

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing Nos. A-07/10-318
)
) & A-07/10-319
Appeal of)

INTRODUCTION

The petitioner appeals two decisions by the Department for Children and Families, Child Development Division (CDD), citing petitioner's Family Day Care Home with several licensing violations. The Department bases their findings upon the June 2, 2010 and June 17, 2010 site visits.

The issue is whether the petitioner violated the pertinent regulations for Family Day Care Homes.

Procedural History. Petitioner filed for fair hearing on July 8, 2010. A telephone status conference was held on August 5, 2010. The CDD and petitioner met that day for a Commissioner's Review. Petitioner's case was continued to a telephone status conference on September 2, 2010 to await the resolution of the Commissioner's Review. By that conference, the CDD had not yet issued their Commissioner's Review. The petitioner's case was scheduled for hearing on October 20, 2010. The CDD issued their Commissioner's Review on October 5, 2010 clarifying which violations remained in dispute. The hearing was held on October 20, 2010.

The petitioner and N.T-D., licensing field specialist, testified at hearing. The decision is based on the evidence adduced at hearing.

FINDINGS OF FACT

1. Petitioner operates a Family Day Care Home and has done so for the past nine years. Petitioner has been in her current home for the past six years.

2. Petitioner's two story home sits on a corner lot in Swanton, Vermont. She has two acres of land. Her home is 125 feet off Woodhill Road and 150 feet off Donaldson Road. Her yard is not fenced. There is a play structure in the back of the yard that the children use.

Petitioner has a finished day care space in the basement that is developmentally appropriate. There is a movie room in the basement that she uses periodically for the children. Petitioner has a large kitchen on the first floor and feeds the children in the kitchen. She has a room off the kitchen that she uses for the children. Both the basement and the first floor have two means of egress. Petitioner's family have their bedrooms on the second floor. There are not two means of egress on the second floor and the second floor is

not to be used as part of petitioner's family day care operation.

There is a deck on the back of the house that petitioner does not allow the children to use. The deck abuts an in-ground swimming pool area that is to the right of the house. The fencing around the pool will be addressed later.

3. N.T-D. is a licensing field specialist employed by the Department. She inspected petitioner's facility on June 2, 2010 and June 17, 2010. On June 17, 2010, N.T-D. was accompanied by J.F., Senior Regulatory Field Specialist. The purpose of a site visit is to determine whether the facility is in compliance with licensing regulations.

N.T-D. has been a licensing field specialist for 3.5 years. N.T-D. has a B.A. in elementary education with a concentration in early childhood education. Prior to her employment with the Department, she was the director of an early childhood program for fourteen years.

The following findings of fact are organized by the Regulation in question. The full text of the Regulation can be found in the Reasons.

Regulation I.7 (keeping daily attendance logs).

4. On June 2, 2010, N.T-D. found that petitioner was caring for nine children but only seven children were listed on the attendance sheet.

5. Two of the children on the attendance sheet were not present on June 2, 2010.

6. Four of the children present that day were not listed on the attendance sheet.

7. Petitioner does not dispute that the attendance sheet was incorrect. Petitioner explained that she serves two families with two children each who only attend one day per week.

8. The regulations do not exempt children who attend a program part-time from the attendance records.

Regulation VI.8 (providing information as part of the site visit).

9. On June 2, 2010, petitioner was feeding seven children in her kitchen when N.T-D. asked petitioner the names and ages of the children.

10. N.T-D. explained that it is her practice on site visits to ask the names and ages of the children present at the time of the site visit. She could not remember the precise words that she used when questioning petitioner.

11. The petitioner testified that she thought N.T-D. only asked her the names and ages of the children eating in the kitchen. Petitioner only gave the names and ages of the seven children in the kitchen.

12. One of the children piped up and said her sibling was asleep upstairs, leading to further questioning of petitioner by N.T-D.

