

STATEMENT OF EMERGENCY
922 KAR 2:405E

This emergency administrative regulation is necessary in order to ensure that licensed child care centers, certified family child care homes, and limited duration child care programs are operating under Centers for Disease Control and Prevention and public health guidelines to prevent the spread of the Novel Coronavirus Disease (COVID-19) as agencies remain open or reopen in the midst of the pandemic. This emergency administrative regulation also waives the fingerprint-based criminal record check required for adults working in child care institutions, as permitted by federal guidance issued pursuant to 42 U.S.C. 5141. Due to the public health emergency caused by the outbreak of COVID-19, it has been deemed unsafe to conduct in-person fingerprint-based checks. Name-based criminal background checks shall be required at this time and fingerprint-based checks shall be conducted once it is deemed safe to do so. This amendment is deemed to be an emergency pursuant to KRS 13A.190(1)(a)1. and 4., as the administrative regulation is necessary in order to address imminent threats to public health, safety, and welfare as child care agencies remain open or reopen in the midst of the COVID-19 pandemic and necessary in order to protect human health and welfare. The federal Children's Bureau has also deemed it unsafe to require fingerprint-based criminal record checks during the pandemic. This emergency administrative regulation will not be replaced by an ordinary administrative regulation as these additional health and safety standards are in direct response to the declared public health emergency caused by COVID-19 and are deemed to be temporary. Pursuant to KRS 13A.190(6)(f), this administrative regulation differs from the previously filed emergency administrative regulation governing the same subject matter, 922 KAR 2:400E, in the following manner:

- Regulating limited duration child care programs;
- Increasing the maximum group size of children twenty-four (24) months and older to fifteen (15) children;
- Allowing tours with potential clients to be provided after regular operating hours if no children are in the facility during the tour and the provider ensures all affected areas are cleaned after the conclusion of the tour;
- Making an exception to the limitation on electronic viewing and listening devices for school-age children completing assigned nontraditional instruction;
- Including Kentucky All STARS program information so that financial awards that providers receive for attaining a higher level of quality are not negatively impacted; and
- Waiving fingerprint-based background checks during the public health emergency per federal guidance.

ANDY BESHEAR, Governor
ERIC C. FRIEDLANDER, Secretary

CABINET FOR HEALTH AND FAMILY SERVICES
Department for Community Based Services
Division of Child Care
(New Emergency Administrative Regulation)

922 KAR 2:405E. Enhanced requirements for certified and licensed child care and limited duration child care programs as a result of a declared state of emergency.

EFFECTIVE: September 1, 2020

RELATES TO: KRS 13A.190, 158.030, 199.011(4), 199.894, 199.896(2), 45 C.F.R. 98.43(a)(2)(i)

STATUTORY AUTHORITY: KRS 194A.050(1), 199.896(2), 199.8982(1)(f), 214.020

NECESSITY, FUNCTION, AND CONFORMITY: KRS 194A.050(1) requires the Secretary of the Cabinet for Health and Family Services to promulgate administrative regulations necessary to operate programs and fulfill the responsibilities vested in the cabinet, qualify for the receipt of federal funds, and cooperate with other state and federal agencies for the proper administration of the cabinet and its programs. KRS 199.896(2) and KRS 199.8982(1)(f) authorize the Cabinet for Health and Family Services to promulgate administrative regulations and standards for child care centers and family child care homes. KRS 214.020 requires the cabinet to take such action as deemed efficient in preventing the introduction or spread of infectious or contagious disease within the state. This administrative regulation establishes additional health and safety standards for certified family child care homes, licensed child care centers, and limited duration child care programs due to the COVID-19 pandemic and declared state of emergency to prevent the spread of disease in child caring homes and facilities. The Children's Bureau identified the requirement of fingerprint-based checks of national crime information databases as an administrative condition that may be modified pursuant to federal authority given that a state conduct all available name-based criminal background checks for applicants during the public health emergency and conduct fingerprint-based checks as soon as it is safe to do so.

Section 1. Definitions.

