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TO: Interested Stakeholders

FROM: Saul Olivarez, Department of Early Learning Rules Coordinator

Date: November 20, 2015

SUBJECT: **Concise Explanatory Statement
Final Adoption of Amended WAC sections WAC 170-290-0130; WAC
170-290-0135; WAC 170-290-0138.**

RCW [34.05.325](#)(6) requires that when a state agency adopts a permanent rule (known as Washington Administrative Code or WAC), the agency must prepare a “*Concise Explanatory Statement*” (CES). This statement is a public document that summarizes:

- Comments, summarized by category, received at public hearings or in written form on the proposed version of the rule;
- Whether the final rule was changed as a result of the comments; and
- Changes from the proposed to the final version of the rule.

The Department of Early Learning (DEL) sends the Concise Explanatory Statement to everyone who testified at public hearings, sent a written comment, or asks to receive the CES. The CES is also posted on the DEL website (see <http://www.del.wa.gov/laws/development/Default.aspx>, *DEL Rules Under Development*).

This document also serves as the summary of public hearing comments to the agency head required under RCW [34.05.325](#)(4).

I. Background

On June 3, 2015, the DEL filed a CR-101 preproposal statement of inquiry as WSR 15-12-120 opening up WAC chapters 170-290 for rulemaking to prohibit child care subsidy program payments to in-home/relative providers who have previously had their child care licenses revoked, or whose child care licenses are currently suspended.

On September 23, 2015, the DEL filed a CR-102 proposed rulemaking “[t]o add language to the existing provider eligibility rules that will prohibit license exempt, in-home/relative child care providers from receiving child care subsidy payments if the provider has a revoked child care license.” The reason the proposed rules are necessary is to enhance and promote the health and safety of children in care. Language prohibiting subsidy payments to providers with suspended licenses was removed from the proposed rule prior to filing for further review and consideration.

Public Comment. The DEL filed proposed rules on September 23, 2015 as WSR 15-19-168. Public hearings were held on October 27, 28 and 29, 2015 in Tacoma, Spokane and Pasco, Washington, respectively. No one attended or testified at the hearing but three written comments were received before the October 30, 2015 comment deadline. The comments were taken directly from their source and were not edited for grammar, spelling or syntax. Multiple comments related to a specific rule were combined and addressed together. If an individual provided recommended WAC edits/changes or additional information such as documentation that supports their comments, then those documents will become a part of the record for this rulemaking and will be made available upon request. The comments on the proposed rules are summarized in section II of this document.

II. Summary of Issues Raised in Public Comments, and DEL’s Responses, Noting if the Proposed Rule was Changed as a Result

A. Public Comments regarding WAC sections 170-290-0130, 170-290-0135, 170-290-0138.	B. 1. DEL Response; and 2. Was the proposed rule changed as a result of the comment? If yes, how?
<p>General Comments.</p> <p>Comment 1: This proposal relates to eligibility for in-home/relative child care providers who have had a child care license revoked. These are providers who are a child's family, friends, and/or neighbors as defined in WAC 170-290-0130 through 170-290-0167. We request that the Department withdraw this proposal and not add the language about license revocation to any of these regulations.</p> <p>Comment 2: Disagree</p> <p>A provider needs to have an opportunity to correct the infraction that caused the license to be revoked. If correction is made then the provider should be able to request a review to become an FFN provider.</p> <p>Comment 3: I am currently an inhome [sic] care for my granddaughter; an [sic] held for about 20 years previously a licensed home day care.</p> <p>It seems that a black & white decision to not allow home care for a relative due to a license revoke is extreme!</p> <p>There should be a review – whereby the reasons behind the license revocation –</p>	<p>1. The department declines the request to withdraw this proposal. There are established policies and procedures already in place where ample opportunity and time is given to a provider to take correction measures before negative action, including revocation, is taken. The department’s decision to revoke a provider’s license is not made lightly. When repeated, numerous or serious non-compliance violations are reported, observed and documented and the health and safety of children is deemed, in the professional judgment of DEL personnel, to be in jeopardy, DEL personnel are required to take appropriate action. One of the DEL’s core responsibilities is to safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care. See RCW 43.215.005(4)(c). To allow for correction after revocation, when multiple opportunities for correction were provided before revocation, is not acting in the best interests of children’s health, safety and well-being.</p> <p>2. The proposed rule will not be revised</p>

