



May 3, 2018

To: Rules Review Commission, via email  
rrc.comments@oah.nc.gov

CC: Dedra Alston, Rulemaking Coordinator, DCDEE, via email  
dedra.alston@dhhs.nc.gov

Re: 10A NCAC 09 .2201 - .2209, .2216, .2217

The NC Licensed Child Care Association represents licensed child care facilities across the state. We would like to take a moment to provide feedback on a few things regarding the rules submitted by the NC Child Care Commission for your May 2018 RRC meeting. As referenced in NCGS 150B-21.9, our comments are questions of ambiguity, necessity and authority.

We appreciate and applaud efforts by the Division of Child Development and Early Education to strengthen their ability to issue sanctions against providers who deserve it. We simply feel a need for more clarity, in order to protect facilities making honest mistakes from sanctions that could ruin their reputations, their businesses, and lead to irreversible financial damage.

- 1) We believe most of the examples using the word "may" in section .2200 are ambiguous as referencing the issuance of each type of action. For example, rule .2203 begins with "A written warning and a corrective action plan may be issued..." So, are there scenarios where it might be a written warning without a corrective action plan, or a corrective action plan without a written warning? Are there scenarios listed in (1) through (3) where a written warning and corrective action plan might **not** be issued?
- 2) Speaking of corrective action plans, it is unclear why the written reprimand in .2202 doesn't include a corrective action plan. If it doesn't require a change in policy or procedure, perhaps it should not "rise" to the level of an administrative action. Would its purpose be clearer if it were an action step beyond traditional regulatory monitoring but short of the severity of an administrative action?

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- 3) Rule .2201 essentially says administrative actions and/or civil penalties may be ordered against any owner who violates ANY provision of state law or child care rules or subsidy rules. Is there blanket authority to issue this type of sanction for ANY violation within the rules? We recognize there are several situations addressed specifically in statute such as child maltreatment, falsification of information, or employment of an individual with a criminal background check disqualification letter.

We are wondering about authority to issue an administrative action for literally any rule within the 192 pages of child care rules, such as failure to post an activity plan (.0508(a)) or failure to maintain fire evacuation procedures for as long as the license remains active (.2318(8)).

- 4) In .2201(b) the language identifies the factors that will be considered when determining the type of AA, however the language doesn't say those factors will be considered when determining *whether or not* to administer an AA.

How will the factors in 2201(b) be considered? Will they be weighted? What combination of factors might result in NOT issuing an AA at all? Might there be a situation where those criteria are met and an AA is still administered? We believe there should be more clarity.

- 5) 2201(b)(3) says all prior administrative actions issued to the facility shall be considered. The prior administrative action could be for a completely unrelated violation under completely different management and teaching staff. How far back will they go?

We've been told "The agency would necessarily put less weight on very old admin actions or substantiations when considering what type of action to take." This is subjective and could vary depending on the licensing consultant doing the inspection. How would DCDEE define "very old" and why not just put a timeframe into the rule so there's no question?

- 6) Acknowledgement of self-report as a consideration by DCDEE in (.2201(b)(6) is new. Does this mean there is a greater chance of penalty if the incident is not self-reported? Does it mean a lesser penalty, or potentially no penalty, if the incident is self-reported? We are unclear as to what difference it will make.

- 7) Also, .2201(b) ends with "Nothing shall prevent the issuance of an AA for a situation that does not fit the specified criteria so long as these factors are considered by the Division." Doesn't this mean DCDEE can still issue an AA even if it doesn't fit the rules they have just written? The purpose of this statement is unclear.

- 8) Rule .2201 (c) (1) includes a definition of "pattern of noncompliance." It could be implied that the violations and technical assistance referenced are for a single facility. However, it could also be interpreted to include violations and/or technical assistance at a different facility that might fall under the same owner. We would like clarity that operations at one facility will not be used against another facility.

