

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

South Carolina Department of Social Services,

Proponent,

Docket No. 17-ALJ-18-0069-RH

PUBLIC HEARING REPORT

In Re: Proposed Document #4747.

PROCEDURAL HISTORY

This matter is before the Administrative Law Court (ALC or Court) pursuant to an Agency Transmittal Form regarding Document Number 4747 filed by counsel for the South Carolina Department of Social Services (Agency or Department) on March 15, 2017.¹ The Agency proposes to make changes to South Carolina Code of Regulations Sections 114-500 through 114-509 concerning the licensing of child care centers.

On April 28, 2017, the Department published the proposed regulations and a Statement of Need and Reasonableness in the South Carolina State Register. 41 S.C. Reg. 15 (April 28, 2017). During the promulgation process the Department received a request for hearing, made by a group representing more than 25 individuals. For that reason, a public hearing was held before the ALC at the Edgar A. Brown Building in Columbia, South Carolina on May 31, 2017. Appearing at the hearing for the Agency were Rose Mary McGregor, Assistant General Counsel; Cynthia Lara, Director of Child Care Licensing; Kelsey Gilmore-Futeral, Outreach Manager for the Division of Early Care and Education; and Tricia Sheldon, Chair of the State Advisory Committee on the Regulation of Child Care Facilities. Registering as interested parties were Cynthia Lara, Rose Mary McGregor, Tricia Sheldon, Felicia McBratney, Olander Lewis, Sherry Ly Ching Chen King, Mary Lynne Diggs, Debra Earwood, Wilhelmina B. Whitfield, and Ella M. Fulton. Both Ms. Sheldon and Ms. Lara spoke at the hearing as proponents of the regulations. Mr. Lewis and Ms. McBratney spoke in opposition to the regulations. At the close of the hearing the Court held the record open for twenty days to receive additional written comments on the regulations.

¹ Under a separate docket number, this matter was previously remanded to the agency by this Court for failure to have a quorum of members at the committee meeting promulgating the amendments to the regulation. See Order of Remand (J. McLeod), Docket Number 16-ALJ-18-0371-RH (S.C. Admin. L. Ct. filed Jan. 18, 2017).

FILED

July 10, 2017

SC ADMIN. LAW COURT

INTRODUCTION

The regulations at issue in this report concern the licensing of child care centers. These regulations are promulgated pursuant to the authority provided by South Carolina Code Section 43-1-80, which states, “The Department may adopt all necessary rules and regulations . . . when not otherwise fixed by law, to carry out effectively the activities and responsibilities delegated to it,” and Section 63-13-180, which directs the Department to develop and promulgate regulations for childcare centers with the advice of the State Advisory Committee on the Regulation of Childcare Facilities (Advisory Committee). Section 63-13-180 states, “The department with the advice of the Advisory Committee shall develop suggested standards which shall serve as guidelines for the operators of family childcare homes and the parents of children who use the service No regulations for childcare facilities may exceed policies or minimum standards set for public childcare facilities regulated under this chapter.” S.C. Code Ann. § 63-13-180(A) & (D) (2010).

STANDARD OF REVIEW

The process for promulgating regulations, or rule-making, is contained in Chapter 23, Title 1 of the South Carolina Code. To promulgate regulations an agency must give notice in the State Register. S.C. Code Ann. § 1-23-110(A)(1) (2005 & Supp. 2016). If requested “by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members,” a public hearing must be held. S.C. Code Ann. § 1-23-110(A)(3) (2005 & Supp. 2016). When promulgation is by a single-director agency, an administrative law judge (ALJ) must conduct the hearing. S.C. Code Ann. § 1-23-111(A) (2005 and Supp. 2016). As the presiding official, the ALJ “shall issue a written report which shall include findings as to the need and reasonableness of the proposed regulation based on an analysis” of factors contained in Section 1-23-115(C)(1)-(11). S.C. Code Ann. § 1-23-111(B) (2005); see also Rule 48, SCALC. These factors include cost and benefit, effect on business or cost of living, effect on employment, source of revenue for implementation, uncertainties of benefit or burden, and the effect on environmental or public health. S.C. Code Ann. § 1-23-115(C) (2005 & Supp. 2016) (excluding subsection (C)(4) and (C)(8) as stated in Section 111). If the ALJ determines that the proposed regulations are not needed or reasonable, the agency may modify the proposed regulations, promulgate with the report, or terminate promulgation. S.C. Code Ann. § 1-23-111(C) (2005).

