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RE: LEAS EXEMPTION FROM LICENSING REGULATIONS

On behalf of the above organizations, we thank you for the opportunity to provide comments on the proposed Title 5 regulations that would exempt local education agencies (LEAs) from certain licensing requirements. We join as a coalition representing LEAs across the state to express our concerns on these proposed regulations that we believe exceed the legislative intent of Assembly Bill 99 (Statutes of 2017).

As rule-makers establish the parameters governing the licensing exemption for LEAs, it is important to remember the intent of the legislation: to provide public schools greater regulatory flexibility that will result in increased access to early education programs by eliminating barriers that prevent vulnerable families and children with special needs from enrolling in high-quality preschool programs. When the original legislation passed in 2017, legislators were attempting to rectify two key problems: (1) that disparate health and safety regulations discourage the integration of General Education Preschool and Special Education Preschool programs; and (2) that low-income families who need full-day care are less likely to have access to programs that provide education and learning opportunities.

During the two years since this legislation passed, LEAs have created plans, begun developing facilities, and received grants that are contingent on accessing the LEA licensing exemption on July 1, 2019. A number of LEAs are prepared to fully integrate their special education and general education preschool classes this year. Many others are planning to create their first full-day pre-K program by layering transitional kindergarten and part-day preschool. Neither of these initiatives will be possible to implement without a true exemption from Title 22 licensing requirements. The scope of this licensing exemption was narrowly crafted for LEAs operating preschool classrooms for four-year-old children because the legislature and stakeholders understood that LEAs operate other pre-K programs with robust health and safety requirements that also serve four-year-old children.

We provide this context to express our disappointment and underscore our concern that the proposed Title 5 regulations merely replicate Title 22 rather than creating an LEA-aligned alternative to the Title 22 standards.

The proposed regulations go far beyond the scope of both the legislation and the recommendations from the Legislative Analyst Office's (LAO) workgroup, and in many cases directly mirror existing Title 22 language. We strongly encourage the California Department of Education (Department) to reconsider the proposed regulations and provide the following comments highlighting areas in which the regulations exceed the legislative mandate to promulgate implementing regulations.

Article 4. Local Educational Agencies Exemption from Licensing Regulations

- **Section 18140. General Provisions.**

- Section 18140(b)(4): Health and Safety Code (HSC) 1596.792, which established the LEA licensing exemption, requires that LEA facilities "meet the requirements for kindergarten classrooms in accordance with Chapter 13 (commencing with Section 1400) of Division 1 of Title 5 of the California Code of Regulations." The Section within this chapter that outlines the standards for kindergarten facilities (Section 14303) specifies that the Superintendent of Public Instruction (SPI) may waive any part of the Section if a district can demonstrate the educational appropriateness and safety of the design would not be compromised by an alternative standard. (5 CCR 14303(r).) If the legislature had not intended this waiver to apply to LEAs seeking the licensing exemption, it would have narrowly tailored HSC 1596.792 to say that LEA facilities "must comply with 14303(h)(2)," as the proposed regulation states. It did not do so. The "plain meaning" and "mere surplusage" rules of statutory interpretation require rule-makers to assume that the legislature was intentional in its word choice and prohibits rule-makers from treating the legislature's chosen language as superfluous. We recommend that the proposed regulation be amended to mirror implementing legislation.
 - Suggestion: "The LEA meets the requirements for kindergarten classrooms in accordance with Chapter 13 (commencing with Section 1400) of Division 1 of Title 5 of the California Code of Regulations."
- Section 18140(d): While we understand the Department's need to know how funded contractors are meeting health and safety standards, we are concerned that requiring an initial and annual determination of eligibility for the exemption will further create a bottleneck in processing preschool contracts. In addition, because a determination is required at the time of initial funding and 2019/20 contracts have already been awarded, the proposed language directly contradicts clear legislative intent that the licensing exemption be accessible to LEAs on July 1, 2019. We encourage the Department to clarify that the pre-determination requirement will commence with the next round of contracts. We are also concerned about the possibility that that the Department could unilateral revoke eligibility for the exemption at any time without notice to the LEA, time to address the reasons for revocation, or time to remedy by pursuing an alternative (e.g. by obtaining a Title 22 license) as provided for in 5 CCR 18301. Mid-year revocation of eligibility will have far-reaching consequences for the families and children benefiting from these programs. We encourage the Department to clarify that revocation of the licensing exemption shall not change the general contract termination or suspension process outlined in 5 CCR 18301. Finally, some LEAs do not plan to take advantage of the licensing flexibility for all their programs or sites. We suggest that the Department create a process by which LEAs may submit their intent to exercise the licensing exemption via a Department-developed template. LEAs would need to be made aware of this new requirement via a Management Bulletin.
 - Suggestion: "Current LEA contractors shall notify the Department of their intent to choose exemption from Title 22 licensing within 60 days of July 1, 2019. Commencing in 2020, the California Department of Education (CDE) shall make a determination whether an LEA