<p>are reviewed & looked at in the <u>best interest & safety</u> for the <u>family & child(ren)</u> involved!</p> <p>I feel government is taking over too much in the rules behind children & who care for their children.</p>	<p>as a result of these comments.</p>
<p>WAC 170-290-0130. In-home/relative providers—Eligibility.</p> <p>Comment 1: Proposed WAC 170-290-0130 describes provider eligibility for in-home/relative provider services under WCCC. Proposed provision (5)(d) excludes individuals who have a revoked child care license. It does not provide any limitation on this disqualification based on when the revocation occurred or the reason for revocation.</p> <p>The rules have no process to review the individual's circumstances or allow an individual to establish that a prior license revocation does not impact his or her current fitness and suitability, either generally or for a specific placement.</p> <p>There are many situations in which a license revocation does not mean an individual poses a risk or is otherwise unfit to care for children. It would require reporting revocations (from our state or others) for reasons unrelated to harm or risk. We have spoken with individuals who did not oppose a revocation because they stopped providing care for a time and could not afford to meet requirements related to training, fees, or facilities. We have spoken with others who disagree with the basis for revocation but did not receive notice in time or have the means to appeal. Others had their licenses revoked for good reason but have since that time (sometimes literally decades ago) addressed the related problems and are currently well-qualified to care for children.</p> <p>This proposal makes the consequences of a license revocation harsher than that of</p>	<p>1. There are established policies and procedures already in place where ample opportunity and time is given to a provider to take correction measures before negative action, including revocation, is taken. The department's decision to revoke a provider's license is not made lightly. When repeated, numerous or serious non-compliance violations are reported, observed and documented and the health and safety of children is deemed, in the professional judgment of DEL personnel, to be in jeopardy, DEL personnel are required to take appropriate action. One of the DEL's core responsibilities is to safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care. See RCW 43.215.005(4)(c). To allow for correction after revocation, when multiple opportunities for correction were provided before revocation, is not acting in the best interests of children's health, safety and well-being.</p> <p>The department disagrees with the claims made here by the unknown individuals referred to in the comment. Revocations are initiated when repeated, numerous or serious non-compliance violations are reported, observed and documented and the health and safety of children is deemed, in the professional judgment of DEL personnel, to be in jeopardy. The inability to meet requirements related to training, fees or facilities are not sufficient reasons for the revocation of a provider's license to take place, but they can be included as part of a revocation. Moreover,</p>

many criminal convictions, which can be vacated, sealed, or reviewed for suitability after passage of time. See, e.g., WAC 170-06-0120(2). Establishing a permanent, automatic, and irrebuttable [*sic*] presumption of unfitness because an individual had a license revoked is not rationally related to the legislative intent of protecting children. In fact, it can have the opposite effect, harming children by reducing the availability of appropriate, high-quality child care.

The lack of flexibility in provider disqualification can be a detriment to the children the Department seeks to protect and serve. Children in some rural areas and children with special needs bear the brunt of this unyielding approach. This is especially true with in-home/relative providers. A child's parent or other primary caregiver is more likely to know how the child will do with these providers than in other settings. Many such providers live nearby, solving transportation problems faced by many low-income parents. The proposal would have an even harsher impact on children seeking a provider fluent in their primary language and/or familiar with their culture, or those with special needs related to health or disability who are hard to place in facility-based settings. Parents of children with particular language, cultural, or other needs already struggle to find appropriate child care. Removing qualified in-home/relative providers from the pool for a reason that might have no bearing on the provider's fitness disparately impacts these children and families.

