STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed
Amendments to Department of
Human Services Rules Governing
Licensure of Child Care Centers
(Minnesota Rules, parts 9503.0015,
9503.0075, and 9503.0170)

STATEMENT OF NEED
AND REASONABLENESS

The three rule parts referenced above are part of a series (Minnesota Rules, parts 9503.0005 to 9503.0170) that govern licensure of child care centers. Informally known as Rule 3, parts 9503.0005 to 9503.0170 were adopted in August of 1988 and were effective early in 1989. Parts 9503.0005 to 9503.0170 replaced an earlier version of Rule 3 (parts 9545.0520 to 9545.0680, Group Daycare of Preschool and School-Age Children) that was first adopted in the late 1950s and amended in 1977.

The proposed amendments to parts 9503.0015 and 9503.0075 result from statutory changes in the 1989 legislative session that affect how drop-in child care programs are licensed and regulated under Rule 3. Although the substantive changes to the rule occur mainly in part 9503.0075, the same statutory changes that require the department to amend part 9503.0075 also necessitate technical changes to part 9503.0015.

The amendments to part 9503.0170 are proposed by the department to make Rule 3 more flexible on points related to age category grouping, staff distribution, and transportation. Specifically, the proposed amendments open to the variance process three provisions in Rule 3 that are not eligible for variances under the rule as currently written.

Background on the Proposed Amendments to Part 9503.0075

Rule 3 as adopted in 1988 addresses a variety of child care programs: day programs, night care programs, sick care programs, drop-in programs. The rule as adopted defined a drop-in program as a program that did not provide care to any one child for more than 45 hours in any one calendar month. Because children who attended drop-in programs did not attend those programs regularly, the advisory committee and department staff members who developed the rule exempted drop-in programs from a few programmatic and space requirements that full-time child care programs are required to meet.

The rule did not, however, treat drop-in care differently from full-time care on requirements related to staff ratio, grouping of children by age, and staff qualifications. The rule as adopted reflected the view that the same standards for staff qualifications and staff ratios should apply whether children are at a center on a regular full-time basis or on a short-term, drop-in basis.

In response to legislation adopted during the 1989 regular legislative session to amend the Human Services Licensing Act, that view is no longer reflected in the proposed amendments to Rule 3. The legislation eased the requirements that drop-in programs must meet with respect to staff ratio, staff qualifications, and group size (see Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6).

The legislation also re-defined drop-in care (see Minnesota Statutes, 1989 Supplement, section 245A.02, subdivision 6a). Rule 3 as adopted allowed centers with regularly scheduled, full-time enrollments to operate drop-in care programs at the same time. Drop-in child care programs as they are now defined in statute may be provided only at a center that has no regularly scheduled enrollment and is licensed exclusively for drop-in care. By definition, a drop-in child care program is limited to providing no more than five hours care to any one child in any one day up to a maximum per child of 40 hours per month. Rule 3 as adopted limited the time per child that drop-in care could be provided to 45 hours a month but imposed no per day limit.

Laws of 1989, Chapter 282, Article 2, Section 211 requires the commissioner by April 1, 1990 to adopt permanent rules amending part 9503.0075 to bring it into conformity with the requirements of Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6. The need to meet that mandate provides the rationale for most of the proposed changes to part 9503.0075 and for the one technical change proposed to part 9503.0015.

9503.0015 OPTIONS FOR CHILD CARE PROGRAMS.

A license holder who offers drop-in care cannot be required to provide "one or more" of the programs in items A to D because the statutory definition does not allow drop-in care to co-exist with any other kind of child care program. Changing the language to "at least one" of the options makes the language applicable to all license holders.

Item B is necessarily changed to make the rule language that describes the drop-in option consistent with the definition of drop-in child care program in Minnesota Statutes, 1989 Supplement, section 245A.02, subdivision 6a.

9503.0075 DROP-IN <u>CHILD CARE</u> PROGRAM

Laws 1989, chapter 282, article 2, section 211 requires the commissioner to adopt permanent rules amending part 9503.0075 to bring it into conformity with the requirements of Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6. Adding "child care" to the name of the rule part is a technical change to make rule language consistent with statutory language.

