

# January 31, 2005

## CHILD DAY CARE

### Definitions, Enforcement And Hearings

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#### Section 413.1 Scope.

The definitions of this Part apply to all references to day care programs included in this Title. The provisions in this Part governing enforcement and hearings apply to all child day care programs addressed in Parts 414, 416, 417 and 418 of this Title.

#### 413.2 Definitions

(a)(1) Child day care means care for a child on a regular basis provided away from the child's residence for less than 24 hours per day by someone other than the parent, step-parent, guardian or relative within the third degree of consanguinity of the parents or step-parents of such child. A relative within the third degree of consanguinity of the parent or step-parent includes: the grandparents of the child; the great-grandparents of the child; the great-great-grandparents of the child; the aunts and uncles of the child, including the spouses of the aunts and uncles; the great-aunts and great-uncles of the child, including the spouses of the great-aunts and great-uncles; the siblings of the child; and the first cousins of the child, including the spouses of the first cousins.

(2) Child day care does not refer to care provided in:

- (i) a summer day camp, traveling summer day camp or children's overnight camp as defined in the State Sanitary Code;
- (ii) a program for school-age children operated solely for the purpose of religious education, sports, classes, lessons or recreation;
- (iii) a facility providing day services under an operating certificate issued by the Office;
- (iv) a facility providing day treatment under an operating certificate issued by the Office of Mental Health or by the Office of Mental Retardation and Developmental Disabilities; or
- (v) a kindergarten, pre-kindergarten or nursery school for children three years of age or older, or a program for school-age children conducted during non-school hours, operated by a public school district or by a private school or academy which is providing elementary or secondary education or both in accordance with the compulsory education requirements of the Education Law, provided that such kindergarten, pre-kindergarten, nursery school or program is located on the premises or campus where the elementary or secondary education is provided.

(b) Child day care provider means any individual, association, corporation, partnership, institution, organization or agency whose activities include providing child day care or operating a facility where child day care is provided.

(c) Provider means a child day care provider or the operator of a child day care center or small day care center, school-age child care program, group family day care home, or family day care home.

(d) Operator means:

- (1) the individual who owns a child day care center or small day care center, school-age child care program, group family day care home, or family day care home; or
- (2) where a child day care center or small day care center, school-age child care program, group family day care home, or family day care home is not owned by an individual, the person with responsibility for oversight and direction of the center, program or home.

(e) Office means the New York State Office of Children and Family Services.

(f) Enforcement means the action(s) undertaken or initiated by the Office to assure that child day care facilities are operated in compliance with all applicable provisions of law and regulation.

(g) Child day care center means a program or facility which is not a residence in which child day care is provided on a regular basis to more than six children for more than three hours per day per child for compensation or otherwise, except those programs providing care as a school-age child care program as defined in this Section. The name, description or form of the entity which operates a child day care center does not affect its status as a child day care center.

(1) Age of children: A child day care center 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.

(2) Maximum capacity means the maximum number of children authorized to be present at any one time as specified on the child day care center license.

(h) Small day care center means a program or facility which is not a residence in which child day care is provided to three through six children for more than three hours per day per child for compensation or otherwise. The name, description or form of the entity which operates a small day care center does not affect its status as a small day care center.

(1) Age of children: A small day care center 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.

(2) Maximum capacity means the maximum number of children authorized to be present at any one time as specified on the small day care center registration.

(i) No more than two children under the age of two may be cared for at any one time.

(ii) When any child who is less than two years of age is present, the maximum capacity is five.

(iii) When all children present are at least two years of age, maximum capacity is six.

(i) Family day care home means a residence in which child day care is provided on a regular basis for more than three hours per day per child for three to six children for compensation or otherwise, except as provided below. The name, description or form of the entity which operates a family day care home does not affect its status as a family day care home.

(1) Age of children: A family day care home 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.

(2) Maximum capacity means the maximum number of children authorized to be present at any one time as specified on the family day care registration.

(i) Except for children in the legal custody of or boarded out with the provider who attend school in kindergarten or a grade level higher than kindergarten, all children present must be counted in determining maximum capacity even if they are relatives or are present three hours per day or less.

(ii) No more than two children under the age of two may be cared for at any one time.

(iii) When any child who is less than two years of age is present, the maximum capacity is five, except as provided in subparagraph (v) of this paragraph.

(iv) When all children present are at least two years of age, maximum capacity is six, except as provided in subparagraph (v) of this paragraph.

(v) An additional two children who are of school-age may be provided care if: the additional school-age children attend kindergarten or a school grade level higher than kindergarten; and the school-age children receive the care primarily before or after the period such children are ordinarily in school, during school lunch periods, on school holidays, or during those periods of the year in which school is not in session. The registration for such capacity for additional school-age children may not be issued until the Office inspects the home to determine whether the provider can care adequately for seven or eight children.

(j) Group family day care home means a residence in which child day care is provided on a regular basis for more than three hours per day per child for seven to 12 children for compensation or otherwise, except as provided below. Such home must be operated by a provider and have at least one assistant present during the hours that care is provided. The name, description or form of the entity which operates a group family day care home does not affect its status as a group family day care home.

(1) Age of children: A group family day care home 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.

(2) Maximum capacity means the maximum number of children authorized to be present at any one time as specified on the group family day care license.

