

# **Response to Public Comments On DSS Licensing Proposed Disqualification Rule**

## **PURPOSE OF PROPOSED DISQUALIFICATION RULE:**

Current state licensing regulations for child care facilities, adult residential facilities, and child placing agencies provided no disqualification period for licensees who have had a prior license revoked for failure to comply with State laws and regulations governing facilities providing out-of-home care for children and elderly or infirmed adults. The lack of a specific disqualification period had allowed substandard facilities to take temporary remedial action and reapply for a new license immediately following revocation of the previous one.

To ensure the health, safety, and/or welfare of Louisiana children and elderly or infirmed adults who are placed in out-of-home child care or residential settings, an Emergency Rule and Notice of Intent was published effective September 2009, to enact a two (2) year licensure application disqualification period for those child care and residential facilities licensed by DSS that have had a license revoked, voluntarily surrendered to avoid adverse action, or not renewed for failing to comply with state laws and licensing regulations.

## **Summary of Public Comments:**

### *1. Lack of clarity on how revocation decisions are made:*

- Proposed rule lacks specific provisions detailing how revocation decision will be made.
- Proposed rule does not provide any guarantees that DSS will take into consideration any mitigating circumstances contributing to the incident or deficiency.
- The standards for determining deficiencies are subjective.
- No written guidelines to assure that licensing revocation justice is handed out evenly.
- Purposed rules don't provide any concrete framework for how revocation decision will be made.
- The disqualification rule should be looked at and revised in regard to the scope and severity of the non-compliance.

**DSS Response:**

Rule does not change revocation process, which has been in place for decades. Therefore, it was considered unnecessary to have specific provision to address this. Additionally, as part of its licensing reform, the department has developed and implemented a framework in which licensing enforcement and revocation decisions are determined. Every DSS licensed provider was notified of the enforcement and revocation decision making process in a letter dated November 12, 2009. A copy of the letter can be found on the [DSS public website](#)

*2. Lack of a Clear Appeals Process:*

- Expressed concern about how decisions would be made regarding continued operation of a facility pending appeal.
- Noted the lack of a due process provisions in the disqualification rule and the absence of an appeals process
- Appeals process is not clearly defined and appears to be open to subjective interpretation and lends itself to frequent changes
- Proposed rule does not adequately address or define a process for appeal of a revocation decision and lack of rules that address the issue of allowing a provider to continue to operate pending the appeal.

**DSS Response:**

Due process guarantees are protected under constitutional and statutory due process provisions. Rule does not change appeals process, which remains as it has been for decades. Therefore, it was considered unnecessary to have specific provision to address this. Appeal process for all DSS licensed providers remains unchanged by this proposed rule: (see below)

*Should a provider decide to appeal the action they may do so by submitting a written request to appeal the decision along with a copy of the notice, within fifteen days of receipt of the notice. A request for appeal should include the specific reasons they believe the decision is erroneous and/or the specific reasons they believe the decision to be incorrect, and mailed to: DSS APPEALS BUREAU, P.O. BOX 2944, BATON ROUGE, LA 70821, after which their appeal request will be forwarded to Division of Administrative Law.*

*3. Proposed Disqualification Rule is vague and subjective:*

- Rule contains definitions that are somewhat misleading in terms of the licensure requirements.
- Rule needs to be reworded to include the provisions for actions of co-owner or employees.

- Noted that the language (owner, director or affiliate) in the rule is too general, wide sweeping and threatening to current service providers.
- Rule is too subjective
- Rule should include language that clearly reflects that the disqualification only applies to the facility whose license was revoked or to applications for a new facility from the provider or affiliate during the disqualification period.
- The rule needs to specifically state that one violation in one center does not affect another center owned by the same provider.

**DSS Response:**

DSS believes the rule clearly spells out the circumstances under which a facility will be disqualified. No subjectivity is involved: either a facility has had a license revoked or not renewed due to non-compliance or it has not.

Out of an abundance of caution, DSS conducted a review of the rule's definitions and language following public comments. The review indicated that the language and definitions contained in the rule were logical, and comprehensible. No change to the definitions or language of the proposed rule was recommended.

