

**NYS Office of Children and Family Services  
Bureau of Early Childhood Services  
Policy Statement**

**ID Number: 05-2**

**Topic: Cease & Desist Policy Decisions**

**Modalities Impacted: all modalities of care**

**Regulations and Law: Social Service Law 390.10**

**Day Care Regulation 413.3(a)(6), 413.3(g)(1) and (2)**

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**Effective: Immediately-- December 19, 2005**

**This policy statement is effective immediately and cancels all previous memos or statements on the topic.**

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The purpose of this policy statement is to provide direction to regional office licensors/registrars on issues pertaining to the inspection and identification of child day care programs and the actions needed to bring illegal programs into compliance. While this policy will address issues concerning all modalities of care, the discussion regarding what constitutes a child care program will be limited to what constitutes a day care center, group family day care and family day care. A separate policy (PS 2-03) is provided for what constitutes a school-age child care program.

**Complaints of Illegal Programs**

Illegal programs are most often identified through complaints made to the Child Care Complaint Line. Upon receipt of this information, regional office/registrar staff data enter the information collected from the caller into the Child Care Facility System (CCFS) Complaint Intake (RC04) screen, and a licensor/registrar is subsequently dispatched to the field to investigate the allegation.

Licensors/registrars who are completing inspections for programs that are still in the application stages may also happen upon a program (through an on-site inspection, through the complaint intake process, or through some contact with the applicant) that has begun operating before the licensing/registration process is complete and prior to receiving their registration/license. This information must be recorded as a complaint in the CCFS system and associated with the facility with the status of 'Application Received' in order to correctly track the illegal status within the facility event history.

Once a complaint is associated with a facility's record, licensors/registrars must exercise due diligence in conducting an investigation to verify, to the greatest extent possible, the existence of an unlicensed/unregistered day care program. Due diligence is defined as:

reasonable care or attention to a matter or a measure of prudence, activity or perseverance which is expected from and exercised by a reasonable and prudent person under the particular circumstances. Due diligence includes a site visit, discussions with the provider about the program, collateral information gathering (such as speaking to a neighbor or parent) and a decision as to whether the program is operating illegally. **Due diligence must NOT include extraordinary or intrusive measures such as video surveillance, wiretapping, or other concealed recording devices. Force must never be used to gain entry to a program.** It may be appropriate, in certain circumstances where an initial inquiry was fruitless, to engage in site surveillance, but such activities must only be engaged in with the guidance and prior approval from the regional office supervisors/manager or home office.

Should a licensor/registrar feel intimidated through force or threat of force, or at any time fear for his/her safety, he/she should leave the property immediately and go to a safe location. If there is concern for personal safety, the police should be contacted for assistance. Once the licensor/registrar is in a safe location they are advised to call their supervisor to update him/her on their actions in the field, and get further instruction/guidance.

If the existence of an unlicensed/unregistered program cannot be verified through the exercise of due diligence as described above, the complaint may be determined as 'Unsubstantiated' in CCFS. Unsubstantiating the allegation of illegal operation will automatically change the complaint status to 'Closed (Unsubstantiated), and the Facility Status to 'Illegal: Unsubstantiated' (if the facility had not had an application pending simultaneous with the complaint investigation); otherwise the status would revert to either 'Application Requested' or 'Application Received' as appropriate. In all cases, a summary of the investigation undertaken that justifies closure of the complaint must be entered into the observation field on the complaint tracking screen (RV01) in CCFS.

#### **A licensor's/registrar's right to inspect a family day care home (illegal or legal)**

Social Service Law (SSL) § 390(3)(a) authorizes site visits and states the following: "The office of children and family services may make announced or unannounced inspections of the records and premises of any child day care provider, whether or not such provider has a license from, or is registered with, the office of children and family services."

The above referenced section of the SSL authorizes Office licensors and registrars to inspect an illegal (or legal) day care program and its grounds. It is important that the licensor/registrar explain their authority to inspect to the alleged illegal operator or provider, and that the licensor or registrar make available their professional identification for the individual to see/inspect. The telephone number of the regional office may also be given to the illegal operator/provider so that the provider may verify the licensor's/registrar's identification and authorization to inspect the program.

The Office also advises licensors/registrars to bring a copy of the SSL with them for the program to review. It may be particularly helpful when and if safety concerns are observed and police assistance is needed to gain access to the program.

