Comments of the Independent Regulatory Review Commission

Department of Human Services Regulation #14-542 (IRRC #3216)

Child Care Facilities

December 13, 2018

We submit for your consideration the following comments on the proposed rulemaking published in the October 13, 2018 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Department of Human Services (Department) to respond to all comments received from us or any other source.

1. Determining whether the regulation is in the public interest.

Section 5.2 of the RRA directs the Independent Regulatory Review Commission (Commission) to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impacts and reasonableness. To make that determination, the Commission must analyze the text of the Preamble and proposed regulation and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide under Section 5(a) of the RRA (71 P.S. § 745.5(a)) in the Regulatory Analysis Form (RAF). The explanation of the regulation in the Preamble and the information contained in the RAF are not sufficient to allow this Commission to determine if the regulation is in the public interest.

There are several instances where the Department's descriptions and responses in the Preamble or RAF are not responsive to the question or appear to be inconsistent with the regulatory language in the Annex. For instance:

- The description of Section 3290.31(a)(2) (relating to age and training) in the Preamble lacks clarity. Does the operator have two renewal periods to simply produce the required documentation or can an operator not have achieved a high school diploma or a GED at the time of application for a certificate of compliance and have two years to obtain it? The Department should clarify its intent in the Preamble and revise the language in the Annex if necessary;

- RAF #19 and the "Fiscal Impact" section in the Preamble do not include the estimated costs to secure an additional designated staff person in family child care homes that provide 24-hour child care. The Department should revise the fiscal impact summary in the Preamble and its response to RAF #19 to include these costs;

- The Department's answer to RAF #25 is not responsive to the question;

- RAF #26 asks the Department to describe any alternative regulatory provisions which have been considered and rejected. The Department's response is confusing because it refers to the proposal to "require video monitors with audio capabilities." Is it the Department's intent to require operators to have monitoring systems that have both video and audio capabilities or was that an alternative regulatory approach that was considered and rejected? If it was an alternative approach that was considered and rejected, the Department should explain why video monitors with audio capabilities are not necessary; and

- The Department, in the Preamble, explains that it is incorporating the existing definition of "legal entity" in Sections 3270.11(c) and 3280.11(c) (relating to application for and issuance of a certificate of compliance) to ensure that all applicants show documentation of the completion of the health and safety topics upon submitting their application to the Department. It appears that the definition is not all inclusive and is outdated. We note that new forms of business entities exist that are not reflected in that definition. The Department should consider taking what appears in the definition of "person" in the Statutory Construction Act of 1972 (1 Pa.C.S.A. §§ 1501 – 1991) and using it as the definition of "legal entity."

2. Communication with the regulated community. – Reasonableness; Compliance with provisions of the Regulatory Review Act; Economic or fiscal impacts of the regulation.

RAF #14 asks the Department to describe the communications with the regulated community and list the specific groups involved. The Department explains that the majority of amendments in the proposed regulation are required by the Child Care and Development Block Grant Act of 1990 (CCDBG) (42 U.S.C.A. §§ 9857 – 9858r). Beyond these federal requirements, the Department also notes that its proposal to increase the annual professional development requirement for all caregivers from 6 hours annually to 12 hours annually is endorsed by the Pennsylvania Early Learning Council (ELC), which is an advisory group composed of a variety of stakeholders and appointed by the Governor. In addition, it states that use of video monitors in family child care homes is supported by members of the ELC as well as the Pennsylvania Child Care Association (PACCA). We commend the Department for working with the ELC and PACCA in the development of the proposed regulation and encourage the continuation of these relationships as it develops the final rulemaking.

In addition to the increase in professional development hours and the use of video monitors mentioned above, the Department proposes to shorten the time frame for submittal of the initial health reports, limit the work period for family child care home operators who offer 24-hour services and require family child care home operators to secure a designated staff person to provide for supervision of children at all times. While we applaud the Department's efforts to protect the health and safety of children in all child care settings through these measures, we also recognize that these changes garnered significant public comment from parents and providers.

On issues where there is general consensus such as the use of video monitoring in family child care homes, commentators expressed concern about the fiscal impact. Another area where there is strong agreement is the Department's proposal to increase the annual professional development hours. However, some assert that the Department has underestimated the cost to providers to comply with the increase in training hours. They note that the calculation is based on a flat hourly rate and does not account for federal overtime rules. It has also been noted that the source for wage data used in the cost analysis is from the "education sector" which is applicable to some employees, but not the majority. As such, they believe the fiscal impact of the proposal is likely inaccurate. They encourage the Department and the legislature to seek their assistance in the development of policies and associated funding.