- (1) "Child" is defined by KRS 199.011(4).
- (2) "Child care" means care of a child in a center or home that regularly provides full or part-time care, day or night, and includes developmentally appropriate play and learning activities.
- (3) "Child care center" is defined by KRS 199.894(3).
- (4) "Child care provider" is defined by 45 C.F.R. 98.43(a)(2)(i).
- (5) "Director" means an individual:
 - (a) Who meets the education and training requirements as specified in 922 KAR 2:090, Section 10;
 - (b) Whose primary full-time job responsibilities are to ensure compliance with 922 KAR 2:090, 922 KAR 2:120, 922 KAR 2:280, and this administrative regulation; and
 - (c) Who is responsible for directing the program and managing the staff at a child care center.
- (6) "Family child care home" is defined by KRS 199.894(5).
- (7) "School-age" means a child who meets the age requirements of KRS 158.030 or who attends kindergarten, elementary, or secondary education.

Section 2. Reopening Protocol.

- (1) If a child care provider chooses to delay reopening after the pandemic closure, the provider shall communicate this to the Division of Regulated Child Care.
- (2) When a child care provider reopens:
 - (a) The director shall update the staff roster in the Kentucky National Background Check Program pursuant to 922 KAR 2:280 and the cabinet-designated database maintained pursuant to 922 KAR 2:240 to confirm all staffing records are current for inspection purposes; and
 - (b) If there is a new director, the program shall contact the Division of Regulated Child Care immediately to file director change paperwork in accordance with 922 KAR 2:090.

Section 3. Limited Duration Child Care Programs.

(1) A limited duration child care program shall have a maximum group size of fifteen (15) children per group.

(2) A limited duration child care program shall have the same staff-to-child ratio as required for licensed child care centers pursuant to 922 KAR 2:120.

(3)(a) Except as provided by paragraph (b) of this subsection, a minimum of two (2) staff members shall be present in each room of a limited duration child care program.

(b) If all staff in the program have a completed fingerprint-based background check via the Kentucky National Background Check Program in accordance with 922 KAR 2:280, one (1) staff member shall be present in each room, subject to the staff-to child ratios established in subsection (2) of this section.

(4) Limited duration child care programs shall be monitored by the Division of Regulated Child Care.

Section 4. Social Distancing Requirements for Child Care Programs.

(1)(a) Except as provided by paragraph (b) of this subsection, a child care center shall meet the maximum group size requirements established in 922 KAR 2:120.

(b) The maximum group size shall be fifteen (15) children per group for children age twenty-four (24) months and older.

(2) A certified family child care home shall meet the maximum group size requirements established in 922 KAR 2:100.

(3) Each child shall remain in the same group throughout the day without interacting with another group.

(4) A certified family child care home and a licensed child care center shall maintain the staff-to-child ratios established in 922 KAR 2:100 and 922 KAR 2:120, respectively.

(5) A child care provider may use a temporary wall to divide classroom space in order to comply with the maximum group size required by subsection (1) of this section. A temporary wall:

(a) Shall be at least six (6) feet tall;

(b) Shall be stable;

(c) Shall not be classroom furniture rearranged to divide classroom space;

(d) Shall not divide classroom space in a manner that results in less than thirty-five (35) square feet of space per child;

(e) Shall not create a traffic pattern that would cause noncompliance with health and safety requirements during a medical state of emergency; and

(f) May create a classroom that does not have its own bathroom if the classroom still has access to a bathroom.

(6) Individuals approved to be inside the child care center or family child care home while children are in the facility shall include:

(a) Facility staff;

(b) A person with legal authority to enter the facility, including cabinet staff and first responders;

(c) A necessary utility worker;

(d) A professional providing medical or therapeutic services for children with special needs;

(e) A child enrolled in the facility;

(f) A parent or legal guardian of a child enrolled in the program; and

(g) A family member who lives in the home of a family child care home.

(7) A child care provider shall:

(a) Reduce the number of staff each classroom of children interacts with each day;

(b) Create a schedule in which the same staff work with the same children each day as able;

(c) Stagger playground time between classroom groups so as to separate one group of children from another;

(d) Allow school-age children to exceed the limitation on electronic viewing and listening devices established in 922 KAR 2:120 in order to complete assigned nontraditional instruction;

(e) Utilize a centralized drop-off and pick-up location to eliminate unnecessary traffic of parents and guardians to the classrooms;

(f) Require parents and guardians to exercise social distancing of no less than six (6) feet during drop-off and pick-up; and

(g) Modify traffic flow to minimize contact between children and staff to the greatest extent possible.

(8) A child care provider may:

(a) Use virtual classroom observations for practicum students;

(b) Use virtual tours for prospective families, with permission of the families whose children may appear in the video; and

(c) Offer tours to potential clients after regular operating hours if no children are in the facility during the tour and the provider ensures all affected areas are cleaned after the conclusion of the tour.