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- 9) One definition of harm in 2201(c)(2) is emotional injury to a child. A verbal example given by DCDEE staff during a meeting was a parent saying their child is suffering nightmares. While we assume burden of proof would necessitate a professional determination for physical or psychological injury, it makes us a bit worried that a parent could speak to emotional injury. More clarity here would be helpful.
- 10) “Pattern of noncompliance” in rule .2204(6) can trigger a provisional license, which is a pretty serious action. Defined in .2201(c)(1), pattern of noncompliance can be triggered by incidents that do not endanger a child. For example, having a blank field for “hospital preference” on a child’s application and failure of the parent to date the child’s application could both be considered violations related to a child’s application. We would feel more confident if there was clarity around protection from administrative actions for incidents not harmful to a child.
- 11) Existing language in .2202 for a written reprimand refers to a brief event that is “unlikely to recur” but the new language says an event that “will not recur.” How can anyone be certain something will not ever happen again? What factors would lead to a determination that an event will not recur? This subtle change makes the rule unclear.
- 12) Written warning may be issued for two consecutive criminal history check violations in .2203(j). This appears to apply to violations of either the pre-service check or the three-year reassessment.

Providers in the field are unclear about what the appropriate process should be regarding lapses in three-year reassessments. Some have been told the employee must be terminated if their qualifying letter expires, which means re-hiring the staff person triggers new time-consuming orientation and training requirements. Some have been told termination is unnecessary, that the staff person simply could be prohibited from working until the qualifying letter is received. The violation may be handled differently depending on whether the licensing consultant observes the lapse in paperwork after the fact or finds a staff member in a classroom during the lapse.

Many factors in the process are beyond the control of the staff member or the center, such as unavailability of law enforcement to do fingerprinting when investigations are underway, challenges for staff who have lived outside NC within the last five years because of a new requirement, and SBI staffing levels and backlog. We believe there should be clarity around three-year reassessments before any future written warnings can be assessed for violations of the reassessments.

- 13) Quite simply, rules .2216 and .2217 are extremely confusing for us to understand and appear to be redundant.

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- 14) There is ongoing confusion around the terms “operator” and “owner.” Attached you’ll find notes from a Child Care Commission subcommittee meeting in January of 2015 where the definitions of these terms were discussed. This attachment will demonstrate the ongoing confusion as to how those terms should be interpreted.

Ultimately, a child care facility can be owned by an individual, a large corporation, and anything in between. The operator of the facility could be the same person or one of the “owners” or perhaps even a team of people, depending on which part of the program is under consideration. The owner and/or the operator could be involved, as an owner and/or operator, in multiple facilities. Each situation is unique.

Operator is defined in 10A NCAC 09 .0102(32) as the “owner, director, or other person having responsibility for operation of a child care facility subject to licensing.” Subparagraph 33 of the same rule defines Owner as “any person with a five percent or greater equity interest in a child care facility; however, stockholders of corporations who own child care facilities shall not be subject to mandatory criminal history checks pursuant to G.S. 110-90.2 unless they are a child care provider.” This rule does not include a definition for “Provider.”

- 15) Finally, we assume the list of potential administrative actions is in order of severity, but we are not sure. We do know that all of them have potential repercussions in terms of lost revenue. According to the fiscal impact statement that accompanies these rules, “When administrative actions are issued, they can be disruptive to a business. Administrative actions are automatically posted on the website for parents to see when they are making their decisions about child care. The amount a provider’s business is compromised as a result is non-quantifiable, but that does not mean it is not considerable.” It goes on to say, “A provider may lose business or the ability to receive funding through grant agencies, which could ultimately result in the closing of the business altogether.”

As you consider these rules, please understand the cumulative regulatory burden child care providers are facing right now.

- a) The likelihood a provider will receive an administrative action is *increasing* with these proposed rules.
- b) Simultaneously, new proposed rules have passed through the Social Services Commission that are more likely to result in termination of the center’s ability to participate in the child care subsidy program. (These are delayed, pending legislative review.)
- c) Additionally, a new audit department in the DCDEE Subsidy unit has begun doing monitoring visits to look at facility attendance records. This provider compliance unit is reconciling several different types of records that have never been monitored before, calculating error rates, and coupled with the new subsidy rules, the process *increases* the likelihood that a provider might receive more regulatory violations, which can lead to administrative actions.