In addition to the input from parents and providers, the Pennsylvania Department of Health, the Pennsylvania Chapter of the American Academy of Pediatrics, pediatricians, the Pennsylvania Breastfeeding Coalition, and child care health and safety consultants asked the Department to address issues that are not part of this regulatory package but would further the goal of the rulemaking.

We believe that had a more extensive outreach been undertaken earlier and with those affected by the rulemaking, some commentator issues could have been addressed prior to the submittal of the proposed rulemaking. The issues raised by parents, providers and partners in the care of children deserve careful contemplation because the Department's responses will affect 400,000 children and their parents, as well as 7,964 child care providers and 70,998 staff working in child care. The Department should explain the extent to which it sought input from the regulated community and how it will engage those affected by the rulemaking as it develops the final regulation.

If the Department decides to include the additional content as suggested by the Pennsylvania Department of Health and others, an Advanced Notice of Final Rulemaking (ANFR) may be appropriate. An ANFR would also allow the Department to engage the regulated community in meaningful dialogue as it develops the final-form rulemaking.

3. **Section 3270.4. Definitions;**
   Section 3280.4. Definitions; and
   Section 3290.4. Definitions. – Clarity, feasibility, need and reasonableness of the regulation; Fiscal impact.

"Regulatory ratio" is proposed to be defined as "The maximum number of children based on the age of the child or children for whom a staff person can be responsible." This term is only used in the definitions of "staff person" and "volunteer." The term "staff:child ratio" is consistently used in Chapters 3270, 3280 and 3290 (relating to child care centers; group child care homes; and family child care homes). How does "regulatory ratio" differ from "staff:child ratio"? If these terms are interchangeable, we ask the Department to revise the final-form regulation to use the established term "staff:child ratio." If they are not interchangeable, the Department should explain the need for and reasonableness of this proposed definition in the Preamble to the final-form regulation.

Further, we note that subparagraph (i) of the definition of "volunteer" in Section 3290.4 refers to the "ratio." Parallel definitions in Sections 3270.4 and 3280.4 refer to the "regulatory ratio." If this definition is retained in the final-form regulation, we recommend that the Department use the term "regulatory ratio."

The definition of "volunteer" is proposed to be expanded to include "A student 14 years of age or older but under 16 years of age enrolled in a Child Care and Support Services Management program . . . ." Several commentators raised concerns about maturity, level of supervision, costs, and liability. As the definition of "child" includes individuals "15 years of age or younger," the commentators stated that there could be confusion as to how this class of volunteers is calculated in the staff:child ratio. Further, what is the fiscal impact on a facility of training student volunteers? In light of these concerns, we ask the Department to explain the reasonableness of including 14- and 15-year olds in the definition of "volunteer." Additionally, the RAF should be revised to address the fiscal impact of training volunteers.

4. **Section 3270.11. Application for and issuance of a certificate of compliance;**
   Section 3280.11. Application for and issuance of a certificate of compliance; and
   Section 3290.11. Application for and issuance of a certificate of compliance. – Protection of the public health, safety and welfare; Clarity of the regulation.

   Section 3270.31. Age and training;
   Section 3280.31. Age and training; and
   Section 3290.31. Age and training. – Protection of the public health, safety and welfare; Clarity of the regulation.

Applicants for certificates of compliance are required under proposed Sections 3270.11(c), 3280.11(c) and 3290.11(e) and staff persons of certified facilities, within 90 days of hire, are required under proposed Sections 3270.31(f), 3280.31(f) and 3290.31(g) to complete professional development in ten health and safety topics mandated by Section 658E(c)(2)(I)(i) of the CCDBG (42 U.S.C.A. § 9858c(c)(2)(I)(i)). The language in Paragraphs (1) – (10) of these six subsections is identical.

Paragraphs (2), (4), (6), (9) and (10) do not significantly deviate from the parallel provisions in Section 658E(c)(2)(I)(i)(II), (IV), (VI), (IX) and (X) of the CCDBG. However, the Department omitted the emphasized Federal statutory requirements in the following paragraphs of its regulations:

- Paragraph (1) – prevention and control of infectious diseases "*(including immunization) and the establishment of a grace period that allows homeless children and children in foster care to receive services under this subchapter while their families (including foster families) are taking any necessary action to comply with immunization and other health and safety requirements*" as required by Section 658E(c)(2)(I)(i)(I) of the CCDBG.

- Paragraph (3) – "administration of medication, *consistent with standards for parental consent*" as required by Section 658E(c)(2)(I)(i)(III) of the CCDBG.

