

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. H-09/16-902  
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Appeal of )  
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INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Child Development Division, denying her application for an Approved Relative Child Care (ARCC) certificate for her child care provider. The issue is whether DCF's decision is consistent with state and federal law.

FINDINGS OF FACT

The following findings of fact were stipulated to by the parties:

1. The petitioner is a single mother of three young girls, a seven-year-old and two-year-old twins. Her ex-husband left the home before the twins were born. The petitioner has had to cope with a number of mental health problems in addition to being a single parent.

2. Following the premature birth of her twins, the petitioner had difficulty finding someone to help her and

provide child care so she could return to work to support her children. She has no family in the area.

3. The petitioner finally found Y.B., a caregiver who is not related to her, to begin to care for the children. When Y.B. began as their caregiver, the oldest girl was five-years-old and the twins were three-months-old. The petitioner was able to return to work on August 18, 2014.

4. Over the course of the next two years, Y.B. provided family-like care for the children and became a close friend of the petitioner. The petitioner describes her as taking on the role of a sister in the absence of any of her own family in the area. The children have thrived under Y.B.'s care and she is the only caretaker the twins have ever known.

5. Throughout this time, the petitioner received a Legally Exempt Child Care (LECC) certificate for Y.B. which allows DCF to pay Y.B. subsidies for the children's care even though she is not a licensed or registered day care provider.

6. The petitioner wanted to reapply for a LECC certificate on August 3, 2016 but DCF told her she needed instead to apply for the "Approved Relative Child Care" (ARCC) certificate program which had replaced the now defunct LECC program.

7. DCF gave the petitioner a booklet regarding the new program and the petitioner filled out a new application. The application informed the petitioner that approved ARCC providers had to be relatives of the children. The petitioner signed a certification that her provider "is related to my child(ren) as defined in the ARCC Requirement Booklet."

8. DCF informed the petitioner by letter dated September 15, 2016, that she could no longer receive subsidies for Y.B. because a data base check did not show that Y.B. is, in fact, a relative of her children. DCF informed her that relatives include only grandparents, great-grandparents, siblings, aunts, and uncles pursuant to a definition found in the new regulations.

9. The petitioner appealed within two weeks and has asked that Y.B. be approved as a recipient of the subsidies as she now considers Y.B. to be her "sister" and, thus, related to the children as an aunt figure. The petitioner does not maintain that Y.B. is related to her by blood, marriage or court decree. The sister bond appears to be emotionally based.

10. DCF asked for time to submit information and briefing on this matter which, after a further extension was

granted, was received on November 26, 2016. The petitioner has continued to receive the subsidy while her hearing is pending.

ORDER

The decision of DCF is affirmed.

REASONS

The burden is on the petitioner as an applicant for benefits under the new ARCC program to show that she meets the requirements. See Fair Hearing Rule 1000.3(O)(4). The Board's review is *de novo*. Since at least 1998, DCF has exempted caregivers from meeting formal day care registration requirements if they are caring for children from two families or less. LECC Provider Requirements, Effective July 1, 1998, Qualifications A. (4) and (5). Instead of registration, the providers were certified if they agreed to follow some basic care guidelines. See *Id.* At B. There was no requirement in the LECC program that the care providers be related to any of the children cared for to receive certification. Providers could be qualified simply by being adults, physically and mentally capable, and not a sibling (in the home) or parent of the cared-for child. *Id.* A. (1)-(3)

The advantage of LECC certification was that, like licensed facilities and day care registered homes, providers could receive reimbursement payments from the state for providing child care through the state's Child Care Financial Assistance Program. See Child Care Financial Assistance Program Regulations, February 9, 2009, I B. See also 33 V.S.A. § 3514. The funding for this program was primarily provided by the federal government pursuant to a federal government Child Care Block Grant (CCBG) (See 45 C.F.R. § 98 and 99, 1996). It does not appear that this block grant restricted payments to providers who were licensed or registered pursuant to state law. The petitioner's provider, Y.B., was certified in 2014 to care for petitioner's children and receive child care payments from the state under this program.

On November 19, 2014, Congress amended its child care funding program through the Child Care and Development Block Grant (CCDBG) Act. 42 U.S.C. § 9857 et seq. This program was the first reauthorization of the child care assistance program since it began in 1996 and the focus of the plan shifted from helping parents with day care funding which enabled them to work to a new focus on providing quality child care programs which would promote "health, safety,

licensing, training and oversight standards." CCDBG Act, § 658A(b) and 81 FR 67595, Sept. 30, 2016. The federal amendments provide funding to providers under the following circumstances:

(6) Eligible Child Care Provider

The term "eligible child care provider" means—

(A) a center-based child care provider, a group home child care provider, a family child care provider, or other provider of child care services for compensation that—

(i) is licensed, regulated, or registered under State law as described in section 9858 (c) (2) (F) of this title; and

(ii) satisfies the State and local requirements, including those referred to in section 9858 (c) (2) (I) of this title applicable to the child care services it provides; **or**

(B) a child care provider that is 18 years of age or older who provides child care services only to eligible children who are, by affinity or consanguinity, or by court decree, the grandchild, great grandchild, sibling (if such provider lives in a separate residence), niece, or nephew of such provider, if such provider complies with any applicable requirements that govern child care provided by the relative involved.

