

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of	)	
	)	
Q L	)	OAH No. 17-0411-CCA
_____	)	Agency No.

**DECISION**

**I. Introduction**

Q L is an approved relative child care provider. The Department of Health and Social Services, Division of Public Assistance decided to terminate her provider status because it learned that Ms. L operates a separate, additional business at the same location as her child care facility and the “employees” of the additional business have access to the child care facility. The applicable regulation, however, states that a provider cannot operate an additional business at the same location as the child care facility if the “customers” of the additional business have access to the child care facility. The Division asserts that the term “customers” in the regulation includes any person other than the owner of the child care facility, including the “employees” of the additional business.

Because the Division’s interpretation of the applicable regulation cannot be reconciled with the common meaning of the regulation’s key term, and because the regulation should be construed in favor of Ms. L, the Division’s decision is reversed.

**II. Facts**

A telephonic hearing was held on May 16, 2017. The hearing was recorded. Q L appeared and represented herself. Sally Dial, the Division’s hearing representative, represented the Division.

On December 20, 2016, Ms. L filed an Approved Relative Child Care Provider Application, which was approved by the Division. The child care facility is in Ms. L’s home. Ms. L’s application includes a floor plan of her home.<sup>1</sup> The floor plan shows that Ms. L’s attached garage has three doors, one of which provides access to her home where the approved child care facility is located.

On March 13, 2017, the Division learned that Ms. L owns a small business, and that this business is in Ms. L’s home garage. On March 13, 2017, the Division sent a notice to Ms. L informing her that her approval status as a child care provider would end effective March 31,

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<sup>1</sup> Ex. 2.4.

2017. The notice stated that, “per regulations, you may not operate an additional business on the premises during the hours established for providing child care services.”<sup>2</sup> The notice stated that “[t]his determination is supported by 7 AAC 41.200.”<sup>3</sup>

On March 16, 2017, Ms. L met with Division staff and provided a revised floor plan of her home.<sup>4</sup> The revised floor plan shows the garage area as a “restricted work area.” The Division’s case note reflects that:

The business does have 2 doors for entry/exits (located on opposite sides of the garage). [T]here is signage to direct customers to the correct door. Provider stated she has 3 employees (which includes her son and daughter in law) . . . . There are no restrooms located in the garage. Provider stated the employee will have to access the child care facility to use the restrooms.[<sup>5</sup>]

The Division did not change its position, and on April 3, 2017, Ms. L requested a fair hearing.

The applicable regulation, 7 AAC 41.202(e), states:

An additional business, including one operated by the governing body or owner of a child care business, may not operate on the premises during the hours the business provides child care services, *if customers of the additional business would have access to the child care premises* or would interrupt the supervision of children in care. [Emphasis added.]

At the hearing, the Division clarified that its action was premised on the issue of access to the child care facility by employees of the additional business needing to use the restroom, not on interruption of the supervision of children in care. Further, the Division took the position that anyone other than the owner of the child care facility (*i.e.*, Ms. L) was a “customer” of the additional business within the meaning of 7 AAC 41.202(e). The Division’s evidence of access consisted of the physical layout of the facility depicted on the floor plans and the absence of restroom facilities in the garage.<sup>6</sup>

Ms. L confirmed that employees of the business access the child care facility to enter the restroom. Ms. L provided a further revised floor plan of the facility.<sup>7</sup> This depicts a new

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<sup>2</sup> Ex. 4.

<sup>3</sup> Ex. 4. This notice is arguably defective because the applicable regulation is 7 AAC 41.202(e). *See* 7 AAC 49.070. Following the hearing, the undersigned ordered briefing on the adequacy of the notice issued by the Division. On June 1, 2017, the parties requested a telephonic status conference. During the conference, which was recorded, Ms. L waived all procedural due process issues concerning the Division’s notice. Accordingly, this decision does not address the issue further.

<sup>4</sup> Ex. 5-5.2.

<sup>5</sup> Ex. 5.

<sup>6</sup> Dial Statement.

<sup>7</sup> Ex. A.

restricted area accessible from the garage, which is a second bedroom formerly used as an office. From this room, a door labeled “gate” provides access to the bathroom in the home (child care facility). Ms. L testified that a person would cross approximately “two feet” to walk from the gate to the bathroom. She testified that customers come to the business regularly throughout the day, averaging ten per day, one or two at a time. She testified that no “customers” of the business come into the house, only her “employees.” She testified that her employees at the additional business work 9:00 a.m. to 5:00 p.m. The child care facility’s hours vary by season and depending on school, but there is substantial overlap with the hours of operation of the additional business. For example, during summer the child care facility operates generally from 9:00 a.m. to 3:30 p.m.<sup>8</sup>

### **III. Discussion**

The question presented is whether Ms. L is disqualified from being a child care provider under 7 AAC 41.202(e) because the “employees” of her additional business admittedly access part of the child care facility, albeit a small part, to enter the bathroom. There was no evidence presented of “customers” of the additional business accessing the child care facility, and Ms. L testified that that does not occur.