- Paragraph (5) – "identification of *and* protection from hazards . . ." as required by Section 658E(c)(2)(I)(i)(V) of the CCDBG.

- Paragraph (7) – "emergency preparedness and response planning *for emergencies resulting from a natural disaster, or a man-caused event (such as violence at a child care facility), within the meaning of those terms under section 5195a(a)(1) of this title*" as required by Section 658E(c)(2)(I)(i)(VII) of the CCDBG.

- Paragraph (8) – "handling and storage of hazardous materials *and the appropriate disposal of biocontaminants*" as required by Section 658E(c)(2)(I)(i)(VIII) of the CCDBG.

The Preamble to the final-form regulation should explain the Department's rationale for omitting these federal requirements that protect public health, safety and welfare.

5. **Section 3270.11. Application for and issuance of a certificate of compliance;**
   Section 3280.11. Application for and issuance of a certificate of compliance; and
   Section 3290.11. Application for and issuance of a certificate of compliance. – Reasonableness of requirements, implementation procedures and timetables for compliance.

Proposed Sections 3270.11(d), 3280.11(d) and 3290.11(f) address the documentation of completion of professional development by an applicant for a certificate of compliance. The Preamble to the proposed regulation states that an applicant who "can document completion of the precertification professional development within the 2 years prior to the date of publication of the final-form rulemaking, will be considered as having satisfied the requirement." Although the Department states that it will accept professional development completed prior to the publication of the final-form regulation, these subsections do not include this language. Further, how did the Department determine that 2 years prior to publication of the final-form regulation was reasonable? As noted by a commentator, facilities may have completed this professional development when it was implemented in September 2016. We ask the Department to explain its rationale for the 2-year time period in the Preamble to the final-form regulation. In addition, we suggest that the Department revise this subsection to include a date certain for precertification professional development that was completed prior to the adoption of the final-form regulation.

6. **Section 3270.19. Child abuse reporting;**
   Section 3280.18. Child abuse reporting; and
   Section 3290.16. Child abuse reporting. – Protection of the public health, safety and welfare; Clarity and reasonableness of the regulation.

Proposed Subsection (b) directs a facility person to report "suspected child abuse to ChildLine through the hotline, online, or any other method as prescribed by the Department." The current text of this subsection includes the telephone number of ChildLine and the Preamble to the proposed regulation includes the website address. In the Preamble to the final-form regulation, the Department should explain how the omission of this information is in the public interest and protects the health, safety and welfare of children in these facilities.

7. **Section 3270.25. Availability of certificate of compliance and applicable regulations;**
   Section 3280.24. Availability of certificate of compliance and applicable regulations; and
   Section 3290.22. Availability of certificate of compliance and applicable regulations. – Protection of the public health, safety and welfare; Reasonableness of the regulation.

Subsection (a) currently requires a facility to post "a copy of the applicable regulations . . . in a conspicuous location used by parents . . . ." The proposed amendments delete the copy requirements and instead require a facility to provide "information on how to access the regulations in this chapter electronically . . . ." We ask the Department to explain its rationale for no longer requiring a hard copy of the regulations and how this will protect the health, safety and welfare of children in these facilities. Further, we ask the Department to explain the reasonableness of not requiring a facility to post the regulations and how this is in the public interest given that not all individuals may be able to access the regulations electronically.

8. **Section 3270.27. Emergency plan;**
   Section 3280.26. Emergency plan; and
   Section 3290.24. Emergency plan. – Clarity of the regulation.

The Preamble states that the "proposed regulation **specifies the provisions** that must be included in the child care provider's emergency plan for infants, toddlers and children who have disabilities or chronic medical conditions." (Emphasis added.) Commentators note a lack of specificity relating to the emergency plans and special accommodations for infants, toddlers and children who have disabilities or chronic medical conditions. They have questions on the types of drills (shelter in place or evacuation) that are to be conducted. Are the emergency drills to include the children or are they to be conducted with staff only? The Department should provide more specificity in the final-form regulation or explain how it plans to address the regulated community's concerns regarding the requirements set forth in these provisions.

In the description of the emergency plan amendments, the Department states that "This requirement specifies that a child care provider's emergency plan shall include provisions that **all child care staff are aware of the components of the plan**." (Emphasis added.) The proposed language does not include this requirement. The Department should include this provision in the final-form regulation.

Several commentators have remarked that the emergency plan provision is missing federal lock-down requirements. See Comment #4 regarding the content of the professional development for operators and staff.

9. **Section 3270.31. Age and training;**
   Section 3280.31. Age and training; and
   Section 3290.31. Age and training. – Reasonableness; Clarity of the regulation.

