

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH**

In the Matter of)	
)	
D. G.)	OAH No. 24-0419-CCA
_____)	Agency No.

FINAL DECISION¹

I. INTRODUCTION

A hearing was timely requested by D. G. on June 20, 2024, following denial of a Child Care Assistance Provider Application by the Department of Health Division of Public Assistance (Division). A video hearing was held in this matter Friday, August 9, 2024, at the time scheduled.² D. G. was represented by Ms. N. J. and the Division was represented by Ms. Marie Thirwell. Numerous exhibits were submitted by both parties, which are deemed admitted. Testimony was given by Mr. Matt Bockhorst on behalf of the Division. The hearing closed at the conclusion of argument, but the administrative law judge ordered the record to remain open until 5:00 p.m. Friday August 16, 2024, for receipt of certain documents. The documents filed by the parties were received into evidence and the record closed August 26, 2024.

The Department’s regulations describing child care assistance provider eligibility require that D. G. must meet the requirements of 7 AAC 10.1095, so the Division’s denial of the application is correct. However, the Division’s position that it cannot inspect or investigate D. G.’s compliance under 7 AAC 10.9600, is not supported by the regulations. Applicable regulations permit inspection and investigation of an entity subject to “this chapter” (7 AAC 10) for purposes of compliance with “this chapter, and *any other applicable statute or regulation*” and 7 AAC 41.265.³ The Division subjects D. G. to 7 AAC 10.1095, seeking to enforce

¹ A hearing was held on August 9, 2024, the record closed August 26, 2024, and a proposed decision was issued September 11, 2024. The parties were then given the opportunity to file proposals for action and this final decision now issues. AS 44.64.060(e)(3).

² Originally scheduled to be heard July 22, 2024, the matter was rescheduled at the parties’ request.

³ 7 AAC 41.265. Compliance and other reviews.

(a) For purposes of determining compliance with this chapter, ongoing monitoring, and assisting the department in its review of a provider, the department may conduct inspections, including announced or unannounced onsite inspections and investigations.

(b) In addition to compliance and monitoring reviews described in (a) of this section, the department will inspect and investigate the provider for purposes of health and safety compliance within 90 days after receiving a complete application or participation approval. The department

compliance with 7 AAC 10.1095, therefore, the Division may inspect and investigate D. G. for purposes of compliance with 7 AAC 10.1095. The denial of the application is AFFIRMED based on a determination that D. G. must meet the requirements of 7 AAC 10.1095.

II. BACKGROUND FACTS

The facts giving rise to this matter are not contested. D. G., a program of a childcare agency in Alaska, is a summer day camp for school-aged youth, accredited by the American Camp Association (ACA).⁴ D. G. is operated on the grounds of the University A, situated on heavily wooded acres bounded by No Name, the University B, and the campus of an Alaska Medical Center. D. G. applied to the Division to be a Child Care Assistance⁵ provider, to allow it to extend its summer day camp program to children whose parents cannot pay the full camp fee. The program uses some indoor facilities in buildings owned by the University, but those facilities are not in issue here, as plants are not allowed inside them.⁶ Staff are taught proper identification of Alaska wildlife and vegetation.⁷ When known poisonous plants are identified on university grounds, staff are made aware to avoid camper contact.⁸ Campers are not “touching or picking plants of any kind” during general camp activities.⁹ D. G., having heard of another summer day camp being approved as a provider for child care assistance, applied to be provider on December 7, 2023.¹⁰

On May 2, 2024, the Division requested a copy of the “updated copy of American Camp Association Accreditation standards that meet or exceed the requirements of Alaska regulation 7

will conduct annual unannounced inspections during subsequent years of a provider's program participation.

(c) The department may extend the time specified in (b) of this section, if the department determines a longer period is needed to obtain additional information or evaluate the effect of a change.

