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**MEMORANDUM**

**TO: Child Care Licensing Staff  
OGC Field Litigation Unit**

**FROM: Lois Barrett-Luke, Director, Child and Adult Care Licensing  
Bill Russell, General Counsel**

**DATE: June 27, 2011**

**SUBJECT: UPDATED: Legal Referral Process Procedures in Child Care Licensing  
Cases**

This updated memo expands on the webinar training sessions that were held last fall for both Child Care Licensing staff and the OGC Field Litigation Unit and adds an extra step to the legal referral process governing legal enforcement actions against child care agencies.

**1. Collaborative Decision-Making Process**

**A. Triggering Event**

The licensing program supervisor (PS) must initiate the legal referral process by assembling the licensing team (PE, FS1, PS) and the field attorney whenever a child care agency has committed violations of the licensing law/rules which result in conditions at the agency that require consideration of whether legal enforcement action should be taken by the Department of Human Services against the license of the agency. The initiation of the legal referral process will most often be the result of contact with an agency due to a/an:

- UAV;
- Partner visit;
- Assessment visit;
- Complaint;
- Investigation; or

- Other contact with the agency.

This triggering event reveals violations at the agency and conditions at the agency that demonstrate:

- Imminent risk of harm or actual harm to a child;
- Demonstrated inability or unwillingness to comply with Licensing law/rules;
- Chronic noncompliance;
- Repeated, recurring, or multiple violations;
- Restriction or modification necessary to protect health, safety, welfare;
- Necessary protective measures to reduce risk of harm to children;
- Uncorrected violations;
- Conscious, deliberate or intentional failure to protect children; or
- Special circumstances.

The PE will consult with the FS1 when the violations/conditions at an agency suggest the need for possible legal enforcement action. The FS1 will then contact the PS to initiate the legal referral process.

## **B. Conference Call**

The PS will initiate the collaborative decision making portion of the legal referral process by arranging a conference call (or if possible, depending on everyone's location, a face to face meeting) between the licensing team and field attorney. The conference call will be arranged by the PS as soon as possible after being contacted by the FS1, depending on the violations/conditions at the agency. If the conditions at the agency demonstrate an emergency situation (such as imminent risk of harm or actual harm to a child), the PS will contact state office, the FS1, PE and field attorney, and will coordinate with all of them to arrange for the conference call to take place that same day.

If the violations/conditions at the agency do not demonstrate an emergency situation, the PS will arrange for the conference call by contacting the FS1, PE and field attorney by email, and based on everyone's availability will schedule the conference call to take place as soon as possible. (The use of the GroupWise calendar is encouraged, so that a busy search can determine everyone's availability.) The PS will also copy the Director, state office Program Manager and state office Program Coordinator on the email scheduling the conference call (including a telephone number for conference call capability, in case any of them wishes to participate in the scheduled conference call).

If the field attorney is not available to participate in the conference call, the PS will contact the Deputy General Counsel, who will locate another field attorney who is available to participate in the conference call.

The PS will lead the discussion in an emergency conference call; the PE will lead the discussion in a scheduled conference call. All of the participants in the conference call should review the agency's record in RACCS before the conference call, if possible.

### **C. Decision on Legal Enforcement Action**

The purpose of the conference call will be to determine whether legal enforcement action against an agency's license is needed to address the violation(s) and to ensure the protection of the health, safety and welfare of the children enrolled at the agency. The conference call should focus on the conditions at the agency and the facts and issues surrounding the violations that have been documented by the licensing staff. The field attorney will review with licensing staff the legal actions that may be appropriate, and will discuss the evidence and documentation needed for each type of legal enforcement action being considered. The licensing team and field attorney will reach a decision on whether legal enforcement action is needed, and if so what type, before concluding the conference call. If not already participating in the conference call, the Director will be brought in by the PS or field attorney if there is not a consensus reached during the conference call.