The proposed amendments to part 9503.0075 are essentially a restatement of the requirements in Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6. The requirements as adapted from statute are divided into subparts to make reading the rule easier for providers, licensors, and others who have occasion to consult it.

Subpart 1. Exemptions for drop-in child care program. Stating exemptions is necessary to bring part 9503.0075 into conformity with Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6. Creating a subpart summarizing exemptions is a reasonable way to make the rule easy to consult. In one or two instances, part 9503.0075 as written granted essentially the same exemption as the new statutory language (see, e.g., former item A and new item F in new subpart 1). The proposed amendment replaces the present language in part 9503.0075, items A to E with all new language rather than work around the existing language. The new language is needed to make the rule part consistent with Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6.

Item C requires justification because it interprets rather than reiterates Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6 on bedding and blanket requirements. It is clear in statute that drop-in child care programs are exempt from the requirements in part 9503.0050, subpart 6, "except for children less than two and one-half years old." The construction of part 9503.0050, subpart 6, however, makes it less clear what the statute intends: "Separate bedding must be provided for each child in care. Bedding must be washed weekly and when soiled or wet. Blankets must be washed or dry cleaned weekly and when soiled or wet."

The department concludes that the exemption applies only to the provider's obligation to provide separate bedding for each child and not to the provider's obligation to wash or dry clean bedding and blankets, however they are used and for whatever age group. This interpretation is reasonable because it recognizes that drop-in centers by nature have a high potential for the spread of disease. This is the case because having new children every day has the potential of bringing a larger germ pool into the center than would be present if the same children came every day. Moreover, because drop-in program staff often do not know that a child has picked up a disease because the child does not return, steps are not taken to curtail the spread of the disease. It is necessary to keep the washing and dry cleaning provisions as a safeguard against the spread of disease.

Subp. 2. Supervision. The substance of items A and B can be found in Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6. It is reasonable to establish a subpart summarizing supervision requirements to make the rule easier to work with.

Item A is explicitly required by statute. Item B makes explicit what the department believes is implicit in the following sentence of Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6: "A drop-in child care program must maintain a minimum staff ratio for children age two and one-half or greater of one staff person for each ten children, except that there must be at least two persons on staff whenever the program is operating."

Interpreting the statutory requirement that there be "at least two persons on staff" to mean that "at least two persons on staff should be present" is reasonable on the assumption that the provision means to ensure there is always more than one person present. A minimum of two people is needed in case of emergency or to avoid a situation where a person's supervision of children is undermined because the person has other duties such as answering the phone. The requirement that at least two staff persons always be present is consistent with department rules governing adult day care centers.

It is also reasonable for the rule parts to be explicit about requiring the presence of two staff persons even when the staff-to-child ratio requirements would not otherwise so require. By stating explicitly what is implicit in the requirement, the rule resolves the ambiguity, thereby preempting any dispute that might arise over this issue and ensuring compliance with the requirement.

Subp.3. Staff ratios. Staff ratio requirements for drop-in care established in Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6 are necessarily added to part 9503.0075 to make rule provisions governing drop-in care consistent with statutory provisions governing drop-in care.

Items A, B, and C establish age categories (six weeks through 16 months, 17 months through 29 months, and 30 months through 12 years) that are slightly different from the categories established in Minnesota Statutes, 1989 supplement, section 245A.14, subdivision 6 (up to 16 months, 17 months to 30 months, and two and one-half years or greater). The changes are not substantive and are made only because the statutory language leaves out children who are exactly 16 months old and uses 30 months as the higher limit of one category and the lower of the next.

Subp. 4. Exception to staff ratio for ages 30 months through 12 years. It is necessary to give notice of the exception and the conditions under which the exception applies to make the rule parts governing drop-in child care programs consistent with the statutory provisions governing drop-in child care programs. The substance of the rule part can be found at Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6.

Subp. 5. Age category grouping. Part 9503.0075 necessarily includes provisions on age category grouping to be consistent with Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6. The last sentence of subpart 5 reflects and clarifies the explicit requirements of Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6.

In the first sentence of subpart 5, the commissioner exercises an option given the commissioner in 1989 First Special Session, section 10, subdivision 1. The special session legislation addressed the requirement in Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6 that drop-in programs **must** (emphasis added) provide care for children under 30 months of age in an area separated from older children. The amendment says the commissioner **may** (emphasis added) by rule require the separation that was previously mandated.