⁴ The American Camp Association, formerly known as the American Camping Association, was founded in 1910 as the Camp Directors Association of America. The name was changed from American Camping Association to American Camp Association in 2005 with adoption of a new logo. Am. Camp Assoc., *Timeline of ACA and Summer Camp*, available at <https://www.acacamps.org/about/history/timeline>, (last visited Sept. 5, 2024). 7 AAC 57.015(a)(11)(A) refers to the American Camping Association, but the Association's name change does not affect its applicability.

⁵ See, AS 47.25.001 *et seq.*, directing the Department of Health to implement a program to assist in providing day care to children of low and moderate income families.

⁶ Div. Ex. 5.5.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Div. Ex. 2

AAC 10.1095, regarding Toxic Substances; poisonous plants.”¹¹ On May 22, 2024, the Division denied the application because the accreditation by the ACA did not address the presence of poisonous plants as required by 7 AAC 10.1095.¹² While the Division now concedes it has some discretion to allow a provider to supplement through its own statement, the Division argues that it has no power to enforce compliance with such a statement.¹³ D. G. appealed.

This matter turns on the Division’s application of 7 AAC 10.1095 to D. G. D. G. claims it is exempt from licensing requirements under AS 47.32.020, 7 AAC 41.200(a)(2) and 7 AAC 57.015(a)(11)(A). It argues that its internal manual is sufficient to satisfy 7 AAC 10.1095.¹⁴ The Division argues that 7 AAC 10.1095 is applicable to D. G. notwithstanding the licensing exemption based on its national accreditation. It argues that, unless the accreditation standard D. G. relies on is equivalent to (or stricter than) the poisonous plant requirements of 7 AAC 10.1095, federal law¹⁵ prohibits the payment of childcare assistance which originates from a federal block grant under the Child Care and Development Fund.¹⁶ The Division argues it

¹¹ Divi. Ex. 3.

¹² Div. Ex. 6.

¹³ *Id.*

¹⁴ The Division’s denial of D. G.’s application was not based on a review of D. G.’s internal standards regarding poisonous plants. Therefore, this decision does not decide if D.G.’s internal standards meet 7 AAC 10.1095’s requirements.

¹⁵ The Division cites 45 CFR 98.41.

¹⁶ The Child Care and Development Fund is a program administered by the U.S. Department of Health and Human Services that provides money to states to ensure low-income working families have access to quality childcare, by subsidizing partial payment to childcare providers. The Alaska Department of Health administers the program in Alaska. 45 CFR 98.56 restricts the use of these funds as follows:

(a) *General.*

(1) Funds authorized under section 418 of the Social Security Act and section 658B of the Child Care and Development Block Grant Act, and all funds transferred to the Lead Agency pursuant to section 404(d) of the Social Security Act, shall be expended consistent with these regulations.

Funds transferred pursuant to section 404(d) of the Social Security Act shall be treated as Discretionary Funds;

(2) Funds shall be expended in accordance with applicable State and local laws, except as superseded by § 98.3.

(b) *Construction.*

(1) For State and local agencies and nonsectarian agencies or organizations, no funds shall be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement of any building or facility. However, funds may be expended for minor remodeling, and for upgrading child care facilities to assure that providers meet State and local child care standards, including applicable health and safety requirements. Improvements or upgrades to a facility which are not specified under the definitions of construction or major renovation at § 98.2 may be considered minor remodeling and are, therefore, not prohibited.

(2) For sectarian agencies or organizations, the prohibitions in paragraph (b)(1) of this section apply; however, funds may be expended for minor remodeling only if necessary to bring the facility into compliance with the health and safety requirements established pursuant to § 8.41.

cannot rely on D.G.'s internal manual to meet its poisonous plants requirements, because D. G. is not subject to inspection or enforcement as an exempt provider.¹⁷

III. DISCUSSION

The "poisonous plant requirement" that was the basis of the Division's denial of D.G.'s application is found in 7 AAC 10.1095, which provides in pertinent part:

(a) An entity shall ensure that

* * *

(3) a poisonous plant is not in an entity where children, or adults with impaired judgment, are in care, except as provided in (b) of this section.