If the decision has been made to impose a legal enforcement action, the field attorney will make specific requests during the conference call for any evidence and documentation from the licensing file that the field attorney deems he/she needs. These requests, and a time frame for response, will be confirmed in an e-mail from the field attorney to all participants in the conference call. Accordingly, photographs, video, and voice recordings should be used during an investigation/citation of a violation to preserve evidence of violations that are discovered and to record the physical layout of the agency, problem areas in the facility, objects/equipment/vehicles of concern, interviews with staff or other persons, and any other relevant conditions. This will give the field attorney, administrative law judge, hearing officer, and the Board of Review a clearer understanding of the physical facilities and conditions at the agency.

If, for any reason, the evidence and documentation cannot be obtained within the specified time frame, the PE must let the field attorney know directly by phone, if the situation is urgent, or, otherwise by e-mail, and provide the reasons why the evidence/documentation cannot be obtained. Copies of all e-mails regarding an issue with timely completion shall be sent to the FS1 and PS.

### **D. Legal Referral**

#### **i. Drafting of Legal Documents**

Once the decision has been made to pursue legal enforcement action against an agency, the PE will draft the legal referral using the approved template and submit it to the FS1, along with the evidence and documentation requested by the field attorney during the conference call. The FS1 will review and then forward the draft legal referral to the state office Program Coordinator. The Program Coordinator will finalize the draft legal referral, utilizing information from the conference call, RACCS, and check sheets/confirming letters/PONs/POCAs/other documentation from the file and send it to the Deputy General Counsel for assignment to a field attorney. The subject line of the email to the Deputy General Counsel will say "Legal Referral," the name of the child care agency and the proposed legal enforcement action. The name of the

field attorney who participated in deciding on the legal enforcement action will be listed in the email.

If, for any reason, the evidence/documentation does not support the proposed legal enforcement action against an agency, further processing of the legal referral will be stopped by the field attorney and the reasons for the stoppage will be detailed in writing and submitted to the PE, FS1, PS, Director, Assistant General Counsel for Licensing and the Deputy General Counsel. The field attorney will also provide direction to the licensing team about any additional action, documentation, or evidence that would be needed to justify legal enforcement action against the agency. The PS should contact the field attorney to schedule a conference call with the licensing team to discuss the next steps.

The responsibility for drafting the legal enforcement action documents will depend on the type of legal enforcement action. The field attorney will be responsible for drafting the documents for summary suspensions, license revocations, license denials, restricted licenses and civil penalties. The PE will be responsible for completing voluntary suspensions, safety plans, and notices of probation using the templates developed by state office.

## **ii. Review/Signing of Legal Documents**

After the legal enforcement action documents have been completed/drafted, they will be reviewed before being signed and then served on the child care agency. If the legal document was drafted by the PE, it will be emailed to the FS1, then to the PS, and then to the Program Coordinator. If the legal document was drafted by the field attorney, it will be emailed to the Director.

The legal enforcement action documents that are drafted by the field attorney must be signed by the Commissioner of Human Services. The Director will sign on behalf of the Commissioner and return the document for service on the agency. The Director is the only authorized Licensing staff member who may sign on behalf of the Commissioner. (If the Director is not available, the General Counsel will sign the document on behalf of the Commissioner.)

After final approval/signing, the legal enforcement action document will be returned to the PE to be served on the child care agency.

## **iii. Service of Legal Documents on the Agency**

Although the law allows for service by certified mail for most of the legal enforcement action documents, personal service is always the preferred method of service. As a result, the Order, Notice, safety plan, or statement of legal enforcement action will be personally served by the PE and/or FS1 on the agency. If the PE/FS1 encounters any difficulties in serving the legal enforcement action document, they will contact the PS and field attorney to discuss whether service should be completed by certified mail.

Personal service of legal enforcement action documents by licensing staff will be confirmed by an Affidavit of Service detailing the date, time of service, the person served and any other

circumstances of service that would be relevant to a determination of adequate service and will be documented in the licensing record. The Affidavit of Service must be completed by the PE and notarized before the PE goes to serve the legal enforcement action document that same day. A complete copy of the legal enforcement document must be left at the child care agency.

Certified mail receipts will be maintained in their original form for proof of service in the case file and will be scanned in to any computer records of the case.

