



CHILD CARE LAW CENTER

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Questions and Answers for Family Child Care Providers: Appeals and Complaints with Licensing June, 2006

1. What can I expect when a complaint investigation has been completed?

After an investigation is completed, the Licensing Analyst makes a report on form LIC 809; this form is a family child care provider's first opportunity to agree or disagree with Licensing's findings as a result of the site visit.

If a Licensing Analyst is investigating a complaint from a parent or someone else, the report will categorize the findings in one of three ways:

- (1) Substantiated, meaning that the Licensing Analyst determined that the allegation that the family child care provider violated the law or regulation is correct;
- (2) Inconclusive, meaning that the Licensing Analyst cannot determine or prove whether or not the allegation was correct; or
- (3) Unfounded, meaning that the Licensing Analyst found the allegation to be untrue.¹

All substantiated and inconclusive reports become part of a family child care provider's licensing file, which is available for review by the public. Unfounded reports are kept in the provider's confidential file, meaning that they are not available for review by the public.

If a Licensing Analyst finds a problem during a site visit, the Analyst may issue a citation or assess a civil penalty. If the violation is serious or repeated, the Analyst may initiate an "Administrative Action" such as a temporary suspension or license revocation.

2. What can a family child care provider do if the provider disagrees with an action taken by Licensing?

Family child care providers who disagree with an action that Licensing takes have several options. They may:

- File a complaint;
- Appeal a citation, penalty, or investigation report with Licensing;
- Appeal, if the action taken by Licensing is an Administrative Action.

3. What is the difference between a complaint and an appeal?

Family child care providers have the right to file a complaint regarding improper application or enforcement of the Licensing regulations, and the review of any issue in dispute. Family child care providers should use the complaint process if there has been no citation, penalty, or administrative action against them, but they still believe that Licensing did something wrong. For example, if a family child care provider

believes that the rules are being incorrectly applied or that a nonexistent deficiency was found because of a personality conflict with the Licensing Analyst, the provider can file a complaint with Licensing. Licensing is not permitted to discriminate against a provider who files a complaint.²

Family child care providers may appeal **any** civil penalty or citation against them. This includes the issuing of a citation for a violation of the Licensing regulations, as well as an “inconclusive” finding in a complaint investigation report that the provider believes should have been “unfounded.”

4. Is there a deadline for appeals?

Yes, you must make your appeal of a citation or civil penalty within 10 days of receiving a citation.³ A provider who misses this deadline may not have an opportunity to appeal at all, even if she believes that the action taken by Licensing was wrong.

5. Where can I find help with my complaint or appeal?

Licensing Advocates may be of assistance to family child care providers who are having problems with Licensing. Licensing Advocates have a different role from Licensing Analysts; although the Advocates work for Licensing, they have the responsibility to help resolve disputes. Contact the state Licensing Advocate by calling Betsy Rutana at 510-622-2623.

It is a good idea to get assistance from an attorney in filing appeals or complaints with Licensing. The Child Care Law Center does not represent family child care providers in complaints and appeals, but family child care providers may find an attorney by calling their County Bar Association’s Lawyer Referral Service. Find the telephone number by looking in the telephone book or visiting

the website of the State Bar of California, www.calbar.ca.gov.

APPEALING AN ADMINISTRATIVE ACTION

6. What is the appeals process for citations and civil penalties?

The appeal process for citations and civil penalties involves the following four steps. At each level, if the family child care provider does not agree with the decision made, he or she may appeal to the next level.

- Appeal to a *Licensing Program Manager*. The first step for a family child care provider is to write a letter to the Licensing Analyst’s supervisor explaining why you disagree with the conclusion of the Analyst. After a review, the supervisor notifies the provider about what action will be taken.
- Appeal to the *Regional Manager* or the county equivalent.
- Appeal to the *Program Administrator*.
- Appeal to the *Deputy Director*: The Deputy Director works in Sacramento. This is the last level of administrative appeal for citations and civil penalties.⁴

7. What should I write in my appeal letter?

It is important to write the appeal letter carefully and thoughtfully, and to include the following information:

- A clear statement that the letter is an appeal letter;

- A description of the action taken by Licensing against the family child care provider. If possible, enclose a copy (not the original) of any citations, reports, or other notices related to the appeal;
- An explanation of the situation and the arguments that the provider believes apply. Include copies (not the originals) of any documents that might be helpful;
- An explanation of regulations and laws that the provider believes were misinterpreted or misapplied;
- An explanation of any factors the provider believes were not adequately considered by the Licensing analyst or others.

