HANDBOOK FOR WRITING LICENSING RULES FOR HUMAN SERVICES PROGRAMS

David Ditmar & Jake Terpstra
To order additional copies contact:

Clearinghouse
The National Child Welfare Resource Center for Organizational Improvement
Edmund S. Muskie School of Public Service
400 Congress Street
P.O. Box 15010
Portland, Maine 04112

(207) 780-5813
1-800-HELP KID
Fax: (207) 780-5817
E-mail: clearing@usm.maine.edu

Stock No. B050170

© 1998 Edmund S. Muskie School of Public Service,
University of Southern Maine
licensing is a legally instituted process of state intervention in the affairs of those who would provide a designated service. The intervention is carried out through the use of specific criteria, namely licensing rules used to assess the services. Thus the licensing rules become tools of those who carry out the licensing function. Persons who license services for children and vulnerable adults have been called guardians of the rights of children, adults and their families. In a more general sense it can be said that well written licensing rules applied by skilled licensing staff are the guardian of the rights of children, vulnerable adults, and their families.

Generally licensing serves to protect persons whose lives are controlled by persons other than their families and who are not in a position to protect themselves.

Licensing rules, essential to a state licensing program, are the yardstick by which licensed services are measured and held accountable. Once promulgated, rules usually remain in effect for several years, and even when they are revised, the existing rules generally serve as a basis for the new set of rules. Given these and other factors, rules have an impact on a large number of people over a long period of time and therefore must be developed using the utmost care, planning and testing.

Terms other than “rules” are used in some states. These terms include regulations, requirements and standards. The term “rules” is used here because it has broad use, and rules are in fact state administrative rules.

Licensing rules are mandates and prohibitions, which have the force of law to the person or organization seeking or holding a license. The rules are based on a state licensing law, and must be consistent with the law. Rules, when promulgated are part of the administrative rules of the state, forming the “floor” below which a regulated service may not legally operate. Rules are designed to protect children and adults from hazards and to mandate services at a basic level of quality.

This handbook is intended as an aid in:
1. outlining a process for developing rules
2. developing a format for rules
3. understanding the context of rules
4. defining appropriate content of rules
Overview

Licensing is a process the state uses to protect persons who are in circumstances where they are vulnerable, and sometimes helpless. This includes children when they do not receive care and protection normally provided by parents. Services involved in this area are provided by child placing agencies, child care institutions, day care centers, family foster homes and family day care homes. Newly developing services such as day treatment, crisis nurseries and independent living also may be licensed. Services may also include those for adults who because of age or other factors cannot care for themselves and receive care apart from their families. The licensing of human services programs is the state’s authorization to certain individuals and organizations to provide specified services to children and adults, but only if the services meet certain criteria. Licensing can be viewed as a quality control process at a rather basic level.

Licensing and licensing rules are based upon values and philosophies as well as on objective information about the effects of certain conditions. The values permeate all aspects of licensing, even though they generally are not articulated, except perhaps briefly in a licensing law preamble or in a foreword statement to the licensing rules. Some states have included a “philosophy statement” in the licensing rules booklet to show the values reflected in their state’s rules. Although such statements are not enforceable per se they can be helpful in that they provide a frame of reference for licensing rules.

Licensing Law

The legislative branch of state government, through the passage of a law, establishes the legal base for an agency of the administrative branch of state government to carry out the licensing of specified activities. All activities of governmental agencies are mandated and governed by state laws. This includes licensing activities. The licensing law specifies the services to be regulated, designates the responsibility to a particular state agency, delegates rule making authority to that agency, establishes the parameters of the rules and specifies other factors such as conditions, types, and length of licenses, as well as penalties and appeal rights.

Although there is considerable variation among states in terms of what content is included in the licensing law, there are some general commonalities. The licensing law contains the mandates or “marching orders” to the agency which carries out licensing, and thereby to the licensing staff.
The licensing law does not normally include requirements for licensure, e.g., specific staff ratios, but does authorize the licensing agency to promulgate rules on staffing ratios. The law does not spell out licensing policies or procedures such as the frequency of monitoring visits, other than perhaps minimums. (See Appendix I for a list of areas generally covered in a human services licensing law.)

Applicants and licensees should be able to look to the licensing rules to learn all the specifics with which they must comply to be eligible for a license. They do not look to the licensing law for this. Where an applicant or licensee believes that licensing is being carried out inappropriately, however, he or she should be able to refer to the licensing law to determine whether licensing staff are in fact implementing licensing in accordance with the law. The applicant or licensee also may look to the law to learn appeal rights to contest a licensing action. (In good practice the licensee should be informed of the appeal process whenever the licensing agency is recommending a licensing action which adversely effects the licensee.) (Note: A model state licensing law for child welfare services was developed by The Child Welfare League of America and is available from Virginia Commonwealth University School of Social Work.)

Licensing rules are based on state law; they are regulations that are developed and promulgated by the state administrative agency responsible for carrying out the licensing law. The types of services for which state legislatures delegate rule making and enforcement responsibility to a particular state agency are generally in keeping with the mission of that state agency. For example health departments usually license health services and social services agencies regulate social services.

Licensing rules should contain all the specifics, i.e., mandates and prohibitions that an applicant or licensee needs to know to be eligible for a license. Specific requirements for licensure should not be contained anywhere else, such as the licensing law; as having more than one source for license requirements increases the possibility of confusion and error.

