Licensing Rules: Too Much? Too Little?

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This article explores the concept of balance in rule-making and describes the complex principles that must work together when writing rules. Although the article is written in the context of rule-writing for the child care field, the principles and concepts are equally applicable to the rule-writing function for all forms of human care regulation.

I've been in regulatory practice over twenty years and still face that choice with great humility. Let me share some thoughts and experiences as we all wrestle that bedeviling question.

A child care center director whom I greatly respect once publicly shared a very disturbing experience. Both her staff and the licensing inspector had missed an unusual and partially concealed head-entrapment hazard in a playhouse on her center's playground. Naturally, a three year old didn't have a bit of trouble finding what the adults had missed! He slipped through the opening and was seen hanging by his head. Because more staff than the licensing rules required were present and were supervising attentively, we did not have a dead child that day.

In telling about the near-miss to warn other providers and regulators to be more vigilant, the director added that she had initially opposed the head-entrapment rule when it was added a few years earlier. She said she'd once thought this rule over-protective. Interestingly enough, however, she added that she still had her doubts about other licensing rules! Her comments about the rules, brought these thoughts to mind.

Licensing rules look unnecessary until something bad happens.

Jake Terpstra, a nationally known licensing expert now retired from the Children's Bureau, often began his presentations with a reminder: *Licensing was born in scandal and tragedy*. It's true.

Over 100 years ago, the concept of human care regulation grew from the recognition that most of the suffering and deaths in children's institutions were preventable. Two major causal conditions were readily apparent. Some unscrupulous providers cut corners on health and safety to increase their share of the already meager donations or payments they received for the children's care. Other people, many extremely well-meaning, were undertaking care without the experience and training to develop safe methods. However, the risks were often the same. For example, overcrowding and insufficient staff, whether from greed or runaway good intentions, still left a lot of sick and dead children. Something had to be done. Human care regulation was born.

Jake Terpstra was usually making one of two different points when he said that licensing is born in scandal and tragedy, however:

- He was reminding his audiences that the greatest temptation to conclude that regulation must be unnecessary arises when regulation is doing its job and achieving its mission, i.e., when there's no tragedy or scandal on the front pages. It is hard to prove the worth of licensing because it is hard to measure what does *not* happen.
- Or, he was making the point that weak licensing laws and rules often don't get strengthened except in the aftermath of a scandal or tragedy.

The tendency of policy-makers to strengthen rules only *after* people have been hurt or killed is frustrating for licensors. It is particularly galling to the profession when the risks and necessary interventions are obvious. The mission of licensing is to make services safe in advance, i.e., to prevent and contain risks.

Here's an example of the effects of delaying regulatory protection. A few years ago in one state a multiple-fatality fire led to a requirement to retrofit older nursing homes with sprinklers. Retrofitting was also considered but ultimately rejected for older hospitals that, like older nursing homes, had been built without sprinkler systems. Faced with the predictable testimony expressing the hospitals' concerns about costs, the board responsible for adopting regulations responded to arguments that hospitals' larger numbers of personnel would be sufficient compensatory protection to avoid the expense of retrofitting. A few years later, a fatal fire in an older hospital re-surfaced the same issue in that state.

This story reminds me of a non-regulatory story told many years ago by a corporate safety specialist who, as a good will gesture, had been loaned to a small local plant to assist with its safety program. He found a boat-load of problems but was so puzzled by one observation that he could hardly wait to inquire about it at the exit interview. "I couldn't help noticing," he began, "that four of the 15 sets of stairs in the building had handrails. Can you tell me why those did?" The chairman of the safety committee looked puzzled for a moment before answering in a tone that suggested their fancy safety consultant must be a bit dense, "Well, sure. We *always* install rails where we've had a fall."

Clearly, people often have difficulty generalizing lessons learned in one situation to same or similar situations. The learning interference may be due to conscious concerns about cost or convenience. The interference may also be due to psychological factors, such as denial in defense of the need to feel secure or faulty perception based on narrowed perspective or role-taking.

The truth is that most of us either simply don't think about safety rules, or we think of them as an unnecessary bother – until we have what learning theorists call "a significant emotional experience" or *SEE*. The *SEE* is an attitude-shifting event that leads to a behavior change by breaking through the perceptions that were sustaining the previous behavior pattern. For example, a provider may discount the need for a licensing rule saying, "I've been in business umpty-years, and I've never had that problem." Licensing staff, being in many facilities and being familiar with the relevant literature, may have seen the hazard numerous times, but that provider's personal experience is the only perception that is real to him.

His perception is unlikely to change unless he has a *SEE* – either a personal encounter with that risk or a compelling confrontation with the risk through the experiences of others with whom he can emotionally identify (which probably excludes regulators!). This is one of the reasons regulators must earn the confidence and trust of providers – and have the data to present the logic behind concerns they may have about rules and care practices. It is also one of the reasons it is important for providers to affiliate with professional associations and for those associations to take an active role in supporting soundly conceived licensing rules.