8. Do I have the right to a hearing if I appeal a citation or civil penalty?

No. The appeal process for civil penalties and citations is limited, and there is no right to a hearing. At each level, the appeal must be made in writing. Also, the decision makers are employees of Licensing. The decision of the Deputy Director of Licensing is final. Providers **do** have the right to request a meeting with the district office administrators to discuss any licensing issues and, with notice, to bring any person to the meeting. This informal meeting is not a hearing, so the district office administrator does not have to issue an official decision.⁵

9. Can evidence be used against me?

Evidence that a family child care provider gives to Licensing, including evidence given during the appeals process, may be used against a family child care provider later.

Therefore, it is important for family child care providers to avoid admitting that they have committed a crime or giving information that shows that they may have committed a crime (“self-incrimination”), both in the appeal letter and in any informal conference.

APPEALING AN ADMINISTRATIVE ACTION

10. How do appeals for administrative actions differ from appeals for citations and civil penalties?

Administrative Actions by Licensing, which include license suspensions, revocations and denial of licenses, are more serious than citations and civil penalties. Because Administrative Actions are so serious, a family child care provider who is subjected to an Administrative Action has many more rights and protections than a family child care provider who receives a civil penalty or citation.⁶

When Licensing takes an Administrative Action against a family child care provider, the provider has a right to a full administrative hearing before an Administrative Law Judge who is employed by the California Office of Administrative Law.⁷ Licensing is represented by a Licensing staff attorney.⁸

11. What is the deadline to appeal an Administrative Action?

The deadline for appealing an Administrative Action is **fifteen (15)** days after the date that Licensing mails the Notice of Action to the provider.⁹ The Notice of Action is a legal form that puts the provider on notice that Licensing is planning to take an Administrative Action.

12. Should I consult with an attorney to appeal an Administrative Action?

It is a good idea for a family child care provider to be represented by a competent attorney when appealing an Administrative Action. Providers do **not** have a right to have a free attorney appointed to represent them in the appeal, and they may represent themselves if they choose to do so.

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13. How will I know that Licensing has taken an Administrative Action against me?

A family child care provider has a right to receive a Notice of Administrative Action that provides the following information:

- The nature of the action Licensing has taken or is planning to take;
- What laws require this action; and
- What steps the family child care provider may take to defend him or herself.¹⁰

14. What can I do when I receive a Notice of Administrative Action?

If you believe the action is incorrect, you can appeal. To do so, a family child care provider who receives a Notice of Administrative Action must file a Notice of

Defense within fifteen days of the date that Licensing mailed the Notice of Administrative Action.¹¹

15. What is a Notice of Defense?

A Notice of Defense begins the appeals process. It should provide the following information:

- A statement notifying Licensing that the provider is requesting a hearing;
- Any objections to the accusation that has been made against the provider, including reference to laws that may have been violated by Licensing; and
- Presentation of a defense.
- Request for an interpreter if needed.¹²

16. What happens after the Notice of Defense has been filed?

Once the Notice of Defense is filed, the family child care provider has a right to a hearing. Both family child care providers and Licensing have certain rights before the hearing:

- Licensing may amend the accusation. The family child care provider is then given an opportunity to respond;¹³
- Both the family child care provider and Licensing have a right to make a written request for discovery before the hearing. Discovery is the opportunity for each side to obtain information that the other side has in its possession to make sure that they can each present their cases fully at the hearing.¹⁴ Discovery requests must be made within certain timelines;

- Both sides may get a court order requiring the appearance of parties, witnesses, and documents (called a “subpoena”), and may request depositions to obtain testimony from the other side before the hearing.¹⁵ The purpose of a deposition is to obtain information from witnesses who cannot or will not attend the hearing;
- A pre-hearing conference may be held in order to explore the possibility of settling the case, prepare stipulations (agreements), clarify issues, or resolve other matters before the hearing.¹⁶
- A written affidavit or declaration from a witness who will not be able to attend the hearing may be introduced into evidence at the hearing. A family child care provider must mail or deliver the affidavit to Licensing at least 10 days before the hearing.¹⁷
- The family child care provider will receive a notice of hearing at least ten days prior to the hearing.¹⁸

17. Who holds the Hearing?

The hearing is conducted by an impartial Administrative Law Judge who did not previously play a role in the case.¹⁹ The hearing is a formal administrative hearing; it is somewhat less formal than a civil trial, but the case should be presented in the same manner.