(i) Except for children in the legal custody of or boarded out with the provider who attend school in kindergarten or a grade level higher than kindergarten, all children present must be counted in determining maximum capacity even if they are relatives or are present three hours per day or less.

(ii) There must be one caregiver for every two children under the age of two years in attendance at the group family day care home. Any such caregivers who are not providers or assistants must meet the qualifications of an assistant.

(iii) When any child who is less than two years of age is present, the maximum capacity is 10, except as provided in subparagraph (v) of this paragraph.

(iv) When all children present are at least two years of age, maximum capacity is 12, except as provided in subparagraph (v) of this paragraph.

(v) An additional two children who are of school-age may be provided care if: the additional school-age children attend kindergarten or a school grade level higher than kindergarten; and the school-age children receive the care primarily before or after the period such

children are ordinarily in school, during school lunch periods, on school holidays, or during those periods of the year in which school is not in session.

(k) School-age child care program means a program or facility which is not a residence in which child day care is provided to an enrolled group of seven or more children under 13 years of age during the school year before and/or after the period such children are ordinarily in school or during school lunch periods. School-age child care programs also may provide care during school holidays and those periods of the year in which school is not in session, including summer vacation. Such programs must operate consistent with the local school calendar. The name, description or form of the entity which operates a school-age child care program does not affect its status as a school-age child care program.

(1) Age of children: A school-age child care program may provide care for school-age children of any age. If the program provides care for children over 13 years of age, the program must meet all regulatory standards in regard to such children just as if the children were under 13 years of age. No child may be admitted unless the child is enrolled in kindergarten or a higher grade or is at least six years of age. Children may receive care through the conclusion of high school.

(2) Maximum capacity means the maximum number of children authorized to be present at any one time as specified on the school-age child care registration.

(1) License means a document issued by the Office authorizing a provider to operate a child day care center in accordance with Subpart 418-1 of this Title or a group family day care home in accordance with Part 416 of this Title. A valid license must be obtained from the Office prior to the operation of any child day care center or group family day care home.

(m) Registration means a document issued by the Office authorizing a provider to operate a school-age child care program in accordance with Part 414 of this Title, a family day care home in accordance with Part 417 of this Title or a small day care center in accordance with Subpart 418-2 of this Title. A valid registration must be obtained from the Office prior to the operation of any family day care home or school-age child care program.

(n) Applicant means any individual submitting an application for a license or registration or the director or other individual designated by any association, corporation, partnership, institution, organization or agency submitting an application for a license or registration to represent such entity in the application process.

(o) Staff means all personnel, including temporary staff or substitutes, para-professionals, volunteers and any other person(s) employed by a child day care center or school-age child care program.

(p) Director means the person or persons who have responsibility for the development and supervision of the daily activity programs for children and the administrative authority and responsibility for the daily operations of a child day care center or school-age child care program.

(q) Health care provider means a licensed physician, physician's assistant, nurse practitioner, or registered nurse.

(r) Health professional means a licensed physician trained in pediatrics or family health, or a registered nurse, nurse practitioner or physician's assistant with at least one year of pediatric or public health experience.

(s) Infant means a child up to 18 months of age.

(t) Toddler means a child 18 months to 36 months of age.

(u) Preschooler means a child who is at least three years of age and who is not yet enrolled in kindergarten or a higher grade.

(v) School-aged child means a child under 13 years of age who is enrolled in kindergarten or a higher grade.

(w) Parent means custodial parent(s), legal guardian(s), other persons having legal custody of a child or any other person with whom a child lives who has assumed responsibility for the day-to-day care and custody of the child.

(x) Mildly ill child means a child who has symptoms of a minor childhood illness which does not represent a serious risk to other children and who is able to participate in the routine program activities with minor accommodations. The Office's health care plan guidelines discuss the symptoms and illnesses which commonly constitute minor illness.

(y) Moderately ill child means a child whose health status requires a level of care and attention that cannot be accommodated in a child day care setting without the specialized services of a health professional. The Office's health care plan guidelines discuss the symptoms and illnesses which commonly constitute moderate illness.

(z) Night care means care provided during the hours when children have begun or will be continuing their night's sleep.

(aa) Evening care means care provided from late afternoon or evening until children begin their night's sleep.

(ab) Nap means a short sleep during the day.

(ac) Shift means an eight to ten hour period during which care is provided to a group of enrolled children.

(ad) Substitute means any person who has been selected by the provider to provide child day care to children in a family or group family day care home or small day care center during short-term, non-recurring absences of the day care provider or assistant.

(ae) Assistant means any person who has been selected by the provider to help the provider provide child day care to children in a group family day care home.

(af) Alternate assistant means any person who has been selected by the provider to provide child day care or help the provider provide child day care to children in a group family day care home in the absence of either the provider or assistant. The alternate assistant must meet the same qualifications as the assistant.

(ag) Alternate provider means an individual who provides child day care in a family day care home or small day care center in the absence of the provider. The alternate provider must meet the same qualifications as the provider.

(ah) Caregiver means all persons who are providers, alternate providers, assistants, alternate assistants, substitutes or volunteers with child care responsibilities in a family or group family day care home or a small day care center.