Similarly, clarity of rules and responsibility also is greater if the licensing rules contain only requirements for licensure. Mandates for the licensing agency operation and for licensing staff should be in the licensing law and in licensing policies. Licensing rules should contain only directives to persons who seek or hold licenses.

Even though the licensing law and the licensing rules are not statements of values, and do not explain why the directives are given, they are nevertheless based upon values. Each person involved in rule writing brings basic assumptions and values which the rules reflect to some degree. This sometimes creates a dilemma for the rule writers, the persons who enforce the rules and those regulated by the rules. When licensing staff and licensees work with the rules over a period of time, they sense that there is an
underlying value system. For persons who first encounter the rules, however, this value base may be less obvious and the rules may seem to be basically red tape. The “what” may be clear but not the “why.”

Most people are able to work more effectively if they understand the reason something is to be done a particular way. Many states handle this by including a section in the rules such as a “Statement of Philosophy” in the front of the booklet of licensing rules. Such statements are not part of the rules and do not go through the promulgation process. However, like rules they should be brief succinct statements which clarify why the rules are written, as well as what the objectives of the rules are. (See Appendix II for a sample based upon one state’s statement of philosophy.)

While the law is the base and sets the parameters of licensing, polices and procedures are also needed to carry out the law. They are administrative directives specifying the way licensing activities are to be carried out. The licensing policies are usually contained in a licensing operations manual. These policies are not requirements for applicants and licensees but are generally binding on the licensing staff. The policies are one of the tools the licensing agency uses to provide fair and consistent treatment of applicants and licensees. While these policies are not requirements applicants and licensees must meet, they indirectly affect applicants and licensees because the policies direct the way licensing staff carry out their duties.

Many states share their policies and procedures manuals with licensees as information, to help them understand the licensing process. It is recommended that policies and procedures not be included in the same booklet as the rules, to reduce the possibility that licensees interpret any of the policy content as requirements they must meet.
Staff specialization in the rule writing process is very helpful. While a full time position is not feasible in most states, assignment of primary responsibility for rule writing as part of the duties of a particular staff position should be sought. Promulgating licensing rules is a dynamic and exacting process which takes considerable skill as well as a strong knowledge of both licensing and the program(s) the rules will regulate. Because the person who has responsibility for rule writing must have a great deal of familiarity with the regulated services, the licensing process and the rule promulgation process, it is suggested that this responsibility be assigned to a person in that area of licensing for which the rules are being written and who is proportionally relieved of other responsibilities. In most instances the person best able to serve as coordinator is the person who is head of the part of the agency responsible for enforcing the rules. For example if the state agency has licensing units for day care services, child welfare services and adult services, the directors of each of those units would serve as the coordinator for each set of rules written for their area of licensing.

A preliminary step in the rule writing process is deciding which areas of service will be regulated under the set of rules to be developed or revised. The parameters may be already established by the licensing law or the licensing law may be written in a way that a description of services to be regulated by a set of rules allows some latitude. The first step in the process of developing or revising rules should begin with a careful analysis of whether new or revised rules are needed. Factors to consider may include:

1. A new licensing law or amendment requires the promulgation of rules.
2. The licensing law requires the rules be reviewed and revised periodically.
3. The current rules do not provide adequate protection.
4. The regulated services have changed since the rules were last revised.
5. New forms of services have emerged, requiring new rules to provide appropriate protection.
6. Practical problems have been identified in applying or enforcing the existing rules.
7. Numerous waivers or variances related to particular rules have been granted indicating they are not necessary to provide protection or need to be changed.

8. There is political pressure to change the existing rules. (Political pressure may come from a number of sources and be motivated by a variety of things. It may originate from providers for valid reasons.)

Some state licensing laws require that rules be reviewed periodically, i.e., every 3 or 5 years. Whether or not the licensing law requires it, periodic review is a sound practice. In such reviews, input from a cross-section of interested parties should be obtained. The recommendation may be:

1. The rules should not be revised.

2. A partial revision is needed, e.g., only specific areas of the rules be revised.

3. A major revision is needed.

The process of deciding the extent of the revision needed, based on input from interested parties, is generally preferable to undertaking a revision simply because a certain amount of time has passed since the last revision.

Determining the reason for developing or revising rules at a particular time will provide a basis for understanding what areas the new rules will likely address. This information in turn needs to be compared with the parameters specified by the licensing law for the scope rules may encompass. Where there is anticipated need for a rule or rules which exceed the scope of the licensing law it will be necessary either to amend the law or rescind the law and enact a new licensing law.

The process of determining what area(s) will be governed by the rules to be developed can be complex and requires careful thought and planning. For example, the licensing law governing day care licensing may include care for children who are ill, school age, “latchkey children,” night time care as well as other types of day care. Each of the types of care may be provided in private family homes or in child care centers including crisis nurseries. The question of whether such categories of day care will be included within one set of rules for child care centers and another set of rules for family homes needs to be resolved at the onset.

As services become more complex and varied, the need for clarity as to which services will be governed by a particular set of rules becomes increasingly more significant. Generally, a certain number of program types can be licensed using one set of rules when that set of rules is composed of separate modules or sections. Such a set of rules would begin with core rules which apply to all licensees, and have modules that address components of particular types of programs. Using this approach, virtually the full range of residential child care facilities such as small agency staffed group homes, large facilities, secure facilities, maternity homes, drug treatment, short term emergency care facilities, etc. can be regulated under one set of rules, provided that set of rules addresses the unique aspects of various types of care in separate modules.
The structure of a set of rules governing the above type of residential child care programs could include:

1. A general provisions or core section which includes the rules which apply to all programs to be licensed. (Exceptions to individual rules or parts of a rule can be built into the individual rules where needed.)