(b) The department may allow a poisonous plant that is a common household plant, including a poinsettia, . . . to be present in an entity described in (a)(3) of this section, if the department finds that children in care or adults with impaired judgment will be protected from harm. The entity shall submit to the department a written list of all poisonous plants maintained in the entity, and a description of how the entity will protect children, or adults with impaired judgment, from being harmed by the plants. If the department allows one or more poisonous plants to be present in the entity, the entity shall inform . . . parents of children in care, social workers, care coordinators, and case managers, as applicable, of any poisonous plant present in the entity, and describe how the entity will protect children. . . from harm.

(c) In this section, "poisonous plant"

(1) means a plant, tree, or shrub that can cause injury or death, if a portion of that plant, tree, or shrub is ingested or touched; and

(2) includes certain

(A) flower garden plants, including autumn crocus, bleeding heart, chrysanthemum, daffodil, four-o'clocks, foxglove, hyacinth, hydrangea, iris, jonquil, lily of the valley, morning glory, narcissus, and snow on the mountain;

(3) Tribes and tribal organizations are subject to the requirements at § 98.84 regarding construction and renovation.

(c) *Tuition*. Funds may not be expended for students enrolled in grades 1 through 12 for:

(1) Any service provided to such students during the regular school day;

(2) Any service for which such students receive academic credit toward graduation; or

(3) Any instructional services that supplant or duplicate the academic program of any public or private school.

(d) *Sectarian purposes and activities*. Funds provided under grants or contracts to providers may not be expended for any sectarian purpose or activity, including sectarian worship or instruction. Assistance provided to parents through certificates is not a grant or contract. Funds provided through child care certificates may be expended for sectarian purposes or activities, including sectarian worship or instruction when provided as part of the child care services.

(e) *Non-Federal share for other Federal programs*. The CCDF may not be used as the non-Federal share for other Federal grant programs, unless explicitly authorized by statute.

¹⁷ Div. Ex. 6, pg.7, citing 7 AAC 10.9600.

(B) house plants, including bird of paradise, castor bean, dumbcane (also known as dieffenbachia), English ivy, holly, jequirty bean (also known as rosary pea), Jerusalem cherry, mistletoe, mother-in-law, oleander, philodendron, poinsettia, and rhododendron;

(C) trees and shrubs, including black locust, boxwood, chokecherry, elderberry, English yew, horse chestnut, buckeye, juniper, oak, water hemlock, and yew;

(D) vegetable garden plants, including asparagus, sprouts and green parts of potato, rhubarb leaves, and green parts of tomato; and

(E) wild plants, including belladonna, bittersweet, buttercups, Indian hemp, jack-in-the-pulpit, jimson weed, larkspur, monkshood, certain mushrooms, nightshade, poison hemlock, poison ivy, poison oak, poison sumac, tobacco, and skunk cabbage.

7 AAC 10.1000 describes the purpose and applicability of 7 AAC 10.1095:

(a) The purpose of 7 AAC 10.1000 - 7 AAC 10.1095 is to protect public health, safety, and welfare by establishing environmental health and safety standards for entities listed in (b) of this section that are in addition to the requirements of 7 AAC 50, 7 AAC 57, and 7 AAC 75, as applicable.

(b) Subject to (c) of this section, to be licensed by the department, the following entities are subject to the applicable requirements of 7 AAC 10.1000 - 7 AAC 10.1095:

(1) a residential child care facility, including a residential group home and a residential child care center;

(2) repealed 7/1/2022;

(3) a residential psychiatric treatment center;

(4) a maternity home;

(5) a child care facility required to be licensed under AS 47.32 and 7 AAC 57;

(6) an assisted living home.

(c) If an entity is licensed for more than one category of care listed in (b) of this section, the entity is subject to the most stringent requirements applicable to those categories of care, even if an exemption might apply if licensed separately.

A. Exemption from licensure does not exempt a child care assistance eligible provider from the poisonous plant requirement.