Every licensing rule was "bought" at a price. Something happened. Something made a lasting impression on the collective consciousness of the profession and its publics. For example, I will never forget the grief of a licensing colleague from another state as she described a tragedy. A toddler had been killed two days earlier when he toppled a cart for audio-visual equipment while the provider and his mother were talking only a few feet away. His carotid artery was severed. If a colleague's face still haunts me years later, can you imagine the nightmares his mother and his care providers endure?

How licensing rules and safety consciousness develop

This is an exercise you may be able to do. If not, imagine with me. Walk through the facility. Look for ways a child could get hurt. Repeat the process, but this time on your knees so you can see what the children see that might attract and endanger them. Chances are you won't see more than a few hazards, even including those you find from taking a child's-eye view. After all, if you could see them, it's likely someone would already have seen and corrected them. Now, imagine that you are examining the facility with half a dozen experienced providers and regulators. Do you have any doubt that their collective experience will identify more hazards? Your safety audit now has the benefit of all their years of observations and their collective recollections of heart-stopping near-misses when some child did something they had never anticipated.

That's the way licensing rules evolved. Knowledgeable people, using their collective experience and expertise, plus any available research, have identified common hazards and devised preventive methods to counteract or reduce those hazards. Moreover, every rule also had to survive the predictable challenges for practicality, cost-benefit, and reasonableness. Children obviously cannot be protected from every conceivable danger. They should be protected from all reasonably foreseeable serious risks to their health, safety and well-being, however.

Am I suggesting, then, that all licensing rules are sacred icons that must never be changed? Absolutely not. Experience, research, technology, and changes in an industry's operating situation make a dynamic environment – reducing some risks and introducing or elevating others. Rules should be evaluated every few years to see if they still withstand the tests of knowledge, conscience, and common sense. Newly invented toys or equipment, such as baby-walkers, may introduce hazards. Research may identify hazards in familiar equipment, such as dangling cords from window blinds, hand-operated diaper pails, or ill-fitted crib mattresses. As another example, most licensing rules require that medication storage provide full security (locked or inaccessible) and be in fixed locations for easy staff access and control. These rules had to be reconsidered with the advent of single-dose emergency devices for children prone to severe asthma attacks on the playground while still controlling for such eventualities as access by other children or losing track of the location of the device during shift changes.

I do believe, however, that rule reviews should be approached conservatively and respectfully. That is, there should be a good reason for discarding somebody's hard-challenged experience that convinced the profession the rule was necessary in the first place. We should respect the warnings of our history until we are intellectually and morally confident that those warnings are no longer valid.

Constructing safety rules: layering the lines of defense

Licensing rules do not protect children.

*Licensing rules help **people** to protect children*.

The rules are there to structure the care-giving environment.

The rules are there to instruct and to guide staff in safe methods and procedures – staff who may have less than optimum training and experience.

The rules do no good if they are considered a book of hassles to endure when the licensor comes.

The rules are there as daily working tools to keep adults reminded of hazards and to keep them in the ***habit*** of being alert and safety-conscious.

As we saw in my opening story, that center director's child did not die because she had extra staff stationed nearby and *actively* supervising, i.e., assigned to supervise particular areas of the playground or particular children and constantly scanning their zones/children. They dashed to free the child. Had they been less alert, the outcome could have been tragic. People *always* make the difference.

Good safety practices are always "layered," never depending on a single line of defense. One of the best examples is airline industry regulation, including aircraft construction and maintenance as well as flight operations. Airline safety depends extensively on layering or "redundancy." Redundancy means that if one system or procedure fails, a back-up system or procedure will take over or make timely correction possible, which is what happened when active playground supervision took over after the head-entrapment hazard had been overlooked. Moreover, failures and serious incidents in the air transportation industry are exhaustively investigated to see what can be learned. In that respect, airlines have an enviable feedback loop designed to prevent recurrences of the same failure.

Regrettably, licensing agencies have no such national collection and analysis of serious incidents in licensed settings to guide their rule-making. They do use safety information available from a wide array of sources, however. The good news is that the availability and dissemination of such information has significantly improved in recent years. This, in turn, makes it necessary to review and revise rules more often to respond to the growing body of health, safety, and care-giving literature – and to establish methods of alerting providers to findings of urgent applicability, such as unsafe product warnings or recalls and newly discovered medication reactions.

Although not to the extent seen in the airline industry, well-constructed human care safety rules are also layered, particularly in high-risk, high-prevalence hazards. Because people are always both the first and the last lines of defense for children in care, staffing ratios are intended to reduce all hazards. Staffing ratios protect by trying to estimate the people needed to maintain safety and necessary care for different age groups and for different activities, such as nap times or field trips. Most licensing agencies also have a general rule that requires staff to maintain sight and sound supervision in all activities.