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- d) The NCFAST electronic payment system still has unresolved glitches, even after being operational over a year, and is taking approximately three to four times as many administrative hours to process.

The timing of all these coming together when programs are struggling like never before to find staff, raises the stakes for child care providers. We believe many of these rules are unnecessary. Thank you for working to ensure the rules are very clear for those of us who are tasked with following them.

We appreciate the opportunity to share our concerns and perhaps to help put these rules into perspective for the Rules Review Commission. Please do not hesitate to reach out to us if you have any follow up questions.

Sincerely,

Linda Piper, Director of Regulatory Services  
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Andrea Stogsdill, Executive Director  
[andrea@nclcca.org](mailto:andrea@nclcca.org)

**Attached: Approved CCC Sub-Committee Meeting Notes 01 20 2015 Definitions of Owner etc.pdf**

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NC DEPARTMENT OF HEALTH AND HUMAN SERVICES  
DIVISION OF CHILD DEVELOPMENT AND EARLY EDUCATION

**NORTH CAROLINA CHILD CARE COMMISSION**

**Special Rules Sub-Committee Meeting**

**Tuesday, January 20, 2015**

Old Education Building, Conference Room 401

114 West Edenton Street

Raleigh, NC 27603

**Commission Members Present**

Kevin Campbell, Vice Chairperson

Linda Vandevender

William Walton, III

**Division of Child Development & Early Education Staff Present**

Alexi Gruber, Attorney General

Carleton Jones, IT

Rachel Kaplan, NC Pre-K

Jim Wellons, Attorney

**The subcommittee comprised of Vice Chairperson Kevin Campbell, Ms. Alexi Gruber, Ms. Linda Vandevender, Mr. Billy Walton, and Mr. Jim Wellons was appointed by Chairperson Glenda Weinert during the 1/12/15 Child Care Commission Meeting. The minutes detailing the discussion leading up to this decision are pasted below.**

**Pre-Licensing Requirements**

***Section .0300 Procedures for Obtaining a License***

- *.0301 Pre-Licensing Requirements*
- *.0302 Applications for a License for a Child Care Center*
- *.0304 Ongoing Requirements for a Permit*
- *.0305 Requirements for a One-Star Rated License for a Child Care Center*
  
- *Vice Chairperson Kevin Campbell discussed the confusion about the language referring to the individual who owns or runs a child care center-owner/applicant/licensee/operator; referred to in different places, e.g., 0204; .0302(a)*
- *Ms. Alexi Gruber wanted to make everyone aware that there is a definition in statute of “operator” that cannot be changed.*
- *Mr. Jim Wellons appealed to Chairperson Glenda Weinert to appoint a committee to deal with this issue.*
- *Ms. Elizabeth Gilleland asked about what the language would be for individual in non-profit settings where there are no “owners”.*
- *Mr. Jim Wellons stated that the ideal would be to find a word that would act as a substitute for the role in all of these settings.*

- *Chairperson Glenda Weinert appointed to the Committee: Vice Chairperson Kevin Campbell, Mr. Billy Walton, Mr. Jim Wellons, Ms. Alexi Gruber, and Ms. Linda Vandevender*

### **1/20/15 Subcommittee Meeting Purpose:**

**Purpose of this subcommittee meeting is to discuss the terms “provider”, “owner”, “licensee”, & “operator” in the NC Child Care Rules**

- **“Provider”**
- **“Owner”**
- **“Licensee”**
- **“Operator”**

Mr. Jim Wellons started the meeting by passing out a copy of the Rule (.0300 “Procedures for Obtaining a License”) that was being discussed passed out the Rule that was being discussed when the initial discussion of the confusion surrounding the terms arose. Mr. Jim Wellons also passed out a document in which he presented the use of the relevant terms up for discussion in statute 110 and in Rule.