meets the requirements of this article at the time of initial funding and thereafter yearly as part of the continued funding process.”

- Suggestion: “An LEA’s contract shall not be terminated, suspended, or reduced mid-year because the Department revoked the LEA’s licensing exemption.”

- **Section 18145. Visual Supervision.**

- Section 18145(c); HSC 1596.7925, which codifies the LAO workgroup’s recommendations on implementing regulations, directs the Department to issue health and safety regulations on six specific issues: (1) outdoor shade; (2) drinking water; (3 & 4) restroom facilities; (5) visual supervision; and (6) indoor and outdoor space that is properly contained, has appropriate playground equipment, and provides sufficient space . The legislature’s decision to limit the scope of the LAO workgroup in HSC 1596.792 and narrowly codify their recommendations in HSC 1596.7925 was intentional. The rules on statutory interpretation are clear here: where the legislature names specific categories with “particularization and detail” and fails to include others, the legislature intended to limit the scope to only those categories specified. To ignore such specificity would amount to "enlargement" of the statute rather than "construction" of it.” HSC 1596.7925 does not instruct the Department to issue regulations regarding care or facilities for sick children. Thus, we recommend that this section be narrowed to fit within the scope of the legislation.
 - Suggestion: “There shall be direct supervision of a child that is ill. and cared for in a designated isolation area until parent pickup.”

- **Section 18150. Indoor Space.**

- 18150(a)(1): We object to the proposed regulation as it is duplicative of existing law and regulation, overly prescriptive, and contrary to legislative intent. The proposed regulation states that if an exempt preschool classroom is a “permanent structure, [it must] be at least 1,350 square feet in size, including restrooms, storage, teacher preparation and wet and dry areas.” HSC 1596.792 already clearly outlines the facilities requirements LEAs must meet to be eligible for licensing exemption: the Field Act, Title 24, and Chapter 13 of Division 1 of Title 5. These robust standards are currently being used to ensure the health and safety of four-year-old children in other existing pre-K programs. The applicable Section of Title 5 states that “Kindergarten classroom size for permanent structures is not less than 1,350 square feet...” (5 CCR 14030(h)(2).) The purpose of including the word “permanent” in this Section is to allow LEAs the flexibility to use portable or modular structures which are generally 960 square feet. The Section also grants the SPI the authority to waive any part of the Section. As discussed above, if the legislature had not intended to extend the existing flexibility for Title 5 kindergarten classrooms to exempt preschool classrooms, it would have narrowly tailored HSC 1596.792 to say that LEA facilities “must comply with 14303(h)(2).” It did not do so. We recommend that the proposed regulation be amended to mirror implementing legislation.
 - Suggestion: “If a permanent structure, be at least 1,350 square feet in size, including restrooms, storage, teacher preparation and wet and dry areas; meet the requirements for kindergarten classrooms in accordance with Chapter 13 (commencing with Section 1400) of Division 1 of Title 5 of the California Code of Regulations.”
- 18150(a)(2): We object to this language as it is duplicative of existing Title 5 regulations found in 5 CCR 14030(h)(2)(F).
 - Suggestion: We recommend that the proposed regulation be deleted.