PUBLIC COMMENT

The Court received comments and objections from members of the public both orally at the hearing and in writing following the hearing. Those comments centered around three topics: the requirements regarding serving children with disabilities, the modification of the standards regarding hot water, and changes with respect to emergency workers and the training and qualifications of substitute teachers. Comments were received from Felicia McBratney with McLeod Health; Roger Pryor, a member of the Advisory Committee; Doris Simmons, Linda Lavender, and Lisa Evans with Lexington School District Four; and Linda Harris regarding the qualifications and training of substitute teachers. Comments were received from Olandor Lewis with the LCAA Head Start program; Alice Stradford with Lancaster County First Steps and the Early Head Start–Child Case Partnership; Walter Kellogg and Walter Fleming on behalf of the South Carolina Community Action Programs Directors Association; Jessica McMoore on behalf of the South Carolina Head Start Collaboration Committee; and Leroy Gilliard on behalf of the Executive Board of the South Carolina State Head Start Association regarding water temperatures. Comments were received from Linda Harris regarding the requirement to accept disabled children.

DISCUSSION

Regulation 114-500(C)—Children with Disabilities

The proposed amendments to regulation 114-500(C) adds language regarding children with disabilities including the following new language:

- (1) Child care centers cannot exclude children with disabilities from their program unless the child’s presence would pose a direct threat to the health and safety of others or require a fundamental alteration of the program.
- (2) Child care centers must make reasonable modifications to their policies and practices to integrate children, parents and guardians with disabilities into their programs unless doing so would constitute a fundamental alteration.
- (3) Child care centers may not refuse service to a child with a disability without considering the individual child’s needs by communicating with the child’s parents, guardians and/or other professionals who work with the child in other contexts.
- (4) Under most circumstances, children with disabilities must be placed in their chronological age classroom, unless the parents/guardians agree otherwise.

Proposed Regulations 114-501(A)(10) and (11) contain definitions of “child with a disability” and “child with special needs.”

Proposed Regulation 114-505(F)(17) provides that “Children may not be refused care by a center because they require toileting assistance due to a disability.”

Linda Harris submitted a letter via email objecting to the mandate to accept disabled children because some disabled children need one-on-one care, medical treatments or have other needs that would require additional staffing. Tricia Sheldon, the chair of the Advisory Committee, testified that these changes simply add the requirements of the federal Americans with Disabilities Act, which child care centers are already required to comply with, to the regulation to draw attention to the existing requirement.

A large portion of the language of the proposed regulation appears to be taken directly from an outdated page on a U.S. Department of Justice-maintained website and not from any federal statute or regulation. See Disability Rights Section, Civil Rights Division, [Commonly Asked Questions about Child Care Centers and the Americans with Disabilities Act](https://www.ada.gov/childqanda.htm), <https://www.ada.gov/childqanda.htm> (last visited July 3, 2017). While the intent of the Advisory Committee in seeking to highlight its interpretation of applicable federal requirements within the state regulations is commendable, the proposed regulation is outside the authority granted to the Department. Section 63-13-180, which authorizes the Department to promulgate regulations for childcare centers with the advice and consent of the Advisory Committee, expressly prohibits regulations that exceed the minimum standards set for public childcare facilities set forth in Chapter 13 of Title 63. S.C. Code Ann. § 63-13-180(D) (2010). The existing regulation states, “Access to and within the center, and physical site accommodations and equipment, shall be provided for children with disabilities to meet their health and safety needs in accordance with applicable state and federal laws.” That provision is sufficient to draw the attention of child care center directors to the existing requirements of the federal law without imposing a state enforcement mechanism or inserting a summary of those laws that may be open to a different interpretation by the federal courts. Therefore, I must conclude that this proposed regulatory language is neither necessary nor reasonable and is in excess of the Department’s authority. I recommend that the draft regulation sections 114-500(C)(1) through (4), 114-501(A)(10) and (11) and 114-505(F)(17) be deleted from the proposed regulation.

