

VOLUME 39, ISSUE 2

ISSUE DATE: **JANUARY 16, 2007**

RULE ADOPTIONS

**CHILDREN AND FAMILIES
OFFICE OF LICENSING
CHILD CARE CENTER REQUIREMENTS**

39 N.J.R. 213(a)

Adopted Concurrent Amendment: [N.J.A.C. 10:122-5.2](#)

Physical Plant Requirement for All Centers

Proposed: November 6, 2006 at [38 N.J.R. 4746\(a\)](#).

Adopted: December 18, 2006 by John A. Ducoff, Director of Legal Affairs and Regulatory Oversight, Department of Children and Families.

Filed: December 18, 2006 as R.2007 d.20, **with a substantive change** not requiring additional public notice and comment (see [N.J.A.C. 1:30-6.3](#)).

Authority: [N.J.S.A. 9:3A-7\(f\)](#) and [30:5B-5](#).

Effective Date: December 18, 2006, Concurrent Amendment;

January 16, 2007, Change Upon Adoption.

Expiration Date: February 26, 2009.

Summary of Public Comments and Agency Responses:

The Department received written comments regarding this rulemaking action from a total of six persons representing organizations, programs and companies that included:

1. Community Day Nursery, Kathy Burke, Executive Director
2. New Jersey Association for the Education of Young Children (NJAEYC), Dr. Lorraine Cooke, Vice President, Public Policy
3. New Jersey Child Care Association (NJCCA), Barbara DeMarco, Public Affairs Agent
4. Equity Environmental Engineering LLC, Robert L. Jackson, P.E., Senior Project Manager
5. Respond, Inc., Wilbert Mitchell, Executive Director

6. Riker, Danig, Scherer, Hyland, Perretti, LLP, Steven T. Senior, Counsel representing the Newport Associates Development Company (NADC)

COMMENT: Kathy Burke, Executive Director of the Community Day Nursery, commented that it would make more sense to regulate the dry cleaners and the nail salons rather than penalize child care centers that opened in good faith to provide needed services in the community. Since they are the businesses that are causing the environmental degradation, they should be the ones to bear any financial burdens in the remediation of the problem. If any business is going to be obliged to close it should be those that are causing the problem.

RESPONSE: The Department does not have the authority to regulate dry cleaners or nail salons. The Department of Environmental Protection (DEP) and the Department of Health and Senior Services (DHSS) have the regulatory authority for such entities. However, the Department is working with DEP and DHSS to address issues of environmental contamination at child care centers that may be impacted by dry cleaners and nail salons.

COMMENT: Community Day Nursery asked why the child care centers should bear the burden of the remediation costs and that nail salons, dry cleaners and other entities that are responsible for such potential harm and hazardous residue be liable to pay for remediation costs. Ms. Burke noted some examples of entities that were identified as responsible parties for pollution regarding the Passaic River. The New Jersey Association for the Education of Young Children (NJAEYC) also expressed similar concerns regarding centers paying for environmental testing and remediation and that there were no funds for remediation.

RESPONSE: There are existing environmental rules that address the identification of responsible parties to take the necessary actions in such cases. Currently, the Department is not aware of public funds for remediation, although the Department intends to work with other State departments to identify any such funds.

COMMENT: Community Day Nursery indicated that the emergency rules do not address the emotional impact on children who have established relationships with care givers in the centers that may close.

RESPONSE: The Department recognizes that there may be emotional impacts on some children; however, safeguarding the health of children from the environmental hazards in particular centers is paramount.

COMMENT: Community Day Nursery states that none of us wants children to spend large portions of their days in a building that may be potentially hazardous to their health. Also, Respond, Inc., is in agreement that there should be regulations in place to ensure that buildings housing child care centers are entirely free of any hazardous materials. NADC also supports New Jersey's initiative to ensure that all child care centers are safe and healthy environments for children.

RESPONSE: The Department agrees and this is the primary reason for this new regulation.

COMMENT: NJAEYC asked where will families go when their children have been displaced when a child care program is closed.

RESPONSE: The Department will provide information to families who need to find new centers for their children. There are Child Care Resource and Referral Agencies located throughout the State that can provide this information as well. These agencies can be

reached at 1-800-332-9227.

