

PROPOSITIONAL STATEMENTS IN DEFENSE OF LICENSING AS SOUND PUBLIC POLICY FOR THE SAFEGUARDING OF CHILDREN IN AWAY-FROM-HOME CARE

BY

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I will present three questions which are fundamental to developing the rationale for why licensing of all child care programs, regardless of auspices, is sound public policy. I will then answer each by a series of propositional statements and discuss the appropriateness of licensing throughout this paper.

Question No. 1: Why is a licensing approach the most appropriate means of protecting children in away-from-home settings?

I.

Before presenting specific reasons that would deal with the appropriateness of licensing as sound public policy, it would seem essential to make this prefatory comment as to the functional nature of licensing: Child care licensing is frequently confused with certain other so called "social services" or "child welfare programs." These include child protection, foster care, adoption placement, juvenile probation, public assistance to dependent families with children, child guidance clinics and community recreation, and group-work services for children. Now in every one of the programs and others like them, there tends to be an individualized social treatment aspect present. Somebody gets "something." To be sure, what is "gotten" varies greatly from case to case. It may be in the form of financial assistance; it may be professional treatment at a clinic, it may be care by strangers when the child is away from home; it may be a building with supervising adults so that children may play together. But whatever the service, whether provided by the state, philanthropic organizations, or individuals, it is based upon an established individual need (determined by a case-by-case approach) or a presumed need attested to by the person requesting the service. Overall these services may always be categorized as an individualized helping-healing-ameliorating operation.

Child care licensing, functionally speaking, is fundamentally different. The goal of licensing is consumer protection whether it applies to professional or vocational groups (e.g.,

¹ This non-published monograph was prepared as a "think-piece" for the Michigan Department of Social Services and the assistant attorney general assigned to a case involving a child care center that refused to accept state licensure authority for religious reasons. Professor Class was contracted by the state to provide consultation to state officials and to serve as an expert witness. It is important to understand this as Professor Class makes direct references to Michigan's licensing program and he occasionally compares Michigan with other states. The paper was written in 1981; the case was a non-jury trial that commenced on December 13, 1982 and was concluded on June 3, 1983. The matter was ultimately appealed to the Michigan Supreme Court which rendered a unanimous opinion on April 9, 1990 upholding the right of the state to enforce the licensing law of the state based on a compelling state interest to protect children.

physicians or taxi drivers) or to facilities (e.g., medical hospitals, orphanages, and child care centers). In each case the legislature, through the enactment of statutes, achieves this consumer protection by designating certain activities or operations as having a “public interest” and then utilizes the general police powers of the state to formulate standards (requirements) which must be met before – and continue to be met during – ongoing operations. The purpose of the standards is always the same: risk reduction. Generally speaking, most state licensing laws, including the child care licensing statute of Michigan, have legislative guidelines as to the areas of risk reduction in which standards are to be formulated, implemented, and enforced. Thus, in the final analysis, licensing to be fully understood must be seen not in its similarity to other child welfare programs but in terms of its difference. Two fundamental differences are:

1. Licensing is not a treatment-remedial program but is a preventive activity. Utilizing general police powers, it acts in advance to reduce risks to consumers of a general service (as defined by statute).
2. Licensing, utilizing the general police powers of the state, is not concerned with individuals having a specific need at a given time, which is the essence of social treatment services, but is concerned with all persons at all times in respect to a general category of operations, which are the essentials of a preventive activity.

In short, the fundamental concern of child care licensing is not with a certain Tommy Brown at the XYZ Facility but with the challenge that any Tommy Brown at the XYZ facility or any categorically similar facility will be provided risk-reduced care. Requests for exemptions from having to meet standards raises significant public policy issues, both in respect to equal protection and equal treatment.

II.

The appropriateness of child care licensing, especially in respect to the matter at hand, free exercise of religion, may be substantiated by these three propositional statements:

1. The required manners in which licensing standards are formulated tend to ensure their having a secular purpose.
2. The standards implementation process is, in effect, a community education operation which in turn contributes to wholesome social cohesiveness.
3. The presence of provisions for operational flexibility makes for an optimal accommodation to social realities.