13. Petitioner testified that she knew she was over her ratios during the site visit.

14. It is more credible that petitioner did not fully respond to N.T-D.'s request because of the extra children in her care.

Regulation V.19 (two means of egress).

15. Petitioner does not dispute that two infants were asleep on the second floor of her home on June 2, 2010.

16. On June 17, 2010, while N.T-D. and petitioner were talking, two school age boys went upstairs to the second floor. Petitioner did not see the boys go upstairs because she had her back to where the boys were. N.T-D. did see the boys go upstairs. One of the boys had just started at petitioner's program and had not been told the ground rules; that child was familiar with petitioner's home from visiting

petitioner's family in the past. Petitioner does not dispute that both boys were on the second floor.

17. Petitioner does not dispute that two girls were playing on the second floor on June 17, 2010.

Regulation V.10 (safety provisions).

18. Petitioner was cited for violations of Regulation V.10 after the June 2, 2010 and June 17, 2010 site visits. The basis of the June 2, 2010 violation focused on the in-ground swimming pool, the gas grill and fire table on the deck, missing wall outlet covers, and a stone by the outdoors play equipment. The June 17, 2010 violations focused on petitioner allowing school age children on occasion to play outside without an adult present.

19. Petitioner put in her pool four years ago. The pool is enclosed on three sides by a solid vinyl fence that is 6 to 6.5 feet high. On the fourth side, the pool abuts the deck. The deck is approximately 32 inches off the ground. There is slatted fencing approximately 36 inches high off the deck floor. The space between the slats is approximately nine inches.

20. Until the June 2, 2010 site visit, petitioner had no notice from the previous site visits that the pool was an issue.

21. Based on the June 2010 site visits, petitioner added latticework in the gaps on the side of the pool fence abutting the deck, upgraded the gates to be self-locking with padlocks (at the site visit, the gates were not well secured), and filled in any gaps between the deck fencing and hot tub found by the licensors. As part of the Commissioner's Review, the CDD noted petitioner's efforts to improve the safety of the pool area and the petitioner's commitment to the children's safety. The Commissioner's Review is ambiguous whether CDD continues to consider the issues from June 2, 2010 a violation.

22. The petitioner does not allow the children onto the deck. Petitioner has a propane fire table and gas grill on the deck. Petitioner has complied with the licensors and both are now covered. The petitioner complied with further recommendations from the June 2, 2010 site visit by removing the stone by the play equipment.

23. Since January 18, 2007, petitioner's registration as a family day care home has been conditioned on petitioner providing supervision outside when the children play outside. During the June 17, 2010 site visit, petitioner informed N.T-D. that she allows school age children to play outside

without an adult present on occasion although the children will be watched from inside the house.

ORDER

The Department's decision to cite violations of Regulations I.7, VI.8, V.19 and V.10 (pertaining to failure to provide outside supervision) is affirmed and the Department's decision to cite violation of Regulation V.10 based on the June 2, 2010 site visit is reversed.

REASONS

The Child Development Division promulgated regulations governing the operation of Family Day Care Homes to ensure the quality of care children receive and to ensure the protection of children.

To enforce these regulations, the CDD conducts site visits. The site visit gives the CDD a sense of how the particular program conducts itself. If a licensing violation is found, the CDD informs the Family Day Care Home. Notice of violations are posted on the CDD website as a means of providing information to parents or guardians of children.

The petitioner is appealing several licensing violations stemming from two site visits. In a fair hearing, the Department has the burden of proof to show by a preponderance

of evidence that the petitioner's actions rise to the level of a license violation.

Each regulation will be addressed separately.

Regulation I.7

Regulation I.7 states:

Daily attendance records, listing dates of attendance for each child shall be kept on file for a period of at least 12 months.

There is no dispute that on June 2, 2010 that the attendance records were not accurate. The attendance records did not include four children present that day and included two children who were not present that day.

The attendance records are important. They verify that a particular program is within the ratios of provider to children allowed under the pertinent regulations. They also provide documentation in cases where the CDD is providing a childcare subsidy for a child.