If a provider remains uncooperative in allowing the licensor/registrar to have access to the program, the licensor/registrar should contact regional office supervisory staff to

advise them of the situation and seek the regional office's advice on the next step. The licensor/registrar should take note of all that is observed, and whatever information the illegal operator/provider divulges that will help them make an initial determination as to whether illegal care and/or unsafe conditions exist. **Under no circumstances must the licensor/registrar force their way into a program.**

The majority of providers are cooperative and will answer questions posed by the licensor/registrar. Questions should include: what are the names, ages and numbers of children present at the program, what relationship are the children to the provider, what are the children's attendance schedules, program's hours, and what services does the program provide. All such information should be recorded in the observation field on the Complaint Tracking Screen (RV02) and shared with the supervisor when the licensor/registrar returns to the office.

When all information pertinent to the investigation has been recorded in CCFS, a draft letter should be generated. The inspector's supervisor should review the draft for accuracy and completeness, only approving the inspection letter if satisfied that the draft letter is correct. Once the inspection has been approved, the letter must be mailed within 10 days of the inspection date.

### **What constitutes a day care center, group family day care program and family day care program?**

The definition of a family day care home in § 390 (1)(e) of the SSL and the Office's regulations provides in pertinent part that a family day care home is a program providing care for more than three hours per day, per child. The explanation is also relevant to group family day care homes and day care centers, as those terms are defined in § 390 (1)(d) and 390 (1)(c) of the SSL, respectively.

In evaluating school-age child care (SACC) programs the number of hours children are in attendance is not the relevant issue for determining whether the program must be registered. Licensors and registrars must use the guidelines written in policy statement number 02-03 "What Constitutes a School Age Child Care Program?" to evaluate whether or not a program must be registered as a SACC. Once a decision has been made as to whether or not the program in question must be registered as a SACC, the licensor/registrar must follow the steps outlined in this policy paper under section "Steps to Take After a Decision is Made".

### **Statutory Provisions**

The discussion that follows applies to family day care programs, group family day care programs and day care centers.

The statutory provision discussed above "for more than three hours per day per child" means that, in order to fall within one of the definitions above, the individual children have to be present for more than three hours. It does not matter how many hours a day the program operates. The "per child" language means that we look to see how many hours a day particular children receive care. As a corollary to this, children who receive care for no more than three hours a day are not considered in making the determination whether the program is subject to licensure or registration. The first condition for coming within

the licensing or registration jurisdiction, then, is that individual children be present for more than three hours a day.

In order to determine if the provider is subject to licensure/registration, the licensor/registrar will need to count the number of children in the provider's care. Once a licensor/registrar has that number they must exclude from the calculation the relatives (i.e., those children whose parent is within the third degree of consanguinity of the provider). This applies regardless of how many hours of care they receive per day. We then must determine whether the provider is subject to licensure/registration based on the other (i.e. non-relative) children. If there are three or more non-relative children in care for more than three hours a day, then the provider is subject to licensure/registration. Once the provider is subject to licensure/registration, however, the Office considers all the children in determining capacity and, thus in determining what type program it is.

To use an example, if a provider cared for eight children total and four of these children are relative children, two are non-relative children in care for more than three hours a day and two are non-relative children in care for no more than three hours a day, the provider would not be subject to licensure/registration. A licensor/registrar arrives at this decision by subtracting the four relative children (how long they receive care is irrelevant) and looking at the other four children. Among the other four children, there are only two children receiving care for more than three hours a day. Accordingly, the provider does not meet the threshold for being subject to licensure/registration.

If we change the above example slightly and have three non-relative children in care for more than three hours a day, and one non-relative child in care for no more than three hours a day, the result changes. Now there would be three non-relative children in care for more than three hours a day, and so the provider is subject to licensure/registration. In total there are eight children in care, and now the status of the relative children becomes relevant in determining the modality of care that is being provided. If the four relative children are all receiving care during school hours, the provider is subject to licensure as a group family day care provider (eight children receiving care full time). However, if two of the relative children are also school-age and receive care only outside school hours, then the provider would be a family day care provider (six full time children and two school-age children).

### **Who is Considered a Relative?**

A relative is a person who is within the third degree of consanguinity of the parent or stepparent. This means that in order for the provider to be considered a relative they must be one of the following:

- *the grandparent of the child*
- *the great-grandparent of the child;*
- *the great-great-grandparent of the child;*
- *the aunt or uncle of the child, including the spouse of the aunt or uncle;*
- *the great-aunt and great uncle of the child, including the spouse of the great-aunt and great-uncle;*
- *the sibling of the child; and*
- *the first cousin of the child, including the spouse of the first cousin.*

Children receiving care who are related to any other caretaker in the program such as the assistant, substitute or alternate provider must be counted as non-relative children. The provider's relative children are the only children to be excluded when counting the children in care to determine capacity. The only rare exception to this would be if the other caretaker's child were also the provider's foster child or ward.