#### Licensee

- “Licensee” is used 2 times in Statute 110 and 20 times in the Rule
- 10A NCAC 09 .0102 Definitions: “The owner of a facility is the licensee.”

#### Owner

- “Owner” is used 3 times in Statute 110 and 4 times in the Rule.
- Statute 110 Definition: “Owner means any person with a five percent or greater equity interest in a child care facility, however stockholders of corporations who own child care facilities are not subject to mandatory criminal history checks pursuant to G.S. 110-90.2 unless they are a child care provider.

#### Operator

- Operator is used 39 times in Statute 110 and 202 times in the Rule
- “Operator” “includes the owner, director, or other person having primary responsibility for operation of a child care facility subject to licensing.”
- Operator is used more than any other of the terms being discussed

#### Provider

- Provider is used 43 times in Statute 110 and 74 times in the Rule.
- Mr. Jim Wellons advises staying away from using “provider” because of its strong presence in the Criminal Records Check statute 110-90.2.
- Mr. Jim Wellons stated that “Provider” is defined broadly for CRC: “Child care provider means a person who: a. is employed by or seeks to be employed by a child care facility providing child care as defined in subdivision (1) of this subsection, whether in temporary or permanent capacity, including substitute providers; b. owns or operates or seeks to own or operate a child care facility or nonlicensed child care home providing child care as defined in subdivision (1) of this subsection; or c. Is a member of the household in a family child care home, nonlicensed child care home, or child care center

in a residence and who is over 15 years old, including family members and nonfamily members who use the home on a permanent or temporary basis as their place of residence

- “Child Care Provider” includes the following employees who have contact with the children in a child care program:
  - Facility directors
  - Administrative staff
  - Teachers
  - Teachers’ aides
  - Cooks
  - Maintenance personnel
  - Drivers

#### Sponsor

- “Sponsor” is used 31 times in Statute 100 and 6 times in the Rule.
- With few exceptions the term sponsor is used in conjunction with the word “religious”

Mr. Jim Wellons stated that “Licensee” and “Operator” are the terms that are most likely the candidates for use in the Rules.

Ms. Alexi Gruber commented:

- Restated the definition of “Operator” in law: “includes the owner, director, or other person having primary responsibility for operation of a child care facility subject to licensing.”
- Licenses are issued to owners
- Licensees are owners of child care facilities.
- When addressing non-profits, this is not problematic because the non-profit owns the facilities (child care businesses);

Vice Chairperson Kevin Campbell asked the question as to what constitutes a “facility”; is it the structure or the business? Mr. Billy Walton agreed that the term is confusing.

Ms. Alexi Gruber responded that in this case “facility” refers to the business. She also stated that the term is also in law.

Mr. Jim Wellons stated that “facility” can be used to mean a physical building and it can refer to the program operated in the physical facility. “Facility” routinely has had two meanings in government regulation. Therefore, it needs to be specified when it is used whether it is referring to the physical building or the business.

Mr. Billy Walton asked whether there is a time in which “owner” would need to be used in lieu of “licensee”.

Ms. Alexi Gruber responded affirmatively. For example, in cases in which “owners” are not yet “licensees”, such as .0204.

Ms. Alexi Gruber stated that the term “operator” is broader and there may be times when it is appropriate that a Rule regulates people beyond just the “owner”.

Vice Chairperson Kevin Campbell inquired if the situation differs for a business that is incorporated; the situation in which someone owns shares but not the business. Ms. Alexi Gruber stated that anyone who meets the 5% or greater threshold is technically and “owner”.

Mr. Jim Wellons pointed out that licenses issued to licensed partnerships.

Vice Chairperson Kevin Campbell asked about an example, such as Kindercare; this is a privately held corporation, in which the license is issued to Knowledge Learning for that facility.