The Department could better accomplish its mission in protecting and meeting the needs of children if license revocation ceased to be a factor after a set amount of time (such as the five years used for some criminal convictions) and DEL provided a process within that period to review the provider's current suitability.

the claim of not properly receiving notice in time for appeal is factually incorrect. DEL procedure states that a child care license is not legally revoked until the licensee has the legal revocation letter in hand specifying the licensee's due process rights. Appeal information is included with the revocation and legal representation is not required for the hearing. Lastly, providers who have had their child care license revoked for good reason is precisely the reason why DEL is proposing the rule. The proposed rule minimizes the risk of safety loopholes. The safety of children is priority one for the department.

The department disagrees with the claim that the proposed rule is harsher than many criminal convictions and reiterates its commitment to child safety as previously stated.

The department disagrees with the claim that the proposed rule is a detriment to the children it serves. There is insufficient evidence to suggest otherwise. Child safety is an integral part of the department's mission.

The department disagrees with the idea of a license revocation ceasing to be a factor after a set amount of time. To allow for correction after revocation, when multiple opportunities for correction were provided before revocation, is not acting in the best interests of children's health, safety and well-being. The department is committed to child safety.

With regard to RCW 43.215.070, the department disagrees with the comment's interpretation and believes child safety is more important than flexibility in these situations.

2. The proposed rule will not be revised at this time.

<p>Moreover, the proposal's rigidly unreasoned approach is inconsistent with the statute the Department cites as authority for the proposal. RCW 43.215.070 directs the Department to "grant waivers from the rules of state agencies for the operation of early learning programs requested by the nongovernmental private-public partnership <i>to allow for flexibility to pursue market-based approaches to achieving the best outcomes for children and families.</i>" (Italics added.) The proposal limits the overall provider pool, and especially options for those with transportation issues and special needs related to limited English proficiency, culture, or disability.</p> <p>If the Department does not adopt our recommendation to withdraw this rulemaking proposal, we request the following additional provisions: 1) relating the basis of revocation to protective intent, 2) a time no greater than five years after which the Department no longer considers revocation of a child care license, and 3) a process for a suitability review within that time period.</p>	
<p>WAC 170-290-0135. In-home/relative providers—Information provided to DSHS.</p> <p>Comment 1: A fundamental tenet of regulatory construction is that when different language is used, those provisions are interpreted to have different meanings; when the same language is used, those provisions are interpreted as having the same meaning. Proposed WACs 170-290-0130(5)(d) and 170-290-0135(1)(e)(viii), however, use different language to convey the same concept. This is confusing.</p> <p>Proposed WAC 170-290-0130(5)(d) refers to "An individual who has a revoked child</p>	<p>1. The department has edited this WAC to be consistent with WAC 170-290-130.</p> <p>The department references its prior response made in WAC 170-290-130 to address similar concerns made here.</p> <p>2. This proposed rule was edited for consistency.</p>

<p>care license" while WAC 170-290-0135(1)(e)(viii) refers to "an individual whose child care license has been revoked." This word choice is ambiguous. The latter could be read to include an individual whose child care license was wrongly revoked but reinstated.</p> <p>If the Department does not adopt our recommendation to withdraw this rulemaking proposal altogether, the language in WACs 170-290-0135(1)(e)(viii) and 170-290-0130(5)(d) should be consistent. WAC 170-290-0135(1)(e)(viii) should be rephrased as "An individual who had a child care license revoked:</p> <ol style="list-style-type: none"> 1. in the past five years; 2. due to abuse, neglect, or abandonment of a child; and 3. the license was not reinstated." <p>The other issues noted above should be addressed in this regulation as well.</p>	
<p>WAC 170-290-0138. In-home/relative providers—Responsibilities.</p> <p>Comment 1: Please see our comments above. If the Department does not adopt our recommendation to withdraw this proposal, we request additional language to ensure the requirement to report a child care license revocation is limited to revocations that were due to abuse, neglect, or abandonment of children; is time-limited; and allows for review within the limited time period.</p>	<ol style="list-style-type: none"> 1. The department disagrees that this proposed rule requires revision. <p>The department references its prior response made in WAC 170-290-130 to address similar concerns made here.</p> <ol style="list-style-type: none"> 2. The proposed rule will not be revised at this time.

III. Changes to the final rule compared to the proposed rule.

For consistency, proposed rule WAC 170-290-0135 was edited as a result of the comments the WAC specifically received.