2. Special provisions modules which contain rules related to a specific program category such as those mentioned above.

3. A fire safety section.

4. An environmental health section.

The “Residential Group Care Facility Rules” found in the Suggested State Licensing Models, developed by the Child Welfare League of America under a contract from the Children’s Bureau of the U.S. Department of Health and Human Services, is an example of such a set of rules.

Using one set of rules which govern several categories of programs has advantages over separate sets of rules for each type of program if the programs have many commonalities. Using separate sets of rules for each program operated by the same organization presents a problem with maintaining compliance with each set of rules if the rules are not consistent with each other on organizational matters, case planning, policies, staff educational requirements, etc. It is also more efficient to review or revise one set of rules than to review or revise several sets of rules. Regulating several types of service under one set of rules assumes that the types of service regulated have organizational commonalities and that additional rules are developed for the specific characteristics of each program to be regulated.

Most states have an administrative procedures act which specifies the steps to be followed in promulgating rules. It is important to review this law and be familiar with the legal requirements for promulgating rules before beginning to revise or develop new rules.

Once it has been decided which programs will be governed by the rules and that the anticipated scope of the new rules will be within the parameters of the licensing law, other planning tasks can be completed. These include:

1. Developing a working plan and schedule for carrying out the various steps in the development process.

2. Deciding on the advisory committee structure and membership.

3. Developing the general format for the rules.

4. Selecting staff to assist in the process.

The development of a schedule for the rule writing process is important. The schedule should include the dates of the advisory committee meetings. The number of meetings of the advisory committee will depend largely
on the amount of work to be done. For development of a completely new set of rules the committee will need to meet at least six times, while the number of meetings for revision of an existing set of rules may be fewer.

The development of a schedule with specific dates accomplishes several things. First, it provides a framework to measure progress. Second, setting the dates of the meetings in advance allows members to plan their schedules. Third, it implants the idea that the task of the advisory committee will be accomplished within a given period of time and that the advisory committee is time-limited.

Even with a well-planned schedule there is no guarantee that the work of the committee will be completed within the time allotted. Divergent views among members and pressures from outside interests can slow the process. However, the fact that the process can be delayed only underscores the need for a schedule, since it serves to minimize these factors. Generally several months are needed to carry out the process if there are no unexpected delays.

The general format and outline for the rules can be based on existing rules or a set from another state which is considered exemplary, or if the area to be regulated is child welfare, the model state rules developed by the Child Welfare League of America. Having such a base to work from is important as it provides a frame of reference for the advisory committee and helps the committee to work with a sense of direction. If resources allow, securing the services of a communications or technical writing expert to analyze the existing rules and make recommendations on style, organization and format, is recommended.

Fundamental to rule development is the use of an ad hoc committee to advise the state agency on the content of the rules. The work of the advisory committee generally is best accomplished by dividing the committee into two or more subcommittees depending on the size of the total group. Subcommittees then deal with specific sections of the rules, such as general provisions or core rules, program, administration, and fire and environmental health.

Generally membership of the advisory committee should include:

1. Representatives from organizations regulated by the rules. (This group should comprise the majority of the committee.)
2. Persons with special expertise in the regulated services.
3. Persons who use or have used the regulated services; such as parents of children in day care, children of parents in adult foster care, former foster children, etc.
4. Representatives from the “public.” This can include persons from organizations such as the League of Women Voters.
5. Representatives of state agencies, such as education, fire and health officials, when their participation is used in the licensing
process. (These persons often have a specific focus relative to the rules, however, their expertise may be essential.)

Selection of the specific members of the advisory committee is the responsibility of the state agency responsible for licensing. However, it is advisable to invite organizations of providers to suggest their own representative. The invitation can outline the qualities which are important in a committee member, such as the ability to represent the interests of the consumers as well as providers and a commitment to attend all meetings. When the selection of individual committee members can be made, it is often possible to select a person who fits more than one of the above listed characteristics. This can be useful in keeping the committee to a manageable size. It may be appropriate to have a committee member from the same department that the licensing unit is a part of, if that department also provides services which are regulated by the rules to be promulgated. This department staff person would not be from the licensing unit and would serve as an active member of the committee.

The size of the committee ideally should be 12 to 16 members. Efficiency tends to diminish for a committee larger than 16 and it is difficult to obtain sufficient representation when membership is less than 12.

Selecting the members of each subcommittee can be accomplished by calling prospective members before the first meeting and asking them to serve on a particular subcommittee. If the person prefers to serve on a particular subcommittee the request normally should be granted as interest generally improves the quality of participation. However, if there are not enough interested persons for a particular subcommittee it may be necessary to assign members to that subcommittee to maintain an appropriate balance.

After the subcommittee structure has been decided the selection of licensing staff to assist the advisory committee can be made. In addition to the person who coordinates the overall rule making process, there should be one licensing staff member for each subcommittee and they should be staff who license the services to be regulated by the rules. It is important to select licensing staff who are experienced in the licensing process and who also have a strong knowledge of the services to be regulated. In addition, the licensing staff need to be capable of writing clearly and succinctly, as they will take the committee’s ideas and translate them into rule language.