Each of these propositional statements will now be briefly elaborated upon:

A. Formulation process tends to assure a secular purpose. To hear it told by uninformed and irresponsible persons, licensing standards are impulsively formulated by a select few, reflect their own particular biases, and are completely disregarding of due process considerations. Empirically, nothing could be further from the truth. Here are some of the built-in defenses against formulation of standards that haven’t any other purpose than that of a secular purpose of reducing identifiable risks in a given category of child care. One, the types of standards formulated are restricted to legislative guidelines in the statute. (Parenthetically, as a student of comparative child care regulatory administration in the

United States, it would be my opinion that the Michigan licensing standards are far above the average in respect to meticulous restraint as to keeping within the limits of rule-making as delegated by the legislature.) Two, proposed standards are reviewed before adoption by a state advisory group composed of representatives from diverse organizations, various political and religious backgrounds and different geographical sections. Three, in many states, including Michigan, there must be state-wide hearings where affected parties are notified and have a right to be heard – orally and in writing. Four, in a limited number of states, but including Michigan, there is a form of legislative review [and approval] of adopted standards. Five, the standards must be filed in a central registry to ensure easy accessibility to them. These several steps do not constitute the totality of the public review process of licensing standards but they should be sufficient to support the speculation that the final product, a collectivity of promulgated standards, will likely be characterized as having a secular purpose and only that!

B. The standards implementation as community education. Operationally defined standards are legitimated community expectations of providers who have official approval to operate. The standards, the statements of expected performance, do not become a dynamic of safeguarding unless they are “internalized” by the provider. Helping providers to internalize these patterns of expected behaviors is in the final analysis a teaching and learning operation. “Orders” – including bold statements of requirements --are seldom effectively and efficiently carried out without an educational support service (either formal or informal or combinations of both). These are a few of the administrative actions of standards implementation that substantiate the claim that the regulated operation is a community education operation:

1. The explicitness with which the standards are stated, plus formatting, makes the document a piece of teaching material of high quality.
2. Pre-application consultation that provides an individualized teaching service (this is not often achieved in public administration).
3. The application phase in the child care licensing process goes far beyond a “signing of a piece of paper” permitting the state to initiate an investigation of licensing requirements. In Michigan, a systematic – educational – effort is made to inform the would-be licensee regarding not only what is involved in the regulatory investigation (purpose, scope and means), but a beginning is made in providing technical assistance which will be helpful in complying and maintaining compliance with licensing standards.
4. The investigation is conducted by technically trained staff able to interpret, apply and clarify the intent of licensing requirements. (In the provision of in-service training and staff development services to licensing personnel, Michigan rates very high in the country.)
5. Supervision (monitoring) visits to licensed facilities in many states, including Michigan, is more than a “check” to determine continued compliance to standards -- although checking is of great importance in the safeguarding of children in out-of-home care. A supervisory visit also provides an excellent opportunity for clarification of standards in terms of the reality of the provider’s operation. Perhaps an even more valuable educational service is provided to the licensee in relation to the discovery of early non-compliance, and the licensor and licensee formulation of a plan of correction. Without this service of nipping non-compliance the bud, a

situation may well evolve which could only be dealt with through a revocation action that would be destructive both to provider and consumer (child and parents).

The pay-off of licensing operations is community education, which contributes to social cohesiveness of the community. When care providers have positively internalized the expected patterns of operation that the state (legislature and administrative agency) requires and when consumers are informed as to what they are and their safeguarding value, there is a congruent community value system conducive to social unity and stability.

C. Operational Provisions that Make for Realistic Accommodations. For some, the word, standards, connotes operational rigidity – uniformity for the sake of uniformity. Fortunately, the development of child care licensing administration in this country has been such that it has been able to escape this fate of operational inflexibility. Rather, it has been able to acquire equitable accommodation necessary for program survival in a country of culturally conflicting value systems – often referred to, technically, as “cultural pluralism.” Here are some of the ways and means by which this accommodative flexibility has been achieved without compromising the intent of the standard.