(ai) Personal residence means a one or two family dwelling or a single dwelling unit in a multiple dwelling classified for permanent occupancy under the New York State Uniform Fire Prevention and Building Code, except that a community residence shall not be considered a residence for purposes of the child day care regulations. A one family residence shall be considered to have one dwelling unit and a two family residence shall be considered to have two dwelling units. A dwelling unit must be occupied or used as living space to be used for family or group family day care and considered a residence for purposes of the child day care regulations, except as follows:

(1) when one dwelling unit of a two family dwelling is occupied and is used for family or group family day care, the second dwelling unit may not be used for family day care or group family day care unless the second dwelling unit is also occupied;

(2) when one dwelling unit of a two family dwelling is occupied and is not used for family day care or group family day care, the second dwelling unit need not be occupied to be used for family day care or group family day care by an occupant of the first dwelling unit;

(3) where a property includes a dwelling unit which is occupied and is used for family day care or group family day care and there is a separate building on the property under the control of the occupant of the dwelling unit which contains an additional dwelling unit, the additional dwelling unit may not be used for family day care or group family day care unless the second dwelling unit is also occupied;

(4) where a property includes a dwelling unit which is occupied and is not used for family day care or group family day care and there is a separate building on the property under the control of the occupant of the dwelling unit which contains an additional dwelling unit, the additional dwelling unit need not be occupied to be used for family day care or group family day care by an occupant of the first dwelling unit;

(5) where a property includes a dwelling unit which is occupied and is used for family day care or group family day care and there is a separate building on the property under the control of the occupant of the dwelling unit which does not contain a dwelling unit, neither the separate building nor any portion thereof may be used for family day care or group family day care; and

(6) where a property includes a dwelling unit which is occupied and is not used for family day care or group family day care and there is a separate building on the property under the control of the occupant of the dwelling unit which does not contain a dwelling unit, upon inspection and approval by the office, the separate building or a portion thereof may be used by the occupant for family day care or group family day care by an occupant of the dwelling unit.

(aj) Plan of study means a written plan which sets forth reasonable timeframes and shows continuous progress towards completion of the requirements for a degree or credential. If the plan is for a director of a program, the plan must be signed by the director and the Office, and be overseen and monitored by the Office. For all other individuals, the plan must be signed by the participant and the director of the program, and be overseen and monitored by the director.

(ak) Health care consultant means a physician, physician assistant, nurse practitioner or registered nurse who possesses a valid New York State license in his or her field. Such consultant may include a health care professional who is an employee of a local Department of Health.

(al) Licensed authorized prescriber means a person licensed, currently registered and authorized under the Education Law to issue prescriptions for medication or medical treatment.

(am) Children with special health care needs means children who have chronic physical, developmental, behavioral or emotional conditions expected to last 12 months or more and who require health and related services of a type or amount beyond that required by children generally.

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### 413.3 Enforcement of Regulations

(a) Types of Enforcement Actions. Enforcement actions which may be undertaken by the Office include, but are not limited to:

(1) issuance of written inspection reports which include corrective action plans and notices of intention to initiate enforcement through the imposition of a fine or the limitation, suspension, termination or revocation of a license or registration;

(2) meetings or telephone conversations between a provider and the Office to discuss corrective action plans;

(3) the holding of hearings to determine if a provider has failed to comply with applicable law and regulation;

(4) determinations, after hearings, that civil penalties should be imposed;

(5) determinations to deny, reject, revoke, terminate, suspend or limit a license or registration;

(6) issuance of orders to cease and desist operation of day care services, commissioner's orders, or orders approved by a justice of the Supreme Court, requiring a provider to immediately remedy conditions dangerous to children receiving child day care;

(7) temporary suspension or limitation of a license or registration upon finding that the public health or child's safety or welfare are in imminent danger;

(8) requests to the Attorney General to seek injunctive relief against providers for violations or threatened violations of law or regulation;

(9) requests to the Attorney General to take such action as is necessary to collect civil penalties, seek criminal prosecution, or to bring about compliance with any outstanding hearing decision or order; or

(10) publication in local newspapers of the names and addresses of child day care providers whose licenses, registrations or applications for licensure or registration have been rejected, denied, limited, suspended, terminated or revoked, or against whom a fine has been assessed after an administrative hearing.

(b) Current records of visits and findings relative to the issuance, denial, rejection, revocation, termination, suspension or limitation of licenses or registrations, including documentation submitted by applicants or holders of licenses or registrations, must be maintained by the Office as well as all criminal history records obtained by the Office through criminal history record checks.

(c)(1) Any violation of applicable statutes or regulations will be a basis to deny, reject, limit, suspend, revoke or terminate a license or registration.

(2) Consistent with Article 23-A of the Correction Law and Office guidelines referenced in subdivision two of section 425 of the Social Services Law, if the Office is made aware of the existence of a criminal conviction or pending criminal charge concerning the operator of a family day care home, group family day care home, school-age child care program, or child day care center; or concerning any employee, assistant or volunteer in such homes, programs, or centers; or any person age eighteen or over who resides in such a home, such conviction or charge may be a basis to deny, reject, limit, suspend, revoke or terminate the provider's license or registration. When the Office is made aware of a conviction or charge through a criminal history record check, the Office shall act in accordance with the provisions of section 413.4 hereof.