- Ms. Alexi Gruber restated the definition of “owner” in Statute 110 “Owner means any person with a five percent or greater equity interest in a child care facility, however stockholders of corporations who own child care facilities are not subject to mandatory criminal history checks pursuant to G.S. 110-90.2 unless they are a child care provider.

Mr. Jim Wellons posited that if one corporation sells a facility to another corporation, then this would be a change in ownership because that center is now owned by a different corporation.

Ms. Alexi Gruber stated that there are two purposes of defining ownership; one is defining ownership for the purpose of liability and the other is for defining the “person” who owns the facility.

Mr. Jim Wellons inquired if a change of corporation would necessitate a new issuance of a license. Vice Chairperson Kevin Campbell stated that this was what he was asking about earlier.

Mr. Jim Wellons posited a hypothetical situation that if a corporation bought Kindercare from another corporation, it would necessitate a new license; however, if someone bought the Kindercare facility but the same corporation still maintained ownership of Kindercare, it would not necessitate a new license.

Mr. Billy Walton stated that there should be a rule that if more than 95% of shares changes hands, a new license should be issued even if the “legal entity” didn’t change.

Ms. Linda Vandevender asked for clarification between family child care homes and child care centers.

Ms. Alexi Gruber stated that one difference is that family child care homes are less regulated than child care centers. There are three types of facilities: family child care homes, child care centers, and religious facilities.

Mr. Jim Wellons and Ms. Alexi Gruber reaffirmed that the narrow purpose of the subcommittee meeting is to make recommendations as to how the Commission should proceed with treating the “provider”, “owner”, “licensee”, & “operator” in the NC Child Care Rules from this point forward.

#### **RECOMMENDATION:**

Ms. Alexi Gruber stated that when the commission goes through the Rules, they need to make note of these terms and make sure that the correct term is being used.

Ms. Alexi Gruber agreed with Mr. Jim Wellons’ earlier recommendation that the term “provider” be avoided if not CRC related.

Ms. Alexi Gruber also stated that there will be instances in which “licensee”, “owner”, and “operator” will each have a proper use.

Ms. Alexi Gruber affirmed that “ownership” is the ownership of the entity that owns the child care facility.

Mr. Jim Wellons posited that “operator” appears to be the most neutral term.

Ms. Alexi Gruber restated the definition of “operator”: includes the owner, director or other person having primary responsibility for operation of a child care facility subject to licensing”

Ms. Alexi Gruber explained that it is the licensee of the facility on which any substantiation is issued; not individual “owners” who make up that entity. Any substantiation is issued against the facility; the law reads that any substantiation of abuse or neglect occurs against the facility.

### **RECOMMENDATIONS:**

Mr. Jim Wellons proposed that as the Commission proceeds through the Rules, they should flag any of the terms and determine what is appropriate for each occurrence. One scenario might be to use “licensee” if the Rule speaks specifically to a license; “owner” if Rule speaks to applying for a license (so not yet a licensee); and otherwise “operator” should be used, avoiding “provider” altogether.

Vice Chairperson Kevin Campbell inquired as to whether “caregiver” still exists in the Rules. Mr. Jim Wellons performed a search on the document and discovered there is no reference to “caregiver” in Child Care Rule.

Ms. Alexi Gruber stated that the term “staff” is used in Rule (e.g., 0501 “Staff/Child Interactions”) and pointed out that when the Commission encounters its use, they should question whether the broader term of “staff” should be used or if there are instances in which a more specific term, such as “teacher”, is more appropriate.

Ms. Alexi Gruber provided the list of terms that should be flagged by Commission as they move through Rules:

Provider  
Operator  
Owner  
Licensee  
Staff  
Teacher  
Director  
Administrator

**\*\*\*Ms. Alexi Gruber noted that DCDEE staff plans to go through the Rules before each Commission meeting and find and flag these terms and make recommendations as to the most appropriate term for the Commission to review.\*\*\***

**REMINDER: Next Child Care Commission Meeting: Monday, February 9, 2015, 9:00am-4:00pm**