The regulation provides that a child care provider cannot have an additional business on the premises “if *customers* of the additional business would have access to the child care premises.”<sup>9</sup> The Division asserts that “customers” includes any person other than the owner of the child care facility, including specifically the “employees” of Ms. L’s additional business. If the Division’s interpretation of “customers” in 7 AAC 41.202(e) is permissible, then the Division’s decision should be affirmed.

The term “customers” is not defined in the Division’s Child Care Assistance Program regulations; nor is “employee.”<sup>10</sup> When a term is not defined by statute, regulation or by judicial construction, the term is generally given its plain or common meaning.<sup>11</sup> The term “customer” has a definite common meaning. One dictionary defines “customer” as “one that purchases a commodity or service.”<sup>12</sup> Another defines “customer” as “a person who purchases goods or

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<sup>8</sup> L Testimony.

<sup>9</sup> 7 AAC 41.202(e) (emphasis added).

<sup>10</sup> See 7 AAC ch. 41 and specifically 7 AAC 41.990 (definitions). The Department’s Child Care Assistance Policy Manual provides no guidance on this question.

<sup>11</sup> *Tesoro Alaska Petro. v. Kenai Pipe Line*, 746 P. 2d 896, 905 (Alaska 1987).

<sup>12</sup> <https://www.merriam-webster.com/dictionary/customer> (visited 5/25/17).

services from another; buyer; patron.”<sup>13</sup> “Employee,” on the other hand, has a very different common meaning. One dictionary defines “employee” as “one employed by another usually for wages or salary and in a position below the executive level.”<sup>14</sup> Another defines “employee” as “a person working for another person or a business firm for pay.”<sup>15</sup> In sum, in common language, “employees” are not “customers.”

The regulation uses the term “customers” relative to the operation of an additional business at a child care facility location. Businesses, by their very nature, have both “customers” and “employees.” Yet, 7 AAC 41.202(e) omits reference to the “employees” of the additional business and refers only to “customers.” The Division’s interpretation of “customers” to include “employees” of the additional business cannot be reconciled with the common meaning of either term. A term meaning ‘one who purchases goods and services from another’ cannot be stretched to mean ‘one who works for a business for pay,’ let alone ‘anyone other than the owner of the child care facility.’ If the Division meant to exclude access by anyone other than the owner of the facility, a completely different term than “customers” should have been used.

In *Alaska Public Offices Commission v. Stevens*, the Alaska Supreme Court held that “imprecise, indefinite, or ambiguous statutory or regulatory requirements must be strictly construed in favor of the accused before an alleged breach may give rise to a civil penalty.”<sup>16</sup> The same could be said of an agency’s interpretation of regulatory language that conflicts with the subject language’s common meaning. In *Stevens*, the accused was fined \$630. Here, the Division seeks to terminate Ms. L’s provider status. *Stevens* counsels that 7 AAC 41.202(e) should be construed in favor of Ms. L and not to embrace the expansive interpretation adopted by the Division.

There is no evidence that the “customers” of Ms. L’s additional business access her child care facility. Therefore, Ms. L has not violated 7 AAC 41.202(e), and the Division may not terminate her provider status.

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<sup>13</sup> <http://www.dictionary.com/browse/customer> (visited 5/25/17).

<sup>14</sup> <https://www.merriam-webster.com/dictionary/employee> (visited 5/25/17). “Employed” is defined as “to provide with a job that pays wages or a salary.” <https://www.merriam-webster.com/dictionary/employed> (visited 5/25/17).

<sup>15</sup> <http://www.dictionary.com/browse/employee?s=t> (visited 5/25/17).

<sup>16</sup> 205 P.3d 321, 326 (Alaska 2009).

#### **IV. Conclusion**

The Division's decision to terminate Ms. L's provider status is REVERSED.

DATED: June 6, 2017.

By: Signed \_\_\_\_\_  
David J. Mayberry  
Administrative Law Judge

#### **Adoption**

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 29<sup>th</sup> day of June, 2017.

By: Signed \_\_\_\_\_  
Name: Erin E. Shine  
Title: Special Assistant to the Commissioner  
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication.]