(3) Before a license or registration is revoked or terminated, or when an application for a license or registration is denied or rejected, the applicant for or holder of such license or registration is entitled to a hearing before the Office.

(4) The request for such hearing must be made in writing within 30 days of the receipt of written notice of the revocation, termination, denial or rejection.

(5) The revocation, termination, denial or rejection will become final if the applicant or holder fails to request a hearing within the 30 day period.

(6) The holder or applicant may reapply as described in Parts 414, 416, 417 and 418, as applicable.

(7) The Office may require the provider to post the revocation or termination of licensure or registration on the premises of the facility.

(d) Suspensions or Limitations of Licenses or Registrations.

(1) A license or registration will be temporarily suspended or limited in its terms without a hearing upon written notification to the holder of the license or registration by the Office of a finding that the public health or a child's safety or welfare is in imminent danger.

(2) The holder of the license or registration has 10 days from the date of the written notice of the suspension or limitation of the license or registration to request a hearing before the Office. Such a request must be in writing.

(3) Failure to make such a request will be prima facie evidence that the finding of imminent danger is valid, and the temporary suspension or limitation will continue in effect until the Office has determined that the condition requiring such suspension or limitation is corrected or the license or registration is permanently revoked or terminated pursuant to subdivision (c) of this section.

(4) If the holder requests a hearing, the temporary suspension or limitation will continue in effect until the Office has determined that the condition requiring such suspension or limitation is corrected, the license or registration is permanently revoked or terminated pursuant to subdivision (c) of this section, or a hearing decision orders the lifting of the suspension or limitation.

(5) The Office may require the provider to post the notice of suspension or limitation of licensure or registration on the premises of the facility.

(e) Fines. Operating without a License or Registration.

(1) A fine of up to \$ 500 per day may be assessed against any child day care provider for the provision of child day care without a license or registration.

(2) Such a fine will not be imposed until a hearing has been conducted and a decision has been issued. It is the Office's responsibility to request and schedule such hearings.

(3) Rectification of operation without a license or registration, either by becoming licensed or registered or by ceasing operation, will not preclude the assessment of a fine for the period of operation without a license or registration.

(f) Fines. Regulatory Violations.

(1) In addition to any other civil or criminal penalty provided by law including but not limited to the denial, rejection, termination, revocation, limitation or suspension of a license or registration, a fine of up to \$ 500 per day may be assessed against any child day care provider for any violation of office regulations.

(2) Such a fine will not be imposed until a hearing has been conducted and a decision has been issued. It is the Office's responsibility to request and schedule such hearings.

(3) Fines will be determined according to the following classifications:

(i) Class I violations are subject to a maximum fine of \$ 500 a day. A Class I violation is defined as:

(a) any violation of a regulatory requirement which harms a child or places a child at risk of death, serious or protracted disfigurement, or protracted impairment of physical or emotional health, including but not limited to:

(1) the existence of any condition which constitutes or creates a serious fire, safety or health risk, including but not limited to a substantial failure of the facility's fire detection or prevention system or conditions which would prevent or impede emergency evacuation procedures;

- (2) the use of corporal punishment or of frightening or humiliating methods of control or discipline;
  - (3) inadequate or incompetent supervision;
  - (4) inadequate light, ventilation, sanitation, food, water or heating; or
  - (5) repeated findings that the facility has exceeded its maximum permitted capacity. The term repeated as used in this subdivision includes any violation noted in more than one written inspection report prepared by the Office and sent to the child day care provider so that corrective action could be taken;
- (b) the abuse of a child, as defined in section 1012(e) of the Family Court Act, who is receiving care at the facility by the owner, operator, director or any staff member of the facility;
  - (c) the intentional failure to report instances of alleged child abuse or maltreatment to the Statewide Central Register of Child Abuse and Maltreatment and/or to take appropriate action to protect children when an allegation of such abuse or maltreatment is reported to the day care provider; or
  - (d) the refusal or failure to provide access to the day care facility to a representative from the Office for the purpose of inspecting the facility for compliance with the requirements of office regulations.
- (ii) Class II violations are subject to a maximum fine of \$ 200 a day. A Class II violation is defined as any violation of a regulatory requirement which places a child at risk of physical, mental or emotional harm, including but not limited to:
    - (a) the use of corporal punishment or of frightening or humiliating methods of control or discipline;
    - (b) inadequate or incompetent supervision;
    - (c) inadequate light, ventilation, sanitation, food, water or heating; or
    - (d) providing care for more than the maximum number of children permitted by the facility's license or registration.
  - (iii) Class III violations are subject to a maximum fine of \$ 50 a day. A Class III violation is defined as any violation of a regulatory requirement other than those included under Class I or II violations.
- (4) Where a child day care provider demonstrates that corrective action has been taken within thirty (30) days of notification of the imposition of the penalty, a fine will not be imposed, except in cases where:
    - (i) the office determines, after a hearing, that:
      - (a) there has been a total or substantial failure of the facility's fire detection or prevention systems or emergency evacuation procedures prescribed by Office regulation;
      - (b) the provider has failed to provide adequate and competent supervision as prescribed by Office regulation;
      - (c) the provider has failed to provide adequate sanitation as required by Office regulation and by State and local departments of health;
      - (d) the child day care provider or an assistant, employee or volunteer has abused or maltreated a child in care; or
      - (e) the child day care provider has violated the same statutory or regulatory standard more than once within a six month period; or
    - (ii) the Office determines, after a hearing, that a provider has refused to obtain a license or registration or continued to operate a child day care facility after denial of an application, revocation of a license or termination of a registration.
  - (g) Complaint procedures.
    - (1) The Office, through duly authorized representatives or agents of the Office, may make announced or unannounced inspections of the records and premises of any child day care provider, whether or not such provider is licensed by or registered with the Office. To the maximum extent possible, the Office will make unannounced inspections of the records and premises of any child day care provider after the Office receives a complaint that, if true, would indicate such provider does not comply with the regulations of the Office or with statutory requirements.
    - (2) Child day care providers must admit inspectors and other representatives of the Office onto the grounds and premises at any time during their hours of operation or while children are in care for the purpose of conducting inspections. Such inspectors and representatives must be given free access to the building or buildings used by the provider, staff and children, and to any records of the provider.
    - (3) The Office may require the child day care provider to post in a prominent place at the program a copy of any written inspection reports issued to the program by the Office.

