STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. A-01/13-71
	)	
Appeal of	)	

INTRODUCTION

Petitioner appeals a finding of a licensing violation by her family daycare home program made by the Child Development Division of the Department for Children and Families ("Department"). The primary issue is application of the Department's rule establishing a maximum number of non-school age children, and alleged violation of that rule stemming from a site visit to petitioner's summer program. The following facts are adduced from an evidentiary hearing held September 3, 2013 and documents submitted therein.

FINDINGS OF FACT

1. Petitioner operates a licensed family daycare home in Vermont.

2. Petitioner's program was the subject of a Child and Adult Food Program site visit in July of 2012. While there, the Food Program representative observed what appeared to be an excess number of non-school age children on the premises.

3. There are varying accounts of what was stated between petitioner and the Food Program representative at the time of the site visit. The Food Program representative states that petitioner reported the additional children were "neighborhood" children. Petitioner testified that she offered to send some of the children away if having them there was a problem, to demonstrate that they were just visiting her home.

4. During or shortly after the visit of the Food Program representative, petitioner directed five of the children to leave. All of the children were non-school age. Three of the children were enrollees in petitioner's program. Two of the children were not enrollees.

5. The children left with one of petitioner's daughters, who is officially listed as an associate in petitioner's program but was not on duty that day, and the boyfriend of petitioner's other daughter, who is also officially listed as an associate in petitioner's program and was on duty that day.

6. The Food Program representative returned to her office, and after confirming with a record review the ages of the children present during her site visit, reported petitioner's program as potentially violating the family

daycare licensing rules related to the maximum number of non-school age children who may be present on-site at any given time.

7. The night before the site visit, petitioner received a phone call from a parent in her program with a personal emergency and needing childcare coverage the following day. The parent has three children enrolled in petitioner's childcare program, although they did not normally attend on the day of the week in question.

8. Petitioner responded that she could not take the children because she would be over enrolled for non-school age children, but suggested that her mother could be available to provide childcare. Petitioner's mother is also designated as an associate in her daycare program, but was not scheduled to work on the day in question.[1]

9. Eventually, an arrangement was made for petitioner's mother and daughter – neither of whom was scheduled to work that day – to provide care to the three children.

10. Petitioner then decided that – because two of the children have autism and might be affected by the unfamiliar

[1] Petitioner described her mother's role in her daycare business as one in which she would "fill in" occasionally but not work on a regular pattern.

surroundings of her mother's home – she would arrange for two children regularly in her program on the day in question to be cared for by her mother and daughter, and keep the two children with autism on site in her daycare program.

11. Arrangements were then made with the families of the two other children – already scheduled to be in her program - to be cared for by her mother and daughter, along with the third child of the family with the personal emergency.

12. On the day in question, the children were dropped off in the morning at petitioner's home, where her daughter also lives, and taken by her daughter to the home of petitioner's mother.

13. At some point that morning, petitioner received a call from her daughter's boyfriend, who was caring for his two young cousins and wanted to come to petitioner's home but did not have transportation. Petitioner was planning to set up a "bouncy castle" and invited him to come over, suggesting that he call her other daughter for a ride.

14. Petitioner's mother testified at hearing. She considered herself, along with petitioner's daughter, to be responsible for the care of the three children brought to her home by the daughter that morning. At around 10:00 a.m. she

observed the daughter receiving a phone call from the other daughter's boyfriend, seeking a ride to petitioner's home. She understood that the children had been invited back to petitioner's site to play on the bouncy castle.

15. Petitioner's daughter departed the mother's home around 10:00 a.m. with the three children. They returned to her home at approximately 11:00 a.m., with petitioner's daughter visibly upset regarding the events that had just transpired with the Food Program site visit.

16. After an initial investigation, the Department determined that no violation of the rules had occurred. The interpretation of the rules was based on the principle that "visitors" should not be counted towards the number of non-school age children on site.

17. After the investigator's initial decision was reviewed by a supervisor, it was determined that petitioner was in violation of the rules. The three children that were brought there by her daughter from her mother's home were counted among the non-school age children she was caring for, bringing that total to eight non-school age children. The maximum under the regulations is six non-school age children.

18. The two children on site that were under the care of the other daughter's boyfriend were not counted towards the total number.

19. Petitioner appealed the violation through a "Commissioner's Review" process. The Commissioner's Review upheld the violation, finding that:

> You state you are fully aware of the Family Child Care Home regulations. However, your statements have been inconsistent about what arrangements had been made for specific children and who was responsible for the three children on the morning of July 27th. Based on the information gathered it appears, you made a decision to have your daughter take three children from your home to the camp to be in compliance during the meal review.
>
> Therefore, this violation is upheld.
>
> This is the position that the Department will take if you decide to continue your appeal and exercise your right to a fair hearing before the Human Services Board.

20. At hearing, there was considerable testimony regarding interpretation of the rule at issue, in particular with respect to how visitors to a program are treated under the rule. The Department's witness who conducted the investigation testified that she now understood the rule would require "counting children who are present, whether enrolled or not." This witness also stated that if two independent daycare programs were to hold a joint event at one of their respective sites, they would be limited to the

maximum number of non-school age children in total for the one program at which site the event was being held.

21. The Department's position at the close of hearing was that the essential factor in petitioner's violation is that petitioner had delegated care to an "associate" listed as care providers for her program – her mother and her daughter – such that it blurred the lines around who was actually responsible for caring for the additional children.