Regulation 114-501—Definitions of “Substitute Teacher” and “Emergency Person”

The proposed regulations include a new definition for “substitute teacher” and a revised definition of “emergency person.” A substitute teacher must meet all of the same qualifications as a teacher, including experience and the training. An emergency person must meet all of the requirements, including experience, except the training, but is limited to not more than eighty hours

in a calendar year. Read together, the proposed regulations would allow only individuals who meet all the qualifications of a teacher to perform the duties of an absent teacher and would require fifteen hours of training for any such person after two weeks. The proposed definition of “substitute teacher” is somewhat redundant because it makes no distinction between the requirements of a teacher and a substitute teacher.

Felicia McBratney appeared at the hearing to object to the qualification and training requirements for substitute teachers. She testified that the proposed regulations would be burdensome and expensive for child care centers. Even if free training can be obtained, the employer must pay the substitute teacher’s salary for the two days required to complete the training. McBratney advocates allowing several pathways for qualification of substitute teachers as recommended by the National Association for the Education of Young Children. Following the hearing, Roger Pryor submitted a letter objecting to the requirement that substitute teachers be required to meet the teacher/caregiver training requirements. Mr. Pryor states that, as written, the regulation would make it harder for programs to find the best people to fill in for an absent teacher, that it would add unnecessary costs, and that it goes beyond the minimum health and safety requirement role of the regulations.² Three officials from Lexington School District Four, Doris Simmons, Linda Lavender, and Lisa Evans, also wrote to the Court objecting to the substitute teacher definition. They stated that the proposed regulation would significantly limit their ability to recruit and retain quality people and would have a significant fiscal impact related to providing the required training to non-employees. In addition, Linda Harris wrote to state that the existing regulation requiring one year’s experience in childcare for all teachers and caregivers has been a hardship for childcare centers because it leaves no pathway for new teachers to gain that experience. She objects to extending that requirement to substitute teachers and emergency persons. The current regulation provides the following requirements for Caregivers and Teachers:

(4) Caregivers/Teachers

(a) Caregivers/Teachers shall meet the following qualifications:

- (i) Be at least 18 years of age, and able to read and write;

² Mr. Pryor, as the sole dissenting member of the Advisory Committee, also raises an issue as to why he and other members of the Advisory Committee were not personally notified of the date and time of the hearing. The Department has met the minimum requirements of public notice through publication in the State Register. However, its failure to notify the one person who had previously taken a position opposing the proposed regulations of the hearing does raise a question as to whether the spirit of the statutory requirement that draft regulations be “widely circulated for criticism and comment” has been honored. S.C. Code Ann. § 63-13-180(A) (2010).

(ii) A teacher/caregiver who began employment in a licensed or approved child care center in South Carolina after June 30, 1994, must have at least a high school diploma or General Educational Development Certificate (GED) and at least six months experience as a teacher/caregiver in a licensed or approved child care facility. However, a teacher/caregiver who is prevented from obtaining a high school diploma or GED because of a disability, and who otherwise is qualified to perform the essential functions of the position of teacher/caregiver, must have at least a high school Certificate of Completion and at least six months experience as a teacher/caregiver in a licensed or approved child care facility. If a teacher/caregiver does not meet the experience requirements, the teacher/caregiver must be directly supervised for six months by a staff person with at least one-year experience as a teacher/caregiver in a licensed or approved child care facility. Within six months of being employed, a teacher/caregiver must have six clock hours of training in child growth and development and early childhood education or shall continue to be under the direct supervision of a teacher/caregiver who has at least one year of experience as a teacher/caregiver in a licensed or approved child care facility.