In the Preamble to the proposed regulation submitted to the Commission, the Department states that "Under the CCDBG (42 U.S.C.A. § 9858c(c)(2)(G)), all applicants who **wish to operate as a child care provider** in the Commonwealth must complete a **one-time** only pre-certification professional development in ten health and safety areas . . . ." (Emphasis added.) The Department further explains that "**all staff persons currently employed** in a certified child care center, group child care home or family child care home shall also complete the same **one-time only professional development**." (Emphasis added.)

Current staff in child care centers and group child care homes

Sections 3270.31(f), 3280.31(f) and 3290.31(g) require staff persons to complete professional development in ten health and safety content areas **within 90 days of hire**. Section 3290.31(i) relating to family child care homes states that **all current staff persons** other than the operator are to complete the precertification professional development. However, parallel language addressing professional development requirements for current staff in child care centers (Section 3270.31) and group child care homes (Section 3280.31) is not included. The Department should revise the language in the child care center and group child care home regulations to be consistent with Section 3290.31(i).

Effective date

In the Preamble, the Department provides "an additional 180 days for the operators and current staff to receive professional development under [Sections] 3270.31(f), 3280.31(f) and 3290.31(g)." Commentators indicate that some staff may have already completed the health and safety professional development contained in this rulemaking beginning in September 2016. They are concerned that based on the effective date for current employees, some may staff may need to re-complete it because their safety training will have fallen outside the 2-year window. The Department should explain how the effective date regarding completion of professional development will be implemented. The Department should include a date certain to ensure that those providers who completed the training, as required by the Health and Safety training OCDEL Announcement C-16-01, will have satisfied this requirement.

One-time training

The regulations do not specifically state that this is a one-time training. This section requires an individual to complete the training "within 90 days of hire." The Department should revise Sections 3270.31(f), 3280.31(f) and 3290.31(g) to clarify that this is a one-time training and that staff may show proof of the completion of professional development that is required under these provisions to meet the training requirement.

10. Section 3270.34. Director qualifications and responsibilities;
Section 3280.34. Primary staff person qualifications and responsibilities; and
Section 3290.31. Age and training. – Clarity of the regulation.

Sections 3270.34(c), 3280.34(a) and 3290.31(a)(3) address the responsibilities and qualifications of the director of a child care center, the primary staff person of a group child care home and the operator of a family child care home, respectively. These subsections require photo identification to be provided to the Department during an inspection. The proposed text relates to an inspection and is not stated as a requirement of the director, primary staff person or operator. To improve clarity, we suggest that the Department move the photo identification requirement to the regulations addressing inspection.

11. Section 3270.131. Health information;
Section 3280.131. Health information; and
Section 3290.131. Health information. – Reasonableness.

The Department is proposing to shorten the time frame that an operator has to require the parent of an enrolled child provide an initial health report from "no later than 60 days" to "no later than 30 days" following the first day of attendance at the facility.

Many commentators expressed concern with this amendment. They assert that the new window may not give parents enough time to contact their medical providers since the availability of health services is inconsistent across the state. Commentators ask the Department to retain the current language. The Department should explain the rationale for and the reasonableness of this provision.

Family Child Care Homes

12. Section 3290.11. Application for and issuance of a certificate of compliance. – Clarity of the regulation.

Proposed Subsection (c) requires an applicant to obtain a certificate of compliance for "a family child care home to care for **up to six** unrelated children . . . ." (Emphasis added.) The definition of "family child care home" in Section 3290.4 (relating to definitions) states that care is provided for "**four, five or six** children unrelated to the operator." (Emphasis added.) To improve the clarity of proposed Subsection (c), we suggest that the Department revise the reference to the number of children to correspond to the definition in Section 3290.4.

13. Section 3290.16. Child abuse reporting. – Clarity of the regulation.

The proposed language in Subsection (b) requires a staff person to report suspected child abuse to ChildLine. The Preamble to the proposed regulation states that the amendment is intended to clarify "that a child care staff person, volunteer or other adult who is employed by a child care provider who has reason to believe that a child is a victim of child abuse, shall make the report to the Child Abuse Hotline . . . ." The definition of "staff person" in Section 3290.4 addresses the regulatory ratio. Conversely, the definition of "facility person" includes "A staff person, a

substitute staff person or a volunteer." In addition, the parallel provisions in Sections 3270.19(b) and 3280.18(b) (relating to child abuse reporting) refer to a facility person. For clarity, we suggest that the Department revise this subsection to refer to a facility person.

14. Section 3290.113. Supervision of children. – Clarity; Statutory authority; Protection of the public health safety and welfare; Implementation procedures.