(9) A child care provider shall not:

(a) Provide access to visitors or students conducting classroom observations;

(b) Hold center-wide family events;

(c) Permit field trips;

(d) Allow high-contact sports on the playground;

(e) Utilize family style dining at this time. Staff members shall prepare plates and pass them out to individual children;

(f) Offer transportation to children upon reopening. When the public school system resumes classes, child care providers may model their transportation policy from the Kentucky Department of Education's recommendation to the public school system; and

(g) Permit staff to congregate in common areas and shall require they observe social distancing policies whenever possible.

Section 5. Business Practices. To the greatest extent possible, a child care provider shall:

(1) Conduct business practices by telephone or internet;

(2) Use digital documents instead of paper documents;

(3) Communicate with parents and vendors by telephone and digital communication;

(4) Utilize digital billing and invoices; and

(5) Discourage employees from sharing phones, computers, and office supplies if duplicate materials are available.

Section 6. Cleaning and Sanitizing Requirements for Child Care Providers.

(1) A child care provider shall:

(a) Utilize the cleaning and sanitizing procedures outlined in the cabinet-approved orientation training that is required by 922 KAR 2:090 and 922 KAR 2:100;

(b) Create and post a cleaning and sanitizing plan specific to the individual child care center or family child care home and outline the additional cleaning and sanitizing requirements from the Centers for Disease Control and Prevention for child care during a pandemic;

(c) Eliminate "lost and found" bins; and

(d) Prohibit the use of communal water fountains.

(2) Toys children have placed in their mouths or that have been contaminated by other bodily fluids shall be set aside in a separate container for soiled toys until the toys are cleaned and sanitized by a person wearing gloves.

(3) Machine washable toys shall not be used.

(4) Groups of infants and toddlers shall not use shared toys unless the toys are cleaned and sanitized before being shared between children.

(5) Bedding (blankets, sheets, pillows, sleeping bags) shall be:

(a) Able to be washed;

(b) Separated and stored in individual labeled bins without touching another child's bedding; and

(c) Washed, at least at the end of each week.

(6) Children and staff shall:

(a) Meet the handwashing requirements established in 922 KAR 2:100, Section 13(4) and (5), in a certified family child care home and 922 KAR 2:120, Section 3(4) and (5), in a licensed child care center, respectively; and

(b) Wash their hands with liquid soap and warm running water or utilize hand sanitizer or hand-sanitizing wipes prior to center or home departure.

(7) The child care center or family child care home shall provide liquid soap, hand-sanitizer (as appropriate), handwashing programs, tissues, and wastebaskets in convenient locations.

Section 7. Screening and Illness Requirements.

(1) Children and adults shall be screened for fever and contagious symptoms upon entry into the child care center or family child care home each day and shall not be allowed to enter if displaying a contagious fever or symptom of COVID-19.

(2) A contagious fever shall be considered a fever of 100.4 degrees Fahrenheit or higher in accordance with recommendations from the Centers for Disease Control and Prevention.

(3) Staff who demonstrate symptoms of COVID-19 shall be tested for the illness.

(4) A child or adult who tests positive for COVID-19 shall follow the recommendations of the local health department on when to return to child care.

(5) A child care provider shall follow the recommendations of the local health department on whether the program shall temporarily close due to an outbreak of COVID-19.

(6) If a child demonstrates a fever or other contagious symptom, the child shall be removed from the classroom setting immediately and placed in a safe, low-traffic area until the parent or guardian arrives to pick up the child. The provider shall require the parent or guardian to pick up the child within one hour of being contacted.

(7) A child care provider shall notify enrolled families and staff when a diagnosed case of COVID-19 is identified in the center or home, while still protecting the privacy of the individual who was diagnosed.

Section 8. Personal Protective Equipment (PPE) Requirements.

(1) Each adult, including parents and guardians at drop-off and pick-up, shall wear a face mask while inside a child care center or family child care home:

(a) Unless doing so would represent a serious risk to their health or safety and they are able to present a medical statement stating this;

(b) Except during planned staff breaks and lunch away from children in care and other staff; and

(c) Except for staff working with infant or toddler groups who choose to wear a face shield instead.

(2) A provider shall make masks available to parents, guardians, and other adults permitted into the facility.

(3) If an adult refuses to wear a mask, or face shield as permitted by subsection (1)(c) of this section, the facility may refuse the individual the right to enter the facility. A provider shall establish a policy as to whether a parent or guardian is allowed to enter the facility if an adult refuses to adhere to the facility's policies regarding the guidelines of the Centers for Disease Control and Prevention.