18. What if I do not speak English?

Hearings are conducted in English. If someone does not understand or speak English, and requests language assistance, then Licensing must provide an interpreter.²⁰

If an interpreter will be needed for the hearing, it is a good idea to request an interpreter at the time of filing the appeal.

19. What is the timeline for scheduling the hearing?

There are strict timelines for the hearing to be scheduled after a Notice of Defense is received, depending on whether or not the license has been suspended.

- If the license has **not** been suspended, the hearing should be held within ninety (90) days of the receipt of a Notice of Defense.²¹
- If the license has already been suspended, then the hearing should be held more quickly, no later than thirty (30) days after receipt of the Notice of Defense. The temporary suspension remains in effect until the hearing is over and a decision has been made.²²

20. What evidence is admissible at the hearing?

All relevant evidence is admissible, including some types of hearsay that are not admissible in a regular court.²³ If a person testifies “my head hurts,” the statement is not hearsay. But if a person testifies “Tom said, ‘My head hurts,’” Tom’s statement is hearsay when it is repeated.

Hearsay is usually allowed in Administrative Hearings, but only to support some other evidence, which is not hearsay, such as eyewitness testimony. A finding of fact cannot generally be based on hearsay alone.

Even though an Administrative Hearing does not have the same rules of evidence as courts have, it is critical that appropriate objections

about whether a finding of fact is valid are made on the record, just as in a court trial. This is one reason that it is good to be represented by an attorney in these hearings.

The out-of-court statements of witnesses under the age of twelve (12) who are alleged to be victims in the case are admissible in the hearing unless a timely objection is made based on lack of reliability.²⁴

A witness, such as a child, may be permitted to testify outside the presence of the family child care provider when the witness is vulnerable and could be intimidated if forced to testify in front of the family child care provider. The provider will be given an opportunity to observe the witness through one-way closed-circuit television, and to cross-examine the witness.

21. What is the burden of proof in a Licensing Hearing?

Licensing must prove its allegations by a preponderance of the evidence.²⁵ This is a legal term that means that the overall evidence must support Licensing's claim, even if by only a little bit. Licensing has the burden of proving their case; the family child care provider is not required to prove that Licensing is wrong.

22. Who may attend a Licensing Hearing?

The following are some of the people who may attend the hearing:

- The family child care provider him or herself;
- The family child care provider's representative.²⁶ It is a good idea to have an attorney, although it is not required;

- An interpreter, if needed and requested in the Notice of Defense;
- The attorney for Licensing, and anyone else from Licensing who will testify at the hearing;
- Witnesses.²⁷

Although other people may attend the hearing, the Administrative Law Judge has the authority to clear the hearing room of anyone who is not part of the case.²⁸

23. What are my rights at the Hearing?

Each side has the following rights:

- To present evidence;
- To call and examine witnesses;
- To cross-examine opposing witnesses; and
- To rebut evidence against him or her.²⁹

24. How and when is a decision made?

An Administrative Law Judge prepares a proposed decision within thirty (30) days after a case is submitted. Then Licensing has an opportunity to accept or change the decision.³⁰ Thus, Licensing has a great deal of control over the decision in cases. Thirty days after Licensing receives the proposed decision from the Administrative Law Judge, Licensing must file the decision as a public record and serve it on each side and his or her attorney.³¹ The decision ordinarily becomes effective thirty days after it is delivered or mailed to the family child care provider.³² The decision may be reconsidered by the Administrative Law

Judge either by the request of Licensing, or because of a request by the family child care provider.³³

25. What is the effect of a decision denying or revoking the provider's license?

A family child care provider who appeals a denial or a revocation of a license and then loses the hearing will have to wait a year after the date of the hearing decision to reapply.³⁴ If the provider decides not to follow through on an appeal, the Administrative Law Judge will still make a finding; even in that case, the provider must wait for a year before reapplying.

There is, of course, no guarantee that when the provider reapplies, the license will be restored. When Licensing believes that it has a strong case against a family child care provider, it is not likely to grant a new license application even after a year. Therefore, if a family child care provider disagrees with an action taken by Licensing, it is important to appeal, and to make as strong a case as possible on appeal.

26. What options do I have if I lose the administrative hearing?

If a family child care provider loses the administrative hearing, he or she has one option left: going to court. A family child care provider has a right to file a petition in court within thirty days after the last date that reconsideration could be requested even if reconsideration is not requested.³⁵ If a family child care provider requests a transcript of the administrative hearing within ten (10)

days of the mailing of the decision, the timeline for filing a petition for writ of mandate is extended until thirty (30) days after delivery of the transcript.