42 U.S.C. § 9858n, as amended Nov. 19, 2014.

The U.S. Office of Health and Human Services, Administration for Children and Families, Office of Child Care, after publication and comment, adopted regulations

regarding the CCDBG Act on September 30, 2016, to be effective November 29, 2016. They provide, in pertinent part, as follows:

Eligible child care provider means:

- (1) A center-based child care provider, a family child care provider, an in-home child care provider, or other provider of child care services for compensation that—
  - (i) Is licensed, regulated, or registered under applicable State or local law as described in §98.40; and
  - (ii) Satisfies State and local requirements, including those referred to in §98.41 applicable to the child care services it provides; or
- (2) A child care provider who is 18 years of age or older who provides child care services only to eligible children who are, by marriage, blood relationship, or court decree, the grandchild, great grandchild, siblings (if such provider lives in separate residence), niece, or nephew of such provider, and complies with any applicable requirements that govern child care provided by the relative involved;

. . .

45 C.F.R. § 98.2 Definitions, amended Sept. 30, 2016

The federal statute and regulations make it clear that day care providers who are eligible for payment from federal CCDBG funds must now, in general, be registered or licensed with exceptions only for certain specified family members who are caring for their own relatives. The statute requires

that any state receiving funding under this authority must give assurances that the state will comply with these regulations, including licensing and registration requirements. 42 U.S.C. § 9858c(a)(1).

In order to comply with the new funding requirements and to further "the health, safety, and well-being of children in the care of relatives receiving Child Care and Development Fund (CCDF) payments to provide child care services, not subject to Vermont Child Care Licensing Regulations," the Child Development Division of DCF adopted new regulations<sup>1</sup> for Vermont on September 1, 2016, entitled "Child Care Financial Assistance/Approved Relative Child Care Provider Requirements." *Id.* Page 1. Those regulations contain the following pertinent provisions:

Definitions

. . .

Approved Relative Child Care Provider (Provider)--

A person who (1) is a relative of the child(ren) in their care; (2) has obtained an Approved Relative Child Care Provider Certificate for a family receiving child care financial assistance; and (3) who is paid for that care through the Child Care Financial Assistance Program.

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<sup>1</sup>There were several other changes brought about by the new law and it appears that DCF scrapped its old "LECC" regulations entirely in favor of new regulations governing "ARCC" certifications.

. . .

Relatives--

Grandparents; great-grandparents; siblings (if the sibling lives at a separate residence); aunt or uncle by birth, marriage, or by court decree.

*Id, p. 2*

**Requirements**

A. Criteria

. . .

2. The Provider must be a relative of the child(ren) that is qualified to receive Child Care Financial assistance. *Appropriate documentation may be required.*

*Id, p. 4.*

The petitioner's mid-August 2016 application for funding for day care was subject to this new regulation. DCF correctly determined that the petitioner's provider, Y.B., was not related to the petitioner's children. It also correctly determined that the provider was neither registered nor licensed, a fact which the petitioner does not dispute. DCF's decision that the chosen provider, Y.B., could not receive funding through this program is consistent with the federal statute and regulations and the new state regulations cited above. The petitioner argues that her provider should be considered a "relative" as she has a close relationship

with her. But DCF's regulations do not cover persons who are relative-like in the definition of "Relatives" and, indeed, there is no authorization for a re-working of this definition by the states in the federal statute and regulations.

The petitioner further argues that this regulation "discriminates" against those families who need payments for child care but who do not have family members living nearby. It is true that the exception category is limited to named relatives only but the petitioner offered no argument as to why this distinction--one clearly intended to limit the burden of government regulation within a close family circle--might be constitutionally invalid, e.g. a violation of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution or the Common Benefits Clause of the Vermont Constitution. Furthermore, the only likely outcome of a successful argument in this area would be the elimination of the relative exception, an outcome which would not help the petitioner.

Under the new program, the petitioner's provider can continue to be reimbursed for day care under this program if she registers as a family day care home. This is clearly what the new funding statute expects to happen in the case of non-relative caretakers in order to provide more oversight

for the welfare of children in day care. As DCF's action is in accord with its new regulation, its decision denying the petitioner must be upheld by the Board. 3 V.S.A. §. 3091(d), Fair Hearing Rule 1000.4D.

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