If a provider cares for more than eight children in total, the status of the children as relative or non-relative discussed above no longer applies as long as at least one child is a non-relative child. Once the group size is over eight and includes at least one non-relative child, the licensor /registrar will consider all the children in determining if the provider is subject to licensure. Thus, if the provider cares for three or more of the children in this group of eight-plus children (relatives or non-relatives) for more than three hours per day, the provider is subject to licensure. The licensor/registrar must consider all the children in determining capacity. A provider caring for at least nine children is subject to licensure as a group family day care provider.

An example of this is a provider who has ten children in care. Of these ten children, six are relative children and two are non-relative children, all in care more than three hours per day. The other two children are present at the home after school. To determine capacity, the licensor/registrar must count all the children. Since there are three children receiving care for more than three hours a day the program must be licensed in order to operate. There are eight in care all day and two additional school-age children, so this is a group family day care home with two additional school-age children.

One other factor that must be considered is that the day care definition in Section 390(1)(a)(i) of the SSL excludes from the definition of day care provided to a child in the **child's** residence. Thus, if a person provides care only to children who live in the children's residence the provisions of Section 390(2)(e) do not come into play, as there is no day care being provided. The Section 390(2)(e) analysis applies only where relative children are being cared for **outside** their own homes.

The day care regulations in 18 NYCRR § 413.2 defines the age of children as follows: "Age of children: A child day care (program) may provide care for children six weeks through 12 years of age; for children 13 years of age or older who are under court supervision; for children 13 years of age or older who are incapable of caring for themselves when such inability is documented by a physician, psychiatrist or psychologist; and, in extenuating circumstances, for children under six weeks of age when prior approval has been obtained from the office. Children who attain the maximum age allowed during the school year may continue to receive child day care through the following September 1 or until they enter school for the following school year."

### **Doing The Math**

In order to analyze whether a program is operating illegally or not, use this five-step approach:

1. Remove from the analysis all children who do not receive care for more than three hours a day. If there are fewer than three children left, the program is not required to have a license or registration; therefore they are not operating illegally. If there are three or more children left, proceed to the next step.

2. Examine the program population for the presence of one of the following two possibilities:
  - (a) When you remove from the analysis all the children who are related to the provider (within the 3<sup>rd</sup> consanguinity of the parent or stepparent) and you are left with 3 or more children-proceed to step 3. If you are left with fewer than 3 children the program is not required to be licensed or registered
  - Or
  - (b) When the total number of relative and non-relative children who attend the program for more than 3 hours a day (step 1) exceeds 8 and there is at least one non-relative child present, proceed to step 3.
3. Examine the periods when the remaining children are present to see where those periods overlap. If there is no overlap, i.e. only one such child is present at any given time, the program is not required to be licensed or registered and is therefore not operating illegally. Otherwise, proceed to the next step.
4. For the periods that overlap, find the periods where three or more children are present. If there are no such periods, the program is not required to be licensed or registered and is therefore not operating illegally. If there are such periods, proceed to the next step.
5. Add up the total number of hours in those periods. If that total is more than three, the program is required to be licensed or registered and is therefore operating illegally. If that total is three or less, the program is not operating illegally and is not required to be licensed or registered. Please see below for next steps.

### **Steps to Take After a Decision is Made**

#### **I. How to proceed if the program is not operating illegally**

Once a determination has been made that a program is not operating illegally, results of this investigation are entered into CCFS by the licensor/registrar, including updating the name and/or address of the alleged illegal provider, if necessary, via the 'Update Facility Information and/or Request Application' icon on FM07a. When the draft letter has been approved and the final letter has been generated by the supervisor, the program status changes to 'Illegal: Unsubstantiated'. The inspection letter documenting this determination is mailed to the individual. No further action is required.