COMMENT: NJAEYC is concerned that accessing city inspectors in a timely manner is difficult. Center directors have reported incidents when it has taken months to contact a building inspector in order to receive a Certificate of Occupancy or other inspections.

RESPONSE: In keeping with the Governor's news release of August 25, 2006, the Department of Community Affairs (DCA) has notified all municipal building officials of the new emergency child care center rules and to anticipate the potential impacts. DCA has included information on its website (www.state.nj.us/dca/codes). Centers can always call the Department of Children and Families (DCF) Office of Licensing for assistance in contacting the local building officials.

COMMENT: NJAEYC noted that the proposed new regulations did not address child care centers that may have had a previous agricultural use.

RESPONSE: The Department of Environmental Protection (DEP) has the authority and responsibility regarding potential environmental hazards resulting from previous agricultural use, including water and soil contamination problems by requiring centers to obtain No Further Action (NFA) letters.

COMMENT: NJAEYC indicated that it is redundant to require child care centers to obtain certification and documentation of previous building use, water, air, soil and the DEP "No Further Action" letter each time the license is renewed.

RESPONSE: The DCF Office of Licensing has already sent out a letter to all child care centers that clarifies that in most cases such certification and documentation need only be obtained once. However, as such a change cannot be made upon adoption because it would be too substantive, the Department will propose amendments to the rule in the future in order to further clarify that in most cases this information need only be obtained once upon renewal for existing child care centers.

COMMENT: NJAEYC pointed out that public schools are exempted from the new regulation since the regulation does not apply to them and, as such, NJAEYC asserts that these rules are discriminatory and will be misappropriated.

RESPONSE: As indicated by NJAEYC, DCF does not have the regulatory authority over public schools. DCF, instead, has regulatory authority over child care centers. DCF does not believe that this will lead to improper application.

COMMENT: NJAEYC suggested that the DCF Office of Licensing fund specialists to conduct environmental testing at the centers.

RESPONSE: As indicated, DCF is working with other State agencies to attempt to identify available funding.

COMMENT: NJAEYC suggested that a grant program be developed to provide funds for remediation at no cost or low cost. Respond, Inc., also commented that the fiscal impact on some child care centers may be overwhelming and that there should be some type of appropriations for relief. NADC commented that any new regulatory requirements should be tailored to protect children, without creating unnecessary administrative burdens or costs that will drive small business owners out of the child care sector or create disincentives to new child care center business.

RESPONSE: DCF will explore the availability of such grant programs with other State agencies. The Department's primary focus in proposing the new regulation is the impact it has on the health, safety and well-being of children.

COMMENT: NJAEYC indicated that the DCF Office of Licensing should have assessed the number of affected sites and collected responsible estimates regarding the costs of the amelioration without proposing mass closure.

RESPONSE: DEP has cross-referenced its database with the DCF database for child care centers and has started inspections of centers that are located near known contaminated sites. The DCF Office of Licensing lacks the authority and expertise to conduct environmental assessments.

COMMENT: NJAEYC commented that some centers located in public schools are currently exempt from meeting the physical plant requirements and that the exemption should be removed from the regulations and applied universally.

RESPONSE: [N.J.A.C. 10:122-1.2\(a\)2](#), in keeping with P.L. 2000, c. 122 ([N.J.S.A. 30:5B-5g](#)) exempts centers operated by a nonprofit organization in a public school building used as a public school from meeting the requirements governing the safety and adequacy of the physical plant or facilities. As this exemption is required by statute, DCF is unable to remove the exemption from the rules as the commenter has requested. It is important to note that DEP has the authority to take appropriate corrective actions in public school buildings.

COMMENT: NJAEYC expressed concern about the neighborhoods where centers identified with environmental problems may be located and raised several questions about the impacts such contamination may have on families being forced to leave their homes.

RESPONSE: As mentioned previously, the DEP has the jurisdiction over such environmental problems and would take the necessary and appropriate actions to ensure health and safety of the families.

COMMENT: NJAEYC expressed strong concern that regulations are repeatedly imposed on the child care programs and that regulations are designed by those who do not work in child care programs, or have a functional knowledge of how programs operate, but who craft policy deeply affecting programs. NJAEYC also indicated that the child care community be included in the discussions when such policy is created and noted that their appeals have gone unanswered.

RESPONSE: The Department disagrees that the rules were developed by those who lacked knowledge of how child care programs function. The persons crafting the rules have knowledge about centers and how they operate. The Department has a long history of including the child care community in the development of new and amended rules. While the emergency regulation was implemented due to extraordinary circumstances, the Department met and discussed the regulation with the membership of the Child Care Advisory Council. The Department will continue to seek input and advice from the child care community.

COMMENT: NJCCA strongly urges the DCF to adopt more stringent guidelines for all facilities occupied by entities licensed by DCF -- not just licensed child care centers.

RESPONSE: DCF will be pursuing the development of rules that address its other regulated

programs serving children.

COMMENT: NJCCA indicated that the verification that no environmental hazards exist in a child care center should be the responsibility of the landlord or owner of the building where the center is housed and not the child care operator unless they are the landlord/operator. NJCCA suggested that the language in the rules change the term "facility operator" to "landlord of the facility that houses the child care center."

RESPONSE: The landlord/owner would be responsible for obtaining the verification information through the municipalities and DEP. However, DCF has only the authority to regulate child care centers. The center would work in conjunction with the landlord/owner to ensure that the center is able to provide the required information to the Office of Licensing.

COMMENT: NJCCA recommended that [N.J.A.C. 10:122-5.2\(i\)7](#) specify that air sampling be required only when a dry cleaner or nail salon is located within 50 yards of the building co-located with a center, since there may be structures such as strip malls or shopping malls that are connected structurally housing all these entities but are located far away from the center.

RESPONSE: The Department understands the concerns raised, but the intent of the regulation is to protect children and staff from harmful fumes from dry cleaners and nail salons and the distance such fumes may travel vary greatly depending upon building design, air exchange systems and physical locations. As such, the Department will maintain the regulation as written. The DCF Office of Licensing will consult with DEP and the Department of Health and Senior Services (DHSS) in those circumstances where the distance of the nail salon or dry cleaner may be considered to determine whether or not air sampling is required.

COMMENT: Equity Environmental Engineering indicated that the rules do not address child care centers located in a building or on a site that is actively undergoing an environmental remediation that is not yet complete. Equity Environmental Engineering asked if a center is located in a building that previously housed a Use Group specified at [N.J.A.C. 10:122-5.2\(i\)1](#), and the site, not the building, is under a DEP-approved remediation plan, what documentation would be required from the center, such that they may continue to operate.

RESPONSE: The DCF Office of Licensing would accept documentation from DEP indicating that the children were not at risk during such remediation.

COMMENT: Respond, Inc., indicated that the child care center in Gloucester County seems to be an isolated case and is concerned that the entire child care community must suffer from the oversight that should have been picked up by the local officials.

RESPONSE: Although the situation in Gloucester County may have been isolated, it identified possible holes in the safety net that could place other children at risk. This regulation attempts to shore up that safety net because the State of New Jersey is committed to ensuring that all child care centers are safe for children and staff members and have implemented these emergency rules to accomplish that end.

COMMENT: NADC indicated that the new rules should be applied only to centers that are not subject to DEP oversight.

RESPONSE: The new regulation was developed with DEP, DHSS, DCA and the Department of Labor and Workforce Development to ensure that child care centers were safe for children

and did not present environmental risks. The intent of the regulation is not to duplicate DEP responsibilities and oversight, but rather to require child care centers to provide information that demonstrates that children in child care centers are not exposed to environmental hazards. As stated previously, the Department would accept documentation from DEP indicating that children were not at risk during an ongoing remediation.

COMMENT: NADC indicated that the Department should allow other forms of approval of site clean ups other than a "No Further Action" letter.

RESPONSE: The intent of the regulation is to ensure that there are no environmental risks to children. The Department would always consider other appropriate DEP documentation if an NFA letter could not be issued due to existing DEP oversight, as long as such documentation indicated there were no health risks. However, the Department will change [N.J.A.C. 10:122-5.2\(i\)6](#) upon adoption to include other types of documentation from DEP that indicates that there are no health risks.

COMMENT: NADC suggested that the Department only apply the new rules at [N.J.A.C. 10:122-5.2\(i\)4](#) through 6 to those centers that may present a potential hazard to children because the center is housed in a building that was previously used as one of the Use Group categories identified at [N.J.A.C. 10:122-5.2\(i\)1](#).