1. D. G. is exempt from licensing as a child care facility.

As written, the “poisonous plant” standard in AS 7 AAC 10.1095 applies only to “entities listed” in 7 AAC 10.1000(b). Those entities “to be licensed by the department” are subject to 7 AAC 10.1000-1095. The listed entities include four residential type facilities and “a child care facility *required to be licensed* under AS 47.32 and 7 AAC 57.” Viewed in isolation, this regulation does not subject D.G. to the poisonous plant standard because it is not required be licensed under the statute (AS 47.32) or the regulation (7 AAC 57).

AS 47.32.010(b)(3) subjects child care facilities to AS 47.32 and “regulations adopted under” it by the Department of Health. AS 47.32.020(a) requires child care facilities to be licensed “unless the entity is exempt under regulations adopted under AS 47.32.030.” AS 47.30.030(a)(3) authorizes the Department of Health to adopt regulations to carry out the purposes of AS 47.32, including imposing requirements and standards on “licensed entities that are in addition to those imposed by this chapter or by any other applicable state or federal statute or regulation” and to “provide for waivers, variances, and exemptions from the requirements . . . including the requirement to obtain a license.” Thus, if the entity is exempt under regulations adopted under AS 47.32.030, it is not required to be licensed under the statute.

7 AAC 57.10 was adopted under authority of AS 47.32.030. It applies to child care facilities licensed or required to be licensed under AS 47.32.010 and [7 AAC 57]. A facility regularly providing child care for five or more children who are not relatives of the caregiver may not operate as a child care facility unless the facility

- (1) has a current license issued by the department under [7 AAC 57] or
- (2) is exempt under 7 AAC 57.015.

7 AAC 57.015(a) exempts from the licensure requirements of AS 47.32 and 7 AAC 57 various facilities including

(11) subject to (b) of this section, a day camp or similar facility or program that

(A) holds a current accreditation or certification from the American Camping Association or another national accreditation group with standards the department finds are substantially similar to the requirements of this chapter; a facility or program that believes it should be exempt under this paragraph shall submit the standards to the department for review and approval;

(B) provides services for children age five years and older;

(C) operates more than five weeks in any 12-month period; and

(D) operates only during summer, winter, and spring school breaks.

(b) To be exempt from the licensure requirements of AS 47.32 and this chapter under (a)(11) of this section, a facility or program must implement and conduct a fingerprint-based background check that meets or exceeds the standards set in 7 AAC 10.900 - 7 AAC 10.990 for each employee and other individual associated with the facility in a manner described in 7 AAC 10.900(b). If the facility or program does not conduct fingerprint-based background checks as described in this subsection,

(1) except for the requirements of this chapter dealing with background checks, the department will accept the accreditation or certification standards of the facility or program in lieu of licensing requirements of this chapter; and

(2) the facility or program must meet the applicable requirements of AS 47.05.300 - 47.05.390 and 7 AAC 10.900 - 7 AAC 10.990 (barrier crimes and conditions; background checks).

7 AAC 57.020 prohibits the Department of Health from issuing a license to a child care facility that is exempt under 7 AAC 57.015(11). Thus, because it is accredited by the ACA,¹⁸ provides services only to children five years old and older, operates only during summer school breaks, and operates for more than five weeks¹⁹, D. G. is not only exempt from licensure, but the Department of Health *may not* license it.

2. To be eligible as a child care assistance provider, D. G. is subject to the poisonous plant requirement.

AS 47.32 and 7 AAC 57 do not impose a licensing requirement on D. G. D. G. is not “required to be licensed under AS 47.32 and 7 AAC 57.” As 7 AAC 10.1000 is written, it would appear that if D. G. is not a child care facility under 7 AAC 10.1000(b)(5), so that 7 AAC 10.1095 does not apply to it. However, this case does not end with D. G.’s exemption under 7 AAC 57 or 7 AAC 10.1000(b).

Child care assistance program payments to eligible child care providers are regulated by a different chapter of title 7 of the Alaska Administrative Code. 7 AAC 41.10 states that 7 AAC 41 applies to the administration of the child care assistance program under AS 47.25.001-.095. 7 AAC 41.200(a) states that unless the provider is precluded by 7 AAC 41.055, the Department “shall authorize a provider to participate in the child care assistance program”

if the provider meets the applicable requirements of this chapter and has . . .