(iii) A teacher/caregiver who has two years experience as a teacher/caregiver in a licensed or approved facility and was employed as of July 1, 1994, in a licensed or approved child care center in South Carolina is exempt from the high school diploma, General Education Development (GED), and Certificate of Completion requirements of (ii) above; and

(iv) A teacher/caregiver with an undergraduate degree from a state approved college or university in early childhood, child development, or a related field may begin working with the children immediately without additional supervision.

(b) Exception: A teacher/caregiver may be 16 or 17 years of age if he/she is continuously supervised by a qualified teacher/caregiver who is in the room at all times.

(c) Exception: Staff persons who were employed prior to the effective date of these revised regulations are not required to meet the staff qualifications specified in this chapter if the staff qualifications required in the prior regulations are met. If a teacher/caregiver has had more than a twelve-month break in service, the new guidelines shall be met for re-employment as a teacher/caregiver.

(5) Professional development

(a) The director(s) shall provide orientation for all new staff, volunteer(s), and emergency person(s) prior to their employment, volunteering, and student/teacher training. This orientation shall include the following:

(i) Specific job duties and responsibilities;

(ii) The requirements of this chapter related to their job; and

(iii) The policies and procedures of the center that affect the health and safety of children.

(b) The director shall participate in at least twenty clock hours of training annually. At least five clock hours shall be related to program administration and at least five clock hours shall be in child growth and development, early childhood education and/or health and safety excluding first aid and CPR training. The remaining hours shall come from the following areas: Curriculum Activities, Nutrition, Guidance, or Professional Development and must include blood-borne pathogens training as required by OSHA.

(c) All staff, with the exception of emergency person(s) and volunteer(s), providing direct care to the children shall participate in at least fifteen clock hours annually. At least five clock hours shall be in child growth and development and at least five clock hours shall be in curriculum activities for children excluding first aid and CPR training. The remaining hours shall come from the following areas: Guidance, Health, Safety, Nutrition, or Professional Development and must include blood-borne pathogens training as required by OSHA

S.C. Code Ann. Regs. 114-503(K)(4)–(5).

The controlling statute provides:

(A) A caregiver who begins employment in a licensed or approved childcare center in South Carolina after June 30, 1994, must have at least a high school diploma or General Educational Development (GED) and at least six months' experience as a caregiver in a licensed or approved childcare facility. If a caregiver does not meet the experience requirements, the caregiver must be directly supervised for six months by a staff person with at least one year experience as a caregiver in a licensed or approved childcare facility. Within six months of being employed, a caregiver must have six clock hours of training in child growth and development and early childhood education or shall continue to be under the direct supervision of a caregiver who has at least one year of experience as a caregiver in a licensed or approved childcare facility.

(B) A caregiver who has two years' experience as a caregiver in a licensed or approved facility and is employed as of July 1, 1994, in a licensed or approved childcare center in South Carolina is exempt from the high school diploma and General Educational Development (GED) requirements of subsection (A).

S.C. Code Ann. § 63-13-30 (2010). "Caregiver" is defined as "any person whose duties include direct care, supervision, and guidance of children in a childcare facility." S.C. Code Ann. § 63-13-20(1) (2010).