Video monitoring device

Subsection (f) requires operators of family child care homes to "use a monitoring device with a video camera or other video or sight technological device to supervise a child if the operator is not able to directly see, hear, direct and assess the activity of the child due to activities such as the need to be in the restroom or for the preparation of meals and snacks." We support the Department's efforts to provide an additional layer of safety for children being cared for in family child care homes. However, we have three questions:

- What is the Department's statutory authority to require video monitoring devices in family child care homes?

- Why does the Department not require the video monitors to have audio capabilities as referenced in RAF #26?

- What are other states' policies regarding the use of video monitors in family child care homes?

Commentators have expressed concern with the cost of equipment and implementation. How will an operator determine the appropriate number of devices needed to comply with this provision? The Department should explain how it plans to implement and inform the regulated community regarding this requirement.

RAF #24(d) asks the Department to provide a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. The Department responds that it will consider alternative technology to video monitors. It defines appropriate alternative technology "as any device or product that allows the [family child care home] or staff provider to visually monitor children while attending to other needs." The Department states that "The use of mirrors in the [family child care home] may be a suitable option depending on the layout." However, subsection (f) does not expressly allow for the use of mirrors. Rather, it references, but does not define, a "sight technological device." If it is the intent of the Department to allow mirrors to meet the requirements of this section as an alternative technology, then the language in the regulation should be amended accordingly. Additionally, the Department should define in subsection (f) what is an acceptable "other video or sight technological device."

Work period

In subsection (g), the Department proposes to limit the working hours of staff in family child care homes that provide services for 24 hours per day to no more than 16 hours in a day. The proposal also requires an operator to "secure a designated staff person to ensure that there is appropriate supervision."

While most commentators support this change, there are comments from parents and family child care home providers asking the Department to reconsider this amendment. The issue they raise is that for some communities in the Commonwealth there are very few child care options for parents who work late nights, long shifts and weekends. They state that overnight care is already less available than typical child care. Their concern is twofold: the costs to cover the additional staff person required under this new language will be passed on to already financially-strapped families which in turn may then force them to seek unregulated care. We encourage the Department to reach out to the affected regulated community to address their concerns as it formulates the final-form regulation.

The Department should clarify the phrase "secure a designated staff person." The Preamble states that a similar measure was adopted in New Jersey to safeguard that family child care staff persons are "not caring for children more than 16 **consecutive** hours within a 24-hour period." (Emphasis added.) If that is the intent of the proposed language, the Department should revise the section to include the term "consecutive" or explain why the term "consecutive" is not needed. The Department should consider qualifying language that underscores that the designated staff person is at the facility to supervise during the eight hours that other staff persons may not work.

Special Exceptions

15. Section 3290.213. Age and training. – Clarity of the regulation; Statutory authority.

Although this section is being amended for technical edits, we ask the Department to explain the term "permanently qualified." Are permanently qualified operators required to participate in the professional development requirements in this proposed regulation? If these operators are excluded from the professional development requirements in this proposal, the Department should amend the Preamble to address those that are grandfathered and identify its statutory authority for retaining this section.

16. Miscellaneous clarity issues.

- Why isn't "day" proposed to be deleted in Section 3041.13(a)(1) and (2) (relating to parent choice) as it is in Section 3041.13(a)(3)?

- The Department's description of Sections 3270.11(b) and 3280.11(b) in the Preamble to the proposed regulation characterizes the existing language regarding orientation training as a new provision. Instead, the description should explain the proposed

change relating to the increase in annual minimum hours of child care training from 6 hours to 12 hours.

- Sections 3270.11(b) and 3280.11(b) propose to require "12 hours of child care training." Sections 3270.31(e) and 3280.31(e) (relating to age and training), which are cross-referenced, require "12 **clock** hours of child care training." (Emphasis added.) The Department should add "clock" to Sections 3270.11(b) and 3280.11(b) for consistency.

- Proposed Sections 3270.27(a)(6), 3280.26(a)(5) and 3290.24(d) (relating to emergency plan) require facilities to conduct "emergency plan drills." This term should be corrected to "emergency drills."

- Proposed amendments to Sections 3270.34(c) and 3280.34(a) (relating to director qualifications and responsibilities; and primary staff person qualifications and responsibilities) include a "designated responsible person" when requiring identification during an inspection. This term is neither defined nor used in other regulations. We suggest that the Department revise this terminology to correspond to terms used throughout the regulations.

- "Premises" in the definition of "group child care home" in Section 3280.4 (relating to definitions) is proposed to be amended to "premise." We suggest that the definition be amended to refer to "other premises."