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#### **413.4 Criminal History Review of Child Day Care Providers**

- (a) The Office shall perform a criminal history record check regarding any operator, employee, volunteer or assistant of a child day care center, small day care center, school-age child care program, group family day care home, or family day care home, as defined in Section 413.2, and any person age eighteen or over residing on the premises of a group family day care home or family day care home which is to be licensed or registered.
- (b) Operators of a child day care center, small day care center, school-age child care program, group family day care home or family day care home; any employees, assistants or volunteers in such center, home or program in operation on the effective date of this section; and any person age eighteen or over residing on the premises of a group family day care home or family day care home who

previously did not have a criminal history record check performed in accordance with this section shall have such a criminal history record check performed when the program or facility applies for a renewal of its license or registration.

(c) The provisions of this section shall apply to a volunteer only where the volunteer has the potential for regular and substantial contact with children enrolled in the program.

(d) Process.

(1) As part of the provider's initial application for any child day care license or registration, the operator or provider shall furnish the Office with fingerprint cards of any operator, employee, volunteer or assistant of the child day care program, and any person age eighteen or older who resides on the premises of a group family or family day care home.

(2) As part of the provider's application for, or renewal of, any child day care license or registration, the operator or provider shall furnish the Office with fingerprint cards of any operator, employee, volunteer or assistant of the child day care program, and any person age eighteen or over who resides on the premises of a group family or family day care home, who previously did not have a criminal history record check performed.

(3) Every child day care provider shall obtain a set of fingerprints for each prospective employee, volunteer or assistant of the child day care program and any person age eighteen or over who will be residing on the premises of the group family day care home or family day care home.

(4) The provider shall furnish to the applicant, blank fingerprint cards and a description of how the completed fingerprint cards will be used. The provider shall promptly transmit such completed fingerprint cards to the Office.

(e) A licensed or registered child day care provider may temporarily approve an applicant to be an employee, assistant or volunteer for such provider while the results of the criminal history record check are pending, but shall not allow such person to have unsupervised contact with children during such time. A registered family day care home or licensed group family day care home may not permit a person age eighteen or over who resides or will reside on the premises of the family day care home or group family day care home and for whom a criminal history record check has not been completed to have any contact with children receiving day care in the home while the results of the criminal history record check are pending.

(f) After reviewing a criminal history record of an individual who is subject to a criminal history record check pursuant to this section, the Office and the provider shall take the following actions:

(1) Applicant to be an Operator.

(i) where the criminal history record of an applicant to be an operator of a child day care facility or program reveals a conviction for a crime set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office shall deny the application unless the Office determines, in its discretion, that approval of the application will not in any way jeopardize the health, safety or welfare of the children in the facility or program;

(ii) where the criminal history record of an applicant to be an operator of a child day care facility or program reveals a conviction for a crime other than one set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office may, consistent with Article 23-A of the Correction Law, deny the application; and

(iii) where the criminal history record of an applicant to be an operator of a child day care facility or program reveals a charge for any crime, the Office shall hold the application in abeyance until the charge is finally resolved;

(2) Applicant to be an Employee, Assistant or Volunteer.

(i) where the criminal history record of an applicant to be an employee, assistant or volunteer for any child day care provider, facility or program reveals a conviction for a crime set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office shall direct the provider to deny the application unless the Office determines, in its discretion, that approval of the application will not in any way jeopardize the health, safety or welfare of the children in the facility or program;

(ii) where the criminal history record of an applicant to be an employee, assistant or volunteer for any child day care provider, facility or program reveals a conviction for a crime other than one set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office may, consistent with Article 23-A of the Correction Law, direct the provider to deny the application; and

(iii) where the criminal history record of an applicant to be an employee, assistant or volunteer for any child day care provider, facility or program reveals a charge for any crime, the Office shall hold the application in abeyance until the charge is finally resolved;

(3) Adults in Family and Group Family Day Care Homes. For applications for registration of a family day care home or licensure of a group family day care home:

