



CONTEMPORARY ISSUES IN LICENSING: Elements of a Licensing Statute

Introduction

Licensing is a form of regulatory administration and is governed by administrative law, which defines the powers and legal boundaries to be carried out by a governmental regulatory agency (NARA, 2000). A sound licensing statute provides the guidance for a State to establish, refine, and carry out an effective licensing program. Periodic review and evaluation assure the statute and the State's child care licensing program reflect new research and legal thinking as well as recommended regulatory practices.

When recommending statutory revisions for consideration by the state legislature, the licensing agency must assess the level of support both for the existing statute and proposed amendments. Licensing administrators should be prepared to offer compelling evidence on the importance of child care licensing to children, their families, providers, and the State. Educating the public on the importance of the licensing laws and regulations for keeping children safe from harm should be an ongoing and intentional effort. The paper, *Building Support for Licensing* (National Center for Child Care Quality Improvement, 2014), offers examples from States in using the following approaches to increase support with various stakeholder groups:

- Maintaining an intentional and ongoing outreach effort;
- Promoting licensing as a key to choosing child care;
- Utilizing licensing Web sites as an educational tool;
- Building support for state policies;
- Strengthening relationships with supportive groups; and
- Building on the work of national organizations.

The paper is available at <https://childcareta.acf.hhs.gov/resource/building-support-licensing>.

This report, one in a series of reports about contemporary issues in licensing, focuses on common elements of licensing statutes including the rationale for each element. As statutes are revised in response to state and federal events and circumstances, States have the opportunity to strengthen these elements to ensure an effective licensing program and better protection of children in out-of-home care.

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Background

Statutes related to licensing have existed for more than 200 years. Human care licensing began in the early 1800s in response to the rampant abuse of vulnerable children and adults housed in asylums and almshouses. After the first human care licensing laws were enacted in Pennsylvania in the early 1880s, human care licensing continued to expand throughout the 20th century. As part of this expansion, state laws were passed that directed regulatory agencies to license child care facilities in accordance with the State's regulations. (NARA, 2000).

More recently, in the early 1970s, the federal government recognized the importance of strong statutes in improving the quality of child care in the United States. After a two-year effort to assess and recommend improvements for child care licensing, the U.S. Department of Health, Education, and Welfare published a guidance document in 1973 for a model state child care licensing act and licensing standards. The document, *Guides for Day Care Licensing*, resulted from the work of a representative task force of consumers, regulators, and specialists. Recommendations included mandated authority for a permanent or ad hoc committee to review and revise licensing standards and strengthened enforcement authority (DHEW, 1973). Between 1973 and the early 1990s, States used this document widely in revising their licensing statutes and rules.

Purpose of Statutes

Statutes provide the legal framework for all the regulatory actions a State takes in relation to child care and establish the authority and standards for child care programs to operate. Norris Class, in a 1968 conceptual statement, emphasized the importance of the statutory framework in noting "To rely on the administrative technique without first creating a firm legal base of individual right and social obligation is like attempting to paint a picture without an underlying conception of it" (Class, 1968).

The licensing statute authorizes government to protect children, as vulnerable citizens, from the risk of harm. (NARA, 2000). The statute should establish the full scope of authority, responsibilities, and methods needed to administer the law. The state regulatory agency is legally obligated to perform the authorized duties, responsibilities, and enforcement methods established by the statute and implement these actions through administrative policy and its interpretation (Lapp-Payne, 2011).

A carefully crafted licensing statute is critical to the effective administration of a licensing agency. It should provide clear guidance in the development and refinement of the licensing process, rule issuance, enforcement decisions, due process provisions, provider support services, and communication with consumers and the public. Without a sound statute, the agency will be more vulnerable to criticism and lawsuits for inconsistent interpretation and implementation of the law and regulations (NARA, 2000 & Morgan, 1993).

The state licensing statute should be periodically updated in response to research, current practice, and legal thinking, for example, relocation of the designated licensing agency, addition or removal of responsibility for categories of care, changes in comprehensive background checks, and refinement of enforcement and rulemaking authority. A review of enforcement and appeal activity may reveal loopholes and ambiguities which can be tightened by revision or updating of the statutory provisions. Periodic review of the statute for legal and practical clarity is important to ensure it remains strong and clear in its guidance.

Elements of a Statute

The chart below outlines the recommended elements for a licensing statute, the rationale for each section, and other pertinent information about the element.