Once the licensing staff have been selected and before the first meeting of the advisory committee, a meeting should be held with them to clarify their roles and the process to be used in working with the committee and subcommittees. The staff should function as facilitators and resource persons to the committee and subcommittees, not as active committee members. They should take notes and record the concepts the subcommittees present. The staff also should help the subcommittees understand whether the concepts suggested for inclusion in the rules are within the parameters of the licensing law.
Staff members play key roles as resources to their subcommittee. This includes keeping the subcommittee task-focused and helping members understand how a point under discussion would have an impact on programs to be regulated. They must, however, be careful not to act as active members of the subcommittee. They should not vote in the subcommittee, or in the full committee meetings.

The site of meetings needs to be comfortable and large enough to allow for the subcommittees to meet separately at the same time, as well as provide room for the committee of the whole to meet. The preparation for each committee meeting is most important to the success of the committee process. Through careful attention to detail, the potential for negative feelings of committee members can be avoided. The preparation also needs to include appropriate materials and amenities such as coffee.

It is important to prepare the committee at the first meeting for the reality of their task and their role as advisors and facilitators. It is important to keep in mind that the licensing agency has the responsibility for developing the rules and must make sure that the rules do not unduly discriminate against or favor a particular type of program. Keeping these responsibilities in focus can prevent committee disappointment.

Committee members tend to measure their success in terms of the amount of impact they feel they have, rather than on the quality of their input. Thus it is important to keep the focus practical and on the licensing process. The committee members need to understand that the task is to develop licensing rules, not ideal standards. Invariably, some committee members will wish to include ideal standards and recommendations beyond basic requirements. The staff can help prevent this by keeping the focus on the mandatory aspects of rules. The rules need to be written with the assumption that noncompliance with any one of the rules could lead to license denial or revocation. Thus, only significant basic content should be included.

Some states ask the advisory committee to develop recommended standards in addition to licensing rules. This can serve a number of useful purposes, including making it clear to licensees that licensing rules are not a handbook which defines everything necessary for the operation of a program. Recommended standards also can be useful consultative tools for licensing staff. Where such standards are printed in relation to the rules is of considerable significance. Standards can be printed in a rear section of the rule booklet or in a separate booklet. Printing recommended standards with the rules, where each page contains both rules and standards is not recommended, as the likelihood that the distinction between what is to be enforced and what is recommended will be lost. There are some drawbacks to having the advisory committee develop recommended standards. First, it can lengthen the time it takes to write the rules. Second it can shift some individual priorities from the primary purpose of the committee, namely advising on licensing rules.
The subcommittees should not attempt to write the actual rules but should discuss and present concepts and basic principles which the rules should address. For example, a subcommittee might suggest that the parents of children in residential care be provided services to resolve the problems which precipitated the need for substitute care. The licensing staff would help the subcommittee assess whether a rule addressing this concept would be within the purview of the licensing law and if it is, would later write specific proposed rules based upon this suggestion of the subcommittee. The actual writing of rules usually occurs between meetings and is reviewed at the next meeting.

When staff make commitments to have certain materials or reports available or mailed to committee members, it is important to carry out the commitment. As the committee sees the licensing agency staff follow through as promised, the committee will trust that the product will benefit those to be protected. In this climate the members are more likely to support the final product even if it does not include everything they would have included had they been given a free reign.

A major part of the first meeting should be orientation of the committee as a whole. The orientation should include:

1. An informed speaker who can inspire the members relative to the goal.
2. Clarification of the role and ground rules of the advisory committee and the importance of their input and support for the end product.
3. A gentle reminder that the licensing agency is ultimately responsible for the format and content of the rules.
4. Sharing of house-keeping tasks such as procedures for travel expense reimbursement.

After the orientation is completed, the subcommittees are convened. The major portion of the first subcommittee meetings should focus on getting acquainted and role clarification, with a brief time given to beginning the task of the subcommittees.

The majority of the time during subsequent meetings should be devoted to the work of the subcommittees, with time at the end of each meeting used to present to the committee of the whole the issues the subcommittees have dealt with. This allows all the members to see the bigger picture and present their ideas and concerns relative to all areas of the rules, which also helps to build a consensus.

The use of a rule drafting manual or handbook can be most helpful. Often such a manual or handbook is available from the branch of state government responsible for reviewing the style and format of the rules before they are promulgated. The federal government also has developed an excellent manual on this subject titled, “Legal Drafting Style Manual,” copies of which are available from the Children’s Bureau of the Department of Health and Human Services.
There are many tenets which the writers of rules need to keep in focus as the rules are written, rewritten and polished into final form. The writers of rules must assume that once the rules are implemented a license can be denied or revoked for failure to comply with a single rule. While this may not happen in actual practice, it must be assumed that it can happen, as licensing staff do not have the luxury of “excusing” a licensee from meeting a rule. Because rules have the force of law, it is not legal for staff to “bend” a rule for any licensee. It is possible to waive or grant a variance to a rule under prescribed circumstances if the law or rules provide for doing so. However, if the rule writers believe that exceptions to certain rules should be made under certain circumstances, those rules should be written to allow for such exceptions.

As rules are developed it is important to keep another basic tenet in mind, namely avoidance of over-regulation. Excessive rules are as detrimental to the goal of protection as is under-regulation. Over-regulation prevents needed services from being available by discouraging potential providers from entering the field, while under-regulation allows those who use the services to go unprotected or to be exploited. Over-regulation is also conducive to over-regimentation in programs and detracts from the provision of appropriate services.