- 18150(a)(3) & (5): The proposed regulations on educationally appropriate activities and materials go beyond the scope of the Department's charge as outlined in HSC 1596.7925 and are duplicative of existing standards. Where the legislature names specific categories with "particularization and detail" and fails to include others, it intends to limit the scope to only those categories specified. To ignore such specificity would amount to "enlargement" of the statute rather than "construction" of it." HSC 1596.7925 does not direct the Department to issue regulations regarding educationally appropriate activities or materials, presumably because robust standards already exist within Title 5 and the California Preschool Learning Foundations.
 - Suggestion: To avoid duplication and confusion, we recommend that these regulations be withdrawn or amended to mirror implementing legislation.

- 18150(b): The proposed regulation establishing prescriptive room temperatures go beyond the scope of the Department's charge as outlined in HSC 1596.7925 and directly contradict legislative intent. Where the legislature names specific categories with "particularization and detail" and fails to include others, it intends to limit the scope to only those categories specified. To ignore such specificity would amount to "enlargement" of the statute rather than "construction" of it." HSC 1596.7925 does not direct the Department to issue regulations regarding indoor environmental conditions, much less room temperature. Furthermore, we are very concerned by the Department's attempt to copy Title 22 standards into Title 5 (see 22 CCR 101239) in direct contravention of the legislature's intent to create a flexible alternative to Title 22 licensing regulations for LEAs already meeting high health and safety standards in Title 5 and the Early Childhood Environment Rating Scale (ECERS).
 - Suggestion: We urge the Department to withdraw this proposed language .

- 18150(c): The proposed regulation governing individual permanent or portable individual storage spaces go beyond the scope of the Department's charge as outlined in HSC 1596.7925 and contradicts legislative intent. Where the legislature names specific categories with "particularization and detail" and fails to include others, it intends to limit the scope to only those categories specified. To ignore such specificity would amount to "enlargement" of the statute rather than "construction" of it." HSC 1596.7925 does not direct the Department to issue regulations regarding storage space. Furthermore, we are very concerned by the Department's attempt to copy Title 22 standards into Title 5 (see 22 CCR 101238.4) in direct contravention of the legislature's intent to create a flexible alternative to Title 22 licensing regulations for LEAs already meeting high health and safety standards in Title 5 and ECERS.
 - Suggestion: We urge the Department to withdraw this proposed regulation.

- 18150(d): The proposed regulation governing napping and bedding materials go beyond the scope of the Department's charge as outlined in HSC 1596.7925. Where the legislature names specific categories with "particularization and detail" but fails to include others, it intends to limit the scope to only those categories specified. To ignore such specificity would amount to "enlargement" of the statute rather than "construction" of it." HSC 1596.7925 does not direct the Department to issue regulations regarding use, storage, or type of napping or bedding materials. Furthermore, we are very concerned by the Department's attempt to copy Title 22 standards into Title 5 (see 22 CCR 101239.1) in direct contravention of the legislature's intent to create a flexible alternative to Title 22 licensing regulations for LEAs already meeting high health and safety standards in Title 5 and ECERS.
 - Suggestion: We urge the Department to withdraw this proposed regulation.

- **Section 18155. Outdoor Space.**

- 18155(a): We object to this proposed regulation as it is overly prescriptive and contrary to legislative intent. HSC 1596.7925 directs the Department to issue regulations requiring exempt preschool programs to have “outdoor space that is properly contained or fenced and provides sufficient space for the number of children using the space at any given time.” The proposed regulation attempts to narrowly define “sufficient space” as 75 square feet per child without considering that extenuating factors, such as the location of the program or the abilities of enrolled children, may vary considerably. Adopting such a prescriptive requirement may necessitate LEA contractors to retrofit their existing facilities, despite the legislature not appropriating funds for LEA contractors since it was never intended that complying with these new regulations would result in renovation of existing LEA facilities. Furthermore, in densely populated areas it may be nearly impossible to find facilities that meet this requirement, thus preventing any providers from operating in these areas and making it impossible for LEAs to offer license-exempt preschool programs in existing facilities. We reiterate our concerns with the Department’s attempt to copy Title 22 standards into Title 5 (see 22 CCR 101238.2), which is in direct contravention of the legislature’s intent to create a flexible alternative to Title 22 for LEAs already meeting high health and safety standards. We recommend that the proposed regulation be narrowed in scope and be amended to mirror implementing legislation.
 - Suggestion: “There shall be ~~at least 75 square feet per child of~~ sufficient outdoor activity space based on the ~~total capacity~~ number of children using the space at any given time.”