*4. Term "Affiliate" is poorly defined:*

- Believes that 2 year disqualification period would penalize the entire group and not the individual violator.
- Noted that often the violator is an employee or co-owner who disagrees with the compliance rule and matters are out of the service provider's control.
- Noted that to pass a "one strike and you're out" disqualification rule that would apply to all affiliate communities with a poorly defined appeals process is not a logical methodology to protect the state's senior population
- Major concern that licenses could be revoked at affiliate communities if a deficiency was found at a related community

**DSS Response:**

In law one is frequently held vicariously liable for the acts of others. If one's business associates do not believe in following the law it would be wise to rethink one's choice of partners. The department believes the rule will restore a

greater sense of responsibility in licensed facilities by ensuring that owners closely monitor the actions of their employees and business associates. The department maintains that the language of the rule is clear as to when and under what circumstances the exclusionary process will be activated.

*5. Lack of Intermediate Sanctions:*

- Rule does not allow for the Secretary to reconsider the two year minimum disqualification period or impose a shorter disqualification period. Rule should have some flexibility with respect to the disqualification period.
- Asserted that the disqualification rule permitting an immediate license revocation for two years will have a detrimental impact on the family and on small business
- Believes DSS' system needs to change to allow for a rehabilitative and training period of 2 years to replace the existing permanent bar from providing needed services to the elderly
- Noted that a provider that is found to have deficiencies should be placed on probation as an intermediate step to afford the provider an opportunity to correct the deficiencies.
- Steps should be taken prior to a complete shut down of a residential care facility that would bring the facility into compliance.

**DSS Response:**

DSS Licenses are not revoked for light or transient reasons. A generous opportunity to correct deficiencies other than those which pose an immediate threat to the health, safety, or welfare of residents is provided prior to any decision to revoke a license. Facilities whose licenses are revoked have frequently been provided a lengthy period in which to take necessary corrective action. Furthermore, the department has continued to develop and implement a framework in which licensing enforcement and revocation decisions are determined. Every DSS licensed provider was notified of the enforcement and revocation decision making process in a letter dated November 12, 2009. A copy of the letter can be found on the [DSS public website](#)

*6. Lack of Stakeholder involvement:*

- Requested involvement of the Louisiana Assisted Living Association in any proposed changes regarding the Adult Residential regulatory process.
- Believes that with the upcoming transfer to DHH, that DHH should work through any decisions to incorporate a disqualification rule

**DSS Response:**

The opportunity for stakeholder involvement is the public hearing and public comment provided for in laws governing rulemaking. In anticipation of the forthcoming transfer of Adult Residential Licensing from the Department of Social Services (DSS) to the Department of Health & Hospitals (DHH), the department does not contemplate any further Adult Residential rulemaking prior to transfer of licensing authority to DHH effective July 2010.

*7. Increase in Unlicensed Providers:*

- Concern that the rule may actually result in an increase in the number of unlicensed providers, with the rule forcing such providers "underground" rather than pushing them to work toward a level of compliance.

**DSS Response:**

The unlicensed operation will extend the disqualification period until two years after verification that unlicensed operation has ceased. Unlicensed operation will also lead to court action and civil fines. The department believes that enforcement of the proposed disqualification rule as it relates to unlicensed operations will allow the department to effectively address, enforce, and deter unlicensed facility operations by providing substantial and enforceable sanctions.

**Conclusions:**

The Department of Social Services deems the rule necessary to prevent the "revolving door" of poorly-managed facilities simply applying for a new license upon revocation. The rule would have no impact upon competently-run businesses as the rule applies only to the most egregious offenders whose failure to take prompt corrective action or whose disregard for the health and safety of their clients has led to loss of license.

The department believes the rule will ensure greater protection of all its most vulnerable citizens - - the elderly, the disabled, and children - - by removing unfit providers for a significant period of time. The Department of Social Services appreciates the time and effort that went into the responses received and believes that your suggestions will ultimately result in improvements to the care of children and adults in out-of-home residential care.

Thank you for your participation in this process.