Rules need to be clear and precise and, where possible, they should be measurable; however, this sometimes is not possible in the literal sense (e.g., emotional stability, good character, or cleanliness). When it is not possible to write a rule which is measurable, the rule still must be written so that the “reasonable person” can determine compliance or noncompliance.

When writing rules it is necessary to resist the tendency to include everything a licensee should do. Rules are not high quality standards or ideals but are requirements below which providers are not allowed to operate. Rules do not lead the way to new levels of service quality but can raise the “floor” of acceptable services as the quality of regulated services advance.

As noted earlier, licensing rules have the force of law. However, the rules apply only to those who are required by law to be licensed. Therefore statements or mandates directing licensing staff relative to their licensing function are not appropriate in licensing rules. This is not to suggest that such mandates should not be shared with licensees. In fact, it can be helpful to providers to have access to the policies and procedures which the licensing staff must follow, but these polices and procedures are not rules and should not be printed in the same booklet as the rules. Policies and procedures that direct licensing staff are more appropriate in a licensing manual.

Licensing rules always direct the applicant or licensee to do or refrain from doing something. They do not give directives to third parties. For example, a rule applying to adult residential facilities cannot require that all vehicles on the premises have seat belts. A rule, however, can require the licensee to use only public transportation or vehicles equipped with seat belts for transporting residents and that where a vehicle is equipped with seat belts that they be used. In other words, rules can prohibit or man-
date only matters over which the licensee has direct control. This distinction may seem subtle at times, but can be critical in enforcing the rules.

In writing rules for child welfare services, agency accountability also is clearer if the terms child “care” and child “placement” are selectively used. Child placing agencies make placements, or place children into care and are thus responsible for those placement activities. Child care providers by contrast only provide child care. It is important that the licensing language reflect this distinction. Most states develop separate sets of rules for child placing agencies and for child caring organizations, and apply both for agencies which provide both child placement and child care functions. When this is done, many of the rules dealing with the organization itself can be identical in both sets of rules, such as rules related to budgets, audits, qualifications for the director, etc.

Where possible, and practical, licensing rules need to be specific. Specific rules usually contain numbers and is easily measured using commonly accepted measurement tools or scales. However, in the regulation of human services having specific rules is not always possible or even desirable. For example, to write a rule which only lists unacceptable forms of discipline would result in failure to list all possible unacceptable forms of discipline and thus would create a loophole in the rule. A rule which states that the licensee shall have and follow a discipline policy, which emphasizes positive aspects of discipline with a subsection which prohibits general punishments such as “humiliation” and “corporal punishment” would serve to protect the residents. It also should specifically prohibit the more common types of severe discipline, but only following a more general statement on discipline. The following is such a rule:

R 400.4137 Discipline and behavior management.

Rule 137. (1) An institution shall establish and follow written polices and procedures regarding discipline and behavior management.

(2) Upon request, the written polices regarding discipline and behavior management shall be available to all residents, their families, and referring agencies.

(3) Staff shall receive a copy of the polices and procedures and shall comply with them.

(4) The policy shall emphasize positive discipline and behavior management as well as prohibit all cruel and severe discipline, including any of the following:

(a) Any type of severe physical discipline inflicted in any manner.

(b) Verbal abuse, ridicule, and humiliation.

(c) Denial of any essential program services.

(d) Withholding of any meal.

(e) Denial of visits and communications with family.

(f) Denial of opportunity for at least 8 hours of sleep in a 24-hour period.
(g) Denial of shelter, clothing, and essential personal needs.

(h) Excessive chemical, mechanical, and physical restraint.

General rules tend to be more difficult to measure than specific rules and often the absence of documentation of rule noncompliance must be taken as the evidence of compliance. This raises an important related point. As a rule is being written, the question of how compliance with the rule will be determined must be considered. If the conclusion is that it is not possible to determine compliance, the rule will need to be rewritten or eliminated. Often licensing staff are in the best position to know whether the wording of a rule makes it possible for them to come to a definite conclusion of compliance or noncompliance.

Specific rules that can be readily quantified are in effect measures. Rules which are more general and cannot be easily quantified often can be more valuable when dealing with actual problems. Because general rules have broader applicability they can be use to apply leverage, where specific rules address only a particular aspect of an issue. “Lever” rules may be most valuable when problems arise. Such rules often deal with concepts such as “safe,” “clean” and “emotional health” and noncompliance is generally apparent, but compliance is not easily quantified. “Lever” rules are more difficult to apply under routine circumstances and require licensing staff who are well trained in applying the rules consistently. The following is an example of a “lever” rule:

**R400.4113 Staff qualifications.**

*Rule 113. Each employee of the facility shall be of good moral character, emotionally stable, and of sufficient health, ability, experience, and education to perform the duties assigned.*

Vague terms such as “adequate” and “proper” generally should be avoided in writing rules. Again, however, there are times when their use may be necessary because more specificity cannot be given. An example would be a rule requiring that a licensee maintain adequate staff to carry out the treatment program specified in the licensee’s own program statement. Broad “lever” rules such as this usually do not stand by themselves but are combined with other more narrow and specific rules, such as staff-to-child ratios, and a minimum number of staff required to supervise any group. This combination makes it possible to enforce a basic floor while also enforcing based on individual circumstances, providing a safety net to be used when needed. As noted earlier “lever” rules require extra care on the part of licensing staff to gather and document findings to substantiate rule compliance and noncompliance. The following is such a rule:

**R 400.4127 Staff-to-resident ratio.**

*Rule 127. (1) The licensee shall develop and adhere to a written staff-to-resident ratio formula for direct care workers.*
(2) The ratio formula for direct care workers shall correspond with the institution’s purpose and the needs of the residents and shall provide for the continual safety, protection, and direct care and supervision of residents.

