

OFFICIAL OPINION NO. 90-37, Licensure of Before and After School Day Care Programs

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OFFICIAL OPINION NO. 90-37

Licensure of before and after school day care programs

Dear Mr. Hanson:

You have requested an official opinion based upon the following factual situation.

FACTS:

A parent's group and YMCA are joining forces to provide care to children after school hours on a daily basis. Children will be registered for the program and a "menu" of activities (music, reading, computers, etc.) will be made available to them while at the facility. Staff will be available to oversee the children's activities.

A second organization is making its facilities available to children on a drop-in basis for several hours after school during the school year and for four hours in the afternoon during the months when school is not in session. This program has no registration or fees. There are activities available to the children such as crafts, visits to nursing homes, Bible study, etc., on a daily basis, but children are not required to take part in them. There are volunteers available to oversee activities and children may come and go as they please.

Based upon the foregoing factual situation, you have asked the following questions.

QUESTIONS:

1. Does a facility providing care after school hours only, fall under the definition of a "before and after school day care program" under SDCL 26-6-14(7) and thus is it required to be licensed as a child welfare agency by the Department of Social Services?

2. Does an organization which makes a facility available to children on a drop-in basis without registration or charging of fees fall under the definition of "before and after school day care program" under SDCL 26-6-14(7) and thus is it required to be licensed as a child welfare agency by the Department of Social Services?
3. What is the meaning of "providing of care and supervision" under SDCL 26-6-14(7)?
4. Is it possible to use ARSD 67:42:10 (day care centers) and 67:42:04 (group family day care) as licensing standards for before and after school day care programs during the period that licensing standards are being developed for before and after school day care programs?

DISCUSSION:

SDCL ch. 26-6 provides for regulation and licensing of child welfare agencies. A child welfare agency is defined in SDCL 26-6-1 as follows:

Any agency or institution maintained by a municipality or county, or any agency or institution maintained by a person, firm, corporation, association or organization to receive children for care and maintenance or for placement in a family home, or that provides care for mothers and their children, is considered to be a child welfare agency. The department of social services is a child welfare agency. (Emphasis supplied.)

Various agencies are particularly described in SDCL 26-6-14 as constituting categories of child welfare agencies for purposes of licensure. For purposes of this opinion, this statute provides as follows:

A child welfare agency shall be licensed, as provided in this chapter, for activities which fall within one or more of the following categories: . . .

(7) The providing of care and supervision of children on a regular basis before and after regular school hours which does not exceed four hours daily per child shall be known as a before and after school day care program.

A reading of ch. 26-6 indicates an intent to broadly include all those agencies and persons providing care for children, for purposes of safeguarding the children from harm that might occur incident to their care. In addition to the provisions of ch. 26-6, it is plain from the Code that the State in general, and the Department in particular, is charged with the duty of overseeing child welfare agencies and promoting the best interests of the children who may

be in their care. See SDCL 26-8-2 (chapter on dependent and delinquent children shall be "liberally construed in favor of the state for purposes of the protection of the child from neglect . . ."); SDCL 26-4-9 (department of social services to assist in the enforcement of all laws regulating welfare of children); SDCL 26-4-7 (department of social services to develop standards of care for children in public agencies and private organizations caring for dependent, neglected, delinquent, or mentally handicapped children); SDCL 26-4-6 (department of social services shall further development of local public services for children); SDCL 26-4-5 (department of social services shall undertake research that will contribute to general public education on problems of child welfare).

In addition to broad mandates of these statutes, the Legislature has provided specific exemptions from the requirement of licensure of a child welfare agency under ch. 26-6. SDCL 26-6-27 provides as follows:

Nothing contained in this chapter applies to educational services performed by an institution, school or nursery school if the care and maintenance of children is only incidental to the operation of the school, to services performed by summer or recreational camps designed primarily for character building or recreation, to the care of children by a relative, to the casual care of children by a baby sitter, or to the exchange of care of children by parents under informal mutual arrangements, to care furnished by a legal guardian or by institutions operated by other departments of state government.

For the purposes of this chapter, "casual care of children" is employment which is irregular or intermittent and which is not performed by an individual whose vocation is babysitting and which does not exceed twenty sitter hours rendered to not more than six children per week.

IN RE QUESTION NO. 1:

It is my opinion that a facility providing care after school hours only, as opposed to both before and after school hours, falls under the definition of a before and after school day care program, SDCL 26-6-14(7), and is thus required to be licensed as a child welfare agency by the Department of Social Services. I assume that this type of licensure would be less onerous than that for a day care center or group family day care home, since it is intended to apply only to facilities that care for any child less than four hours per day. Any facility caring for children more than four hours is likely subject to broader regulations unless exempt as a family day care home not receiving public funds. SDCL 26-6-14, 26-6-14.1.

You have described the parents' group and YMCA to which this question applies as providing after school hours care on a daily basis. Children would be registered and have activities available to them, as well as having a staff to oversee the children's activities.