1. The use of a provisional or probationary license (statutorily based) during the start-up phase of the operation makes possible the development of a respectful professional teaching relationship between the licensor and the provider (licensee) to help the latter to understand the intent of standards, to apply them appropriately, and thereby to move toward full compliance and a regular license when the probationary period ends.
2. The administrative agency has provision for “exemptions,” thereby making possible certain modifications of a requirement that still achieve the intent of the standard while recognizing certain operational or circumstantial realities.
3. The presence of statutory provision for setting the terms or conditions of a license makes it possible for facilities of various magnitude and type of service to operate as long as safeguarding requirements are met.
4. There is an operating practice on the part of the administrative agency that when a serious non-compliance situation occurs there is an understanding that this becomes a basis for revocation action, but that it is preceded by a reasonable period of time for the licensee to implement a corrective action plan that has been formulated by the licensee in consultation with the licensor.
5. There must be an established procedure whereby aggrieved licensees may seek a fair and impartial hearing in a timely manner.
6. There is the right of an aggrieved person, after exhausting administrative remedies (including an administrative hearing), to appeal to the court. This constitutes a final step of assuring that the administrative agency’s application and enforcement of the law has reasonably and responsibly accommodated the legal, constitutional (and common law) rights of the licensee. Two aspects that the court will evaluate are whether the agency provided the licensee with a reasonable period of time to achieve compliance, and whether the licensee was provided a fair hearing before an impartial hearing officer.

It is to be noted that licensing as we understand it and as it is defined in statute does not exist in countries ruled by dictatorships of either the right or the left. Administrative law as

defined and practiced in the United States allows for a unique balance of ensuring private ownership and entrepreneurship while simultaneously protecting the rights of consumers.

Question No. 2: Is licensing the least intrusive means of assuring equal treatment/protection of children?

I.

Presently, the only conceivable alternative to child care facility licensing would be criminal law enforcement of legislatively formulated rules and regulations. This alternative will be shortly considered. Prefatorily, these two comments should be made: a) Licensing, for almost a century, has pre-empted the field in respect to safeguarding out-of-home care facilities for children. This historic fact needs to be noted in relation to our federal system of government. As such, a federal system makes operational innovation and differential approach at the state level of government relatively easy, but in respect to the regulation of child care facilities this simply has not happened. This historical fact gives support to a belief in its administrative appropriateness and its freedom from intrusiveness. b) In the course of an almost century of enacting child care licensing laws, state legislatures with very few exceptions have not seen fit to exempt religious organizations, although other provisions of the statute, such as exempting care operations during church service and Vacation Bible Schools, would seem to constitute evidence that the legislature was mindful of the matter of reasonable religious exemptions.

II.

The only conceivable alternative to licensing that would achieve a minimal safeguarding and meet tests of equal protection would seemingly be a criminal law enforcement of legislatively formulated rules and regulations. The state, utilizing the general police powers, would formulate legislatively based standards and then proceed to achieve standards compliance through a criminal law enforcement approach. Such an approach would eliminate a so called “administrative agency” approach. However, a moment’s reflection reveals the cumbersomeness of such a safeguarding arrangement. Among other factors is the cumbersomeness of a criminal law enforcement approach that derives from the relatively strict burden of proof and from delays in coming to court, during which the party would continue to operate. In the end, however, it would be debatable if such an approach would be as cost-effective in goal achievement as licensing. Also in many instances, the investigative activity would probably raise the same questions of “entanglement,” and when carried out as “pure” criminal law enforcement actions, it would contribute to political divisiveness.

III.

Michigan and a number of other states have engaged in regulatory innovativeness in the safeguarding of children in family day care homes [referring to the registration of family day care homes as a less intrusive means of regulation that is appropriate for this category of setting]. Frequently, states establishing this new type of safeguarding have titled the program “registration.” Operationally, registration is held to be a simpler and less cumbersome

regulatory approach. Granting the validity of this last statement raises the question: Why not use a registration approach for child care centers rather than a licensing approach?