(4) A child who is five (5) years of age or younger shall not wear a face mask due to increased risk of suffocation and strangulation. School-age children may wear a face mask if temperament and developmental ability permits.

(5) Staff shall wear gloves when preparing meals and serving bottles. Gloves shall be changed between bottle feedings.

(6) A provider shall ensure that gloves are available to staff engaging in high-touch activities to the greatest extent practicable, if wearing gloves does not create additional health hazards for that activity.

(7) A provider shall have at least a one week supply of the required cleaning supplies and PPE on-site prior to reopening the child care center or family child care home. Child Care Aware staff members shall screen facilities to ensure supplies are on-site prior to opening.

Section 9. Training Requirements. (1) All child care staff, directors, owners, and operators shall complete a new, mandatory training on cleaning, sanitizing, health procedures, and mandatory reporting prior to the date of reopening. The new training shall be available on June 1, 2020, and shall be a free, online course.

(2) All new staff hired shall take the mandatory training on cleaning, sanitizing, health procedures, and mandatory reporting within ninety (90) days of their hire date.

(3) A child care provider shall not be penalized if staff did not complete the training hours required by 922 KAR 2:090 or 922 KAR 2:100 during the child care closure.

Section 10. Kentucky All STARS Program. (1) All STARS quality rating visits to be conducted pursuant to 922 KAR 2:270 shall be suspended during the public health emergency.

(2) A provider shall remain at the All STARS level that had been attained prior to the public health emergency.

(3) The expiration date of All STARS levels shall be extended by one (1) year.

(4) Providers shall receive applicable awards for their current STARS level.

Section 11. Safety and Background Check Requirements. (1) Staff with expired tuberculosis skin tests and newly hired staff shall be given an extension not to exceed 120 days after the date established for reopening to be tested.

(2) Annual visits from the Division of Regulated Child Care shall begin after child care centers and family child care homes reopen.

(3) New background checks for staff who were employed at the time of the child care closure on Friday, March 20, 2020, shall not be required due to the rapback feature of the Kentucky National Background Check Program.

(4) Staff with a completed fingerprint-based background check via the Kentucky National Background Check Program shall return to the classroom and may be left alone with children in accordance with 922 KAR 2:280.

(5) New staff shall:

(a) Undergo name-based background checks upon hiring;

(b) Not be left alone with children until the name-based background checks have been approved and returned; and

(c) Undergo fingerprint-based background checks pursuant to 922 KAR 2:280 once the checks are operational again.

(6) A provider shall ensure staff are informed that they may identify and communicate potential improvements or concerns in order to reduce potential risk of virus exposure in the workplace.

MARTA MIRANDA-STRAUB, Commissioner

ERIC C. FRIEDLANDER, Secretary

APPROVED BY AGENCY: August 31, 2020

FILED WITH LRC: September 1, 2020 at 8 a.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall, if requested, be held on November 23, 2020, at 9:00 a.m. in Suites A & B, Health Services Building, First Floor, 275 East Main Street, Frankfort, Kentucky, 40621. Individuals interested in attending this hearing shall notify this agency in writing by November 16, 2020, five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who attends will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on this proposed administrative regulation until November 30, 2020. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to the contact person. Pursuant to KRS 13A.280(8), copies of the statement of consideration and, if applicable, the amended after comments version of the administrative regulation shall be made available upon request.

CONTACT PERSON: Donna Little, Deputy Executive Director, Office of Legislative and Regulatory Affairs, 275 East Main Street 5 W-A, Frankfort, KY 40621; phone 502-564-6746; fax 502-564-7091; email CHFSregs@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact person: Laura Begin or Donna Little

(1) Provide a brief summary of:

(a) What this administrative regulation does:

Kentucky Governor Andy Beshear announced on March 16, 2020, that all child care centers would close by the end of business on March 20, 2020, due to the declared state of emergency caused by the COVID-19 pandemic. On May 21, 2020, Governor Beshear announced that a portion of childcare centers will be allowed to reopen on June 8, 2020, with the rest being allowed to reopen on June 15, 2020, with certain health and safety requirements in place to prevent the spread of the Novel Coronavirus Disease (COVID-19) within facilities and homes. This administrative regulation contains requirements to ensure the health and safety of staff and families in child care centers, family child care homes, and limited duration child care programs who remain open or choose to reopen during the COVID-19 pandemic.