The commissioner has chosen to require that younger children be separated only when more than 20 children are present. This approach balances the need to protect the safety of younger children with the reasonableness of allowing license holders some flexibility in how they provide for that safety. Licensing division staff are familiar with one stiuation, for example, where care is provided in a setting that makes physical separation of areas by doors or walls impossible. The safety of youngsters in that setting is never in doubt because the number of children present at one time is low enough and the number of staff present as required by the staff ratios is high enough to ensure adequate supervision.

Using the presence of 21 children as the point where separation of younger children must begin is consistent with part 9503.0040, subpart 1 which sets 20 as the maximum group size for preschoolers. The reasonableness of that number was established by research and other data submitted in the original rulemaking process. It is reasonable to adopt the maximum group size for preschoolers as the standard for when to separate, according to licensing division staff who monitor drop-in care, because preschoolers (ages 30 months to five years) are the age group most heavily represented in drop-in care.

Subp. 6. Staff distribution. Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6 provides that drop-in programs serving both infants and older children may use assistant teachers to supervise children up to 30 months of age as long as other staff members are present in appropriate ratios. It is necessary for the rule provisions to reflect this option in order for the rule to be consistent with statute. Rule 3 as adopted does not offer the option but requires instead that a teacher supervise each group.

Item A expresses the option by specifying that the first staff person needed to meet the 1:4 ratio required for infants and the 1:7 ratio required for children 17 to 29 months have at least the qualifications of an assistant teacher. The staffing configuration is repeated three times rather than summarized in the belief that stating the requirement explicitly facilitates compliance with the requirement.

Alternating assistant teachers and aides one-for-one is reasonable because that pattern 1) allows the assistant teacher option permitted by statute; and 2) compensates some for losing the teacher currently required by the rule by retaining an overall higher level of trained staff than would result if an assistant teacher were required only for every two or three aides.

The requirements in item B for the supervision of children 30 months and older are taken directly from Minnesota Statutes, 1989 Supplement, section 245A.14, subdivision 6. The requirements are both necessary and reasonable because they bring the rule part into conformity with statute.

9503.0170. LICENSING PROCESS.

Subp. 6. Variances. Opening the three referenced provisions to the variance request process is necessary to allow access to remedies for the occasional atypical situation where complying with the provisions would not necessarily achieve the effect intended. These provisions were excluded from the variance request process in the original rulemaking process because the provisions' effect on certain programs and situations was not anticipated.

It is reasonable to consider requests for variances from the staff distribution requirements of part 9503.0040, subpart 2, item D and the age category grouping requirements of part 9503.0040, subpart 3, item B, subitem (1). Under certain circumstances, it may be possible to relax the requirements and impose less burden on the provider without sacrificing the ability of the provider to achieve the rule's intended effect, that of adequately providing for supervision.

Similarly, centers situated in rural areas need the flexibility of being able to request a variance to the requirements of part 9503.0150, item E. The referenced item requires an additional adult besides the driver to be present in center vehicles transporting children and establishes one hour as the maximum time allowed per one way trip. Requiring two adults in each of several buses that a center might send into rural areas may be cost prohibitive. Moreover, it may be difficult to find enough personnel to meet the staffing requirement. It is therefore reasonable for the commissioner to consider granting a variance that proposes other alternatives such as having a CB radio or telephone in the vehicle to enable the driver to call for help if necessary.

It is also not always feasible in rural areas, particularly when winter driving conditions make driveways and country roads difficult to navigate, for a bus to complete its total route in an hour's time. If children picked up at the beginning of the route occasionally have to ride longer than the one hour per one way trip required by the rule as adopted, it is reasonable to promote flexibility in the application of the rule parts by allowing the center to request a variance.

Expert Witnesses

If the proposed amendments should go to public hearing, the department does not plan to use outside expert witnesses to testify on its behalf.

Small Business Consideration

The requirements of Minnesota Statutes, section 14.115 do not apply to these rule parts since day care centers are specifically exempt from section 14.115 under subdivision 7(c).

Date: 1/26/90

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