The response needs to be negative. The following needs to be noted: Registration is based on some factors which are not present in relation to child care centers. Foremost among these factors is that parents using a family day care home, which may even be in the immediate neighborhood, might be presumed to be able to more effectively evaluate the home setting wherein only a very small group of children is being provided care. Few people have the expertise to determine if the number of adults is sufficient to assure age-appropriate supervision of children of varying ages, whether the building is fire safe, and whether food storage and preparation areas are sanitary. Few parents are inclined to check into the background of the caregivers and to evaluate their educational philosophies and program content. Parents cannot be expected to know all of the children in the facility and determine whether they are all free from contagious diseases or to examine the nutritional adequacy of food served. They cannot be expected to examine all aspects of the physical plant and transportation vehicles to assess their safety and to monitor play time and field trips. Indeed, in this day, few parents have the time to delve into an initial and on-going evaluation of the larger settings. Thus, consumers of child care must depend on the state to determine whether or not the child care center is operating at least at minimally acceptable levels (conformity with state standards).

Questions No. 3. What is the compelling state interest with regard to the regulation of child care centers?

I.

The following statement relates to child care regulation generally as a state responsibility for safeguarding children in out-of-home care. As such, it is put forward as a preface to a listing of specific dynamics in child care centers that intensify the necessity for state intervention in safeguarding operations.

The principle of the right of the state to safeguard out-of-home care of children has been incorporated into state law for nearly one hundred years, starting with the enactment of a child care certification program in the state of Pennsylvania in 1885. (Parenthetically, it might be noted that even earlier, in 1863, Massachusetts, concerned with the care of children in institutions, passed its famous State Board of Charities law. This law, although not a formal licensing program, provided for a right of entry, public inspection, and reporting on operations and care that was given in certain child care facilities.) Since 1885, every state, territory, or district (District of Columbia) through its legislative body has enacted and implemented some form of a child care facility licensing law. In the overwhelming number of instances of these licensing laws being enacted, there has been no exemption of religious, philanthropic, or non-profit organizations. Moreover, there seems to be little or no direct case law whereby it was held that the licensing of certain types of child care facilities was unconstitutional by reason of the First Amendment of the United States Constitution. It might be noted that in many instances, including the state of Michigan, the legislature was apparently quite conscious of the religious exemption issue by virtue of the fact that short-

term or incidental child care, such as care of children during religious services or similar programs were specifically exempt in the statute.

The long history of child care facility licensure with no serious constitutional challenge, plus the universalization of enactment, would seem to constitute, *per se*, an acculturated validation of a community held belief that there is a need for state programs to safeguard out-of-home care of children generally.

II.

When child care centers are examined in particular these few aspects of center care intensify the conclusion that a compelling state interest to safeguard children is present. The five aspects are:

- a. Age of the children
- b. Range of ages and physical sizes of the children
- c. Size of the groups
- d. Staff instability and shifting group composition
- e. Absence of agency placement services

I will comment on each of these five factors.

A. The age of the children. The majority of children in child care centers, nationally and in Michigan specifically, are of pre-school age, under six years of age, with a probable modal age of three to four. (It is worth noting that the application of the Emmanuel Baptist Child Care Center in 1978 specified: 2.5 to 6 years.) [This is the church that in 1979 claimed that submitting to state licensure was a violation of its First Amendment rights, claiming exemption on the basis of religious grounds.] The state's concern with the safeguarding of very young children is of longstanding. In fact, the first child care licensing statute enacted in Pennsylvania in 1885 focused on "infants." Most of the child care licensing measures before World War I (1917-1918) included the regulation of child placing agencies generally and adoption placement organizations specifically. Of course, the long history of state regulation of facilities caring for young children is not hard to understand. At a preschool age, the child is generally not able to discern properly his/her needs, rights, and self interests. Even if able to make the proper perception, he/she would be generally incapable of "verbalizing" them. (The Latin base of the word "infant" translates into: a person without voice - soul.) Consideration of this age must be coupled with what might be termed the "limited social visibility" of children in child center care. By limited social visibility is meant that the children are generally not in the public eye. Thus, in a sense the children may easily become a "captive group" of the operator or staff. Licensing, with its right of entry, inquiry and inspection must be seen as a compensatory operation against this possibility.