#### **II. How to proceed when the program is operating illegally**

1. If the licensor/registrant determines that the program is operating illegally, the licensor/registrant must advise the provider of this violation and hand them a "Notification of Violation" letter. The notice of violation should be delivered while the licensor/registrant is on-site.
2. Office policy does not require that a licensor/registrant always remain on site until the illegal provider brings her/his attendance numbers down to 2 children. The Office would only require that a licensor/registrant remain on site if they witnessed any safety issues concerning the care of the children. This could include gross overcapacity, unsupervised young children, abuse or maltreatment, and imminent danger scenarios.
3. After returning to the office the licensor/registrant will record in CCFS all observations and specific information obtained during the inspection, and select 'Substantiated' from the "Allegation Determination" dropdown. Changes to the name and/or address, and a request for an application to be mailed, must be made at this point via the 'Update Facility Information and/or Request Application' icon on FM07a. A draft inspection letter is generated, and another inspection record is created with a primary reason of 'Monitoring'. When the inspection letter has been approved by the supervisor and printed, the facility status becomes 'Illegal: Substantiated'.
4. The Office does not require, nor is it recommended, that a referral be sent to the enforcement unit and legal unit based on the program as operating illegally. At this stage in the investigative process the licensor/registrant would only refer cases to enforcement (requesting approval for a C&D action) when the case involves serious safety concerns such as gross overcapacity, unsupervised young children, abuse or maltreatment, and imminent danger scenarios. These are the same issues that would have kept the licensor/registrant at the site until parents picked up their children.
5. A return visit to the site is required. When to return to the site depends on a variety of considerations. If there were safety concerns, the licensor/registrant should return to the site on the next business day. If, however, the complaint indicated that the program only operates on certain days between certain hours, then the visit should be conducted on those days and during those times that coincide with the information found in the complaint. As a rule, the first follow-up visit should always be within five business days of the initial visit, unless there are compelling reasons to postpone that scheduled visit.
6. The licensor/registrant returns to the site.
  - (a) After the monitoring inspection has been conducted, the results of this inspection are recorded in that inspection record. If the inspector finds that the illegal provider has now come into compliance by ceasing all day care operations by caring for fewer than 3 children for no more than 3 hours, the licensor/registrant will record 'No New Violations' as the outcome of that inspection and update the original Complaint Inspection by recording this information in the Provider Response section of the complaint tracking window (RV01). No change in the compliance status of the original complaint inspection is made at this time. When both inspections have been updated, the letter is drafted from the Monitoring

Inspection record, and mailed after supervisory approval has generated a final letter. An additional monitoring inspection is to be conducted within three months of the original complaint inspection. If the second monitoring site visit finds that the provider has remained in compliance, the licensor/registrar, records 'No New Violations' in the second Monitoring inspection and again updates the provider response section in the original complaint inspection record. In addition, after the second monitoring visit confirms compliance, the status of the original inspection would be changed to 'In Compliance' with the date of the second monitoring inspection. The letter is drafted and finalized from the second monitoring inspection record (not from the original inspection). The letter is mailed. The Office's involvement would end at this point. The illegal provider is not notified of or afforded hearing rights based on the serving of a notice of violation; hearing rights are afforded to those providers who are issued a cease and desist order. Should this same individual or corporate entity ever re-open the illegal program at this same site, their actions must be referred for enforcement. Only one violation letter may be delivered to an illegal operator, no matter what the time period is between violations. Licensors/registrars must associate the second illegal complaint to a new Illegal Provider record by selecting the previous Illegal Provider record from the Search/Associate results, and selecting 'Illegal Provider from Facility' in order to establish a link between the two occurrences of illegal operation.

(b) If the provider continues to operate after a notice of violation has been served, an enforcement referral for the issuance of a Cease and Desist letter is completed after the first monitoring visit verifying non-compliance with the notice of violation. In this situation, the results of the monitoring inspection would be 'Violations Found', and the two citations indicating illegal operation would be cited. A second inspection letter will document the findings. The enforcement referral is forwarded, as per procedure, to home office and the Child Care Enforcement Bureau. Once the enforcement action is approved, a cease and desist letter is drafted by regional office staff, approved by Legal and issued to the illegal provider either by certified mail/return receipt requested or by hand. CCFS status is then updated\* to "Cease and Desist" by home office enforcement unit staff.

Licensors/registrars will continue a regular schedule of visits, at least twice per month, to continue to document the illegal provision of care. Each of these visits is recorded individually as an inspection with the primary reason of 'Monitoring'. The updating of the original inspection and the printing/mailing of the letter from each monitoring inspection continues. In each inspection, the licensor/registrar should note in 'Observation' on RV01 the number of children being cared for, hours of attendance and any other violations in accordance with CCFS instructions. The licensor/registrar should present the provider with another copy of the original cease and desist letter with a cover letter stating the date of the visit and noting that the provider was given another copy of the cease and desist on that date. The licensor/registrar will maintain all the documentation but shall consult with regional office, home office and Legal as to the need for additional information to support further enforcement actions.

Illegal providers may be in the process of applying for a registration/license during the same period of time that the Office is investigating them as an illegal operation. In order

to continue to process the application in CCFS, the licensor/registrar must contact home office enforcement staff and ask that the status in CCFS be changed from “Illegal Substantiated” to “Application Received”. This will allow the process to move along while retaining the historical information about the program being an illegal operation.

\* Until the Enforcement phase of CCFS has been implemented, the status of Cease and Desist should not be recorded in CCFS if an application is pending for an illegal provider. The status Illegal: Cease and Desist is an ending status that cannot be changed.

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Approved By



[X ]

Suzanne Zafonte Sennett

Date: 12-19-05