

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-02/11-64
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Child Development Division, to cite petitioner with a licensing violation. The issue is whether a licensing violation exists under the pertinent regulation for Early Childhood Programs.

Procedural History

The petitioner appealed the decision by the Department to cite their facility with a violation of Regulation IIIC18.¹ Petitioner's appeal was filed with the Board on February 1, 2011.

A telephone status conference was held on March 3, 2011. Childcare programs can opt for a Commissioner's Review rather than going directly to hearing. The Commissioner's Review process gives the Department an opportunity to reassess their position and determine whether a licensing violation should

¹The petitioner was cited with another licensing violation that they are not appealing.

be downgraded to an observation or nullified.² If a dispute remains after the Commissioner's Review, a hearing is scheduled. Petitioner opted for a Commissioner's Review.

A telephone status conference was held on April 7, 2011. The parties reported that petitioner had not been contacted for a Commissioner's Review. The case was rescheduled for a telephone status conference on May 10, 2011. The parties reported the Department had not initiated the Commissioner's Review. The case was set for hearing on June 14, 2011.

A Commissioner's Review was not done prior to hearing. Testimony was taken on June 14, 2011. The decision is based on the evidence adduced at hearing.

FINDINGS OF FACT

1. The petitioner is an early childhood program that is licensed to handle up to one hundred thirty two children ranging in age from six weeks to six years of age.

2. J.D'E. is a licensing field specialist who has worked for the Department for seventeen years.

3. J.D'E. conducted a site visit with a colleague on January 10, 2011. The purpose of the site visit was to check the petitioner's compliance with the licensing regulations.

²In many cases, the Commissioner's Review process results in a settlement between the parties or a withdrawal of the fair hearing by a petitioner.

4. L.T. is the program director for petitioner who has worked in this position for seven years. Her duties include oversight of staff, making sure the program is running smoothly, ensuring the children's safety, and substituting in the classroom when necessary. L.T. indicated that petitioner has made great strides in improving their program and their program's regulatory compliance over the past seven years so that they now have three stars.

5. The petitioner keeps multiple records for attendance. The reception area is after the entry into the building. Parents sign their children in and out at the reception area. In addition, the petitioner keeps a separate attendance sheet at the reception desk that L.T. or staff complete. Also, each group or classroom has an attendance sheet kept by the staff member(s) for that group or classroom.

L.T. explained that the children come in at different times. If a child comes in while the teacher is in the middle of a lesson, there may be a delay noting the child's attendance by the teacher.

6. J.D'E. testified that her colleague noted that there were ten children in the two-year old group taught by two teachers and only eight names on the attendance list.

J.D'E. testified that her colleague also found that the attendance list at the reception desk listed sixty-seven children instead of sixty-nine children. J.D'E. cited the petitioner for a violation of Regulation IIIC18.

L.T. confirmed that the teachers had not signed the two children in and that Department staff asked the teachers about this.

There is no indication that the parent's sign in/out records were checked on the day of inspection.

7. J.D'E. testified that the rationale for Regulation IIIC18 is to ensure the safety of the children and provide a means to check whether all children are accounted for in the case of an emergency.

8. L.T. testified that they keep redundant systems to ensure that they know what children are in the facility and that with the three systems and their knowledge of their students they are able to keep track of children in the event of an emergency.

9. J.D'E. testified that the facility had problems with attendance records. The particular problem was an observation regarding attendance records that was noted four years ago.

ORDER

The Department's decision is reversed.

REASONS

The Child Development Division (CDD) promulgated regulations governing the operation of Early Childhood Programs 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 provides the CDD with a snapshot of a particular program. If a licensing violation is found, the CDD informs the Early Childhood Program. Notice of violations are posted on the CDD website as a means of providing information to parents or guardians of children.

The petitioner appealed one licensing violation. In a fair hearing, the Department has the burden of proof to show by a preponderance of evidence that a program engaged in certain behavior or failed to act in a certain manner, and, that based on the facts, the program's action rises to the level of a licensing violation. The Board grants deference to the CDD in their interpretation of their regulations.

Fair Hearing Nos. R-10/09-571 and B-01/10-16.

The CDD based the licensing violation upon Regulation IIIC18, which states:

A child's presence in the facility shall always be documented by using a Time-in and Time-out procedure for each child in attendance.

The regulation does not direct the program to use a specific method for documenting a child's attendance only that a system be in place that will capture each child's attendance.

The Department argues that the petitioner should be cited with a licensing violation rather than an observation pointing to a history of not documenting children's presence in the facility and pointing to the Commissioner's discretion in these cases.

There are several problems with the Department's arguments.

First, the evidence does not show repeated violations. The history only shows one observation from four years ago regarding documentation of attendance. The Board has been cognizant that a pattern of behavior can support the Department's decision to find a violation; however the Board has given weight to this argument when there are repeated observations and/or violations of the same behavior in the recent past.

Second, the Department cannot argue that this case involves the Commissioner's discretion given the lack of a Commissioner's Review despite the time provided for such a review. The petitioner opted for a Commissioner's Review during the first telephone status conference of March 3, 2011. However, by the telephone status conference of May 10, 2011, the Commissioner's Review had not been initiated and the case was set for hearing in the interest of resolution of the conflict.

In addition, the petitioner uses redundant systems to document children's attendance. The evidence does not show the Department checking all the systems; in particular, the parent's sign in/sign out information.

The Department has not met their burden of proof that the above facts constitute a licensing violation rather than an observation. As a result, the Department's decision is reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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