Element	Guidance	Rationale for Inclusion	Other
Title	The title should be of sufficient scope to cover the subject matter to prevent legal challenge (Class, 1968)	The title often becomes the phrase that people use to identify the legislation.	
Legislative Intent and Declaration of Purpose and Policy	The statute should express the State's broad intent of regulating child care to assure children's well-being and protect them from harm in out of home settings. The purpose generally includes the development of minimum standards that include the promotion of sound growth and development in addition to physical care and supervision.	The purpose, intent, or statement of policy provides the reasoning for passing the statute and is valuable to the licensing agency in interpreting the statutory language.	The term "minimum" does not mean the intent to set low standards but rather "at least" and reflects the minimum standards which a program must meet to be granted a license (Morgan, 1993, p. 1).
Definitions	Terms including each type of child care facility subject to licensing should be defined in consistent and clear language to support an unambiguous understanding of the law by all stakeholders.	Clear definitions provide the foundation for the requirements and policies that providers and licensing agencies must follow.	In addition to defining the various types of child care facilities, States also vary in the meaning of terms such as infant, preschooler, school-age child, child care facility, full- and part-time care.
Exemptions	The exemptions should outline which programs are not required to comply with the rules established by the statute.	Exemptions must be clearly stated and not violate principles of equal protection and treatment under the law (Class, 1968).	Most States exclude child care facilities that are operated by state, county or municipal governments since the licensing agency has no authority to impose penalties or remove their license. These programs may, however, be required to meet the relevant program standards.

Element	Guidance	Rationale for Inclusion	Other
Prohibition of Child Care	The statute should establish that to operate without a license is a serious violation of the law with penalties as specified in the statute.	A licensing law is a legislative directive to grant a license or permission to operate to those that have submitted evidence that they meet the State’s minimum standards.	
Designation of the Licensing Agency	<p>The statute should designate the state agency responsible for administering the law.</p> <p>Traditionally, most States relied on their human service agency for child care licensing, with several designating their health department or other agency. With the emphasis on comprehensive early care and education systems, several States have relocated child care licensing to departments of education or a separate department of early learning or education.</p>	The agency should be one that has experience with and a broad understanding of the needs of children and their families. It should also be an agency that embraces and supports the licensing function.	In addition to a license, most States require child care facilities to receive approvals or permits from fire safety, building inspection, and environmental health agencies, many of which have their own statutory authority to inspect child care programs and issue regulations. However, there is considerable variation across States in the designated authority for the safety and health components of child care; for example, the licensing agency may have full responsibility for some portions of health and safety, some statutes make reference to other agencies, and in other States there is language requiring coordination.
Delegation of Rule Making	The main focus of the statute should be to authorize the designated licensing agency to develop and issue the provider standards and procedural rules necessary to administer the law. This section should provide clear authority for the issuance, timely review, and revision of standards based on research and best practice.	<p>Licensing rules should reflect the community’s consensus on those acceptable minimum standards of care critical to the protection and well-being of children.</p> <p>When the frequency for revising the standards is not specified, they may not be updated when changes are needed.</p>	<p>Some statutes mandate a comprehensive review of the licensing standards at periodic intervals, generally every three to five years. In some States, the rules have not been revised for more than five years.</p> <p>In a few States, the statute delegates rulemaking to the local level, however, the local rules usually must meet or exceed the state rules.</p>

Element	Guidance	Rationale for Inclusion	Other
Areas to Be Covered in the Rules	The statute should provide a clear, brief listing of areas to be covered in the standards for child care facilities. There should be sufficient flexibility to enable the agency to revise standards in response to new research, best practices, and changes in federal or state law. The statute may also mandate the development of procedural or administrative rules to guide the licensing process.	Incorporating a listing of the specific areas to be included helps assure that the broader developmental needs of children will be addressed, for example, learning activities or parent engagement. It is also important to revise standards promptly in response to new research that impacts children, such as the back to sleep standards that prevent and reduce the incidence of Sudden Infant Death Syndrome and the revised playground standards that prevent and reduce injury from falls and hazardous equipment.	Including detailed, substantive standards in the statute itself makes it very cumbersome for States to make revisions since any change requires the time and cost involved for introduction and passage of legislation.
Public and Provider Input	The statute should provide for broad public and provider review and comment on proposed standards. It may provide details on the process or delegate these to administrative policy.	Standards cannot be successfully changed and implemented without support from the larger community and general agreement on the part of those being regulated. This support is critical in achieving political and legislative support for rule changes.	The standards revision process traditionally involves consensus building through a committee or ad hoc task force with input from a representative group of interested parties, including providers.
Criminal History and Abuse Registry Checks	The statute should establish the requirements and procedures for ensuring that only individuals with good moral character are permitted to provide care for children. It should also include an appeal process to protect individuals from false accusations or inaccurate findings (Morgan, 1993).	The definition and determination of good moral character is an important fact-finding activity for licensure. The existence of criminal convictions or a substantiated report of abuse in the child or adult protective services registry provide evidence of the lack of “good moral character” of an applicant (NARA, 2000, Chapter 3, p. 16).	Due to ongoing changes in the technology and federal policies related to background checks, detailed procedures may be best located in the licensing agency’s administrative rules.
Statutory Advisory Bodies	The statute may establish an advisory body to the licensing agency with responsibility for writing rules or advising the agency on policy issues. It may also specify the composition of the committee and other provisions.	An advisory board can offer insights from external stakeholders including child care providers, parents, and other experts, and offer public support for the program.	Advisory boards can be very helpful in providing oversight of the licensing process but can be time-consuming and challenging to administer.