27. What happens in court?

Once a case goes to court, no new evidence may be presented. The case is decided solely on the evidence previously presented at the administrative hearing. This is yet another reason for a family child care provider who is pursuing an appeal to have appropriate representation at the administrative hearing. Reviewing courts generally look at whether the Administrative Law Judge made an error in applying the law, and whether there is sufficient evidence to support the proposed decision. Reviewing courts are reluctant to second-guess an Administrative Law Judge's decision regarding the credibility of a witness. Similarly, it is unlikely that a reviewing court will change Licensing's selection of a penalty authorized by law, no matter how harsh the result.

It is a good idea to be represented by an attorney when going to court. Family child care providers who are going to court to appeal a negative decision in an administrative hearing do **not** have a right to have a free attorney appointed for them. The Child Care Law Center does not represent family child care providers in complaints and appeals. Family child care providers may find an attorney by calling their local Bar Association's Lawyer Referral Service. Find the telephone number by looking in the telephone book or visiting the website of the State Bar of California, www.ca.bar.ca.gov

For more information visit the Child Care Law Center's website at: www.childcarelaw.org.

This document is intended to provide general information about the topic covered. It is believed to be current and accurate as of June/06, but the law changes often. This document is made available with the understanding that it does not render legal or other professional advice. If you need legal advice, you should seek the services of a competent attorney.

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- ¹ DSS Evaluator Manual § 3-2635, Making the Determination: Is the Complaint Unfounded, Inconclusive or Substantiated? (Transmittal No. 03RM-08, Aug. 2003), pp. 50-52.
- ² CAL. HEALTH & SAFETY CODE § 1596.842(c), 1597.56 (findings by licensing); CAL. CODE REGS. tit. 22, § 102403 (provider complaints). *See also*, form LIC 9058, Applicant/Licensee Rights, indicating that complaints may be filed based on inappropriate conduct by Licensing employees.
- ³ CAL. HEALTH & SAFETY CODE § 1596.842(b); form LIC 9058, Applicant/Licensee Rights.
- ⁴ CAL. HEALTH & SAFETY CODE § 1596.842(b); form LIC 9058, Applicant/Licensee Rights.
- ⁵ CAL. HEALTH & SAFETY CODE § 1596.842(b)(2); form LIC 9058, Applicant/Licensee Rights.
- ⁶ CAL. HEALTH & SAFETY CODE § 1596.842(b)(3); form LIC 9058, Applicant/Licensee Rights.
- ⁷ CAL. GOV'T CODE § 11502
- ⁸ *See*, DSS Evaluator Manual § 1-0030, Glossary (Transmittal No. 03RM-14, Dec. 2003), p. 6, (<http://cclid.ca.gov/res/pdf/03RM-14ENFORCEMENT.pdf>).
- ⁹ CAL. CODE REGS. tit. 22, § 102401(c) (denial of a license).
- ¹⁰ CAL. GOV'T CODE §§ 11503, 11507
- ¹¹ CAL. GOV'T CODE § 11506(b).
- ¹² *See id.* §§ 11506, 11435.20
- ¹³ *See id.* § 11507
- ¹⁴ *See id.* § 11507.6, 7
- ¹⁵ *See id.* §§ 11507.6, 11511.
- ¹⁶ *See id.* § 11511.5.
- ¹⁷ *See id.* § 11514.
- ¹⁸ *See id.* § 11509.
- ¹⁹ *See id.* § 11512.
- ²⁰ *See id.* § 11435.20.
- ²¹ CAL. HEALTH & SAFETY CODE § 1596.887(c).
- ²² CAL. HEALTH & SAFETY CODE § 1596.886; CAL. CODE REGS. tit. 22, § 102402(c), (d).
- ²³ CAL. GOV'T CODE § 11513(c)
- ²⁴ CAL. HEALTH & SAFETY CODE § 1596.8872
- ²⁵ *See id.* § 1596.889
- ²⁶ *See id.* § 1596.842(b)(3)
- ²⁷ *See id.* § 1596.8871
- ²⁸ *See id.* § 1596.8871(c)
- ²⁹ CAL. GOV'T CODE § 11513(b)
- ³⁰ *See id.* § 11517(c)(2)
- ³¹ *See id.* § 11517(c)
- ³² *See id.* § 11519(a)
- ³³ *See id.* § 11521
- ³⁴ CAL. HEALTH & SAFETY CODE § 1596.851(b)(1)
- ³⁵ CAL. GOV'T CODE § 11523