Apparently, the parents' group and YMCA argue that since they provide only after school day care, they are not a "before and after" care provider. The argument is, apparently, that so long as the agency provides care only after school, not before, it somehow has an exemption from regulation. In my view, this narrow reading of the statute would totally defeat the legislative purpose behind SDCL 20-6-14(7). The parents' group and YMCA are providing care and supervision of children on a regular basis under any reasonable definition of those terms. The purpose of the statute is to license, regulate and supervise such activity in the best interests of the enrolled children. True, the statute may have been clearer if the Legislature had stated that the care regulated was provided "before or after" regular school hours. Still, the purpose of the statute is plain. A facility providing care for any child for less than four hours per day is covered, if the care is before or after the child attends school. SDCL 26-6-14(7). An institution cannot escape regulation merely because it provides "after hours," but not "before hours," care.

IN RE QUESTION NO. 2:

Your second question asks whether a facility that does not charge fees, is available on a drop-in basis, and to which children may come and go as they please, is subject to regulation under SDCL 26-6-14(7). I am of the opinion that such a facility falls under the definition of SDCL 26-6-14(7). I base this conclusion on SDCL 26-6-1, which provides that where the facility receives children for care and maintenance, it is a child welfare agency. In addition, the provisions of SDCL 26-6-14(7) state that where care and supervision of children on a regular basis before and after school hours are provided, the institution is subject to regulation. The chapter should not be interpreted so as to require regulation of facilities such as libraries, swimming pools, video arcades and shopping malls, which do not have as their purpose for existence the care and maintenance of children.

In addition, I am of the opinion that the fact that no fees are charged and that the program is of a "drop-in, drop-out" nature does not exempt the institution from regulation. The Legislature has carefully provided various exemptions from regulation in SDCL 26-6-27, quoted above. In my view, the exemptions provided in that statute are unlikely to apply to this situation. I doubt that the care and maintenance of children is only incidental to the

operation of a school, in the situations you describe. The institution does not appear to be a summer recreational camp designed primarily for character building or recreation. I assume that not all the children cared for will be relatives of the caregivers. I further assume that the arrangement does not constitute exchange of care of children by parents under informal, mutual arrangements; care furnished by a legal guardian, or care furnished by institutions operated by other departments of state government.

It may be a closer question whether the arrangement might constitute "casual care of children" by a babysitter. On balance, in view of the facts as you give them, I find it unlikely that this would be the case. The requirements are that the care be irregular or intermittent, that it not be performed by an individual whose vocation is babysitting, and the care must not exceed twenty sitter hours per week rendered to not more than six children per week. Obviously, an individual determination would be required as to each agency or institution to determine whether it might fit one or more of these exemptions. Any institution defined in SDCL 26-6-14(7) not fitting these exemptions, is not exempt so long as it fits the definition of SDCL 26-6-1 by receiving children for care and maintenance.

IN RE QUESTION NO. 3:

You have asked what the meaning of "providing of care and supervision of children" may be under SDCL 26-6-14(7). In my view, these words have an ordinary and common meaning, which should be self-evident. I would only add that in light of the Code sections cited above, these terms should be interpreted broadly in favor of regulation in order to safeguard the interests of children under care.

IN RE QUESTION NO. 4:

You have asked whether certain provisions from ARSD 67:42:10 and 67:42:04 may be used as licensing standards for before and after school day care programs during the period the licensing standards are being developed for such institutions. SDCL 26-6-16 provides as follows:

The department of social services shall promulgate rules pursuant to chapter 1-26 to establish standards of care of children outside their own homes by licensed or registered child welfare agencies. Such rules may include qualifications of personnel engaged in child care services; requirements relating to safety, sanitation, condition and maintenance of physical plant and equipment utilized in child care; controls relating to the keeping of

records, numbers, ages, and sex of children cared for, conditions which shall be met for the issuance of a provisional license; a list of criminal offenses, including felonies and misdemeanors under federal and state law, the commission of which renders an applicant ineligible for the grant or retention of a license under 26-6-14.3 to 26-6-14.7, inclusive, and the commission of which is grounds for preventing other persons specified in 26-6-14.4 from having contact or employment with a child welfare agency; and such other provisions as may be required for federal financial participation. Such rules may not include requirements as to incorporation as nonprofit entities.

This statute gives broad rule-making authority to the Department. It does not, by its terms, require that individual requirements or licensure standards be adopted for each separate type of day care facility or home. Thus, if the Department had rules governing day care in general, I would be of the opinion that these rules could be used for regulation of before and after school day care programs. I have examined the rules cited (ARSD 67:42:10 and 67:42:04). I am of the opinion that by their terms they apply only to day care centers and group family day care homes. These types of facilities are specifically defined in separate subsections of SDCL 26-6-14. A group family day care home is not a day care center. A day care center is not a group family day care home, and neither is a before and after school day care program. Since the two chapters of ARSD, by their terms, apply only to group family day care homes and to day care centers, they do not govern the provision of before and after school day care. To press them into that service would be contrary to their explicit terms. In addition, the standards in each chapter are different from those in the other. If these were used for before and after care, the Department would have to pick and choose which standards to apply. This would vest too much discretion to disregard or apply rules on an ad hoc basis. The Department may wish to adopt one chapter or the other on an emergency basis while permanent rules are put in place.

Respectfully submitted,

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ATTORNEY GENERAL

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