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SECRETARY OF STATE

Betty Ireland
Secretary of State

October 22, 2007

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Department of Health and Human Resources

RULE: Amendments, 78CSR1, Child Care Centers Licensing

DATE FILED AS AN EMERGENCY RULE: September 27, 2007

DECISION NO. 11-07

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.


BETTY IRELAND
Secretary of State

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EMERGENCY RULE DECISION
(ERD 11-07)

AGENCY: West Virginia Department of health and Human Resources
RULE: Amendments, 78CSR1, Child Care Centers Licensing
FILED AS AN EMERGENCY RULE: September 27, 2007

- par. 1 The West Virginia Department of Health and Human Resources (DHHR) has filed the above amendments to an existing rule as an emergency rule.
- par. 2 W. Va. Code 29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The DHHR filed this emergency rule with supporting documents with the Secretary of State September 27, 2007 and with the LRMRC September 27, 2007.
- par. 7 It is the determination of the Secretary of State that the DHHR has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §49-2B-4C reads:

§49-2B-4. Rules.

The secretary shall promulgate rules in accordance with the provisions of chapter twenty-nine-a of this code regarding the licensure, approval, certification and registration of child care facilities and the implementation of the provisions of this article. The rules shall provide at a minimum the requirement that every residential child care facility shall be subject to an annual time study regarding the quantification of staff supervision time at each facility. Every residential child care facility shall participate in the time study at the

request of the department.

(b) The secretary shall review the rules promulgated pursuant to the provisions of this article at least once every five years, making revisions when necessary or convenient: Provided, That on or before the first day of September, two thousand six, the department shall promulgate emergency rules pursuant to the provisions of article three, chapter twenty-nine-a of this code that amends and replaces licensing requirements for group residential programs for children, 78 CSR 3, and child placing agencies for children, 78 CSR 2. Provided, however, That on or before the first day of July, two thousand six, the department shall promulgate emergency rules pursuant to the provisions of article three, chapter twenty-nine-a of this code that creates requirements for informal family child care homes and relative family child care homes that voluntarily register with the department. All individuals, facilities, entities, programs, agencies or family child care homes subject to said emergency rules shall have one hundred eighty days to come into compliance after promulgation of such rules

par. 9 It is the determination of the Secretary of State that the DHHR has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the DHHR are as follows:

On August 13, 2007, the WV Department of Education, Office of Child Nutrition issued written guidance regarding reimbursement of meals for children enrolled in WV Pre-k. This guidance directs that children enrolled in WV Pre-k community programs can no longer be claimed for meals served during pre-k hours under the Child & Adult Care food Program (CACFP). CACFP is the national feeding program available to child care facilities & Head Start Programs. Instead, children in WV Pre-k community programs are deemed to be enrolled in the public school system and thus are automatically included in the National School Lunch Program (NSLP), which is the feeding program for public schools.

Child care centers & some Head Start programs are licensed according to Legislative Rules Title 78 under the authority of WV Code §49-2B-1 et seq. The rule requires licensed programs to provide appropriate and adequate meals and snacks, with no food allowed from the child's home. Under CACFP, food costs are

included in the daily, weekly or monthly rate parents pay for child care services. Under the NSLP, meal costs are based on family income guidelines. Parents are billed accordingly if the child eats the meal provided. If parents prefer, they may send food from home for their child.

Under the new guidance, parents with children in community pre-k programs are now going to be automatically billed by the school if families are not eligible for free meals. However, since the current licensing rule does not permit meals to be prepared at home to be brought in, parents who prefer to prepare a meal from home are forced to pay for meals provided by the child care center. In addition, since some parents prefer to send lunches rather than pay extra under NSLP, child care centers are placed at a disadvantage in keeping children in their pre-k program. To allow child care centers to fully participate in WV Pre-k, the child centers licensing rule must be changed to allow parental choice in the area of providing or paying for food.

Accordingly, the WVDHHR is submitting an amended Child Care Centers Licensing Rule, 78CSR1, for emergency filing as authorized by WV Code §49-2B-4.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "the immediate preservation of public peace, health, safety or welfare"

par. 14 This decision shall be cited as Emergency Rule Decision 11-07 or ERD 11-07 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Department of Health and Human Resources, the Attorney General and the Legislative Rule Making Review Committee.


BETTY IRELAND
Secretary of State

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