The evidence supports the Department's finding of a licensing violation.

Regulation VI.8

Regulation VI.8 states:

The applicant or Registrant shall not interfere with, impede, deter, provide false information or cause another to do any of the aforementioned, or in any manner hinder the Department or its agent(s) in an investigation or inspection.

The Department based the violation on N.T-D.'s conclusion that petitioner had not been forthcoming when asked the names and ages of the children present that day. There is a factual dispute in that petitioner claims she thought N.T-D. was only asking about the seven children eating breakfast in the kitchen. However, petitioner was aware that she had more children present than allowed at that point of time.

The Department has shown by a preponderance of evidence that petitioner's omission falls within the scope of interfering with an inspection.

Regulation V.19

Regulation V.19 states, in part:

Children may be present and receive care in the basement or on the first and second floor levels provided there are at least two separate means of exit per level.

Petitioner's second floor does not have two separate means of exit as required by the regulations. Petitioner is aware of the regulation.

On both June 2, 2010 and June 17, 2010, children were on the second floor; namely, two sleeping infants on June 2 and two girls playing on June 17.

The Department also cited petitioner for a violation on June 17, 2010 because of two boys who went upstairs to the

second floor. Petitioner was not aware the two boys were going upstairs because she was turned towards N.T-D. in conversation. The two boys were in N.T-D.'s sightline but she did nothing to alert petitioner so petitioner could intervene.

Although the two boys on the second floor will not be considered, the evidence supports a licensing violation on both site visits because of the other children who were on the second floor.

Regulation V.10

Regulation V.10 states:

Children in care shall be protected from any and all conditions which threaten a child's health, safety and well-being. This includes protecting children from stoves, pools, poisons, window covering pull cords, asbestos, wells, known vicious animals, medications, dust or chips from lead paint, traffic and other hazards.

A major point of contention is petitioner's in-ground pool. The pool is over four years old. Until this past June, the Department had not alerted petitioner that the fencing around the pool was a problem. Petitioner assumed that the fencing around the pool was not a problem based on the Department's silence. Her assumption is reasonable.

The regulation is silent on what standards should be followed to ensure that a pool area is safe. Although the

Department mentioned national safety standards in their Commissioner's Review and testimony, there is no material in the regulations putting registrants on notice of any pertinent national standards. Once petitioner heard the Department's concerns, petitioner acted to address each concern. In addition, the Commissioner's Review regarding safety issues noted petitioner's "strong commitment to the safety of the children in [petitioner's] care".

Petitioner also acted to address the other concerns the Department noted from the June 2, 2010 site visit. Although petitioner does not allow the children on her deck, she followed through with covers for the propane fire table and gas grill. Although there is a difference of opinion about the stone by the outdoor play equipment, petitioner removed the stone.

The Commissioner's Review is ambiguous whether the violations stemming from June 2, 2010 violation was upheld or just the violation from June 17, 2010 dealing with supervision of children when outside. Looking at the ambiguity of the Commissioner's Review and the nature of the June 2, 2010 actions, the Department has not met their burden that the Regulation V.10 violations should be upheld rather than reduced to observations.

The June 17, 2010 site visit noted petitioner's comments that supervision of children outside does not always occur. The condition that petitioner provide outdoor supervision has been part of her registration since January 18, 2007. This condition addresses the lack of a fenced-in yard by providing supervision of children outside. The Department's decision to issue a violation of Regulation V.10 on June 17, 2010 is upheld.

In conclusion, the Department's decision to issue the following licensing violations is upheld; (1) Regulation I.7 on June 2, 2010, (2) Regulation VI.8 on June 2, 2010, (3) Regulation V.19 on June 2 and June 17, 2010, and (4) Regulation V.10 on June 17, 2010 for failure to provide outside supervision. The Department's decision to issue a violation of Regulation V.10 on June 2, 2010 is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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