(b) The necessity of this administrative regulation: This emergency administrative regulation is necessary in order to ensure that licensed child care centers, certified family child care homes, and limited duration child care programs are operating under Centers for Disease Control and Prevention and public health guidelines to prevent the spread of COVID-19 as agencies remain open or reopen in the midst of the pandemic.

(c) How this administrative regulation conforms to the content of the authorizing statutes: This administrative regulation conforms to the content of the authorizing statutes by establishing health and safety standards for licensed child care centers and certified family child care homes. These additional health and safety standards are necessary to prevent the spread of the COVID-19 virus in child care facilities and homes.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation assists in the effective administration of the statutes by establishing health and safety standards for child care centers, family child care homes, and limited duration child care programs.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: This is a new, temporary administrative regulation.

(b) The necessity of the amendment to this administrative regulation: This is a new, temporary administrative regulation.

(c) How the amendment conforms to the content of the authorizing statutes: This is a new, temporary administrative regulation.

(d) How the amendment will assist in the effective administration of the statutes: This is a new, temporary administrative regulation.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: Currently, there are 11 limited duration child care programs, 1,835 licensed child care centers, and 231 certified family child care homes in Kentucky. The Department for Community Based Services, Division of Child Care, and the Office of the Inspector General, Division of Regulated Child Care, will be impacted as the child care regulating and monitoring agencies, respectively.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Certified family child care homes, licensed child care centers, and limited duration child care programs will be required to meet the additional CDC and public health guidance contained in this administrative regulation to prevent the spread of the virus within child care facilities.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost to the Division of Child Care or the Division of Regulated Child Care. These requirements are consistent with Centers for Disease Control and Prevention (CDC) guidance at this time and many contents of this administrative regulation are consistent with other states. Federal Coronavirus Aid, Relief, and Economic Security (CARES) Act funding and Child Care and Development Funds have been distributed to cover the cost of fixed expenditures during the closure and to assist with the purchase of personal protective equipment and cleaning supplies needed for reopening.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Entities complying with the requirements of this administrative regulation will reduce the risk of spreading the COVID-19 virus within their facilities and homes and hopefully be able to eliminate or minimize spreading the virus and remain open.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: The amendment to this administrative regulation will not result in any new initial costs to the administrative body.

(b) On a continuing basis: The amendment to this administrative regulation will not result in any ongoing costs to the administrative body.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The Child Care and Development Fund Block Grant, state match and maintenance of effort for the block grant, and limited agency funds support the implementation of this administrative regulation. Federal CARES Act funding was secured and has been distributed to child care providers to cover the cost of fixed expenditures during the closure and to assist with the purchase of personal protective equipment and cleaning supplies needed for reopening.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: There is no increase in fees or funding required as a result of this amendment.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: This administrative regulation does not establish any fees, or directly or indirectly increase any fees.

(9) TIERING: Is tiering applied? Tiering is not applied as all licensed child care centers, certified family child care homes, and limited duration child care programs who choose to open or remain open during the COVID-19 pandemic will be regulated by this administrative regulation.

FEDERAL MANDATE ANALYSIS COMPARISON

1. Federal statute or regulation constituting the federal mandate.

42 U.S.C. 9857-9858q

2. State compliance standards. KRS 194A.050(1), 199.896(2), 199.8982(1)(f), 214.020

3. Minimum or uniform standards contained in the federal mandate. 42 U.S.C. 9857-9858q contains requirements for the administrative body receiving Child Care and Development Block Grant funds and gives states the maximum flexibility in developing child care programs and policies that best suit the needs of children and parents within the state.

4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? This administrative regulation is more stringent than federal mandates as it contains temporary health and safety requirements for child care agencies reopening during the COVID-19 pandemic, consistent with CDC guidelines. The federal rule does give states flexibility in setting standards specific to state needs.

5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. This administrative regulation contains different requirements than federal requirements due to the declared state of emergency and nature of the COVID-19 virus.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Cabinet for Health and Family Services (Division of Child Care and Division of Regulated Child Care) is impacted by this administrative regulation. A local government or a school district reopening a licensed child care center, in whole or in part, will be impacted.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. 42 U.S.C. 9857-9858q, KRS 194A.050(1), 199.896(2), 199.8982(1)(f), 214.020

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will generate no revenue.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will generate no revenue.

(c) How much will it cost to administer this program for the first year? There will be no additional costs to administer this program.

(d) How much will it cost to administer this program for subsequent years? There will be no additional costs to administer this program.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation: