

REPORT TO THE
UTAH LEGISLATURE

Number 2005-11

A Performance Audit
of the
Bureau of Child Care Licensing

October 2005

Audit Performed by:

Audit Manager	Rick Coleman
Auditor Supervisor	James Behunin
Audit Staff	Brandon Bowen David Pulsipher

Table of Contents

	Page
Digest	i
Chapter I	
Introduction	1
Audit Scope and Objectives	5
Chapter II	
Some BCCL Actions Do Not Comply with State Law and Administrative Rules	7
Serious Criminal Offenders Providing Child Care	7
Rule Variances Have Been Granted Inappropriately	12
Recommendations	14
Chapter III	
Utah's Child Care Rules Are Reasonable	15
Utah's Rules Are Justifiable	15
A Few Rules Need to Be Reevaluated	21
Recommendation	23
Chapter IV	
Enforcement Should Be More Consistent	25
Survey of Providers Points to Inconsistent, Not Heavy-Handed, Enforcement	25
Enforcement Records Reveal Inconsistency	27
The BCCL Needs to Provide Better Direction	32
Recommendations	35

Table of Contents (Cont)

	Page
Chapter V	
Administrative Hearings Should Ensure Due Process	37
Guidelines for Informal Review Needed	37
Rules for Adjudicative Proceedings Should be Clarified	41
Recommendations	45
Agency Response	47

Digest of A Performance Audit of the Bureau of Child Care Licensing

Chapter I: Introduction

Some of the practices of the Bureau of Child Care Licensing (BCCL) do not comply with either the law or administrative rules. Although prohibited by state law, the BCCL is granting child care licenses and residential certificates to individuals who have been convicted of serious crimes. In addition, the BCCL has granted rule variances without meeting the required criteria.

While most of Utah's child care providers believe the state's regulations are fair, we found a few rules that appear to be too harsh and should be reconsidered. In addition, we are concerned about the inconsistent practices we observed among the licensing specialists. While at times inconsistency leads to overly strict enforcement, at other times it leads to overly lenient enforcement. We also found inconsistencies in how the agency handles administrative appeals.

This report offers several recommendations that, if followed, will allow the Department of Health to provide better oversight of the Bureau of Child Care Licensing and bring greater consistency to the process of regulating Utah's child care providers.

Chapter II: Some Agency Actions Do Not Comply with State Law and Rules

Serious Criminal Offenders Providing Child Care. According to state law, serious criminal offenders may not provide child care and may not reside in homes where child care is provided. Contrary to the law, some exemptions from the rules have been granted without the consent of the Executive Director of the Department of Health. One exemption was granted to a provider whose husband was a criminal offender. He later abused a child in his wife's care.

Rule Variances Have Been Granted Inappropriately. A child care center may be granted a variance from certain licensing requirements only when the rule does not apply to the provider or when the rule's intent is met through different means. However, we found that 57 percent of the variances granted to child care centers and 59 percent of those granted to in-home child care providers do not meet either of these criteria.

**Chapter III:
Utah’s Child
Care Rules Are
Reasonable**

1. We recommend that the Bureau of Child Care Licensing comply with **Utah Code 26-39-107** and deny a child care license to any criminal offender who either by rule or law is not allowed to have one.
2. We recommend that the Bureau of Child Care Licensing obtain the approval of the Executive Director of the Department of Health before granting a license to misdemeanor offenders who, according to the law, must receive special approval.
3. We recommend that the Legislature amend **Utah Code 26-39-107** to clearly state that the criminal background requirements apply to all residents of a home where child care is provided.
4. We recommend that the Bureau of Child Care Licensing grant rule variances only for reasons specified in Utah Administrative Rules.

We found that most of the requirements for a child care license in Utah are not overly burdensome to child care providers. As required by statute, the BCCL has tried to balance the benefit of each rule with the burden it places on the child care industry. However, a few rules appear to be too restrictive and should be reevaluated.

Most of Utah’s Rules Are Justifiable. Based on our analysis of rules and our survey of providers, we feel Utah’s child care rules are justifiable. In general, we did not find significant differences between Utah’s child care rules and the rules of other states. In addition, most center providers we surveyed told us that Utah’s rules are fair and necessary.

A Few Rules Need to Be Reevaluated. We did find a few of Utah’s rules that appear to be more restrictive than those required in other states. Specifically, the rules regarding annual health assessments, playground cushioning, training hours, food handler permits, posting of daily activity plans, and room temperature should be reevaluated. The BCCL needs to review each of these rules to ensure that the benefit of the regulation outweighs the cost it imposes on child care centers. In addition, the child Care Licensing Advisory Committee should be consulted when reevaluating the rules.

1. We recommend that the Bureau of Child Care Licensing seek the advice of the Child Care Licensing Advisory Committee when reexamining the state’s child care licensing rules, including those specifically mentioned in this chapter, in order to determine the extent to which each rule represents a minimum health and safety standard while balancing the benefits with the burdens.

While we do not think that overly strict enforcement is a widespread problem at the BCCL, inconsistency of licensing staff is a major concern. This lack of consistency suggests that the Department of Health needs to have greater control over the BCCL's enforcement practices.

Survey of Providers Points to Inconsistent Enforcement. A survey of randomly selected child care providers indicates that enforcement of the rules is not heavy-handed but that it is inconsistent. We asked the directors of 51 child care centers how they would describe the licensing specialists who have visited their facilities. Most said that the staff is fair and helpful, but about a quarter of the providers said that licensing specialists are too strict. When we asked questions regarding the consistency of enforcement, 43 percent of those surveyed said they observed inconsistent practices among child care licensing specialists.

Enforcement Records Reveal Inconsistency. Further investigation into licensing specialists' records revealed large discrepancies in the average number of citations issued by licensing specialists. One licensing specialist issues an average of 10.3 citations during each inspection, while another issues only 3.5 citations per visit. Furthermore, only about half of the "high-harm" violations were being cited in accordance to the new enforcement policy. When asked how they would respond to specific hypothetical rule violations, licensing specialists gave differing responses.

The BCCL Needs to Provide Better Direction. The licensing specialists do not have a clear understanding of their agency's mission. In addition, the staff do not always follow a consistent procedure for inspecting child care facilities. In order to provide staff with the guidance they need to do their work correctly, the Bureau of Child Care Licensing needs to clarify the agency's mission statement and provide staff training on how to enforce the rules.

1. We recommend that the Bureau of Child Care Licensing create and follow a mission statement that conforms to, and does not exceed, the purpose of the bureau as set forth in **Utah Code 26-39-104(1)(a)**.
2. We recommend that the Bureau of Child Care Licensing formally adopt new enforcement procedures before they are implemented.
3. We recommend that the Bureau of Child Care Licensing provide licensing staff more extensive training on what constitutes a rule violation.

**Chapter V:
Administrative
Hearings Should
Ensure Due
Process**

Providers who wish to appeal an agency decision are not treated in a consistent manner. The Bureau of Child Care Licensing needs to develop a consistent process for handling both the informal hearings before agency staff and the more formal adjudicative proceedings before administrative law judges.

Guidelines for Informal Review Needed. We have two concerns regarding the informal reviews that are held for providers who wish to appeal agency decisions. First, since there are no policies or procedures, those who conduct the informal reviews are not using a consistent approach in how they handle a provider's appeal. Second, the practice of treating informal reviews as plea bargains and requiring providers to give up their rights to adjudicative proceedings is questionable.

Rules for Adjudicative Proceedings Should be Clarified. As with informal reviews, adjudicative proceedings also need a clearly defined set of procedures in order to provide due process. The term "due process" implies that a consistent and orderly procedure is followed when making decisions that affect people. It also implies that those who administer the process have enough independence from the investigation to provide a fair review of the agency's action. We found that adjudicative proceedings are not guided by clear rules when they are converted to informal hearings and that hearing officers may not be as independent as they should be.

1. We recommend that the Bureau of Child Care Licensing develop policies and procedures to guide staff and hearing officers during the process of conducting informal reviews and administrative proceedings.
2. We recommend that the Bureau of Child Care Licensing give information to providers that describes the bureau's administrative appeal process so they can understand their rights and how their appeals will be handled by the agency.
3. We recommend that the Bureau of Child Care Licensing amend Administrative Rule R430-30 to clarify what procedures apply when a hearing is converted to an informal proceeding.
4. We recommend that the Bureau of Child Care Licensing take steps to assure a separation between its investigative and prosecutorial functions and its adjudicatory function. Specifically, the hearing officer should be appointed by an agency head who is not involved with either the prosecution or the investigation of the case before that hearing office.

Chapter I

Introduction

According to Child Care Licensing Act (*Utah Code 26-39-104*), the state’s purpose for licensing child care providers is to “protect children’s common needs for a safe and healthy environment.” The state agency responsible for licensing child care providers is the Bureau of Child Care Licensing (BCCL) in the Department of Health (the department). The BCCL is led by an Bureau director who supervises three regional program managers. The three program managers supervise 25 licensing specialists who are divided among three regions.

Legislators are concerned that Utah’s child care regulations are too strict and the enforcement is too aggressive.

As it develops state child care standards, inspects facilities and issues licenses, the department is legally required to “...reasonably balance the benefits and burdens of each regulation... .” However, legislators are concerned that the state’s regulation of the child care industry is not balanced. They have asked the Legislative Auditor General to determine whether the licensing rules are too strict, whether the agency is too aggressive in how it enforces the rules, and whether providers are treated fairly when they appeal an BCCL action.

Utah Regulates Five Types of Child Care Providers

Utah currently issues licenses or certificates to five types of child care providers: (1) child care centers, (2) hourly centers, (3) family group providers, (4) family care providers, and (5) certified residential providers. Child care centers and hourly centers operate in buildings dedicated to providing child care. The largest child care center in Utah can serve up to 250 children. In contrast, family group and family providers offer child care services to far fewer children. A family provider working out of a home can care for as many as eight children. A family group provider with two adult caregivers can care for as many as 16 children in a home.

In-home providers also have the option of obtaining residential certificates from the state. Although providers with residential certificates are not licensed, they are still required to comply with a minimum number of health and safety requirements, and they may care for no more than eight children. Figure 1 shows the number of each type of state-regulated child care facility.

Figure 1. Half of the Children in State Regulated Child Care Facilities Attend a Child Care Center. Although it's still the most popular type of child care, the number of child care centers in Utah has decreased 7% during the past five years while other types have increased.

Type of Facility	Number of Providers (Dec. 1999)	Capacity (Dec. 1999)	Number of Providers (July 2005)	Capacity (July 2005)
Child Care Center	288	22,648	268	21,117
Hourly Center	20	620	82	3,157
Family Group	246	3,440	258	3,767
Family Care	1,137	7,834	801	5,774
Residential Certificate	493	3,670	1,332	8,883
Total	2,184	38,212	2,741	42,698

Source: The BCCL Database

Five years ago, child care centers accounted for 13 percent of all providers and 59 percent of child care capacity in the state. As of July 2005, child care centers compose just 10 percent of regulated providers and 49 percent of the child care capacity. In fact, both the number and the capacity of child care centers declined by about 7 percent in the past five years, although the child care industry has grown overall.

The directors of several child care centers have suggested that the state's overzealous regulation is responsible for the declining numbers of child care centers in Utah. However, other factors may have contributed to the decline.

Industry Changes Have Led to a Decline In Child Care Centers

The child care industry has experienced significant changes that have contributed to the decline in child care centers in Utah. Changes affecting both regulated and unregulated providers and have given parents more alternatives to child care centers than they have had in the past.

Some child care providers believe that overzealous regulation is forcing child care centers out of business.

In 1998 the Legislature passed SB 26 which allows residential providers to provide child care with less state regulation.

State Regulated Child Care Has Given Parents More Options.

An important factor in industry changes may be that parents can use state subsidies to pay some unlicensed child care providers. Through its state-subsidized child care programs, the Department of Workforce Services pays for a significant amount of child care in the State of Utah. In the past, those eligible for the subsidy could only take their children to a state-licensed child care facility. Now, residential certificate holders and family members who provide child care may also be paid with state subsidies.

Figure 1 (on page 2) shows that two types of regulated providers that have experienced significant growth in recent years—at home providers with residential certificates and hourly child care centers. Residential certificate holders now account for about half of all regulated providers; both the number of providers and their capacity have more than doubled in five years. Hourly centers have grown even more in percentage terms, although they remain the smallest provider type.

- **Residential Certificates.** The 1998 Legislature changed the law to allow residential child care providers to become “certified” rather than licensed. Those who seek a residential certificate need to meet a minimum set of health and safety standards. However, they are not subject to the same level of inspection as licensed providers, and they still qualify for publicly funded child care subsidies.
- **Hourly Centers.** Hourly child care centers have also grown in popularity among parents over the last several years. These centers allow parents to obtain unscheduled child care services for a few hours at a time. Unlike regular child care centers, hourly centers do not require permanent enrollment. They also follow a slightly different set of regulations than do child care centers. Since 1999, at least seven regular child care centers have converted into hourly centers.

Unregulated Child Care Has Increased in Popularity. State statute exempts certain groups from the following the regulations of the Child Care Licensing Act. Schools are exempt for “care provided as part of a course of study at or a program administered by an educational institution.” In addition, care provided by family members is exempt from state regulation.

A child care facility does not have to be licensed or certified to receive subsidies.

Most of the child care centers that closed in 2004 did not blame the state's tough regulation of the industry.

Four owners said the state's tough regulations influenced their decision to close down their centers.

- **School-Based Child Care.** We visited schools with child care centers in the Jordan, Granite, and Davis school districts, but we did not examine all school-based child care programs in Utah. Schools operate two types of programs. First, schools may operate a child care center in a high school as part of their home education and child development programs. The use of a school-based child care center is mainly limited to the employees of the school district. Second, elementary schools often operate before- and after-school programs for students. In the districts we visited, school officials told us that their child care programs followed the same rules that licensed providers are required to follow. However, it was beyond the scope of our audit to verify their compliance with the rules.
- **Relative Child Care.** Relatives are not required to obtain a child care license or certificate as long as they only provide care to family members. In addition, state subsidies can now be used to pay a relative, such as a grandparent or an aunt, to provide child care. Due to this change, many parents who receive child care subsidies have chosen to take their children to other types of providers rather than to child care centers.

Many Reasons May Contribute to The Closure of Child Care Centers

The state's regulation is rarely cited as the primary cause for centers shutting down. When we interviewed the owners of 39 of the 43 child care centers that closed during 2004, we found that most former owners cited personal or other reasons unrelated to state regulation of their businesses. Of the 39 child care centers directors who closed their centers in 2004, 19 said they had sold their centers while the other 20 simply shut down their operations for various reasons. The reasons given for shutting down or selling a child care center include the following:

- Retirement
- Personal financial difficulties
- Inability to attract clients
- City imposed zoning restrictions
- Personal health problems

However, four of the 39 owners said the state's regulations indirectly influenced their decision to close their center. They said they were forced to close their centers because it was too difficult to comply with all of the BCCL's requirements. Additionally, they mentioned that some of the licensors seemed too strict and inconsistent.

Audit Scope and Objectives

This report documents our audit of the state's regulation of the licensed/certified child care industry and addresses specific concerns raised by several center owners and directors. State legislators asked us to focus our audit work on three tasks:

1. Determine if the rules for a child care license are fair.
2. Determine if the agency is heavy-handed in its enforcement of the rules.
3. Determine if the agency provides adequate due process to child care providers, including whether independent hearing officers are available to hear appeals by child care providers.

Including this introduction, our report has five chapters. Chapter II identifies practices by the BCCL that violate the *Utah Code* and the department's own Utah Administrative Rules. Chapter III summarizes our review of Utah's child care rules and regulations. Chapter IV summarizes our findings with regard to the agency's approach to enforcement. And finally, Chapter V describes our review of the appeal process available to providers who wish to challenge a decision by the BCCL.

This Page Left Blank Intentionally

Chapter II

Some BCCL Actions Do Not Comply with State Law and Administrative Rules

Some of the practices of the Bureau of Child Care Licensing (BCCL) do not comply with either the law or administrative rules. Although prohibited by state law, the BCCL is granting child care licenses and residential certificates to individuals who have been convicted of serious crimes. In addition, the BCCL has granted rule variances without meeting the required criteria.

Some exclusions granted by the Bureau of Child Care Licensing are not allowed by state law.

Serious Criminal Offenders Providing Child Care

The BCCL has allowed criminal offenders who work or reside at a licensed child care facility even though state law and the administrative rules prohibit this practice. Under certain circumstances an exclusion may be granted, but only with the approval of the executive director. We found that BCCL staff, not the executive director, have been granting the exclusions. As a result, we know of at least one offender who received an exclusion that later abused a child who was in his wife's care. We recommend that the Legislature clarify the laws regarding background screenings to specify that criminal background requirements apply to all of the residents of a home where child care is provided.

Exclusions Granted for Individuals Who Failed The Criminal Background Screening

The Bureau of Child Care Licensing has granted exclusions to child care providers, their employees, or family members, even though they failed a criminal background screening. These individuals either had a felony offense, a misdemeanor offense that involved violence against a family member, or an illegal sexual conduct with a child. Figure 2 identifies offenses committed by 28 individuals who, according to state law, should not have been granted exclusions.

Figure 2. Those Convicted of a Felony, Any Sexual Crimes, or Violence Against a Family Member Are Not Eligible for an Exclusion. Exclusions were granted to 28 individuals who either have criminal convictions themselves, have an employee with a criminal conviction, or live with someone with a criminal conviction.

Type of Criminal Offense (All misdemeanors unless otherwise noted.)	Number of Convictions
Felony Drug Possession	4
Felony Forgery	1
Felony Sexual Activity with a Minor	2
Felony Theft	1
Assault (Against a Family Member)	17
Child Physical Abuse	1
Lewdness	3
Child Sexual Abuse	2
Aggravated Assault (Against a Family Member)	1
Sexual Battery	1
Sex Solicitation	1
Total Convictions	34
Total Individuals	28

28 individuals should have been prohibited from being associated with a child care facility.

Figure 2 describes 28 individuals who were granted exclusions in violation of either the state law or BCCL’s administrative rules prohibiting certain criminal offenders from having a child care license. Fourteen of these individuals provide direct care to children, while another fourteen reside in homes where child care is provided, often as the spouse of an in-home provider. Their crimes include felony offenses, violence against family members, and sex offenses. According to state law, they are not allowed to provide child care, work in a child care facility, or otherwise reside at a home where child care is provided. BCCL has not complied with these regulations. However, since June 2005, BCCL has adopted a new policy toward BCI checks and has denied all requests for exclusions from this regulation.

Exclusions Granted Without Approval from The Executive Director

State law allows the executive director of the Department of Health to grant exclusions for certain types of misdemeanor offenses. However, BCCL staff have granted exclusions without the executive director’s formal approval. These exclusions include a wide range of misdemeanor offenses, as shown in Figure 3.

23 misdemeanor offenders are associated with a child care center without authorization from the Executive Director.

Figure 3. BCCL Staff, Without Approval From the Executive Director, Have Granted Exclusions to Criminal Offenders. BCCL staff granted exclusions to 23 individuals who had a total of 34 misdemeanor convictions.

Type of Criminal Offense	Number of Convictions
DUI	13
Theft	5
Assault	4
Forgery	6
Aggravated Assault	2
Drug Possession	5
Violation of Protective Order	1
Hit & Run	1
Supplying Alcohol to a Minor	1
Obstructing Justice	1
Fraud	1
Total Convictions	30
Total Individuals	19*

* Some individuals were convicted of multiple crimes.

The above figure identifies 30 misdemeanor offenses committed by 19 individuals who either provide child care services directly or who reside in homes where child care is provided. While the above crimes are not considered as serious as the offenses described in Figure 2, BCCL needs to use extreme caution when granting licenses to criminal offenders. For this

reason, the law requires that such decisions be made under the direction of the executive director, and not by staff.

Statute Prohibits Criminal Offenders From Providing Child Care

According to state law, any individual who has been convicted of a felony may not provide child care directly or be associated with the administration of a child care center. *Utah Code 26-39-107(2)* states:

An owner, director, member of the governing body, employee, provider of care, or volunteer who has a felony conviction may not provide child care or operate a residential certificate or licensed child care program.

The statute also prohibits BCCL from granting a child care license to those “convicted of a misdemeanor” except under certain circumstances. The law allows BCCL to grant exceptions or “exclusions,” but they must be approved by the executive director of the Department of Health.

We are also uncomfortable with BCCL’s decision to delegate to a staff person the responsibility specifically given to the executive director. The law states that “the executive director may consider and approve individual cases in accordance with criteria established by rule.” In our view, this means that the executive director may ask staff to review applications for an exclusion and make recommendations, but that he must consider each staff recommendation and approve the exclusion under his signature. The following example helps to explain why BCCL needs to use caution when granting exclusions to criminal offenders.

