementioned observations. OCCL should require child care centers to inform parents and guardians that they will make reasonable accommodations for

³Subsection 15.2, which was amended since the November proposal, requires licensees and employees to adhere to federal, state, and local laws, such as the ADA and the Delaware Equal Accommodations Law.

children with medication needs. The language in Subsection 63.8 should also be modified to more clearly warn child care centers that even if OCCL regulations do not require licensees to administer medication by injections, it may be mandatory to do so under state and federal laws. Finally, for complaints under Subsection 12.5, OCCL should promptly refer complaining parties to all appropriate agencies and develop a system for tracking complaints, as well as consider referring disability-related complaints to Community Legal Aid Society.

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

cc: Ms. Trenee Parker, DFS
Ms. Laura Waterland, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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