The statute does not address situations in which a substitute or emergency fill-in teacher or caregiver is required due to the illness or other absence of a caregiver. It is the role of the Department, through regulation, to address such ambiguities. In this case, I agree with the opponents of the regulation that the proposed regulation will add a significant cost burden to childcare centers as well as make it more difficult to obtain qualified substitute

teachers/caregivers.³ However, it is apparent that a regulation addressing the qualifications required for substitute teachers and emergency fill-in caregivers is needed given the ambiguity in the statutory scheme. Because the emergency worker provision as currently written does not contain a bright-line time limitation, it has apparently been abused by some childcare centers. Therefore, I must conclude that a regulation to clarify the requirements for substitute teachers and emergency fill-in persons is needed. Further, while the approach and language chosen by the Department will add a cost burden to the state's childcare centers, I cannot conclude that it is unreasonable based upon the information before me; nor is it outside the statutory authority of the Department. A majority of the Advisory Committee has agreed upon the regulatory language requiring that a substitute teacher meet each and every qualification of a full-time teacher and the Department has promulgated the regulation according to their recommendation. I will not disturb their professional judgment.

Regulations 114-507 and -508—Water Temperature

Several of the proposed amendments deal with standards related to water temperature. Proposed regulation 114-507(A)(7)(a) provides that if water, maintained at a temperature between 68 and 80 degrees Fahrenheit, is unavailable for four hours a center must close. Proposed regulation 114-507(A)(12)(d) recommends that water be a minimum of 60 degrees Fahrenheit in bathrooms and removes the requirement that bathrooms have “hot and cold” water. Proposed regulation 114-508(B)(1) amends the regulation to require that hot water in food preparation areas must meet current DHEC regulations for Retail Food Establishments.

Olander Lewis testified at the hearing objecting to removing the requirement for hot water in hand washing sinks. He proposed a requirement that hot water be required at a minimum of 100–125 degrees Fahrenheit. Alice Stradford, the South Carolina Community Action Programs Directors Association; the South Carolina Head Start Collaboration Committee, and the Executive Board of the South Carolina State Head Start Association wrote comments objecting to the removal of the requirement that each hand washing sink be equipped with both hot and cold water. Some comments specifically request that the standard be more specific or stringent than the pre-amendment regulation, arguing that water temperature in handwashing sinks affects children's health. Trisha Sheldon testified for the Department that the water temperature in the proposed

³ No estimate of that cost was provided to the Court by either the Department or the opponents of the regulation. Therefore, the Court is unable to provide a cost-benefit analysis in this report.

regulation is only a recommendation and notes that hotter water is required only in the food preparation areas.

Nothing in the regulation prevents or discourages child care centers from providing hot and cold water. It is important to remember that the regulations are *minimum* standards and that the Department has no authority under the statutory scheme to promulgate regulations that exceed the standards set forth in the statute. S.C. Code Ann. § 63-13-180(D) (2010). I find that the proposed changes to water temperature regulations are in keeping with the statutory mandate of the Department. See S.C. Code Ann. § 63-13-180(B) & (D) (2010). Recommending that additional strictures be added to the proposed regulations would be contrary to this mandate for minimum standards. Therefore, I conclude that the regulatory amendments proposed regarding water temperature are needed and reasonable.

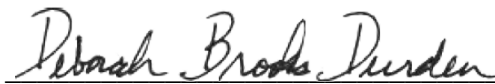
RECOMMENDATION

Upon review of the proposed regulatory changes, I conclude that the proposed amendments to regulation dealing with disabled children are not needed and reasonable, and are outside the Department's authority. Therefore, I recommend that the proposed amendments to the following regulation subsections be stricken:

1. 114-500(C), adding subsection (1) through (4)
2. 114-501(A)(10) and (11)
3. 114-505(F)(17).

I further conclude that the remaining provisions in the proposed regulations are both needed and reasonable.

Therefore, I **RECOMMEND** that Document 4747 be **AMENDED**.

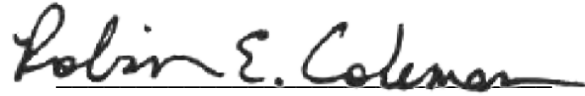


Deborah Brooks Durden, Judge
S.C. Administrative Law Court

July 10, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Deborah Brooks Durden

July 10, 2017
Columbia, South Carolina

FILED

July 10, 2017

SC ADMIN. LAW COURT