(3) The ratio formula used shall be at least 1 direct care worker for every 10 residents or fraction thereof during normal awake hours and at least 1 direct care worker for every 20 residents or fraction thereof during normal sleep hours.

The terms “assure” and “ensure” tend to be overused in rules. Rules normally mandate that a licensee do or refrain from doing something. A direct statement is clearer than one which states that the licensee shall ensure something be done or not be done. It is helpful if near the end of the rule writing process someone highlights all imprecise terms such as “proper,” “adequate,” “sufficient,” “suitable,” “appropriate,” “assure” and “insure,” for review by the ad hoc committee to determine whether more precise or direct wording should be used.

Terms must be used consistently throughout a set of rules. Terms which are ambiguous or are not used in accordance with their common dictionary meaning need to be defined in a definition or glossary section at the beginning of the rules or at the beginning of the section in which they are first used. A term which requires definition but is only used once can be defined in the rule where it is used. Terms which are defined in the licensing law must be used in keeping with their definition in the law. It is not necessary to redefine terms used in the law as the law sets the parameters for the rules including the terms defined in the law.

Unless absolutely necessary, the rules should not require compliance with other laws. Requiring compliance with another law can delay development of a program, e.g., requiring compliance with zoning laws. While zoning approval may be necessary, compliance with zoning is not intended to protect the users of the licensed service and licensing should not be in the position of being the enforcer of zoning. It is simpler to require that the applicant notify the zoning authorities. This approach leaves the responsibility for enforcing zoning with that authority and does not allow zoning to delay licensing simply by not acting, knowing that licensing cannot proceed. Similarly, in most states movement of children to or from other states for foster care or adoption requires Interstate Compact approval. A rule requiring Interstate Compact approval binds the licensee and licensing to any delays which may be entirely the fault of Compact staff. A rule which requires that the licensee notify Compact before placing a child into or receiving a child from another state is sufficient.

Licensing rules should be written so that each rule contains only one subject, whenever possible. A rule may contain subparts, for example a rule on records may list several items which must be contained in records, but such a rule would deal only with records. When a rule contains more than one subject, e.g., record content plus the need to keep records confidential, then a violation could include only one aspect of the rule and enforcement is more difficult.
As a general principle, if the licensee is expected to comply with specific components of other laws, standards or rules, the specifics of those laws, standards or rules should be written into the licensing rule, rather than be referenced. Again there are exceptions to this. For example, where including the specifics would be too lengthy and the organization which produced it does not have a monitoring responsibility, then referencing the material is the only practical way to use the material. When referencing is done, include in the rule the title of the material with the date it was produced and how copies can be obtained. Without this specificity, if the originating organization which developed the material changes the material they in effect revise the licensing rules independently and without due process. When other material is referenced in rules the licensing agency needs to keep copies of the material. This is necessary because the referenced material may be updated by the organization which produced it and the actual material referenced in the rule may no longer be available from the producing source. The following is an example of a rule which requires compliance with an other law:

**R 400.4420 Food service facilities, equipment, and procedures.**

*Rule 420. Facilities, equipment, and procedures used in the preparation, storage, and service of food shall comply with the applicable provisions of sections 12901 to 12922 of Act No. 368 of the Public Acts of 1989, as amended, being Sections 333.12901 to 333.12922 of the Michigan Compiled Laws.*

To get as much leverage as possible from the rules, the writers of rules sometimes reference other materials. Such references may be highly specific or very sweeping such as: “The provider shall comply with all federal, state and local laws, ordinances and regulations.” References such as this place licensing staff in an untenable position.

1. It implies that the licensee and licensing staff must be aware of the specifics of all these areas.
2. It implies that licensing staff must enforce all the specifics involved.
3. It puts licensing staff in a legally vulnerable position if another jurisdiction fails to enforce what is its responsibility.
4. It implies that licensing staff are able to provide information and materials on all the areas referenced.
5. It can allow other organizations to block development of services and immobilize licensing through inactivity or by insisting that licensing enforce every aspect of that organization’s requirements.

The above is not intended to indicate that referencing other material or authorities is always inappropriate. It is possible to reference materials in ways that do not put licensing staff in the position of being responsible for areas over which they have no control. For example, instead of requiring that “a swimming pool shall meet all requirements of the local health authority,” when that protection is in fact needed, it is recommended that a
rule require that the licensee obtain approval of the local health authority. This provides the needed protection while also clarifying responsibility.

When a rule’s content is considered to be of special importance there is a tendency to also mandate that the licensee document evidence of compliance with that rule. This is not necessary, as demonstrating compliance with all rules is required by law. The use of such phrases in only some of the rules can be construed to mean that compliance with other rules is not required or is not as important.

When a proposed rule has significant cost or requires considerable time to achieve compliance for current licensees it is a good idea to write in to the rule a period of time for current licensees to achieve compliance with the rule. This can help reduce resistance to the new rules by those who must comply with them.

The draft of the rules will be reworked by staff many times to refine content and to obtain consistency of terms and language. As part of the rewrite process, the goal of reducing the number and complexity of rules needs to be addressed as there is a tendency to develop voluminous rules in an effort to address every possible issue and concern. The goal of each successive draft of the proposed rules should be to pare the rules down as much as possible without sacrificing basic protection and basic quality. A helpful exercise is to carefully review the rules to see if any sentence, phrase, or individual word can be eliminated without changing the meaning. Near the end of the committee process it is helpful to review all the draft rules to determine whether any of the rules can safely be deleted.