(i) where the criminal history record of any person age 18 or over residing in the family or group family day care home reveals a conviction for a crime set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office shall deny the application unless the Office determines, in its discretion, that approval of the application will not in any way jeopardize the health, safety or welfare of the children in the home or program. If the Office so determines, the Office shall direct the provider that the person not be permitted to have any contact with children receiving day care or impose any other reasonable condition necessary to protect the health, safety or welfare of the children in care;

(ii) where the criminal history record of any person age 18 or over residing in a family or group family day care home reveals a conviction for a crime other than one set forth in subparagraph (i) of paragraph (a) of Section 390-b of the Social Services Law, the Office may, consistent with Article 23-A of the Correction Law, deny the application or direct the provider that the person not be permitted to have any contact with children receiving day care or impose any other reasonable condition necessary to protect the health, safety or welfare of the children in care; and

(iii) where the criminal history record of any person age 18 or over residing in the family or group family day care home reveals a charge for any crime, the Office shall hold the application in abeyance until the charge is finally resolved.

(4) Current Operators.

(i) where the criminal history record of a current operator of a child day care facility or program reveals a conviction for a crime set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office shall conduct a safety assessment of the program, and take all appropriate steps to protect the health and safety of the children in the program. The Office shall deny, limit, suspend, revoke, reject or terminate the license or registration based on such a conviction unless the Office determines, in its discretion, that the continued operation of the center, home or program will not in any way jeopardize the health, safety or welfare of the children in care;

(ii) where the criminal history record of a current operator of a child day care facility or program reveals a conviction for a crime other than one set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office shall conduct a safety assessment of the program and take all appropriate steps to protect the health and safety of the children in the program. The Office may deny, limit, suspend, revoke, reject or terminate the license or registration based on such a conviction consistent with Article 23-A of the Correction Law; and

(iii) where the criminal history record of a current operator of a child day care facility or program reveals a charge for any crime, the Office shall conduct a safety assessment of the program and take all appropriate steps to protect the health and safety of the children in the program. The Office may suspend the license or registration based on such a charge where necessary to protect the health and safety of children in the facility or program. The provider must cooperate with the Office and comply with the direction or directions of the Office to protect the health and safety of the children in care.

(5) Current Employees, Assistants or Volunteers.

(i) where the criminal history record of a current employee, assistant or volunteer for any child day care provider, facility or program, or any person age 18 or over residing in a family or group family day care home, reveals a conviction for a crime set forth in subparagraph (i) of paragraph (a) of Section 390-b of the Social Services Law, the Office shall conduct a safety assessment of the program and take all appropriate steps to protect the health and safety of the children in the program. The Office shall direct the provider to terminate the employee, assistant or volunteer based on such a conviction, and the provider shall comply with such direction, unless the Office determines, in its discretion, that the continued presence of the employee, assistant or volunteer in the center or program will not in any way jeopardize the health, safety or welfare of the children in the facility or program. If the Office determines, in its discretion, that the continued presence of a person age 18 or over residing in a family or group family day care home will not in any way jeopardize the health, safety or welfare of the children in the home, the Office either shall direct the provider not to permit the person to have any contact with children receiving child day care, or impose any other reasonable condition necessary to protect the health, safety or welfare of the children in care;

(ii) where the criminal history record of a current employee, assistant or volunteer for any child day care provider, facility or program, or any person age 18 or over residing in a family or group family day care home, reveals a conviction for a crime other than one set forth in subparagraph (i) of paragraph (a) of section 390-b of the Social Services Law, the Office shall conduct a safety assessment of the program and take all appropriate steps to protect the health and safety of the children in the program. The Office may direct the provider to terminate the employee, assistant or volunteer based on such a conviction, and the provider shall comply with such direction, consistent with Article 23-A of the Correction Law. The Office may direct the provider that a person age 18 or over residing in a family or group family day care home not be permitted to have any contact with children receiving day care or impose any other reasonable condition necessary to protect the health, safety or welfare of children; and

(iii) where the criminal history record of a current employee, assistant or volunteer for any child day care provider, facility or program, or any person age 18 or over residing in a family or group family day care home, reveals a charge for any crime, the Office shall conduct a safety assessment of the program and take all appropriate steps to protect the health and safety of the children in the program. The provider must cooperate with the Office, and comply with the direction or directions of the Office to protect the health and safety of the children in care.

(6) Safety Assessment. A safety assessment performed in accordance with this section shall include, but not be limited to:

(i) a review of the duties of the individual with the criminal conviction or charge;

(ii) the extent to which such individual may have contact with children in the day care facility or program; and

(iii) the status and nature of the criminal conviction or charge.

(g) Prior to making a determination to deny an application pursuant to subdivision (f) of this section, the Office shall afford the applicant an opportunity to explain, in writing, why the application should not be denied.

(1) For operators and group family day care home assistants, this opportunity may, at the discretion of the Office, be afforded in the application materials for such operators and assistants required to be submitted to the Office.

(2) The Office may direct providers to include with the application materials used by providers for employees, assistants and volunteers the opportunity for applicants for such positions to explain, in writing, why the application should not be denied. Where the Office so directs, providers must send to the Office a copy of such explanations, to be transmitted in a form and manner to be established by the Office.