B. The range of ages and physical sizes of the children. Pre-school children from an adult point of view may be generally classified as "small." With much frequency, smallness suggests an operational docility. Smallness may also connote an absence of marked hostile-aggression such as is sometimes associated with adolescents. In reality, in a pre-school group, say, ranging from two to six years of age, there may be marked differences in the sizes of the children. A five year old may be literally almost twice the size of a two year old child.

Likewise, psychological observations have established that there may be marked differences in the hostile aggressiveness in a pre-school group. When there is a combining of marked hostility and largeness of size in a number of children, then the smaller and less hostile children are at greater risk. That is, they are at greater risk unless there is sufficient supervising adult personnel skilled in dealing positively with such situations.

The need for an appropriate adult staff-child ratio requirement is further increased due to what is sometimes referred to as the young child's amoral – or asocial – behavior. The common law doctrine of the changing age of social responsibility of children attests to the universality of societies' awareness of the possible amorality of young children. While the doctrine may relieve the young child of criminal culpability, it in no way relieves adult child caretakers about the possibility of this type of behavior and of responsibility for safeguarding the group, in advance, against the possibility of its being expressed.

C. The size of the group, especially in relation to the number of children to the number of teachers or direct care staff. There would seem to be widespread agreement among parents, teachers and child development experts that the age period of two to five years in the life of a child are highly impressionable years. In fact, some observers hold this two to five year period to be of the most critical importance in the development of the human personality.² The lack of sufficient staff to properly individualize each child's needs and lack of qualified staff to properly meet the needs may likely contribute to faulty development and failure for the child to fully realize his or her innate potential. To try to correct faulty development may be costly and time consuming as every juvenile court judge knows. In fact, with much frequency, the results of faulty development, which might have been avoided at an early age, often become irreversible at a later age.

D. Staff instability and constant change in the composition of the group. Although it may not be true in all child care centers, there is a widespread impression among persons who are able to understand the "larger picture" that there is a high level of staff turnover in child care centers. Staff instability does not contribute to the development of a sense of security in children whose day care is being provided in such a setting. Yet, there is a general holding that a sense of security is of marked importance in positive personality formation. While state licensing may not completely compensate for such a state of affairs, it may help to neutralize some of the negative aspects. Licensing standards can be conducive to agencies having a minimal in-service program especially for new workers. Licensing staff, as they make their supervisory [monitoring] visits, can share their knowledge of sound personnel practice (derived in part from their contacts elsewhere) with the agency at hand. Likewise, sound observation would indicate that there is a tendency for the composition of children making up the group to change with considerable rapidity. Like staff turnover, changing group composition does not contribute to the development of a sense of security either. It is almost axiomatic that stable personalities develop out of stable social relationships. Again

² Editor's comment: During the more than twenty-five years since this article was written, child development research, particularly in the neuro-sciences, has confirmed but also expanded Professor Class' conclusions about the importance of early childhood to preserving and enhancing human potential. Researchers now generally agree that experiences and relationships during birth to three contribute essential brain-organizing development to the phenomenal early developmental period that spans birth through age five. During these early years, the foundations for success in domains relevant to academic and social success throughout life are laid. CHS

licensing will not completely eliminate the negative in this social fact. However, the quality of care a center provides to children should not be lessened by the presence of licensing standards that speak to fiscal and organizational stability, program planning and parental participation.

E. The absence of non-agency connection in placing. In twenty-four hour child care, the placement is, with considerable frequency, made through the services of a child placing agency that is staffed with professional “case work” personnel. The function of the caseworker is to individualize the needs of the child and to select from the various child placement resources the most appropriate setting for this specific child. After placement, the caseworker continues in a supervising or monitoring role to ensure that all parties to the placement decision (parents, child, school, clinic or court, and residential agency) are satisfied with the plan and with the program and progress of the child. This is not the situation in respect to child day care. Children are placed in child care centers independently, meaning without the benefit of a community child serving agency. In effect, the parent of the child acts alone without the benefit of organized knowledge and with very limited information, for the most part, as to the safety of the facility, the suitability and qualifications of the staff, and the quality of the program. Licensing provides that protection and provides the parent with a resource to obtain information about the child care center and to have information about the compliance history of a particular child care center. Moreover, it should be noted also that the overwhelming majority of parents utilizing center care are working mothers with limited time and energy to make such safeguarding investigations on an independent basis. Thus, in a certain sense, it may be said that licensing constitutes a preliminary case-finding service for parents seeking a facility where minimal safeguarding will be present.