Element	Guidance	Rationale for Inclusion	Other
Inspections	The statute should authorize the right of entrance, inspection, and investigation by the licensing agency. It may prescribe a minimum number of inspections and whether the inspections are announced or unannounced. The right of entrance without a warrant is especially important for the investigation of complaints of illegal operations.	Inspection of facilities to verify that the minimum licensing standards are being met is essential for effective licensing and enforcement of the law.	Most statutes require inspection of applicants before a license is granted and may require the licensee to agree to be inspected, such as on a signed application.
Inspection by Other Agencies	The statute may require inspections by or in coordination with other regulatory agencies.	Ideally, responsibility for environmental health, fire safety, and building inspections is authorized by statute to ensure that individuals with expertise conduct these inspections. When it is not, the licensing agency must work and coordinate with other regulatory agencies to ensure the health and safety of children.	
Issuance of the License	The statute should clearly state that all persons subject to licensure are responsible for seeking a license and should authorize the licensing agency to prescribe the licensing application and issuance procedures. It should establish the length of the license and require a timely response by the agency to the application for a license.	Having clear written procedures for the licensing process is essential for consistency in the enforcement of the law and rules. The statute should provide the framework for these administrative procedures.	Some States are now granting a nonexpiring license which can be revoked or suspended for cause. Some statutes authorize a provisional license, for a specific time period, to a new licensee to permit inspection of the actual care of children or for facilities that are out of compliance.
Fees for Licensing	The statute usually establishes any fees to be charged for licensing.	The fees collected for licensing may be used to pay part, but usually not all, of the costs involved in the licensing process or may be placed in the state general fund.	

Element	Guidance	Rationale for Inclusion	Other
<p>License Denial, Revocation, or Emergency Closure</p>	<p>The statute should grant the licensing agency authority to refuse to license or to revoke a license for failure to comply with the provisions of the law, promulgated rules, or with specific terms and conditions of the license. It may include provisions that acknowledge the constitutional rights of a licensee to be given time to achieve compliance as appropriate. The statute may authorize the agency to require the licensee to cease operations at once, sometimes called emergency closure or immediate suspension, for conditions that pose immediate and severe danger to children (Morgan, 1993; Class 1968).</p>	<p>Specifying in statute why a license may be denied or revoked provides the legal grounds for the required action, that is, "that the license will be removed for willful, frequent, continual, or repetitive failure to comply; for falsifying information on the application, or false advertising" (Morgan, 1993, p. 16).</p>	<p>When preventive strategies or intermediate sanctions are not successful in helping providers achieve compliance, the most restrictive negative enforcement actions must be taken to protect children's health and safety. The availability of these sanctions, along with the willingness and wisdom to use them judiciously, safeguards children by closing unsafe or unlawful facilities and removing their right to operate. These actions are required when the findings of substantial noncompliance clearly indicate that the facility will not comply with the terms of the license after all other less restrictive strategies have failed to result in compliance, or after one egregious violation requiring immediate closure.</p>
<p>Intermediate Sanctions</p>	<p>The statute should provide authority for the use of intermediate sanctions; for example,, civil fines, reducing licensed capacity, changing the provider's license status, or stipulated consent agreements, when the level of noncompliance does not warrant imposing the most severe or terminal sanctions such as forcible closure.</p>	<p>Authorizing different levels of enforcement sanctions, including a variety of intermediate sanctions, reflects the use of <i>progressive enforcement</i>. Progressive enforcement provides the State with the flexibility needed to apply the least intrusive enforcement actions needed to encourage or compel licensing compliance (NARA, 2000, & Morgan, 1993).</p>	

