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Arizona Department of Health Services
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Via Email

To Whom It May Concern:

I am writing on behalf of the Goldwater Institute in opposition to the proposed amendments to Rules 9-5-404 and 9-5-726, which impose new “group size” requirements on childcare facilities. The principal purpose of this comment is to highlight legal defects in the proposed amendments, which exceed the Department’s statutory authority and would likely subject the Department to litigation.

In 2022, in order to rein in administrative overreach, the Arizona Legislature imposed several new statutory requirements on agency rulemaking. Relevant here, it prohibited agencies from (1) making any “rule under a specific grant of rulemaking authority that exceeds the subject matter areas listed in the specific statute authorizing the rule,” (2) making any “rule under a general grant of rulemaking authority to supplement a more specific grant of rulemaking authority,” and (3) making any “rule that is not specifically authorized by statute.” A.R.S. § 41-1030(D). The Legislature also provided that a regulation “is invalid unless it is ... reasonably necessary to carry out the purpose of the statute” authorizing it. *Id.* (A).

The proposed amendments violate all these requirements because they impose on childcare facilities a maximum “group size” without any statutory authority to do so. The Department’s regulatory authority derives from A.R.S. § 36-883(A), which authorizes the Department to, *inter alia*, impose “standards for ... “[a]dequate staffing per number and age groups of children.” A.R.S. § 36-883(A)(2). But an across-the-board cap on “group

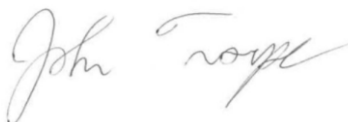
size,”¹ independent of any relevant considerations such as child-adult ratio, is not a regulation of “staffing per number and age groups of children,” *id.*, and it is not justified by any other provision in the statute. Thus, the amendments are not “specifically authorized” by statute, A.R.S. § 41-1003(D)(3), nor are they “reasonably necessary to carry out the purpose of the statute.” *Id.* (A). Moreover, the Department cannot rely on Section 36-883(A)’s general charge to “prescribed reasonable rules regarding ... health, safety and well-being” to “supplement” the claimed authority that’s missing from the enabling statute’s “more specific grant[s] of rulemaking authority.” A.R.S. § 41-1003(D)(2).

The proposed rule change exceeds the Department’s statutory authority, violates clear statutory constraints on rulemaking, and will likely subject the Department to litigation, including the prospect of costs and attorney fees.

What’s more, as others have already detailed in their comments opposing the proposed rule change, these requirements will severely and needlessly burden childcare facilities, reduce childcare access, and drive up costs for families at a time when many Arizonans are already struggling to find and pay for childcare.

For all these reasons, we urge the Department not to adopt the proposed amendments to R9-5-404 and R9-5-726.

Sincerely,



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¹ The regulation is also vague as it fails to define “group size” and gives childcare providers no guidance as to whether the group size maximum applies to individual classrooms, childcare facilities, or on some other basis.