(h) Notifications. Where the Office directs a child day care provider to deny an application, terminate an employee, assistant or volunteer, or not permit a person age 18 or over residing in a family or group family day care home to have contact with the children in care based on the criminal history record, the provider must notify the applicant, employee, assistant or volunteer, or person age 18 or over, that such criminal history record is the basis of the denial. Such notification must advise the applicant, employee, assistant or volunteer, or person age 18 or over that a copy of the summary of the criminal history record provided by the Office to the provider is available from the provider upon written request by the applicant, employee, assistant, volunteer or person age 18 or over.

(i) A child day care provider must inform the Office when:

(1) any applicant who is subject to criminal history record review in accordance with this section has withdrawn the application or is no longer being considered for the position for which the person applied;

- (2) any employee, assistant or volunteer who is subject to criminal history record review is no longer employed by or volunteering at the day care facility or program; and
- (3) any person age 18 or over residing in a family or group family day care home who is subject to criminal history record review is no longer residing in the home.

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**413.5 Hearings (a) Revocation, Termination.**

(1) For a hearing held to review the revocation, termination, suspension, limitation, rejection or denial of a license or registration, the notice must specify the date, time and place of the hearing, the manner in which the hearing will be conducted, the proposed action and the charges which are the basis for the proposed action. The charges must specify the statutes, rules and regulations with which the provider failed to comply and must include a brief statement of the facts pertaining to each violation.

(2) Any provider who is directed to cease and desist operations pursuant to Section 390(3)(b) of the Social Services Law shall be entitled to a hearing before the Office. Upon request, a hearing must be scheduled to commence as soon as possible but in no event later than 30 days after receipt of the request by the Office. A provider shall not operate a day care program after being directed to cease and desist operations, regardless of whether a hearing is requested. If the provider does not cease operations, the Office may impose a civil penalty pursuant to subdivision eleven of Section 390 of the Social Services Law, seek an injunction pursuant to Section 391 of the Social Services Law, or both.

(b) Fines. For a hearing held to assess a fine against a provider, the notice of hearing must specify the date, time and place of the hearing, and the manner in which the hearing will be conducted, and must include a statement of charges.

(1) The statement of charges must specify:

- (i) the existence of a violation or violations and the statute(s) or regulation(s) with which the provider failed to comply;
- (ii) the maximum daily fine which may be imposed and the date upon which initial notice of potential liability for payment of such a fine was given;
- (iii) the corrective action which must be taken to rectify the violation; and
- (iv) if applicable, a statement that the Office will seek imposition of a fine regardless of rectification.

(2) The notice of hearing sent pursuant to this paragraph must be delivered in person or by certified mail at least 30 days prior to the date of the hearing. The notice must be sent to:

- (i) the child day care facility; and
- (ii) the provider, who includes any person known to the Office who, by reason of direct or indirect ownership of the child day care facility, has the ability to direct the facility to take corrective action.

(c) Notice of Hearing. The notice of hearing sent pursuant to subdivision (a) or (b) of this Section also must inform the applicant or provider:

- (1) of his or her opportunity to present evidence and arguments on issues of fact and law at the hearing;
- (2) of his or her right to be represented by an attorney or other representative of his or her choice;
- (3) of his or her right to cross-examine witnesses and to examine any document or item offered into evidence;
- (4) that all witnesses will be sworn; and
- (5) that the hearing will be recorded verbatim.

(d) Answer. (1) The holder of the license or registration or the applicant for initial licensure or registration who has requested a hearing regarding the denial, rejection, termination, revocation, limitation or suspension of a license or registration may file an answer to the allegations contained in a notice of the hearing. The answer must be in writing and must be filed with the Office not less than ten business days prior to the date of hearing.

(2) Any child day care provider who is advised of the imposition of a potential fine pursuant to this Part must respond in writing to the charges set forth in the notice of hearing. Such response must include a description of any corrective action taken by the provider and copies of all written information in the possession of the provider or maintained by the provider which is relevant to the charges and may be unknown to the Office. Such response must be filed with the Office not less than ten business days prior to the date of hearing.

(e) Pleadings, depositions and discovery. (1) The pleadings in an enforcement action will consist of the notice of hearing and answer.

(2) Neither formal discovery procedures nor formal procedures for bills of particulars will apply. However, upon application by the applicant or provider operating or seeking to operate the child day care program, a more definite and detailed statement will be furnished whenever the hearing officer finds that the statement of charges does not adequately describe such charges. Any statement furnished will be deemed, in all respects, to be part of the original notice of hearing. The hearing officer may grant additional time to respond to the notice of hearing when a motion for a more definite and detailed statement has been granted.

(3) Disclosure of evidence by deposition of a party to the hearing or any officer, director, member, agent or employee of a party prior to the hearing will not be permitted, except where the hearing officer determines that special circumstances, as set forth in section 3101(a)

(3) of the Civil Practice Law and Rules, require the taking of testimony by deposition.

(f) Who may be present at hearing; authorization of representative. (1) The applicant or provider, his or her representative or representatives, counsel or other representatives of the Office, witnesses of both parties, and any person who may be called by the

hearing officer may be present at the hearing, together with such other persons as may be admitted by the hearing officer in his or her discretion. Upon his or her own motion, or upon the motion of either party, the hearing officer may exclude potential witnesses and those who have given prior testimony from the hearing during the testimony of other witnesses.