Element	Guidance	Rationale for Inclusion	Other
Injunctive Relief	Most statutes authorize criminal sanctions for programs operating without a license.	A court order for an injunction to stop the program from operating is needed to empower the agency: 1) to stop the continued operation of a program after suspension, denial, or revocation of the license; 2) to force an illegally operating facility to cease operation for failure to obtain a license as required; and 3) to force the immediate closure of a program in response to severe violations which threaten serious harm to children.	The criminal sanction is most often a misdemeanor, administered by the judicial system.
Appeal Process and Other Due Process Provisions	The licensing statute should specify the right of and methods for a licensee to appeal any administrative enforcement action taken by the licensing agency and whether it can continue to operate during the appeal process. It may include references to the right of notice, the entity to hear appeals, such as administrative law judges, hearing officers employed by the licensing agency, and appeals of decisions to a court of law (Morgan, 1993 & Class, 1968).	The State's Administrative Procedures Act or similar legislation protects the Constitutional rights of an applicant or licensee to due process under the law.	
Protection from Liability	The statute may include a section protecting the licensing agency from liability.	State licensing agencies have a legitimate concern for their own liability and that of the staff performing licensing functions, since States have relinquished much sovereign immunity from being sued.	

Element	Guidance	Rationale for Inclusion	Other
Consultation and Supportive Services	The statute may mandate that consultation and technical assistance be provided to applicants and licensed facilities.	Mandating consultation and technical assistance helps ensure that providing these supportive services are a legitimate function of the licensing process that can be provided by agency staff and other qualified persons and organizations.	Some statutes authorize consultation and technical assistance in assisting applicants and licensees in meeting and maintaining licensing standards, but also to encourage them to achieve quality beyond the standards.
Information for Parents	The statute may direct that parents be provided information about licensing, the licensing rules, and the process for submitting complaints to the licensing agency.	Including this direction in statute helps facilitate parents taking an active role in selecting and monitoring care for their children.	

Summary

A sound licensing statute provides the guidance needed to establish and refine an effective licensing program. Periodic review and evaluation will assure that the statute and the program are updated to reflect new research and legal thinking as well as current regulatory practice. When there is a need to amend the statute, such as, when federal child care regulations are revised, state licensing agencies often take advantage of this opportunity to request other changes either to strengthen or clarify the law. The following observations, based on lessons learned and best practices of the States, are offered:

- Periodically review the licensing statute to ensure that it offers clear, legally sound mandates and policy guidance that reflect current regulatory practice and research;
- Update the criminal background check authority, as needed, to ensure comprehensive checks, including a check of the Federal Bureau of Investigation database, for all those who have access to children in child care;
- Ensure that the statute provides for a variety of intermediate strategies that allow an array of progressive interventions and reduces the need for the most severe sanctions unless a program is unable or unwilling to provide safe care of children; and
- Avoid unnecessary specificity to permit the licensing agency flexibility to respond to unanticipated events and provide ease in practice revisions and reforms as needed (NARA Best Practices, 2009). Licensing statutes should provide the framework for the procedural rules that direct the licensing activities for applicants and licensees.

Examples of State Statutes

The following are links to examples of child care licensing statutes from five States. These are a sample from the nine States that were surveyed and interviewed for this series of reports about contemporary issues in licensing.

Florida

“Sections 402.26–402.319: Child Care,” in *Florida Statutes*
<http://ccrain.fl-dcf.org/documents/1/451.pdf#nameddest=402.26>

North Carolina

“Article 7. Child Care Facilities,” in “Chapter 110,” in *North Carolina General Statutes*
http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_110/Article_7.html

Oklahoma

“Sections 410–418,” in “Chapter 18 - Oklahoma Child Care Facilities Licensing Act,” in “Title 10. Children,” in *Oklahoma Statutes*
<http://www.oscn.net/applications/OCISWeb/DeliverDocument.asp?CiteID=63950>

Texas

“Subchapter A. General Provisions,” in “Chapter 42. Regulation of Certain Facilities, Homes, and Agencies That Provide Child-Care Services,” in “Subtitle D. Department of Family and Protective Services; Child Welfare and Protective Services,” in “Title 2. Department of Human Services and Department of Protective and Regulatory Services,” in *Human Resources Code*

<http://www.statutes.legis.state.tx.us/Docs/HR/htm/HR.42.htm>

Washington

“Chapter 43.215 Department of Early Learning,” in *Revised Code of Washington*

<http://apps.leg.wa.gov/RCW/default.aspx?cite=43.215>

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