One Offender Who Received an Exclusion Later Abused a Child

An in-home child care provider was granted a license even after her husband had failed the department’s criminal background check. He had previously been convicted of violating a protective order. The provider asked for an exclusion for her husband, and the request was granted, with the condition that he not be left alone with children. Several months later, the child care provider did in fact leave her husband alone with some of the children in her home-based child care business. During this time,

A child was sexually abused in a home that should not have been licensed according to the administrative rules.

he sexually abused a five-year-old girl. Eventually, the man pled guilty to a charge of sexual battery.

We spoke with the staff person responsible for reviewing requests for exclusions to criminal background screenings and asked why she was granting exclusions to felony and misdemeanor offenders when the law said that the executive director should make that decision. The staff person said that she told her superiors she was uncomfortable making such decisions, but they told her to make the decisions anyway.

Legislature Needs to Clarify the Statute Regarding Background Screenings

During our review of the exclusions given to criminal offenders, we discovered a technical problem with language contained in the statute. The law instructs the Department of Health to perform a criminal background screening for “all adults residing in a residence where child care is provided,” as well as owners, directors, board members, employees, providers of care, and volunteers. However, if the background screening reveals that an adult residing in the home has a criminal history, the statute does not explicitly require the department to act on that information. While it is clear that the Legislature’s intent was to apply the restrictions to all adults living in a home where child care is provided, that intent needs to be more clearly described in the statute.

We recommend that the Legislature clarify the law and require BCCL to respond whenever they discover that an adult family member has a criminal record. The following additions should be made to *Utah Code* 26-39-107:

- (2) An owner, director, member of the governing body, employee, provider of care, **all adults residing in a residence where child care is provided**, or volunteer who has a felony conviction may not provide child care, **reside in a home where child care is provided**, or operate a residential certificate or licensed child care program.
- (3) An owner, director, member of the governing body, employee, **all adults residing in a residence where child care is provided**, or other provider of care who has been convicted of a misdemeanor may not provide child care, **reside in a home where child care is provided**, or operate a residential certificate or licensed child care program, except that:

The Legislature needs to clarify the statute barring criminal offenders from residing in the home where child care is provided.

The above changes should clarify the Legislature’s intent that the criminal background requirements apply to all of the residents of a home where child care is provided.

Rule Variances Have Been Granted Inappropriately

The BCCL has also granted variances to certain administrative rules designed to protect the health and safety of children in child care. These variances are not a violation of state law, but they do violate the Utah Administrative Rules. Though the Utah Administrative Rules allow for variances that meet certain criteria, many variances that have been granted do not meet these criteria.

57 Percent of Variances Granted to Centers Violate Department Rules

The Utah Administrative Rules state that a variance may be granted to a child care center if at least one of two criteria are met (R430-100-5(1)):

- they can show how the rule does not apply to them
- they demonstrate how they will comply with the intent of the rule by different means

If the provider cannot meet at least one of these two criteria, BCCL should not grant a variance. We randomly sampled 76 variances that have been granted to centers since 2002, most were granted in or after 2004. The BCCL granted 43 of the 76 variances were granted for reasons other than one of the two listed above. The reasons given for the variances include: hardship, inability to comply, attempts to comply, and lack of available child care in the geographical area. Such justifications for variances do not meet the requirements described in the Utah Administrative Rules. We found no evidence that the official criteria, mentioned above, were met in order for these variances to be granted.

Many current variances granted to child care centers appear to go outside the principles set forth in the administrative rules (showing non-application or compliance with intent). Providers were granted variances permitting the following:

Nearly half of all rule variances granted to centers are in violation of Utah Administrative Rules.

Many variances have been granted for reasons that are not allowed by the administrative rules.

- no fence in outside play area of in-home provider because provider didn't want to "put the neighbors out"
- a provider to offer care without a high school diploma or GED because she does not yet have a high school diploma or GED
- an indoor play structure to exceed the 3 ft. height limit because it is 10 ft. high
- child/care-giver ratios to be exceeded because there are not enough child care providers in the rural area to meet the "demand"
- not requiring a provider to have a sink in each play area because there is not a sink in each play area
- allowing ratios to be exceeded so that an infant addicted to methamphetamine can enroll in the provider's program
- allowing ratios to be exceeded because the provider feels that she "is up to it"

None of the variances listed above should have been granted, because the providers could not show why the rule did not apply to them or how they might achieve the purpose of the rule through some other means. Apparently, these variances were granted because compliance would have inconvenienced the providers.

59 Percent of Variances to Other Licensed Providers Are Questionable

We randomly selected 39 variances granted to other types of child care providers besides the child care centers. Although there are no rules governing the granting of variances to other types of child care providers, 23 of the 39 variances, or 59 percent, violate the same principles found in the rules governing variances to child care centers.

None of the variances listed above should have been granted because the providers could not show why the rule did not apply to them or how they might achieve the purpose of the rule through some other means. Again, it appears that variances were granted because compliance would have inconvenienced the providers.

We question the justification for another 23 variances that were granted by the BCCL.

Only those items provided for in the administrative rules should be considered when granting a variance to a child care center. Since the time we identified the above practices, officials within the Department of Health have developed a new variance policy that applies to all types of child care providers. In addition, they have committed to: (1) approve fewer variances to the licensing rules, and (2) consider whether certain rules are really justified if variances are commonly needed.

Recommendations

1. We recommend that the Bureau of Child Care Licensing comply with *Utah Code 26-39-107* and deny a child care license to any criminal offender who either by rule or law is not allowed to have one.
2. We recommend that the Bureau of Child Care Licensing obtain the approval of the Executive Director of the Department of Health before granting a license to misdemeanor offenders who according to the law must receive special approval.
3. We recommend that the Legislature amend the *Utah Code 26-39-107* to clearly state that the criminal background requirements apply to all of the residents of a home where child care is provided.
4. We recommend that the Bureau of Child Care Licensing grant rule variances only for reasons specified in Utah Administrative Rules.

Chapter III Utah's Child Care Rules Are Reasonable

Utah's child care rules appear fair and reasonable. We found that the requirements for a child care license in Utah are not overly burdensome to child care providers. However, we did identify a few rules that the Bureau of Child Care Licensing (BCCL) should reevaluate because they appear to be somewhat stricter than those of other states and may unnecessarily increase costs. By statute, the BCCL is required to balance the benefit of each rule with the burden it places on the child care industry. Since we did find some differences with other states, we recommend that the BCCL, with the assistance of its Advisory Committee, review these rules.

Utah's Rules Are Justifiable

Based on our analysis of rules and our survey of providers, we feel Utah's child care rules are justifiable. In general, we did not find significant differences in child care rules between Utah and other states. In addition, most center providers we surveyed told us that Utah's rules are fair and necessary.

Utah's rules for child care are generally consistent with those of its surrounding states.

Utah's Child Care Rules Are Similar To Those of Other States

We compared 16 of Utah's child care rules to those of other states. Our review focused on child care center rules rather than those that apply to other types of licenses or certificates. We began with two rules that may have a great impact on the cost of operating a child care center because they affect the number of staff and the amount of space required. In addition, we evaluated 14 other rules that are either frequently cited as violations by Utah's child care licensors or that some providers suggested were too strict.

Except for the staff-to-child ratio and the square-footage-per-child rules, for which we present national data, we compared Utah rules to those of six surrounding states. In some cases, it's difficult to compare

rules because they differ in so many ways. For example, training requirements for center staff differ in the number of hours required, the curriculum required, and the setting in which training can be received. Thus, it was sometimes difficult to judge whether a Utah rule was more strict or lenient than that of another state.

Utah’s Staff-to-Child Requirements Are Consistent with Other States. One of the regulations that imposes the greatest financial burden to providers is the requirement to maintain a certain staff-to-child ratio. As shown in Figure 4, Utah’s ratio requirements are not significantly different from those of other states.

Utah’s staff-to-child ratio requirements are comparable to those of other states.

Figure 4. Utah’s Staff-to-Child Ratios are Comparable to those of Other States. Like most states, Utah requires more staff per child at younger ages, but less staff per child at older ages.

Ratios	9 Months	27 Months	4 Years	6 Years
1:3	3	1		
1:4	32 	12		
1:5	9	12		
1:6	6	15		
1:7		5 		
1:8		2	1	
1:9		3		
1:10			16	2
1:11				
1:12			14	2
1:13			3	3
1:14			2	3
1:15			6 	13
1:16			3	3
1:17				
1:18			3	6
1:19				
1:20			2	11 
1:21				
1:22				2
1:23				
1:24				
1:25				4
1:26				1

Source: National Child Care Information Center



National Standard



Utah’s Standard

Figure 4 shows that Utah's staff to child requirements are not significantly different from those of other states. For example, a child that 9 months, would be in a group of four children with one caregiver. The majority of states have the same requirement. Utah's requirement for the older children is still quite similar to those of other states, although Utah tends to join the state's at the less restrictive end of the range. For example, Utah joins 10 other states in requiring only one caregiver for every 20 children at age six.

Figure 4 also compares the Utah requirement to a widely recognized national standard which is found in the publication titled *Caring for Our Children: National Health and Safety Performance Standards Guidelines for Out-of-Home Child Care Programs*. This book is endorsed by the U.S. Department of Health and Human Services, the National Resource Center for Health and Safety in Child Care, the American Academy of Pediatrics, the American Public Health Association, and the Maternal and Child Health Bureau. This national set of health and safety guidelines is an ideal that is expensive for providers to meet, and we are not aware of any state that has adopted them entirely. Figure 4 shows that Utah does not follow the national standards for any age group.

The Square Footage Requirement in Utah Is Equal to That of Most States. As with the staff-to-child ratio, space requirements can have a significant impact on the cost of operating a child care center. We found that 42 states, including Utah, follow the national standard of 35 square feet of space per child. One state requires more than 35 square feet per child and seven require less.

Thus, when considering the two rules that may have the greatest impact on the cost of operating a child care center, we did not find a significant difference between the Utah rule and other states.

Other Utah Rules Are Also Comparable to Those in Other States. In addition to the staff and space requirements, we reviewed 14 other Utah child care center rules and found that they were generally similar to those of other states. We examined the nine rules that have resulted in the most citations (besides the ratio rule) and five other rules that some providers identified as too strict. Figure 5 shows the other rules we compared with those in the six surrounding states.

Utah's requirement for square footage per child is consistent with the requirement in other states.

Figure 5. Audit Analysis Indicates Six Utah Rules May Be More Strict than Other States. We compared the 10 most commonly cited rules, plus five other rules, to those of surrounding states.

<u>10 Most Commonly Cited Rules</u>	<u>Audit Analysis</u>
1. Safe Toys and Equipment	rules are similar
2. Annual Health Assessment	Utah rule more strict
3. Playground Cushioning	Utah rule more strict
4. Wall and Ceiling Maintenance	rules similar
5. 20 Hours of Annual Training	Utah rule more strict
6. Provider TB Test	rules similar
7. Proper Toxic Chemical Storage	rules similar
8. Child: Staff Ratio Requirements	rules similar (see Figure 4)
9. Food Handler Permit	Utah rule more strict
10. Regular Fire and Disaster Drills	rules similar
<u>5 Rules Questioned by Some Providers</u>	
1. Posted Menu	rules similar
2. Posted Activity Plan	Utah rule more strict
3. Minimum Facility Temperature	Utah rule more strict
4. Regular Snacks and Meals	rules similar
5. Undistracted Nap Time	rules similar

Source: *Audit Analysis of Utah Rules with those of six surrounding states.*

Figure 5 identifies six rules that, according to our analysis, may be more strict than those of other states. While most of these differences seem relatively minor to us, they may be important to providers. Therefore, we believe the BCCL needs to review each of these rules to ensure that the benefit of the regulation outweighs the cost it imposes on child care centers. The final section of this chapter details how each of these six rules differ between Utah and our surrounding states.

In summary, while our analysis indicates some rules should be reevaluated, as a whole, Utah’s rules are similar to those of its surrounding states. As the next section shows, most providers agree that Utah’s child care regulations do not impose an unreasonable burden.

Child Care Providers Think the Rules are Fair

Our survey of child care center providers shows that most providers believe Utah’s child care rules are fair and appropriate. We randomly selected 51 child care centers and asked the directors or owners to give their opinions about the regulation of child care in Utah. We asked the providers if the requirements to obtain a child care license were “fair and

A few of Utah’s rules may be more strict than those of other states.

necessary to protect children,” “too strict,” or “below what might be considered a minimum standard.” Figure 6 summarizes the providers’ responses.

Figure 6. Most Providers in Centers Think the Rules are Fair. We called 51 randomly selected providers in child care centers and asked them to characterize the rules for having a child care license.

87% of child care providers do not think the current rules are too strict.

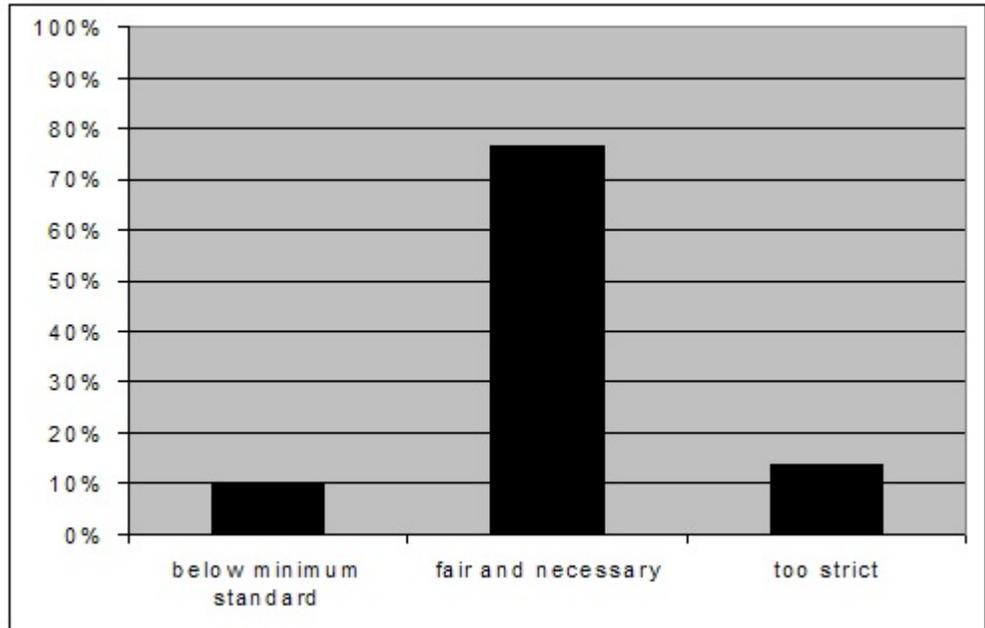


Figure 6 shows that the majority of the directors of child care centers (76 percent) said that they believe that Utah’s child care licensing rules are fair and necessary. Only 13 percent said the rules were too strict in their opinion, and another 10 percent said that they believed the rules were too lenient. So overall, 86 percent of surveyed providers believe that Utah’s child care rules are not too strict.

If providers said they thought the rules were too strict or too lenient, we asked them to provide examples. The rule most often cited as inappropriate was the staff-to-child ratio requirement. Several providers said they thought the requirement is too strict, while others said it is too lenient.

In conclusion, based on our comparison of Utah’s rules to those of other states and on our survey of providers, we find little evidence that

Utah’s child care licensing rules place a greater burden on providers than the rules of other states.

A Few Rules Need to Be Reevaluated

While Utah’s child care rules taken as a whole seem reasonable, we did find a few rules that the BCCL should review with its advisory committee. Licensing rules establish minimum health and safety standards that all providers must meet. These rules are important to protect the children and families who rely on the child care industry. At the same time, overly strict rules may impose unnecessary costs on child care providers that are passed on to consumers. Therefore, *Utah Code* requires that as these minimum standards are established, the BCCL balance the added benefit of each requirement with the burden it places on child care providers.

The BCCL Should Seek the Direction Of the Advisory Committee

The Child Care Licensing Advisory Committee (advisory committee) has been statutorily created to help the BCCL establish necessary and reasonable rules. Although the diverse membership seems appropriate to help regulators balance the benefit and burden of proposed rules, agency staff acknowledge the advisory committee has not been used as effectively as it should be. We think it’s important that the BCCL seek the assistance of the advisory committee as it reexamines the rules described in this report as being somewhat more strict than those of other states.

Advisory Committee Input Can Be Valuable. The advisory committee was established by the Legislature to “advise the department on rules promulgated by the department pursuant to the [Utah Child Care Licensing Act].” By statute, the committee consists of 13 members representing consumers, providers, and professionals. Members include:

- two child care consumers
- two licensed residential child care providers
- one certified residential child care provider
- five representatives of licensed child care center programs
- one individual with expertise in early childhood development
- two health care providers

The advisory committee gives direction to the BCCL regarding its rules.

The advisory committee should consider the burden some rules place on child care providers.

Because of their diverse backgrounds, the members of the advisory committee should be able to assist the BCCL in balancing the benefit of a rule with the burden it places on providers. However, as we reviewed advisory committee meeting minutes and interviewed staff, it was apparent that the committee can be used more effectively.

Greater Reliance on the Committee’s Advice Is Needed. It appears that the committee has not always been relied on as extensively as it should have been. For example, we found that the committee was not involved in the development of important aspects of the new enforcement protocol instituted in 2005. Thus, the designation of high harm rules, rules that could cause immediate danger to the health and safety of the children, was based on the BCCL staff getting together to vote on the new standards without input from the advisory committee. However, in recent months we have observed that the BCCL has increased its reliance on the advisory committee. We think the committee can be a valuable aid to the BCCL as it reviews the rules we identified as somewhat more restrictive than those of other states.

Some Rules Should Be Reviewed

As mentioned earlier, our analysis identified six rules that seem to be at least somewhat more restrictive than rules in surrounding states. They include the following requirement: (1) an annual health assessment for each child, (2) 9 inches of playground cushioning, (3) 20 hours of training, (4) a food handler permit for those who prepare and serve food, (5) a posted activity plan, and (6) 72 degree minimum temperature in child care facilities during the winter months. In many cases we view the differences as relatively minor, but we believe they still merit a review by the BCCL and its advisory committee.

- **Annual Health Assessment.** Every other state we examined requires the parents of children in child care to provide some sort of health assessment to the provider. Utah is the only intermountain state that requires an *annual update* of the health summary for each child in care.
- **Playground Cushioning.** Utah’s child care rules require that a playground have at least nine inches of cushioning within a six-foot fall zone of all play equipment, regardless of the height of the equipment. Other states have more lenient requirements. For

The Bureau of Child Care Licensing should reevaluate a few rules.

example, Colorado only requires four inches of cushioning, and Arizona only requires six inches; Idaho, Wyoming, New Mexico, and Nevada only require “a soft surface.”

- **Training Hours.** Each of the six surrounding states requires the child care center staff to receive some training each year. Utah’s annual 20-hour training requirement exceeds the requirements other states, but only 10 of those hours need to be spent in formal classroom training. The other 10 hours of training can be spent doing personal study, such as reading a relevant article or book. The BCCL also allows the providers to count time spent in required CPR and food handler training as part of the 10 hours of formal training. The six surrounding states require an average of 14 hours of classroom training and no other state gives the option of personal study.
- **Food Handler Permit.** Utah mandates that all providers who prepare and serve food have a food handler permit. None of the states that border Utah have this same requirement.
- **Posted Daily Activity Plan.** Four of the six surrounding states require some sort of activity plan, however no other state requires the provider to *post* the plan.
- **Room Temperature.** Utah’s child care rules require that the room temperature in a child care center be maintained at 72 degrees. Four of the six surrounding states require a minimum temperature of 68 degrees. The other two states do not have a room temperature requirement. In addition, the national standard often used to justify some of Utah’s child care rules requires a minimum temperature of only 65 degrees.

Recommendation

1. We recommend that the Bureau of Child Care Licensing seek the advice of the Child Care Licensing Advisory Committee when reexamining the state’s child care licensing rules, including those specifically mentioned in this chapter, in order to determine the extent to which each rule represents a minimum health and safety standard while balancing the benefits with the burdens.

This Page Left Blank Intentionally

Chapter IV Enforcement Should Be More Consistent

While we do not think that overly strict enforcement is a widespread problem at the BCCL, inconsistent practices by licensing staff is a major concern. Our survey of providers and our analysis of enforcement data both indicate the BCCL has been inconsistent in its enforcement practices. While at times inconsistency leads to overly strict enforcement, at other times it leads to overly lenient enforcement. When enforcement is too strict, providers may be treated unfairly and costs to consumers may be unnecessarily increased. When enforcement is too lenient, children and families may not be adequately protected. This lack of consistency suggests that the Department of Health needs to have greater control over the BCCL's enforcement practices.

Survey of Providers Points to Inconsistent, Not Heavy-Handed, Enforcement

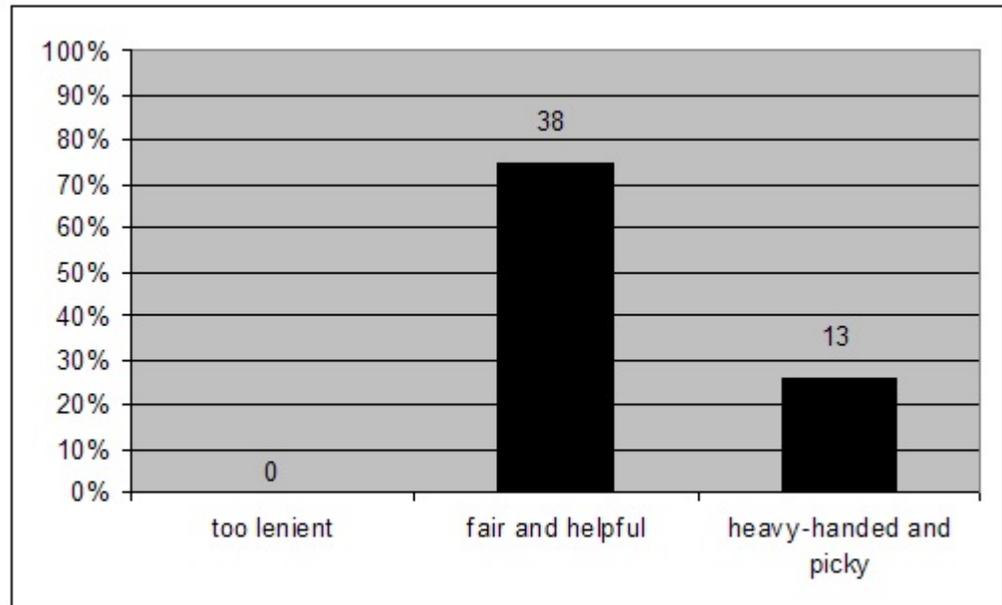
Because some providers are concerned the BCCL is too aggressive in its enforcement of the rules, we conducted a survey to determine how many child care providers share this view. The results indicate that a majority of child care providers do not believe that the licensing specialists use a heavy-handed approach as much as they believe they are inconsistent in their approach to enforcement.

We surveyed the directors of 51 child care centers in Utah and asked them how they would describe the licensing specialists that have visited their facilities. Specifically, we asked if they would describe the licensing specialists as (1) heavy-handed and picky, (2) fair and helpful, or (3) too lenient. As shown in Figure 7, most said that the staff is fair and helpful, but about a quarter of the providers said that the licensing specialists are too strict.

Providers think the licensing specialists are inconsistent, rather than simply heavy-handed.

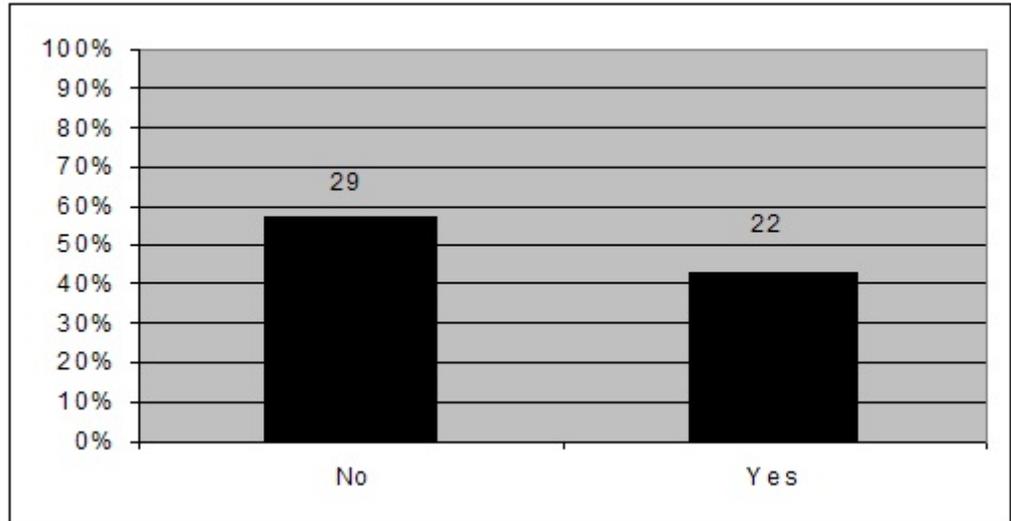
Most providers regard the licensing staff as fair and helpful.

Figure 7. Most Providers think Licensing Staff is Fair and Helpful.
We asked a group of randomly selected directors and/or owners of child care centers about licensing staff.



Given licensing specialists' responsibility to enforce rules, it is not surprising that some providers would express concern with their actions. Yet most providers regard licensors as fair and helpful. As a follow-up question, we asked the providers if they had ever noticed inconsistencies in the way that licensing specialists enforce rules. Figure 8 shows the responses.

Figure 8. 43% of Child Care Center Providers Have Noticed Inconsistent Enforcement. Our survey of providers indicates inconsistency is more of a concern than heavy-handedness.



Providers' greatest concern is with the inconsistent practices demonstrated by licensing specialists.

The responses to our survey indicate that while some providers believe the BCCL is too harsh in its enforcement of the rules, the greater concern lies with inconsistent enforcement. For example, a couple of providers complained that a specialist cited them for something that another specialist told them was acceptable. Several providers said that licensing specialists often have different expectations or interpretations about what constitutes a rule violation. Some specialists reportedly have “pet” rules that they focus on. Some providers indicated that some licensing specialists are much more helpful than others because they focus on correcting problems found rather than on issuing citations.

Enforcement Records Reveal Inconsistency

Our review of enforcement actions identified additional evidence of inconsistent practices by the licensing staff. First, we found that some licensing specialists issue many more citations than others. Second, only about half of the high-harm violations observed January through March 2005 were properly cited while the other half received technical assistance. Third, we found that licensing specialists respond differently to similar situations.

Some Licensing Staff Issue More Citations than Others

One significant difference among licensing staff is the number of citations they issue during routine inspections. We found that some licensing specialists issue more than twice the number of citations than others during their annual inspections of child care centers. Figure 9 lists the average number of deficiencies issued by each licensing specialist during the years 2002, 2003, and 2004.

Figure 9. Average Number of Violations Cited by Licensing Specialists Varies. During the annual inspections of child care centers, the average number of violations cited by licensing staff ranged from 10.3 violations to 3.5 violations.

Licensing Specialist	Number of Inspections	Number of Citations	Average Violations Cited per Inspection
A	14	144	10.3
B	16	123	7.7
C	19	144	7.6
D	25	186	7.4
E	52	385	7.4
F	13	84	6.5
G	20	127	6.4
H	21	124	5.9
I	30	176	5.9
J	20	113	5.7
K	26	144	5.5
L	25	136	5.4
M	31	164	5.3
N	28	144	5.1
O	27	130	4.8
P	45	215	4.8
Q	37	149	4.0
R	18	66	3.7
S	18	63	3.5

**Citations for Centers
are based more on
who inspects the
facility.**

Figure 9 shows that the licensing specialist A issued an average of 10.3 violations during annual inspections of child care centers compared to only 3.5 by specialist S. We assessed whether the size or location of the centers inspected might explain the difference in the number of citations among specialists, but we found no association in either case. It appears to us that some licensing specialists are simply more likely to issue citations than others. Additional evidence of inconsistency is described in the examples below.

Some High-Harm Violations Not Cited

In December 2004, the BCCL adopted a new practice of only issuing citations for violations of rules designated as high harm. Certain rules have been designated as high harm because violations pose an imminent safety risk to the child; thus, citations should always be issued for high-harm rule violations. Less critical rule violations are handled through technical assistance; no citation is issued unless a provider remains out of compliance on a follow-up inspection. However, we found that in some instances the licensing specialists are providing technical assistance even when they find violations in the high-harm areas. As a result, some serious violations are not being cited by the licensing staff.

To verify that the new enforcement policy had been properly implemented, we randomly selected 30 centers, 10 from each of the BCCL's three regions, that had been inspected since January 1, 2005. We then reviewed how the licensing specialist responded to each rule violation. Out of 27 violations of high-harm rules, only 14 were cited. The response to the remaining violations was to provide technical assistance, as shown in Figure 10.

**Some licensing
specialists are not
issuing citations to
those violating
certain high harm
conditions.**

Figure 10. 2005 Deficiency Sample. We randomly selected 10 files of centers which have been inspected since January 1, 2005. The response (citation or technical assistance) was noted for each rule violation associated with the selected inspection.

Region	Tech. Assistance for High-harm Violations	Number of High-harm Violations	Percent of Tech. Asst. For High-harm Violations
Northern	4	7	57%
Central	6	11	55
Southern	4	9	44
Total	14	27	52%

Thus, our review of the licensing inspections conducted during the first three months of 2005 indicated citations were not issued for more than half of all documented violations of high-harm rules. Some of the more common high-harm violations that were documented, but not cited, were:

- Excessive child/staff ratios
- Lack of supervision
- Hazardous chemicals improperly stored

Specialists Respond to Similar Situations Differently

Through interviews and our own observations we identified some inconsistency in how different licensing specialists handle similar situations. We discussed both actual citations that had been issued and hypothetical situations with the BCCL staff. Some licensing specialists told us that they would issue a citation for a certain problem at a provider’s facility. However, other licensing specialists told us that they would mention the problem to the provider, but they would not cite it as a violation. The following paragraphs describe examples of rules or situations for which licensing specialists gave us inconsistent explanations of how they would be handled.

Different Licensing Specialists Handle the Water Temperature Rule Differently. The rules for a child care license require that the hot water at a tap may not exceed 120 degrees Fahrenheit. Some licensors said that they probably would not issue a citation unless the tested water temperature was slightly above 120 degrees because thermometers are not

always completely accurate. Others said that they would allow up to 130 degrees. Still others suggested that they typically do not issue a citation unless the temperature exceeds 140 degrees because that is the temperature at which they were told a serious burn is most likely.

Staff-to-Child Ratio Handled Differently. We asked several licensing specialists what they would do if they encountered the following scenario:

During an inspection of a child care center, they walk into a room and find five sleeping infants and no adult. Almost immediately, the adult staff person rushes into the room stating that she had to use the restroom.

Many licensing specialists said that they would not cite the violation but would simply tell the caregiver and/or director about the rule being violated and its importance. However, other licensing specialists said they would consider it a violation of the requirement that children always be supervised because the caregiver should have already known to find a substitute for bathroom breaks.

Menu, Hand Washing Sign, or Evacuation Plan Not Posted Due to Painting. The administrative rules state that several documents be posted at various locations within a day care center. The menus need to be posted on the wall so parents can monitor what their children are eating each day. In addition, each classroom must have an evacuation plan posted. Finally, signs reminding people to wash their hands must be posted in the bathrooms. At one child care center an evacuation plan had been removed so that the walls could be painted. When the licensing specialist arrived to inspect the facility, the center was cited because the document had not yet been replaced on the recently painted wall. The licenser viewed this as a violation of the rules and issued a citation. We conducted a survey of licensing specialists and asked them what they would do if a document, such as a menu, was not posted because the room had recently been painted. Some said they would have issued a citation while others said they would not.

Caregiver Cited for Handing Pear Slices to Children on the Playground. The administrative rules state that children's food must be served on a plate or napkin, not directly on a bare table. During an inspection, a licensing specialist issued a citation when she saw a teacher

who was outside on the playground slicing pieces of a pear and handing a piece to any child who wanted one. Though the teacher said that she and the children had washed their hands before eating the pear, she was issued a citation because she did not set the food directly on a napkin or plate. Some other licensing specialists, when asked what they would have done in that type of situation, said that they would not have issued a citation.

The preceding tables and examples illustrate the inconsistency that exists in the way the BCCL enforces the state’s child care regulations. We found that some licensing specialists are much more willing than others to simply let certain violations go unreported if the provider has what the licensing specialists feel is a good explanation for why the violations exists, or if the provider corrects the problem before the licensing specialist completes the inspection.

The BCCL Needs to Provide Better Direction

The BCCL needs to ensure that a set of professional standards are established and followed. According to the licensing staff, many of the decisions made during the inspection of a child care center are subjective and are based on what the licensing specialists refer to as their “professional judgement.” However, this professional judgement needs to be guided by clear policies and procedures and training in how to apply them. We determined that the BCCL is not following its own administrative rules. Instead, staff are expected to follow verbal instructions regarding potentially new administrative rules that have never been formally adopted.

There are three things that the BCCL should do to ensure that the licensing specialists understand their responsibilities and follow the standards established by the department. First, the department needs to refocus staff on the BCCL’s mission to protect the health and safety of children in child care. Second, it must develop a set of procedures for inspecting child care centers and for responding to specific rule violations. Third, licensing staff need to receive training on how to enforce the rules consistently.

Providers do not know what to expect from each licensing specialist.

Differing interpretations of the BCCL’s mission contradict each other and statute.

Mission and Regulatory Philosophy Need Clarification

The licensing specialists need to clearly understand their roles and responsibilities. When we asked the licensing staff to describe the BCCL’s role and mission, we heard several different responses. One staff member said the BCCL’s mission is “to help child care providers become better.” Others suggested that the mission of the BCCL is to provide greater access to child care in Utah. Yet others told us that their job is to improve the quality of child care in Utah. One licensing staff member said that she’d been told that the mission of the Bureau is to help child care providers, that the providers are their customers, and that they need to please providers.

The BCCL staff have suggested that there is an underlying cause for the lack of a clear mission statement. They told us that the Director of the Bureau of Child Care Licensing and her supervisor, the Director of the Division of Health Systems Improvement, had fundamental differences of opinion regarding the BCCL’s approach to regulation. Considering that the division director has since been replaced and the department is searching for a new director of the BCCL, it is an appropriate time to draft a clear mission statement.

We recommend that the BCCL draft a mission statement that is based on state law. *Utah Code* 26-39-104 says that the BCCL must “make and enforce rules . . . as necessary to protect children’s common needs for a safe and healthy environment . . .” This statement means that the purpose of a licensing agency is consumer protection. The BCCL must establish and enforce a minimum level of health and safety standards. One of the reasons the licensing function was moved from the Department of Human Services to the Department of Health in 1997 was to focus the BCCL’s efforts on the health and safety of children rather than on educational or other developmental issues. If the BCCL is to stay focused on health and safety, the administration needs to periodically reenforce this concept with staff.

Develop a Consistent Procedure For Inspecting Child Care Facilities

In order to properly carry out the BCCL’s mission to protect children’s health and safety, licensing specialists need to follow a clear set of written procedures that have been formally adopted by the agency. As

Licensing Specialists do not have a current set of procedures to guide their work.

mentioned previously in this chapter, the BCCL has developed a new approach to enforcement that emphasizes licensing specialists giving technical assistance to the provider for violations of rules not deemed to be high-harm. However, the BCCL has made several changes to its enforcement process without formally adopting a new set of administrative rules. The new procedures have been verbally communicated. As a result, BCCL staff members do not have a current set of official procedures to read in order to guide them in how they are to carry out the new procedures they have been told to follow. It is no wonder that licensing specialists are inconsistent in how they administer the state's licensing regulations.

The new emphasis on providing technical training is an example of a new procedure that has never been formally adopted in the administrative rules. In addition, the BCCL has been granting variances to certain rules, but there is no clear procedure for when a variance should be granted to a family provider, a family group provider, or an hourly center. Finally, the BCCL recently decided to stop conducting unscheduled inspections because many providers complained that they were too disruptive. The BCCL adopted a new policy that the annual inspection would be scheduled a few weeks ahead of time, but the new policy was never taken through a formal rule-making procedure. Some providers have expressed opposition to the new policy, but their opinions were never heard.

We recommend that the BCCL follow its enforcement procedures as they have been formally adopted in the administrative rules. If they wish to make changes in their procedures, they must draft a new policy and have the changes formally adopted before the policy is implemented.

Staff Need Greater Training on How to Enforce the BCCL Rules

Licensing specialists not only interpret the rules differently, but they also apply different practices in how they enforce the rules. To help them follow a more consistent practice, we recommend that the BCCL create an in-depth standardized training process for all licensing specialists. This process should cover specific issues surrounding each individual rule that is enforced, including the intent of the rule and conditions that would or would not constitute a violation of each rule. In addition to this standardized training, each region should hold regular staff meetings to discuss the BCCL's enforcement procedures. During these meetings, the program managers should address any concerns the licensing specialists

Licensing staff need more extensive training on what constitutes a rule violation and how they should respond.

may have and discuss how they each handle specific situations—particularly those situations that providers say are being handled inconsistently.

As mentioned previously in this chapter, licensing specialists do not evaluate water temperature the same way. Through better training and communication, such inconsistencies could easily be avoided. For example, program managers should explain how licensing specialists should measure the temperature, and they should require all licensing specialists to then use the same technique. We are told that each region is already holding training meetings, but it appears they may need to focus more attention on specific areas where licensing specialists have been inconsistent.

Recommendations

1. We recommend that the Bureau of Child Care Licensing create and follow a mission statement that conforms to, and does not exceed, the purpose of the bureau as set forth in *Utah Code* 26-39-104(1)(a).
2. We recommend that the Bureau of Child Care Licensing formally adopt new enforcement procedures before they are implemented.
3. We recommend that the Bureau of Child Care Licensing provide licensing staff more extensive training on what constitutes a rule violation.

This Page Left Blank Intentionally

Chapter V

Administrative Hearings Should Ensure Due Process

Although we did not identify any providers who were denied due process, we did find that the Bureau of Child Care Licensing (BCCL) does not have adequate procedures and rules to guide the hearing process. As a result, neither informal reviews before agency staff nor adjudicative proceedings before hearing officers are conducted in a consistent manner. In addition, the method of selecting hearing officers raises concern about the officers' independence.

The BCCL holds administrative hearings when providers wish to appeal an agency action that affects their license. For example, child care providers may appeal the revocation of a license, the placement of a license on a conditional status, or the statement of findings that results from an inspection. Providers have two basic appeal options: (1) an informal review of their case with a regional program manager or the Director of the BCCL, and (2) an adjudicative proceeding before a hearing officer. Providers who request an informal review may later request an adjudicative proceeding. If they are not satisfied with the results of the administrative hearing process, providers can file an action in state courts.

Providers can appeal an agency action to the program manager, division director or a hearing officer.

We found that most appeals are successfully resolved through an informal meeting with a regional program manager or the BCCL director. A few providers have brought cases before a hearing officer. We did not identify any cases that had been appealed to state court. This chapter describes our concerns first with the informal hearings and then with the adjudicative proceedings.

Guidelines for Informal Review Needed

We have two concerns regarding the informal reviews that are conducted by the regional program managers and by the BCCL director. First, since there are no policies or procedures, those who conduct the informal reviews are not using a consistent approach in how they handle providers' appeals. Second, the practice of treating informal reviews as

plea bargains and requiring providers to give up their rights to adjudicative proceedings is questionable.

The informal review is an opportunity for a child care provider to meet with agency staff and discuss any concerns he or she may have with an agency action. A regional program manager handles most informal reviews. Regardless of whether or not a review occurs at the regional level, a provider may request an informal review before the director of the BCCL.

Lack of Policies and Procedures Lead to Inconsistent Practices

A major concern with the informal reviews is that the BCCL has not provided staff with policies and procedures to guide their decision making. As a result, the regional program managers who usually conduct the informal reviews are not consistent in how they respond to the appeals made by providers. We found that program managers often reduce the fines, and sometimes they may even remove the violation from the provider's record, but they are not consistent in how they respond to provider appeals. These inconsistent practices may penalize providers whose violations remain in their records.

Program Managers Are Inconsistent in How They Handle Informal Reviews. We examined 60 informal reviews that were conducted by regional program managers. Since the agency does not have a formal record-keeping procedure for appeals, each region manages its appeal records separately. Only one of the three regions keeps a record of the appeals it has processed. So in two of the three regions we were only able to examine the cases that the program managers remembered. We found that the agency provided accurate information to providers about their initial appeal rights, but we do not believe regional managers follow a consistent process in conducting informal reviews.

Providers have a great interest in removing violations from their records. If a provider can have past violations removed, it can help potential clients feel more comfortable placing their children at the provider's child care facility. Informal reviews often result in violations being rescinded without any clear criteria for doing so. For example, one program manager told us she would sometimes remove a violation from a provider's record if the provider could demonstrate that a significant improvement had been made towards correcting the violation.

Program managers are not consistent during informal reviews.

In addition to addressing violations, informal reviews address fines levied by the BCCL. One program manager told us she typically reduces a fine by 50 percent if a provider faces a serious financial hardship. Our review of the provider files in another region disclosed that the program manager over that region rarely reduced the civil money penalties. However, when she did reduce a penalty, she lowered the amount by more than 50 percent. As a result, we have concluded that the program managers are not following a consistent practice in how they handle provider appeals.

Inconsistent Practices Affect Provider Records. Some parents decide where to place their children based on provider records maintained by the BCCL. Potential clients sometimes call the BCCL and ask for a verbal report of a provider’s violation history. The records have a significant impact on childcare providers and public safety. For these reasons, the BCCL staff who conduct informal reviews should follow clear guidelines regarding when violations may be removed from a provider’s record.

In summary, BCCL staff need clear procedures as they decide whether or not to remove a violation or withdraw a penalty from a provider’s record. Removing some providers’ violations while keeping others’ may create the false impression that one provider has a better track record with the BCCL than another. Clear guidance is especially important because, as described below, agency staff sometimes treat informal reviews as plea bargaining sessions where they negotiate with providers.

Practice of Requiring Providers to Give up Their Rights to Appeal Is Questionable

Another concern we have with informal reviews is that program managers usually treat the meeting as a plea bargain or settlement negotiation conference. Thus, if the BCCL agrees to rescind some citations, but not others, it will generally prohibit practice providers from appealing the violations that were not rescinded. Similarly, the agency may reduce a civil money penalty contingent on the provider accepting the settlement offer. Our concern is that if not properly controlled, such practices could exert an unfair leverage on providers to submit to agency actions.

In general, our view is that if a program manager has sufficient evidence to rescind a violation, then it should not matter whether or not

Inconsistency during informal reviews can deceive potential clients.

Providers must agree to waive rights to further appeals if they accept a review decision.

the provider agrees to make no further appeals. In fact, we identified some informal reviews that resulted in both violations and fines being rescinded without any conditions attached. However, in a number of cases we reviewed, providers were required to accept the ruling of the agency staff in full and agree to forgo further appeals in order to have other agency actions rescinded. The following example shows some of our concerns with this practice.

One Case Illustrates a Potential Problem. In one instance, the BCCL refused to rescind several relatively minor violations even though they had previously been willing to rescind them. The reason was that the provider would not agree to withdraw her decision to appeal several other violations. For example, one of the provider's violations was that she had not complied with the requirement to have a "bodily fluid clean-up kit." When the BCCL held an informal bureau conference to review the provider's appeal, the agency acknowledged that there were reasons to withdraw the citation:

a deficiency was written that the disinfectant and paper towels were not in a portable container; however, the materials were present within 10 inches on the same shelf. The deficiency . . . will be rescinded and the provider will place the items in a portable container.

In addition to this violation, agency staff also said they were prepared to rescind other violations that had been discussed during the informal bureau conference.

Furthermore, the agency offered to reduce the civil money penalties if the provider would not continue to appeal other violations. The agency said that "If [the provider] accepts the findings of the Bureau Conference the civil money penalty will be waived." Another, lower penalty was then offered to the provider. Finally, the agency also offered to rescind its decision to revoke the provider's license and instead offered to place the provider on a conditional license.

In order to have the violations rescinded, fine reduced, and conditional license issued, the provider was required to "agree with the decision" and "agree to withdraw [the] request for administrative hearing." When the provider would not sign the agreement, the BCCL officials continued to pursue penalizing the provider for all of the violations that had been cited

Some licensing specialists use threats of agency action as a mechanism to force providers into compliance.

Program managers need more direction from the department regarding how to handle appeals.

Rules governing adjudicative proceedings are unclear.

even though they had previously indicated that there was sufficient evidence to withdraw some violations.

Sanctions Should Not Be Used as a “Management Tool.” Our concern with the plea bargain approach to informal reviews in general, and this case in particular, is that it raises the possibility that sanctions may be used as a “management tool” to prod providers into compliance. In fact, agency staff report that they never really intended to go so far as to revoke the license of the child care provider in the case described. Instead, as the division director observed, the staff seemed to be using the revocation as a “management tool,” or, in other words, as a means to force the provider to take the corrective action the agency expected from her. There were so many repeat violations of the rules, although nothing that presented an immediate risk to children, the staff decided that the only way to get the provider’s attention was to begin the process of revoking the license, even though they did not believe they would have to go so far as to actually shut down the center.

Although the actions of the BCCL were upheld by a hearing officer, the division director eventually reinstated many of the decisions that had earlier been withdrawn. For example, the final agency order by the division director stated that “because the components of the body fluid kit were present, although not organized into a portable carryall, the [bureau] had earlier determined to rescind this deficiency. This deficiency is rescinded.” The division director also waived the civil money penalty and ordered that a standard license be issued.

In conclusion, the program managers need to have direction from the department regarding when a violation should be rescinded and when it should not. Unless the program managers are given a set of policies and procedures to guide the informal reviews, they will continue to be inconsistent and potentially unfair in how they treat individual providers.

Rules for Adjudicative Proceedings Should be Clarified

As with informal reviews, adjudicative proceedings also need a clearly defined set of procedures in order to provide due process. The term “due process” implies that a consistent and orderly procedure is followed when making decisions that affect people. It also implies that those who

administer the process have enough independence from the investigation to provide a fair review of the agency's action. We found that adjudicative proceedings are not guided by clear rules when they are converted to informal hearings and that hearing officers may not be as independent as they should be.

BCCL Lacks Guidance for Informal Adjudicative Proceedings

Although administrative rules provide direction when it comes to conducting **formal** adjudicative proceedings, few appeals are handled through a formal hearing. Instead, most hearings are conducted **informally**. Even the hearing officers who conducted informal adjudicative procedures could not tell us what rules applied. We think the BCCL rules should clearly state what procedures apply to informal hearings in order to bring consistency to how they are conducted. In addition, providers should have clear information about what to expect when they appeal.

Child Care Licensing Rules Only Address Formal Hearings.

Section R430-30 of the administrative rules provides guidelines for how the BCCL should conduct **formal** adjudicative proceedings. R430-30-3 states that:

All adjudicative proceedings under Title 26, Chapter 39, Utah Child Care Licensing Act, and under R430, Child Care Licensing Rules, are **formal** adjudicative proceedings (emphasis added).

While the rule states that all adjudicative proceedings are formal, most hearings are converted to an informal format in order to protect the interests of providers who are not usually represented by legal counsel. However, the BCCL rules do not address the conduct of informal adjudicative proceedings.

Although the Department of Health has a rule (R380-10) that describes how to conduct informal adjudicative proceedings, the BCCL does not follow this rule in informal adjudicative proceedings. For example, this department-level rule specifies that:

[T]he presiding officer's decision is a recommended decision to the agency head and the agency head may accept, reverse, or modify the presiding officer's order and may remand the order to the presiding officer for further proceedings.

Most formal proceedings are converted to informal, yet the BCCL rules do not address informal proceeding conduct.

It appears that this rule has not been followed because only one of the six adjudicatory proceedings that we reviewed resulted in a recommended decision to the agency head. In the five other cases, the hearing officer issued an order which is consistent with the procedure for formal adjudicative proceedings described in the administrative procedures act.

Hearing Officers Could Not Identify Applicable Rules. We asked three individuals who have served as hearing officers to identify the set of rules that they followed when they conducted their adjudicative proceedings. We received different answers. One individual was the hearing officer for the Division of Health Care Financing. She said she followed R410-14, the rules that guide the hearings for that division. A bureau director who often served as a hearing officer for the BCCL said she did not know what rules applied, but she followed a process she had learned from many years of serving as a hearing officer. A third individual who has served as a hearing officer for the BCCL said he was not sure which rule applied.

If the BCCL is to be consistent in how it handles adjudicatory proceedings, it needs to develop a set of rules that apply to the informal adjudicatory proceedings. It also needs to clarify the rule that suggests that all adjudicatory proceedings are formal because very few hearings are actually conducted in a formal manner.

Providers Deserve Clear Information. Furthermore, we found that providers have a difficult time navigating the BCCL's appeals process because they do not have access to information that describes the process in terms that are easily understood. For this reason, we recommend that the Department of Health give providers information describing the administrative hearing process in language they can understand so when providers choose to appeal and agency action they can participate effectively in the process and know their rights.

It May Be Unfair for the Bureau Director To Select the Hearing Officer

Some may question the independence of the administrative hearing officers because the director of the BCCL both selects the hearing officer and also presents the agency's case to that same officer. The legislators who requested this audit expressed a desire that "providers also have a right to a fair and independent review by the administrative law judge." To offer greater independence for its hearing officers, the Department of

Hearing officers are not familiar with which set of rules govern adjudicative proceedings.

The bureau director often selects the hearing officer and then represents the bureau at the same hearing.

Health should avoid having the hearing officer selected by the same person presenting the agency's case before that hearing officer.

The statute permits the director of the BCCL to appoint the hearing officer for the adjudicative proceedings within the BCCL. At the same time, however, there were at least three administrative hearings in which the director also acted as the prosecutor who presented the agency's case before that same hearing officer. By both selecting a hearing officer and presenting a case before that hearing officer, the BCCL may put the objectivity of the hearing officer into question. No provider would consider it fair to appear before a hearing officer who has been selected by the opposing side.

We also question what appears to be a common practice of bureau directors presiding over other directors' administrative hearings. Though she is no longer employed by the Department of Health, a former director for the BCCL often asked the director of another bureau to act as a hearing officer for her BCCL cases. In turn, the BCCL director acted as the hearing officer for that other agency's administrative hearings. Our concern is that one director acting as a hearing officer for her colleague may feel pressure to favor her colleague's agency because the next time their roles may be reversed in the future.

Executive Branch Agencies Must Separate Their Adjudication and Prosecutorial Functions. In order to preserve the hearing officer's objectivity, executive branch agencies must make sure that those responsible for judging a case are not influenced by those who investigate and prosecute the case. Some have suggested that the best way to protect due process is to move the adjudicative function to an entirely different executive branch agency. However, the Utah Supreme Court has said that creating total structural independence of the adjudicative function would be impractical and too expensive. Instead, in the 1982 ruling of *Vali Convalescent & Care Institution v. Industrial Commission*, the justices made the following statement:

In administrative proceedings, the practice of an agency acting as prosecutor and judge is not unconstitutional, **at least if those functions, with respect to discretionary matters, are kept separate within the agency.**

Division directors who act as hearing officers for another division may not be entirely impartial.

In keeping with the views of the Supreme Court, we recommend that the Department of Health make sure there is an internal separation between the prosecutorial function and the adjudicative function. One approach would be to require that the person who selects the hearing officer of an adjudicated proceeding is not the person who investigates or prosecutes the agency's case. For example, if the director of the BCCL plans to present her agency's case during the administrative hearing, her agency head, the director of the Division of Health Systems Improvement should be the person to appoint the hearing officer.

Recommendations

1. We recommend that the Bureau of Child Care Licensing develop policies and procedures to guide staff and hearing officers during the process of conducting informal reviews and administrative proceedings.
2. We recommend that the Bureau of Child Care Licensing give information to providers that describes the bureau's administrative appeal process so they can understand their rights and how their appeal will be handled by the agency.
3. We recommend that the Bureau of Child Care Licensing amend Administrative Rule R430-30 to clarify what procedures apply when a hearing is converted to an informal proceeding.
4. We recommend that the Bureau of Child Care Licensing take steps to assure there is a separation between its investigative and prosecutorial functions and its adjudicatory function. Specifically, the hearing officer should be appointed by an agency head who is not involved in either the prosecution or the investigation of the case before that hearing officer.

This Page Left Blank Intentionally

Agency Response

September 20, 2005

Mr. John M. Schaff, CIA
Legislative Auditor General
West State Capitol Complex
Salt Lake City, UT 84114-0151

Dear Mr. Schaff:

Thank you for the opportunity to respond to your legislative audit, Report No. 2005-11, titled "A Performance Audit of the Bureau of Child Care Licensing" dated September 9, 2005. As the Director of the Department of Health, I am writing on behalf of the Bureau of Child Care Licensing (a bureau within the Division of Health Systems Improvement).

Although I have only been in this position for less than nine months, I have a great appreciation for the importance of child care in our state. I also clearly recognize the need for an appropriate licensing program to assure the safety of our children who utilize child care services while not reducing access to these services unnecessarily.

I would like to begin by thanking and complimenting you and your staff for their careful, objective, thorough and thoughtful investigation and subsequent report. I have also appreciated the opportunity to meet with them to discuss the changes that I have made in our child care licensing program through my appointment, guidance and support of our new director of the Division of Health Systems Improvement, Dr. Marc E. Babitz, who is a family physician and a professor in the Department of Family and Preventive Medicine at the University of Utah.

As your report has recognized the weaknesses of our program in the past, I see this report as an opportunity to strengthen my efforts to improve our program; and, I was gratified to find support in your report for many of the changes that have already been implemented.

I will now take this opportunity to respond to each of the recommendations in this report.

Recommendations – Chapter II

1. We recommend that the Bureau of Child Care Licensing comply with *Utah Code 26-39-107* and deny a child care license to any criminal offender who either by rule or law is not allowed to have one.

Response: I completely agree with this recommendation. And, as noted in your report on page eight (8); “since June 2005, BCCL has adopted a new policy toward BCI checks and has denied all requests for exclusions from this regulation.” This statute and associated rules will be strictly enforced to assure that individuals with serious criminal records are not allowed access to children in state licensed or certified child care.

2. We recommend that the Bureau of Child Care Licensing obtain the approval of the Executive Director of the Department of Health before granting a license to misdemeanor offenders who according to the law must receive special approval.

Response: Again, I completely agree with this recommendation. We do not concur with previous administrations who had delegated this serious and important responsibility to BCCL staff. Again, since June 2005, we have denied all such requests. Furthermore, I have made it clear to staff that I am the only one who can approve this type of “special approval,” and this type of action will only be presented to me if Dr. Babitz (the Division Director) has very strong reasons to support such an exception.

3. We recommend that the Legislature amend the *Utah Code 26-39-107* to clearly state that the criminal background requirements apply to all of the residents of a home where child care is provided.

Response: As Director of the Department of Health, I am in complete support of this recommendation. Although we are enforcing this recommendation currently through internal policy, as we have interpreted existing law as being designed to prevent individuals convicted of serious crimes from being in contact with children in state licensed or certified child care, we believe that a change in statute would strengthen our enforcement efforts. Furthermore, such a legislative change would send a strong message to our residents and child care providers that these offenders should not be involved with child care in any manner.

4. We recommend that the Bureau of Child Care Licensing grant rule variances only for reasons specified in the Utah Administrative Rules.

Response: Again, I fully concur with this recommendation and we have changed the policies from the past in this regard. On September 19, 2005, revisions to Utah Administrative rule R430-6, Background Screening, were filed with the Division of Administrative Rules for publication on October 15, 2005 and the 30-day comment period. These proposed amendments are attached, as well as amendments filed for Utah Administrative Rules R430-2, R430-3 and R430-4. We are optimistic that these rule amendments will address positively many of the issues raised in this audit. It is also worth noting, as you have noted in your report on page 14, we have already changed our internal policies to: “(1) approve fewer variances to the licensing rules, and (2) consider whether certain rules are really justified if variances are commonly needed.” I would summarize our current policy by stating that we believe in having appropriate rules to protect the safety of children in licensed or certified child care. Therefore, if the rules are appropriate, then the vast majority of variance requests are not appropriate; or, should a rule be

found to be unnecessary or inappropriate, then the rule should be eliminated or changed, as opposed to granting a variance. In addition, consistent with your report on page 12, variances are only granted if a child care provider can show that the rule does not apply to them, or they can demonstrate how they will comply with the rule by different means.

Recommendations – Chapter III

1. We recommend that the Bureau of Child Care Licensing seek the advice of the Child Care Licensing Committee when reexamining the state's child care licensing rules, including those specifically mentioned in this chapter, in order to determine the extent to which each rule represents a minimum health and safety standard while balancing the benefits with the burdens.

Response: First and foremost, we agree with, and appreciate the conclusion that, the vast majority of our CCL rules are reasonable and justifiable. Further, the majority of our rules are consistent with the practices of surrounding states and the vast majority of surveyed providers find our rules to be fair. Second, we agree that some of our rules do require review and possible modification and such a review should include input from our Child Care Licensing Advisory Committee. To this end, the BCCL has already undertaken a major review of all our rules and has already sought input from our Advisory Committee. The proposed changes to our Administrative Rules were filed with the Division of Administrative Rules for publication on October 15, 2005, and we hope to have our proposed changes to our Program Rules ready for committee review, filing and public comment before the end of the year. The six items specifically mentioned in this report will be reviewed in this process to assure that minimum health and safety standards are met.

Recommendations – Chapter IV

1. We recommend that the Bureau of Child Care Licensing create and follow a mission statement that conforms to, and does not exceed, the purpose of the bureau as set forth in *Utah Code 26-39-104 (1) (a)*.

Response: I agree that a clear, concise and legally conforming mission statement would be helpful to our staff, our providers and our citizens. While we have identified different descriptions of the BCCL's purpose, we agree that they are different and do not represent one, clear mission statement. This will be an important issue to address with the input of our Child Care Licensing Advisory Committee.

2. We recommend that the Bureau of Child Care Licensing formally adopt new enforcement procedures before they are implemented.

Response: I agree that the staff of the BCCL have been given inconsistent messages regarding enforcement procedures, as was discussed earlier in relationship to the granting of variances. I have already instructed staff on my desire for more consistent enforcement of our rules. I feel there is merit in a formal adoption of our new enforcement procedures, even while our rule changes are being submitted for public comment. Successful implementation of this type of

change will only occur through proper and consistent training for all staff, along with consistent support from supervisors.

3. We recommend that the Bureau of Child Care Licensing provide licensing staff more extensive training on what constitutes a rule violation.

Response: As noted previously, our rules need to assure that children in state licensed or certificated child care are protected as fully as possible. For this reason, we will enforce our rules and continue to give consistent messages about their enforcement. We agree that the inconsistencies identified in this report are not acceptable. We also agree that training of our licensors is one, important method of decreasing these inconsistencies. Unfortunately, training is an expensive and time-consuming activity. We have already begun the development of a training plan to address this issue, recognizing that our current resources are likely to be inadequate to meet all of the training needs which are identified.

Recommendations – Chapter V

1. We recommend that the Bureau of Child Care Licensing develop policies and procedures to guide staff and hearing officers during the process of conducting informal reviews and administrative proceedings.

Response: We are currently in the process of determining a consistent method for handling informal reviews. Our first step has been to eliminate the term “review” which has been confusing. We are now using two terms, “discussion” or “administrative hearing.” At present, the provider may request an informal discussion with their program manager or with the Division Director (Dr. Babitz’ current position). These discussions will not be “bargaining sessions.” To date, I have continued a policy that would allow the CCLB to adjust (decrease) civil money penalties if those funds would be used to correct the deficiency. Otherwise, these sessions are informational and used to clarify the position of the CCLB (our statute, rules and findings) and the position of the child care provider. After an informal discussion, a provider can choose to accept the findings, or they may request an administrative hearing, which is a more formal, legal process.

2. We recommend that the Bureau of Child Care Licensing give information to providers that describe the bureau’s administrative appeal process so they can understand their rights and how their appeal will be handled by the agency.

Response: Dr. Babitz has met with all of the CCLB Program Managers to discuss this issue. Our central program manager has also met with the DOH attorney to clarify state law and administrative rules on this issue. The result of these meetings and discussions has clarified that child care providers will be more explicitly informed of their right to an informal discussion and/or an administrative hearing if they wish to challenge a finding or ruling of the CCLB. Informal discussions can be held with a Program Manager or the Division Director. Hearings, whether informal or formal, represent a legal process subject to the DOH’s administrative rules and state law and will be conducted in that fashion.

John M. Schaff
September 20, 2005
Page 5

3. We recommend that the Bureau of Child Care Licensing amend Administrative Rule R430-30 to clarify what procedures apply when a hearing is converted to an informal proceeding.

Response: UDOH is fully committed to implementing this recommendation. As noted above, we have already clarified our basic procedures and do not intend to convert a hearing (informal or formal) into an informal discussion. We will inform our child care providers of their right to an informal discussion or a hearing.

4. We recommend that the Bureau of Child Care Licensing take steps to assure there is a separation between its investigative and prosecutorial functions and its adjudicatory function. Specifically, the hearing officer should be appointed by an agency head who is not involved in either the prosecution or the investigation of the case before that hearing officer.

Response: UDOH is committed to fully implement this recommendation consistent with administrative rule, state law and legal precedent.

Again, thank you for the opportunity to respond to your legislative audit.

Sincerely,

David N. Sundwall, M.D.
Executive Director