Because licensing staff are generally well informed on services and licensing, it is advisable that licensing staff who are not directly involved with the committee also be given the opportunity to review the draft rule. It is suggested that this review be done in small groups to allow for group interaction to bring out ideas that may not come out through individual staff review. The staff should look for rules which are redundant and how they would determine compliance with each rule. This process helps the staff focus on the rules and uncover most of the potential problems new rules can present. The group then should present their findings and recommendation for further refinement of the rules.

After the draft of the rules is completed and has been sent to the ad hoc committee members, the committee of the whole should meet one final time. The focus of this meeting will be on the concerns the committee has with the draft rules. It is important to explain fully the reason for not including any recommendations of the committee which the agency does not accept. The draft rules then are reworked, where appropriate, to address the committee’s final thinking and then test and present for review at public hearings.

Before the rules are promulgated, it is most helpful to test the rules by having several licensing staff apply the proposed rules with agencies as a “pilot” test. Agencies, particularly those represented on the advisory com
As part of the promulgation process the proposed rules should be presented for review and comment to those who will be affected by the rules. This can best be accomplished by sending copies of the proposed rules to all licensees and inviting their comments and concerns at public hearings and by requesting the submission of their written comments.

The public hearing should be opened with a clarification that the hearing is an opportunity for interested persons to comment on the proposed rules and that the licensing agency is not there to debate the merits or detriments of the proposed rules. (See appendix III for a sample statement.) It may be necessary for the person in charge to clarify the meaning of a proposed rule or other licensing-related issue to correct misunderstandings, but the merits of any proposed rule or comment should not be discussed. Comments are taken under advisement, not resolved during the hearing.

Each public hearing should be recorded in a verbatim transcript. The comments on the rules, both written and those made at hearings, can then be condensed to a summary of the essence of each comment. Once the comments have been summarized they can be organized by rule. This summary is then used to review each rule and make appropriate changes. An effective way to accomplish this rewrite is to have the staff who work with the ad hoc committee review each summarized comment and decide whether the comment addresses a concept which should be addressed in the rules and if so whether the rule it addresses should be changed. Where a suggestion is not accepted the reason for not accepting it should be recorded. By doing this, each person’s input is specifically addressed. Also, this method reduces the likelihood that biases will influence the rewrite. The written record of comments with the licensing agency’s response serves as an historical perspective on the rationale for the rules when questions arise as to interpretation. After this revision of the proposed rules, the ad hoc committee should meet one more time to review the changes.

Most states’ Administrative Procedures Laws require that proposed rules be reviewed and approved by the Attorney General’s Office and by a legislative committee before the rules can be officially adopted. The Attorney General’s office typically reviews the proposed rules to determine whether they are within the scope of the licensing act and that they are not in conflict with other laws of the state. Even if state law does not require a review by the Attorney General’s office it is generally a sound practice to have that office or the agencies’ own legal counsel review the proposed rules to help point out potential legal problems with the rules, which can be addressed before they are officially adopted.
The required review by the legislative branch of government has come under attack of late and has been found to be unconstitutional in some states as violating the separation of powers between the administrative and legislative branches of government. Where legislative approval is required the support of those involved in the ad hoc committee can be most helpful in gaining legislative support.

Some states require a fiscal impact statement to assess the fiscal implications of the rules both on the licensing agency and those who must comply with the rules. While a fiscal impact statement may be needed as one of the final steps in promulgation of the rules it is an important consideration to keep in mind throughout the rule-writing process.

Once the rules are “fine-tuned” to final form, it is suggested that they be promulgated with an effective date at least three months in advance. This will give the licensing agency time to train licensing staff relative to the rules and to hold training sessions with the organizations which will be licensed under the new rules to help them understand how they can comply with the rules. If the new rules are considered controversial, having members of the rule revision committee assist in training other licensees may defuse some of the tension.

The last step in the promulgation process, after the rules have become a part of the state’s administrative rules, is the printing and dissemination of the booklet containing the rules. Various arrangements are used by states in terms of content and format. It is recommended that in addition to the rules, the booklet include a foreword which contains a statement of philosophy. If licensing policies and recommended standards are included in the booklet, they need to be separate from the rules and located at the end of the booklet.

It also is advisable to include a brief description of the process used in developing the rules and to print the names of the ad hoc committee members in the booklet. This gives recognition to the persons who served on the committee and provides applicants and licensees with evidence that the rules were developed by their peers and by other persons who are well-informed in their field. To those who must comply with the rules the degree to which the rules are “official” can impact their acceptance of the rules. Generally licensees and applicants are not aware of the formal procedures used in the process of developing rules. For many, this information is a significant incentive for taking the rules seriously. (See Appendix IV for an example.)

Because licensing rules are the stock-in-trade of those who carry out the licensing function and are the guardians of the rights of children, their families and vulnerable adults, the rules must be developed with the utmost care and planning to “fit” the services to be regulated, using appropriate advisors. The development process and the rules themselves must respect
the “due process” rights of those who provide the regulated services. It is only by hard work and commitment to a high quality product that sound and appropriate rules for human service programs are developed.
1. Because the future of any society depends on the healthy physical, mental and emotional growth and development of children, the state has an interest in the well-being of children.