(2) An individual, other than an attorney, representing the applicant or provider must have an appropriate written authorization for representation signed by the applicant or provider or by an officer, member or director of the corporation, partnership or other organization applying or operating the program when the applicant or provider is not a natural person.

(g) Hearing officer. The hearing will be conducted by a hearing officer who is an attorney employed by the Office for that purpose and who has not been involved in any way with the matter. He or she will have all the powers conferred by law and regulations of the Office to administer oaths, issue subpoenas, require the production of records and the attendance of witnesses, rule upon requests for adjournment, rule upon objections to the introduction of evidence, and to otherwise regulate the hearing, preserve requirements of due process and effectuate the purpose and provisions of applicable law and regulations.

(h) Conduct of hearing; rights of parties. (1) The hearing officer will preside and will make all procedural rulings. He or she will make an opening statement describing the nature of the proceedings, the issues and the manner in which the hearing will be conducted.

(2) The rules of evidence as applied in a court of law will not apply, except that privileges recognized by law will be given effect. The hearing officer may exclude testimony or other evidence which is irrelevant or unduly repetitious. The burden of proof at such hearings shall be on the Office to show that the charges are supported by a preponderance of the evidence.

(3) All testimony will be given under oath or affirmation.

(4) The provider will be entitled to be represented by an attorney or other representative of the provider's choice, to have witnesses give testimony, and to otherwise present relevant and material evidence on the provider's behalf, to cross-examine witnesses, and to examine any document or item offered into evidence.

(5) At the discretion of the hearing officer, the provider may be permitted to attempt to prove by a preponderance of the evidence any matter not included in the provider's answer.

(i) Adjournment. The hearing may be adjourned only for good cause by the hearing officer on his or her own motion or at the request of either party.

(j) Hearing Record.

(1) The hearing will be recorded verbatim by either the Office or a private contractor. Where the hearing is recorded by other than a private contractor, on request made upon the Office by any party to a hearing, the Office will prepare the record, together with any transcript of the proceedings, and will furnish a copy of the record and transcript or any part thereof to any party as requested. The Office is authorized to charge not more than its cost for the preparation of the transcript. Where a private contractor records the hearing, the party requesting a transcript must make all arrangements for the obtainment thereof directly with the private contractor.

(2) The record. The record will include:

(i) all notices, pleadings and intermediate rulings;

(ii) the transcript or recording of the hearing;

(iii) exhibits received into evidence;

(iv) matters officially noticed;

(v) questions and offers of proof, objections thereto and rulings thereon;

(vi) any proposed findings and exceptions;

(vii) any report rendered by the hearing officer; and

(viii) any request for disqualification of a hearing officer.

(k) Hearing Report. After the hearing has been concluded, the hearing officer will submit a report to the Commissioner of the Office or his or her designee containing findings of fact, conclusions of law and a recommended decision. Findings of fact will be based exclusively on the record of the hearing.

(1) Examination of the record after a hearing. Upon reasonable notice to the Office, the record of the hearing may be examined by any party to the hearing at the Office's offices during regular business hours.

(m) Decision after a hearing. The hearing decision will be made and issued by the commissioner or by a member of his or her staff designated by him or her to consider and make such decisions and must be based exclusively on the record of the hearing.

(1) The decision will be in writing and will describe the issues, recite the relevant facts and pertinent provisions of law and regulations, make appropriate findings, determine the issues, state reasons for the determination and, when appropriate, direct specific action.

(2) A copy of such decision will be mailed to the applicant or provider and to the applicant's or provider's attorney or other designated hearing representative, together with a notice of the right to judicial review in accordance with article 78 of the Civil Practice Law and Rules.

(3) If the hearing before the Office determines that an application for renewal of a license or registration should have been granted, the renewed license or registration will be dated retroactively to the date of the expiration of the prior license or registration.

(4) In the event the decision is adverse to the applicant or provider, the applicant or provider must forthwith comply with the specific action ordered in the decision.

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#### **413.6 Waivers**

- (a) A written waiver of one or more non-statutory requirements of this Part or of Part 414, 416, 417 or 418 may be issued by the Office to an applicant or a provider at the time of application or subsequent to the issuance of a license or registration. Providers who have been issued a license or registration must operate in full compliance with the regulations at all times prior to the issuance of a written waiver.
- (b) An applicant or provider must submit to the Office a written request for a waiver on forms provided by the Office, or approved equivalents. This written application must include:
- (1) the specific regulation for which a waiver is sought;
  - (2) the reason the waiver is necessary; and
  - (3) a description of what will be done to achieve or maintain the intended purpose of the regulation and to protect the health, safety and well-being of children.
- (c) The Office may require the provider to make physical plant modifications or adopt special methods or procedures to protect the health, safety and well-being of children before a waiver is granted pursuant to this subdivision.
- (d) Written approval for a waiver will be granted only upon a determination by the Office that the proposed waiver will not adversely affect the health, safety or well-being of children, and that the purpose of the regulation which is waived will be met. Waivers may be time limited, at the discretion of the Office.
- (e) Failure to adhere to the terms of the waiver will result in rescission of the waiver and may constitute sufficient cause for the Office to deny, revoke, suspend or limit a license or registration.