- 18155(b)(3): The proposed regulation restricting use of outdoor space to only “CSPP, Transitional Kindergarten, and kindergarten children” goes beyond the scope of the Department’s charge as outlined in HSC 1596.7925 and directly contradicts legislative intent. Where the legislature names specific categories with “particularization and detail” but fails to include others, it intends to limit the scope to only those categories specified. To ignore such specificity would amount to “enlargement” of the statute rather than “construction” of it.” HSC 1596.7925 directs the Department to promulgate regulations concerning the sufficiency of outdoor space, containment, fencing, and playground equipment; meanwhile, the proposed regulation attempts to limit who can use outdoor space by mirroring a Title 22 policy prohibiting preschool programs from accessing any outdoor space that is also used by elementary school students. From a practical perspective, this regulation would require LEAs to spend hundreds of thousands of dollars to build a separate playground for preschool, TK, and kindergarten students only. This regulation is so overly burdensome to have the practical effect of rendering the licensing exemption inaccessible to nearly all LEAs and therefore directly contradicts the legislature’s intent to create a flexible alternative to Title 22 for LEAs already meeting high health and safety standards in Title 5 and ECERS. Furthermore, by creating an exclusive list that omits special education preschool students, this language directly contradicts legislative intent to encourage blending of general education and special education preschool classes when appropriate.
 - Suggestion: We urge the Department to withdraw this language or, at minimum, amend the regulation to direct contractors to comply with the playground standards outlined in ECERS and Title 5.

- 18155(d): We object to this language as it is unnecessary in light of existing Title 5 regulations found in 5 CCR 14030(h)(2)(C).
 - Suggestion: We recommend that the proposed regulation be deleted.

- 18155(e) & (g): We object to this proposed regulation as it is overly prescriptive and contrary to legislative intent. HSC 1596.7925 directs the Department to issue regulations requiring exempt preschool programs to have playground equipment that is “safe, in good repair, and age appropriate.” The proposed regulation attempts to create a very narrow definition of “safe” without consideration of extenuating factors. For instance, in alignment with the legislative intent, many LEAs planned to integrate their special education preschool and general education preschool programs using licensing flexibility. To do so, LEAs are planning to, or have begun to, build playgrounds that are accessible to both abled and disabled children using funds from the Inclusive Early Education Expansion Program (IEEEP) grant. While this equipment is safe for able-bodied children, it often looks and functions differently than playgrounds designed exclusively for general education students. We remain concerned with the Department’s attempt to copy Title 22 standards into Title 5 (see 22 CCR 101238.2), which is in direct contravention of the legislature’s intent to establish a flexible alternative for LEAs creating inclusive preschool environments. Furthermore, this regulation is duplicative because ECERS (which is applicable to all Title 5 preschool programs) already has standards governing playground equipment, clearance space, and shock-absorbing surfaces.
 - Suggestion: We urge the Department to support preschool inclusion by withdrawing this regulation.

- 18155(i): The proposed regulation requires that sandboxes have lids, be inspected daily, and have sand that is “washed, free of organic, toxic, or harmful materials.” This appears to be an amalgamation of both Title 22 and Title 5 ECERS standards, but goes beyond either regulation. We echo our concerns with the Department’s attempt to copy Title 22 standards into Title 5 (see 22 CCR 101238.2), which is in direct contravention of the legislature’s intent to establish a flexible alternative for LEAs already meeting high health and safety standards via ECERS.
 - Suggestion: We urge the Department to either withdraw this proposed regulation or amend the regulation to direct contractors to comply with the standards outlined in ECERS.