**Norris Class
1981**

Editorial Explanation:

The above paper was prepared by Professor Norris Class and was intended to guide the assistant attorney general and the administrative staff of the Bureau of Regulatory Services of the Michigan Department of Social Services in the development of a strategy for presenting its case in court. The attorney agreed that the three questions articulated by Professor Class were paramount. While some of the rationale expressed in the paper was thought to be too esoteric, the paper did serve to help us to develop strategies for answering the questions. This involved contracting with a number of expert witnesses to provide expert testimony to address some of the many issues raised by Professor Class. For example, we contracted with the president of Bank Street College in New York City, Dr. Richard Ruopp, along with others who were expert in various aspects of child development and early childhood education to explain why standards needed to be set and to validate our licensing scheme and rules. Our expert witnesses were able to provide research findings to substantiate their opinions. This turned out to be very important in establishing our case. We needed to establish the importance of a non-physical disciplinary rule that prohibited hitting or spanking children.

Much of the trial focused on why we needed a prohibition to corporal punishment which the day care center in question believed was an infringement on their belief that “to spare the rod was to spoil the child.” They presented expert witnesses as well (psychologists, child development experts) to argue their position.

The trial actually took about 12 days (scattered over a lengthy period of time). The Michigan Department of Social Services prevailed at every level – circuit court, the Michigan Court of Appeals and the Michigan Supreme Court.

The language used by the Michigan Supreme Court in its decision is interesting and worth reading as it used some of the points and language that the Michigan assistant attorney general used in presenting the state’s case.

The Michigan Supreme Court handed down a unanimous decision on April 9, 1990.

“The Supreme Court unanimously held: The Department of Social Services regulation prohibiting corporal punishment is justified by a compelling state interest and may be enforced The First and Fourteenth Amendments of the United States Constitution do not prevent the state from compelling the defendants to conform to the licensure requirements of the child care organization act

“. . . Once it is established that a significant burden has been imposed by civil authority on the practice of a sincerely held religious belief, the state must prove a compelling interest that justifies both any direct burdens on religiously motivated conduct and any imposition upon individuals of a hard choice between religious belief and conformity to the legal obligation. In this case, the burden of the licensure requirement is both direct and coercive so as to trigger strict scrutiny. The state met its burden of showing a compelling interest of the highest order in the general licensure requirement sufficient to justify the burdens on the defendants’ free exercise of religion. It has also justified the burden under strict scrutiny of proving that the licensure requirement is the least restrictive alternative capable of accomplishing its objective. Thus, the defendants’ request for exemption need not be granted. . . . The decision of the Court of Appeals that the defendants must operate a licensed day-care center and comply with the regulation prohibiting corporal punishment should be affirmed.”³

Editorial Explanation Section prepared by:
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2006

³ Quotations were taken from the *Syllabus of the Michigan Supreme Court, Lansing MI 1990 of the case Docket No. 79024. Decided April 9, 1990*, pages 1,2,3 and 5. *Syllabus* prepared by the Reporter of Decisions, Michigan Supreme Court, Lansing, Michigan, copyright 1990, State of Michigan.

⁴ The Editorial Explanation was written by Harold S. Gazan. Mr. Gazan was the Director of the Bureau of Regulatory Services, Michigan Department of Social Services, when the Department brought action in the circuit court against the Emmanuel Baptist Church. At the time the case was decided by the State Supreme Court, Mr. Gazan was the Deputy Director of the MI Department of Social Services for the Audits, Investigation, and Licensing Administration. He has since retired.

Inasmuch as Mr. Class prepared the paper as an internal instructional document for Michigan personnel and had not proofed it for publication, minor edits were supplied by Carolynne Stevens, Director, Division of Licensing Programs, Virginia Department of Social Services, with Mr. Gazan’s oversight.