¹⁸ The Division’s argument that the American Camping Association standards must be “substantially similar to” or “equal to or as stringent as” the poisonous plant requirements of 7 AAC 10.1095 appears to rest on a misreading of 7 AAC 57.015(a)(11)(A) and AS 47.32.030(a)(9). In 7 AAC 57.015(a)(11)(A), the disjunctive “or” separates the American Camping Association from “other national accreditation group with standards the department finds are substantially similar to the requirements of this chapter”. The clause “with standards . . .substantially similar to the requirements” modifies the unnamed “group”, not the named “American Camping Association. AS 47.32.030(a)(9) states the Department may “waive the application requirements of an entity seeking licensure if the entity submits documentation . . . that it . . . has accreditation from a nationally recognized organization if the standards for that accreditation are equal to or more stringent than the standards for licensure under this chapter or regulations adopted under this chapter.” D. G. is not seeking licensure, and, as an exempt organization, it may not be licensed.

¹⁹ The application lists dates of the day camp from June 1 through August 6, 2024, with closures on June 19, July 4, and July 5. Div. Ex. 2, pg. 2.

(2) a current accreditation or certification from a national accreditation group for a day camp or similar facility or program as described in 7 AAC 57.015(11);

* * *

(5) approval of the department or a designee under 7 AAC 41.201(d); or

(6) approval of the department or designee under 7 AAC 41.370.

A provider described in 7 AAC 41.200(a)(2) must meet the applicable qualifications of the accrediting agency.²⁰ As a “day camp . . . program as described in 7 AAC 57.015(11)”, D. G. must meet the requirements of 7 AAC 41 to be eligible to participate in the child care assistance program. In addition, a provider described in 200(a)(2) must meet the “applicable general health and safety requirements” of the accrediting group;²¹ the “applicable environmental health and safety requirements” of the accrediting group;²² the “applicable life and fire safety requirements” of the accrediting group;²³ applicable requirements of the accrediting group for first aid kits and procedures;²⁴ and applicable requirements of the accrediting group for certification for first aid and CPR.²⁵ However, 7 AAC 41.240(a) makes clear that the responsibility of a provider described in 7 AAC 41.200(a)(2) to meet the poisonous plant requirements is not satisfied by meeting the requirements of the accrediting group:

A licensed child care provider described in 7 AAC 41.200(a)(1) shall meet the requirements of 7 AAC 10.1090. A provider described in 7 AAC 41.200(a)(2), (3), or (4) shall meet the applicable requirements of the accrediting, certifying, or approving agency regarding the presence of animals in the child care facility. **A provider described in 7 AAC 41.200(a)(1) - (5) shall meet the requirements for toxic substances and poisonous plants under 7 AAC 10.1095.** (emphasis added)

Clearly 7 AAC 41.240(a) requires a provider described in 7 AAC 41.200(a)(2), like D. G., to meet the standards set out in 7 AAC 10.1095 to be eligible for participation in the child care assistance program. Unlike general health and safety requirements, environmental health and safety requirements, life and fire safety requirements, first aid and CPR requirements, or animals, the requirements for toxic substances and poisonous plants are not deferred to a national accrediting group. Instead, the regulation states the provider described in 7 AAC 200(a)(2)

²⁰ 7 AAC 41.200(b).

²¹ 7 AAC 41.215(a).

²² 7 AAC 41.220(a).

²³ 7 AAC 41.222(a).

²⁴ 7 AAC 41.230(a).

²⁵ 7 AAC 41.235(a).

“shall meet the requirements for toxic substances and poisonous plants under 7 AAC 10.1095” with no reference to requirements of an accrediting group. In other words, unlike requirements in 7 AAC 41.215-235, the poisonous plant requirement is imposed on providers directly by the Department, with no reference to national accreditation standards.

B. The Department may enforce the poisonous plant requirement directly, without deferring to national accreditation group standards.