- 18155(i): The proposed regulation requires that water tables be filled and changed after each group of kids plays, that children must wash their hands before touching water, that children with cuts cannot play in water, and that the floor and any surfaces near the water tables be dried during and after play. This appears to be an amalgamation of Title 22 and Title 5 ECERS standards, but goes beyond either regulation. We echo our concerns with the Department’s attempt to copy Title 22 standards into Title 5 (see 22 CCR 101238 and 101238.5), which is in direct contravention of the legislature’s intent to establish a flexible alternative for LEAs already meeting high health and safety standards via ECERS.
 - Suggestion: We urge the Department to either withdraw this proposed regulation or amend the regulation to direct contractors to comply with the standards outlined in ECERS.

- **Section 18160. Restroom Facilities.**

- 18160(a): This proposed regulation, which prohibits adults from using the same restroom facilities as preschool children conflicts with legislative intent, misconstrues Title 5 language regarding kindergarten facilities, and is so burdensome as to make the licensing exemption inaccessible. HSC 1596.7925 (a)(4) is clear that LEA exempt preschools should have “restroom facilities that are only available for preschoolers and kindergartners.” This is a recommendation from the LAO

workgroup that was intended to make explicit what 5 CCR 14030(h)(2)(G) implies¹: that restroom facilities for kindergarteners (and preschoolers) should be separate from those for grades 1 through 12. Title 5 makes no reference to prohibiting staff or parents from using restrooms within the kindergarten complex, but instead focuses on coordinating kindergarteners from older children on the same campus by requiring that the restroom be within the kindergarten complex, presumably removed from facilities for older children. Similarly, we interpret HSC 1596.7925 (a)(4) to mean that facilities for kindergarteners and preschoolers should only be accessible to those grades and not older children. From a practical perspective, this regulation creates an incredible cost as it requires that all preschool programs have at least two separate restroom facilities within the classroom or the complex: one for children and one for adults. This requirement effectively prohibits nearly all existing preschool facilities, including those currently meeting Title 22 requirements, from using the licensing flexibility because even Title 22 regulations do not require that each program have two separate restroom facilities within the classroom or complex. Because it would cost LEAs hundreds of thousands of dollars to modify classrooms to meet this alternative standard, thus making the LEA licensing exemption void, this proposed regulation clearly contradicts legislative intent to create a flexible alternative for LEAs already meeting high health and safety standards in Title 5. While we understand the intent behind prohibiting unknown adults from accessing restrooms intended for preschoolers, preschool teachers and LEA staff undergo extensive background checks and individuals with a criminal history are prohibited from working for LEAs.

- Suggestion: We urge the Department to either withdraw this proposed regulation or amend the regulation to clarify that preschool restrooms may be used by adult preschool staff.
- 18160(d): We object to this regulation for the same reasons as outlined in Section 18160(1) above.
 - Suggestion: We urge the Department to withdraw this proposed regulation.

With the recent adoption of a Master Plan for Early Learning and Care in the 2019-20 state budget, Governor Newsom and the legislature have asserted their collective interest in exploring a feasible pathway towards expanding full-day, full-year preschool programs to all families of four-year-old children. As representatives of local educational agencies, we welcome this important conversation because we understand that early learning experiences create a solid foundation for a child's successful transition into the K-12 system, and their eventual positive contributions to our economy, society and democracy. Increasing access to early learning and care programs, particularly to the most disadvantaged children and those with exceptional needs, should be a priority if we hope to provide early supports and reduce the achievement gap. LEAs welcome the opportunity to have a broader conversation about establishing appropriate health and safety standards that could be applicable to all early learning and care programs, but meanwhile urge the Department to uphold the spirit of the law in promulgation of these regulations.

We appreciate your consideration of these comments. If you have questions, please contact any of the signatories of this letter or our main point of contact, Amanda Dickey at adickey@ccsesa.org or (916) 446-3095. Sincerely,

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¹ 5 CCR 14030(h)(2)(G) requires that kindergarten restrooms be within the classroom or kindergarten complex.

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