RESPONSE: The Department and the other involved State agencies believe that child care centers must have safe potable water. [N.J.A.C. 10:122-5.2\(i\)5](#) reinforces existing requirements for radon, lead and asbestos requirements. As such, the regulation will not be changed.

COMMENT: NADC suggested that the Department modify the requirement at [N.J.A.C. 10:122-5.2\(i\)3i](#) regarding compliance with DEP soil guidelines. NADC pointed out that when DEP has oversight of a facility and directs an appropriate soil sampling that this should be done without referencing DEP guidelines in the new rules.

RESPONSE: In keeping with similar comments, the Department would consider other appropriate DEP documentation related to the soil sampling that may be specific to a particular remediation. The Department has established clear communication lines with DEP so that these types of issues can be readily resolved.

Federal Standards Statement

The adopted current amendment is not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required for this rulemaking.

Full text of the adoption follows (addition to proposal indicated in boldface with asterisks ***thus***):

10:122-5.2 Physical plant requirements for all centers

(a)-(h) (No change.)

(i) Environmental condition precautions are as follows:

1. At the time of the initial application, any renewal application, relocation of an existing licensed center and, in the discretion of the Office of Licensing, any other time, the applicant/facility operator shall submit a written certification to the Office of Licensing

indicating whether the building has ever housed a use that was classified under the Uniform Construction Code, [N.J.A.C. 5:23](#), as any of the following:

- i. Group F - factory/industrial;
- ii. Group H - high hazard;
- iii. Group S - storage; or
- iv. Group B - dry cleaners or nail salons.

2. For those buildings that predate the Uniform Construction Code, the facility operator shall certify whether the building ever housed a use that would have been classified as any of those uses had the Uniform Construction Code been in effect.

3. In the event that the building housed a use that was or would have been classified as any of those uses listed in (i)1 above, the facility operator shall certify in writing to the Office of Licensing that the site of the center:

- i. Complies with the soil guidelines issued by the Department of Environmental Protection (DEP) pursuant to [N.J.A.C. 7:26E](#); and

- ii. That the facility operator has contacted the Department of Health and Senior Services regarding indoor environmental conditions and the Department of Environmental Protection to determine what further steps, if any, are necessary to address the risks posed by the prior historical use, and that the facility operator has complied with all corrective actions recommended by those agencies.

4. At the time of the initial application, any renewal application, relocation of an existing licensed center and, in the discretion of the Office of Licensing, any other time, the applicant/facility operator shall certify in writing that the center provides a potable water supply provided by a public community water system. If the facility or site is not provided a potable water supply by a public community water system, the applicant shall provide potable water sampling results demonstrating compliance with maximum contaminant levels for all contaminants required to be tested pursuant to N.J.A.C. 7:10-5 for non-transient, non-community (NTNC) water systems, regardless of whether they meet the definition of NTNC systems as defined at [N.J.A.C. 7:10-1.3](#). This sampling shall have been conducted within three years of the date of application submission, except nitrates and coliform, for which the sampling shall have been conducted within 90 days of submitting the application.

5. At the time of the initial application, any renewal application, relocation of an existing licensed center and, in the discretion of the Office of Licensing, any other time, the applicant/facility operator shall certify in writing that the center complies with all existing Department of Children and Families regulatory requirements for child care centers with respect to radon, asbestos and lead listed in (a)14 and (h) above and (j) below.

6. Effective June 1, 2007, at the time of the initial application, any renewal application, relocation of an existing licensed center and, in the discretion of the Office of Licensing, any other time, the facility operator shall submit to the Office of Licensing a No Further Action letter ***or other approval which indicates that no further remediation is needed for the site*** from the Department of Environmental Protection which indicates that no further remediation is needed for the site on which the center is located.

7. Effective January 1, 2007, the Office of Licensing shall not issue licenses or renewals to child care centers that are co-located in a building or other structure that contains a dry cleaner or nail salon unless the applicant obtains indoor air sampling that demonstrates that there is no impact to the child care center.

Recodify existing (i)-(q) as (j)-(r) (No change in text.)

39 N.J.R. 215(a)