Scanned copies of all licensing enforcement action documents (with the exception of POCAs) and certified mail receipts of service will be emailed immediately after service to the field attorney, FS1, PS, Director and the Assistant General Counsel for Licensing.

Copies of all licensing enforcement actions above the safety plan (i.e., summary suspension, voluntary suspension, revocation, denial, and restricted license) level will also be emailed immediately to the Deputy General Counsel.

## **2. Hearing Preparation**

### **A. Case Preparation Tasks Email**

After service of a legal enforcement action document, if an agency requests a hearing/appeal of the legal enforcement action, the field attorney will guide the hearing preparation process and will be responsible for all matters affecting the hearing/appeal.

After the field attorney receives and reviews the legal referral, evidence and documentation, the field attorney will send an email (designated as the “Case Preparation Tasks Email”) to the PE (copying the FS1, PS and Director) specifying what tasks need to be completed by the licensing team in order defend the legal enforcement action at the hearing/appeal. This may include additional documentation from the case files, interviews with witnesses, specific agency records, etc. The field attorney will assign a deadline for the completion of each of the specified tasks. Any alteration or delay in completion of the case preparation tasks must be reported immediately to the field attorney and Director, and must first be approved by the field attorney via email. Any telephone discussion regarding requests for additional action in preparation for the hearing must be confirmed by e-mail.

The PE will communicate directly with the field attorney via email regarding the completion of the tasks, copying the FS1 and PS. (The Director, Assistant General Counsel for Licensing, and the Deputy General Counsel will not be routinely copied on these emails.) This procedure is critical; any communication about the case preparation tasks that is not sent directly to the field attorney cannot be assumed to reach the field attorney. Therefore, responses to the field attorney’s requests will not be sent only to the PE’s supervisors with the assumption that it will be timely forwarded to the field attorney. A delay in the receipt of a communication or the failure of a communication to reach the field attorney could negatively affect the defense of the legal enforcement action at the hearing/appeal.

Timely completion of the case preparation tasks is particularly critical when summary license suspensions are necessary. Case preparation tasks during summary suspension actions must clearly emphasize the need for rapid response to requests for information to meet the early suspension hearing deadlines required by statute and must give specific time frames for completion. The field attorney cannot assume that all requests are being completed as directed, and is, therefore, responsible to monitor the progress in these situations to ensure that case preparation tasks are completed, or, if necessary, to determine why the tasks cannot be completed as directed and determine alternative actions if at all possible.

If the case preparation tasks are not being completed as directed and within appropriate timeframes, the field attorney will contact the FS1, and, if necessary, the PS and Director. If the Director is not available, the Assistant General Counsel for Licensing, or in that person's absence, the Deputy General Counsel, may be contacted. This same procedure should be utilized if the PE is unable to contact the field attorney or the field attorney fails to respond to a communication or question from the PE in a timely manner. This contact should be done by telephone in emergency situations (such as a summary suspension or where the hearing date is rapidly approaching), and may be done e-mail in all other situations.

#### **B. Final Hearing Preparation Review**

As a final step in the hearing preparation process, the field attorney will email the PE, FS1 and PS to schedule another conference call. The field attorney will schedule the conference call to take place before the scheduled hearing date. The purpose of this final hearing preparation review is to confirm that all of the case preparation tasks have been completed and that the case is ready for the hearing. The field attorney will discuss the procedure that will govern the hearing/appeal and what evidence/testimony will be presented. The licensing team will have the opportunity to ask questions about the hearing and discuss any issues/concerns about the hearing.

The field attorney will be responsible for ensuring that all licensing staff participating in the hearing is thoroughly prepared for their testimony and that all necessary documentation is prepared prior to the hearing.

Licensing staff are encouraged to tell the field attorney if they do not understand the process or the strategy to be used at the hearing. Licensing staff will also be given advice regarding potential questions from opposing counsel. Licensing staff will notify the Director and Deputy General Counsel if this preparation is not occurring or is not helpful.

cc: Alan Hall, Inspector General

Robert Matthews, Assistant Commissioner, Adult and Family Services

Barbara Wall, Director of Child Care Services

Kim Summers, Deputy General Counsel

Nicole Armstrong, Assistant General Counsel for Licensing