22. Apart from the language of the rule itself, the Department does not have additional written guidance on interpreting the rule in question. The Department investigator – a licensing field specialist - testified at hearing that one way providers could ascertain the proper interpretation of a rule is to call the "licensor on duty" phone line to obtain advice.

23. Petitioner received no compensation for care of the additional children that day. No funds passed through her program to compensate her daughter and mother. Her mother received compensation from her daughter, who – by report – received it directly from the families.

24. No allegation was made, nor did the facts establish, that any children in the program were at risk

during the time the additional children were present, nor that any parent(s) objected to the circumstances.

ORDER

The Department's decision is reversed.

REASONS

The Commissioner of the Department for Children and Families has the authority to adopt rules and regulations governing the day care registration program. 33 V.S.A § 306(b)(1). Those rules and regulations are required by statute to be "designed to insure that children in . . . family day care homes are provided with wholesome growth and education experiences, and are not subjected to neglect, mistreatment or immoral surroundings." 33 V.S.A. § 3502(d). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes", effective October 7, 1996. The Board may only overturn a licensing or registration decision by the Department if it finds that the Department has acted arbitrarily, capriciously or has otherwise abused its discretion. *Huntington v. SRS*, 139 Vt. 416 (1981); Fair Hearing No. R-05/10-235.

This case does not involve a decision by the Department regarding the petitioner's day care license. Rather, it

concerns whether there was a violation of the Department's regulations by petitioner's day care program. If so, a notice of that violation is listed on the Department's web site for the public's information, parental notification is required, and the violation can be considered in whether the facility is eligible for special status regarding subsidies.

Given the purpose of the Department's regulations to protect the health, safety and development of children, and that the posting of violations by day cares on the internet and notification to families is intended to be informational, rather than punitive, the Board has consistently granted the Department deference and leeway in its interpretation of what constitutes a violation of its own regulations. See, e.g., Fair Hearing Nos. J-10/11-625, Y-07/11-402, and H-07/09-379.

The Department's "Regulations for Family Day Care Homes" state that, during summer vacation, a provider may have "[u]p to twelve children in care provided that at least six have been to kindergarten or graded school and a second caregiver is present and on duty when the number of children exceeds six." VT Regulations for Family Day Care Homes, Section II, Summer Option D. The primary issue presented by this case is a reasonable understanding of the meaning of the term "children in care."

The Department makes substantial policy arguments as to why petitioner should be deemed to have had more than six non-school age "children in care" on the day in question. In essence, the Department argues that to find otherwise would enable providers to skirt the rule by offering day care secondarily through their workers. Short of outright intentionally skirting the rules, the Department argues that this case illustrates that the blurring of roles between the provider, staff in the program, and use of petitioner's site leaves an untenable uncertainty as to who is responsible for a given child's care.

Petitioner argues that the additional children at issue were not in her care, were the responsibility of her mother and daughter (not working at her program on the day in question), and she never understood the rule to apply to children visiting a program. There is no evidence that petitioner was compensated for care of the additional children and she presented affirmative evidence that there was a separate arrangement for care with her daughter and mother.

The Department's application of the rule is undercut by inconsistencies that persisted throughout the process and to the close of hearing in this appeal. In the first instance,

the Department's initial determination was that petitioner had not violated the rule on the ground that it does not apply to "visitors."[2] When petitioner's appeal was considered in the Commissioner's Review process, no reference was made to the rule applying to all children present, regardless of whether they were visitors. Rather, the Commissioner's Review questioned petitioner's explanation of the presence of the additional children and alleged that petitioner had tried to skirt application of the rule by sending the children away with her daughter.[3]

At hearing, the Department's witness investigating the alleged violation stated that the rule applied to all children present, "whether enrolled or not." However, the Department did not count the children present under the care of petitioner's daughter's boyfriend. The Department attempted to explain this discrepancy by stating the determining factor was that the boyfriend is not listed as a

[2] As this witness also testified that guidance on application of the rules could potentially come from the Department's "licensor on duty" phone line, she might have theoretically provided the same advice to petitioner if she had called about this issue, which also would have been at odds with the Department's ultimate position in this case.

[3] It should be noted that the Commissioner's Review provides that "this is the position the Department will take at hearing." While the Department suggested at hearing there were "credibility" issues with petitioner's account, ultimately it took the position that the children should be counted even accepting that separate arrangements for care were made with petitioner's mother and daughter.

worker in petitioner's program, unlike her mother and other daughter. Yet, that would not explain the Department's testimony that, if two separate daycare programs met together, the host program would be held to the standard based on *all* children present. At a minimum the Department's response to these scenarios is unclear.

The Department identifies real policy considerations in application of the rule under these facts. Yet, its varying positions interpreting the rule demonstrate the arbitrariness of finding petitioner in violation. Even a year after the incident in question, it is not clear whether petitioner was found in violation because her account was not credible to the Department, whether it was because the additional children were cared for by associates in her program, or whether the rule is applied in blanket fashion so that all children on site are counted. The Department's position is not aided by the fact that it initially found in petitioner's favor, or that it would be reasonable to interpret the term "children in care" to exclude visitors.

The Department's interpretation demands greater specificity in the rule, which is otherwise lacking, before it can be fairly and reasonably applied to petitioner's circumstances. Thus, the Department's finding of a violation

is inconsistent with the rules to the point of being arbitrary, and the Board must reverse. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

# # #