The rules in high-risk situations generally have more "layers" of defense. For example, because playgrounds are heavy-use areas that pose high risks for injuries, most licensing rules require that playground equipment meet national safety standards, be kept in good repair, and be properly positioned on sufficient, properly maintained resilient surfacing. The rules usually address common usage hazards, such as requiring age-appropriate playground equipment, separating areas used by younger and older children, creating barriers or traffic patterns to keep children out of the path of moving playground equipment, etc. Some states require facilities to review playground incidents and injuries and perhaps to develop a playground safety plan. Lastly, the states generally require facilities to maintain continuous first-aid response capability and a ready means to call for professional help, e.g., a working non-pay telephone, posted emergency numbers, emergency medical information, etc. The layering is designed to accomplish:

1. Prevention, through safe equipment and required maintenance for continued safety,
2. Prevention, through appropriate physical barriers,
3. Prevention, through safe usage procedures,
4. Prevention, through required training in the safety procedures,
5. Prevention, through active supervision by sufficient and properly trained staff, and, if all those fail,
6. Containment of injury effects while securing prompt medical attention.

Is that over-regulation or common-sense preventive layering? As individuals answer that question, they will undoubtedly be influenced by the extent of their intellectual and emotional awareness of the prevalence of injuries, of the impact of those injuries on children and families, and of the cost impact of those injuries. For example, not long ago a colleague's son sustained a broken arm on his child care center's playground. It was in the middle-range of seriousness as fractures go, and his family was grateful it was an arm rather than head or spinal injury. Still, there was considerable pain and weeks of recuperation for the child. He had to learn to do things one-handed, then work to strengthen and re-learn using the injured arm. The costs included not only the medical care and missed work but "little" costs that we never think about, such as buying clothing that accommodated his cast.

As you review licensing rules, look for layering patterns that make children safer and your job easier.

There's more to rules development than meets the eye

There's a tendency to think it's easy to write rules . . . Just do a little research. Find out what other states are doing. Listen to the public comments on the drafted rules. Finalize the rules and forget about them for years. Not so.

Rules development is always a thorny task. It will surface divergent, and sometimes heated, opinions about:

- Whether a risk is real and likely to occur. If so, analysis is needed to determine its nature, pattern and contributing elements, such as,
    - Whether occurrence is likely throughout the facility and its activities or is confined to particular areas, activities, times of the day, etc.
    - Whether hazards differ in nature, severity or likelihood with identifiable groups in the facility, such as age groups or special populations in child care facilities or adults with dementia, or those on high-risk medications, or those with swallowing or mobility impairments.
    - Whether there is a sequence of steps or events that create or elevate the risk, and if so, where to intervene in the sequence.

- Whether a rule is needed.
- What kind or combination of rules makes sense, e.g., whether the rule should address:
    - Specific elements or precursor events in the way the risk develops
    - Special equipment
    - Barriers
    - Facility policies and procedures
    - Staff training in the area of concern, to include risk recognition and how to prevent the risk in the normal flow of the care-giving context, e.g., training in universal infection control procedures
    - Documentation/logging procedures or requirements related to special managerial monitoring/oversight of the activity
- How a rule fits with and supports other rules.
- Whether the rule needs a "buttressing" rule, such as one that would require managerial monitoring procedures, public disclosure, or specific training to make a critical rule more effective in practice.

- How to design a rule for maximum convenience and compatibility with normal routines and practices in most facilities.
- How to word a rule for clarity and consistency both for facility compliance and for regulatory enforcement. Rule wording is one of the hardest choices – both realistically and politically. The bind is that both licensors and licensees want both flexibility and consistency, and these are polar values. Precisely worded rules (electrical outlets shall be safety-capped when not in supervised use; cots shall be three feet apart) will be precisely enforced, allowing no flexibility. Flexibly worded rules (cleaning supplies and medications shall be *inaccessible* to children) may be more convenient or practical but also more open to interpretation (Is anything not under lock and key really inaccessible to a toddler who has learned to climb?). Flexible rules are also more subject to fail because of human error or judgment (Will busy, under-trained, under-supervised staff remember to put the sanitizing agent back on the top shelf or leave it sitting on the changing table? Will they remember that medications may be in staffs' or visitors' purses and coat-pockets, not just in medicine chests and refrigerators?).

So, writing good licensing rules is an extraordinarily complex task that requires the integration of knowledge and experience from many domains and perspectives. Writing good rules is also extremely demanding and time-consuming. Nothing, however, protects the interests care-consumers, providers and enforcement staffs so much as a well-conceived, well-researched, well-constructed, clearly written and up-to-date set of licensing rules.

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2002