Exemption from licensure does not mean that D. G. is exempt from oversight. For purposes of determining compliance with various statutes and regulations, including 7 AAC 10.900 - 7 AAC 10.990 (barrier crimes and conditions; background checks), and 7 AAC 10.1000 - 7 AAC 10.1095 (environmental health and safety), and for purposes of ongoing monitoring, the department *may* conduct inspections and investigations.²⁶ *If* a day camp is subject to 7 AAC 10.1095, notwithstanding its exemption, it may be monitored for compliance with that regulation, just as it is for background check and barrier crimes and conditions regulations.

To ensure that a provider, including one described in 7 AAC 41.200(a)(2), is in compliance with 7 AAC 41, the department “*may* conduct inspections, including announced or unannounced onsite inspections and investigations;” the department “*will* inspect and investigate the provider for purposes of health and safety compliance within 90 days” of a complete application; and it “*will* conduct annual unannounced inspections during subsequent years of participation.”²⁷

While the Division’s interpretation its own regulations is normally given effect, unless plainly erroneous or inconsistent with the regulation,²⁸ here the Division’s interpretation is inconsistent with the regulation. 7 AAC 41.240(a) requires direct compliance with 7 AAC 10.1095 by providers like D. G., and it does not rely on outside authority to impose and enforce similar requirements, unlike other health and safety requirements found in the same chapter. The department has the power to conduct inspections to ensure compliance with its poisonous plant regulation, but it lacks the power to defer enforcement (or mandate an accreditation standard) of its poisonous plant requirement to an outside accrediting body. Therefore, while D. G. is subject to the poisonous plant requirement, the Division may not refuse to conduct inspections and

²⁶ 7 AAC 10.9600, 7 AAC 41.265(b).

²⁷ 7 AAC 41.265(b).

²⁸ *Tunley v. Municipality of Anchorage Sch. Dist.*, 631 P. 2d 67, 76-78 (Alaska 1980) citing 1A C. Stands, Sutherland Statutory Construction § 31.06, at 362 (4th ed. 1972).

monitor for compliance with 7 AAC 10.1095 based on D. G.’s accreditation-based exemption from licensure.

IV. CONCLUSION

7 AAC 41.240(a)(2) states that, to be eligible as a child care assistance provider, a provider described in 7 AAC 41.200(2), like D. G., must meet the poisonous plants requirements of 7 AAC 10.1095. This requirement applies only if the child care provider seeks child care assistance eligibility. Because D. G. seeks child care assistance provider eligibility, it must meet the poisonous plants requirements. In order to satisfy this requirement D. G. must submit to the department “a written list of all poisonous plants maintained in [D. G.], and a description of how [D. G.] will protect children, or adults with impaired judgment, from being harmed by the plants,” and the Department must find that “children in care” of D. G. “will be protected from harm.”²⁹ The list and description need not be included in its national accreditation manual but may be produced locally by D. G.

However, unlike other health and safety requirements in 7 AAC 41.215-235 and animals, a child care assistance eligible provider may not satisfy the poisonous plant requirement by meeting the standards of a national accrediting group. Thus, the division may not cede its authority to enforce compliance with 7 AAC 10.1095 to a national accrediting group by insisting its accreditation standards meet or exceed the department’s standards. Even if the ACA had such requirements, D. G., if it were found to be an eligible provider, is subject to direct Department inspection, monitoring and enforcement.

The Division’s denial of child care assistance eligibility is AFFIRMED on other grounds, based on a determination that D. G. must meet the requirements of 7 AAC 10.1095 to be eligible as a child care assistance provider.

DATED: this 10th day of October 2024.

Signed

Kristin S. Knudsen
Administrative Law Judge

²⁹ 7 AAC 10.1095(b).

ADOPTION

The undersigned, by delegation from the Commissioner of Health, 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 10th day of October, 2024.

By: *Signed* _____
Name: Daniel Phelps
Title: Process Improvement Manager
Alaska Department of Health, Office of the Commissioner

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]