2. Because of the family’s value to the child, the state has an obligation to be supportive of families in the performance of their child-rearing role and to strengthen family life, even when children must temporarily live away from their parents.

3. Placement of children and care that they receive outside their homes is given for the purpose of supplementing or temporarily substituting for the care and protection that children should receive from their parents and to enhance the child’s growth and development. Non-parental child care should promote the physical, emotional, intellectual and social growth of the child while supporting the child’s family and should be appropriate for the level of development and individual needs of the child, including identified special needs.

4. The state is responsible for maintaining adequate licensing requirements and for enforcing them to protect the health, safety, well-being and basic nurturing needs as well as special individual needs of children receiving care outside of their own homes. Licensing serves the consumers of child care services who may have neither the access not the expertise to determine quality and safety and who, therefore, must rely on the competence and authority of the state for protection.

5. Fairness requires that placement and out-of-home child care be regulated in a consistent and organized manner. Requirements for compliance are intended to be clear so that they can be understood by caregivers, operators, parents and regulators. The training of licensing staff in the services licensed and in the licensing process is basic to improving the consistent and predictable enforcement of the rules.

6. The regulation of out-of-home child care is designed to protect the due process rights of those who are providing the care with respect to the enforcement of the rules, prompt resolution of disputes, and reasonable sanction for rule noncompliances as well as protecting the rights of persons receiving services.

7. The rules for out-of-home child care reflect the right of parents to have full knowledge about the care given to their children and recognize the role parents can play in supporting the licensing process by their oversight of the care of their children.

8. Licensing rules are not intended to be so stringent that they impede the development of acceptable services for children. The state offers consultations to current and prospective providers of regulated services to help meet the rules.
9. Services for children vary in characteristics and quality as a function of the goal and objectives of the program and the personnel providing the care. However, the regulation of the services is based on the fact that children have common needs for a safe and healthy environment, adequate facilities and equipment, and a defined program with competent caregivers.
The areas generally covered in licensing laws:

- Title
- Preamble
- Designation of services to be regulated
- Definitions of services to be regulated
- Designation of subject to be addressed by rules
- Rule making authority
- Provision for monitoring licensees
- Prohibition against operation without a license
- Application for licensure
- Investigating authority
- Characteristics and conditions of licenses, including duration, and temporary and provisional status of licenses
- Degree of compliance required (e.g., “substantial”)
- Provision for rule waiver
- Denial or revocation of licenses
- Authority for providing consultation
- Record keeping
- Provision for licensing all public agencies including court-administered services which provide the same services as private agencies
- Enforcement procedures
- Penalties
- Injunctions
- Appeal procedures
- Relationship to other state agencies
- Authority to temporarily suspend licenses for hazardous operations, without prior administrative hearing
This hearing is being conducted by the ( ) Department, on proposed rules for (title of rules). This public hearing is an opportunity for the department to hear and receive comments regarding these proposed rules. No final action on adoption of a rule or rejection of a rule will be made at this hearing. However, the comments will be recorded and a transcript made, to enable the department to give careful consideration to each comment. The comments may result in a revision of the proposed rules, if deemed desirable or necessary.

When the proposed administrative rules are in final form, the following steps in processing the rules are required:

1. The rules are submitted to the Legislative Services Bureau for review and certification as to format.
2. The rules are submitted to the Attorney General for review and certification as to legal effect.
3. The rules are submitted to the Joint Legislative Committee on Administrative Rules for review and approval.
4. A copy of the rules is submitted to the Governor’s office.
5. The rules are filed with the Secretary of State, and become part of the state’s administrative code, having then, the force of law.

The authority to develop and promulgate these rules is conferred upon the (name) Department by the following (State’s name) statute: Act No.(#) of the Public Acts of (year), being Section (#) of the (State’s name) Compiled Laws.

As directed by law, public notice of this hearing and the other (#) hearings held around the state were published in the month of ( ), in the following newspapers: ( ). Over (#) copies of the Notice of Public Hearing and copies of the proposed rules have been mailed to all (type of program(s) regulated by the rules) and to persons and officials who have expressed an interest and anyone known to the Department to be interested in these rules.
This is an example of the statement which can be included in the booklet containing the rules. This statement provides information about the process used in developing the rules. Statements such as this help those who must comply with the rules understand that the rules were developed with input from persons who are required to meet the rules themselves.

The process of developing these rules may be of interest to persons affected by the rules. The committee members listed below were selected on the basis of their knowledge about (type of service) and their being representative of large numbers of persons associated with (type of service).

The committee met (#) times during an (#) month period. They showed draft rules to other interested persons and brought their recommendations back to the committee. When the committee completed advising on the preliminary draft, (#) public hearings were held around the state for the purpose of receiving comments on the proposed rules. The committee met again to consider and advise the department relative to the recommendations made during the hearings. Following the hearings the rules were reviewed and modified by the Legislative Services Bureau as to format, submitted to the Attorney General for review and certification as to legal acceptability especially as it relates to Public Act (#) the (state) licensing law, approved by the Joint Legislative Committee on Administrative Rules, and filed with the Secretary of State where they were made part of the state’s administrative code, thus having the force of law.

(Include a list of the names of the ad hoc committee members along with their titles and who they represent.)
<table>
<thead>
<tr>
<th>Suggested Reading List</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child Welfare League of America: <em>Guidelines for Operating a State Licensing Program for Placement and Care of Children</em>, 1983</td>
</tr>
</tbody>
</table>