

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 18,036  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision of the Department of Social and Rehabilitation Services (SRS) suspending and revoking her family day care home registration certificate. The issue is whether the petitioner violated the rules on supervision, discipline, and safety of children and whether SRS abused its discretion in determining to suspend and revoke the petitioner's registration based on these violations.

FINDINGS OF FACT

1. Prior to the events described below the petitioner had been a registered day care provider for fifteen years. She typically cared for infants, toddlers, and preschool children. Until the recent events in question, the Department had not taken any action against her registration.

2. In late summer 2001, the Department received a complaint from a neighbor of the petitioner regarding the petitioner's methods of disciplining children. The neighbor

reported that from her back yard she could hear the petitioner yelling at and threatening the children.

3. For reasons unexplained, SRS did not investigate this report until October 5, 2001. The investigator first went to the neighbor's house, but due to cold weather the children were not outside, and the investigator could not hear what was going on inside the petitioner's home. The investigator then went to the petitioner's house.

4. While she stood outside the petitioner's door for about five minutes the investigator could hear a child crying loudly and continuously and the petitioner yelling at the children to "knock it off". When the investigator entered the home she saw a baby in a car seat crying "hysterically" and other children standing around crying as well. When the petitioner picked up the baby from the car seat the baby stopped crying.

5. The investigator discussed her observations and concerns with the petitioner and issued a "Field Form" citation in which the petitioner acknowledged the observations and agreed to take corrective action.

6. Following that visit the petitioner attended training sessions in the care and disciplining of young children. In a follow up visit in January 2002 the investigator noted the

petitioner having received training, but noted that there were uncovered electrical outlets and electric cords that were accessible to the children. The petitioner agreed to fix these problems.

7. In summer 2002 the Department received another report from the petitioner's back yard neighbor regarding yelling and improper discipline. On July 11, 2002 the Department's investigator went to the neighbor's house and, unseen by the petitioner, observed the petitioner's back yard for about two hours while the petitioner and the children in her care were outside. She observed that several children were out of the petitioner's sight playing behind a row of bushes for extended periods of time. The investigator also saw and heard the petitioner frequently yell at the children, mostly preschoolers, and speak to them in harsh and demeaning tones. The investigator noticed that the petitioner's interaction with the children became markedly more pleasant when one of their parents appeared.

8. The investigator returned to the neighbor's house on July 18, 2002 to conduct another unseen observation of the petitioner's back yard. This visit also lasted about two hours. The investigator again heard the petitioner yelling at the children and not interacting with them in any meaningful

way while they played. The investigator also observed the following incidents:

a. The petitioner disciplined a child by grabbing his arm and swatting him on the bottom.

b. As discipline, the petitioner repeatedly threatened that she would spray the children with a garden hose. The petitioner frequently picked up the hose and pointed it at certain children in a threatening way.

c. The petitioner disciplined a two-year-old boy with a blast from the hose.

d. The petitioner required all but one child to strip naked and made them stand together in a wading pool while she washed all of them with the same washcloth. The children appeared sullen and intimidated while the petitioner did this.

e. The petitioner smoked several cigarettes while she was watching the children.

f. The children were given a snack without washing their hands.

g. A nine-month-old baby was kept in a car seat on the deck for the entire time the other children played in the yard.

9. The investigator testified that she was "shocked" by what she had observed, but that rather than immediately

confront the petitioner she wanted to report to and receive direction from her supervisors.

10. The petitioner's neighbor testified that she had also observed the above incidents. The hearing officer deemed the testimony of the investigator and the neighbor to be credible as to the incidents they observed and the impact the petitioner's actions had on the children.

11. The investigator returned to the neighbor's house to observe the petitioner's yard on July 24, 2002. Before the petitioner and the children came outside the investigator could hear the petitioner yelling at the children inside her house. Once outside the petitioner again was smoking, and she allowed several children to play unobserved behind the bushes. The petitioner abruptly took the children inside after about twenty minutes. The investigator believes that the petitioner had observed her watching the yard.

12. On August 27, 2002 the investigator and a consultant who worked with the Department, and who had provided training to the petitioner in the past visited the petitioner's home and confronted the petitioner with the observations that had been made by the investigator. The petitioner essentially denied hitting the child, claiming she was swatting at bees. She maintained that the hose forcibly discharged accidentally

when she was trying to get an insect off a child. She insisted that the children enjoyed being washed in the pool. She dismissed the investigator's impressions of her behavior as "all bull".

13. On that day the investigator also noted that cleaning supplies and a razor had been left out in the bathroom that was used by the children and that blind cords were dangling unsecured in the children's play area. It was also observed that the children were given a snack without washing their hands.

14. At the hearing the petitioner maintained that the investigator's observations were "untrue", that she never mistreated the children, and that she has been unfairly singled out by the Department.

ORDER

The decision of the Department suspending and revoking the petitioner's family day care registration is affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation of

the Day Care Home Certificate. 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. Furthermore, the Commissioner has the specific authority to revoke registrations "for cause after hearing" and to suspend registrations "in situations which immediately imperil the health, safety, or well-being" of children. 33 V.S.A. § 306(b) (3).

Among the regulations adopted by the Commissioner are the following:

DEFINITIONS

CORPORAL PUNISHMENT - The intentional infliction of pain by any means for the purpose of punishment, correction, discipline, instruction or other similar reason.

SERIOUS VIOLATION - A violation of group size, staffing requirements or any violation which immediately imperils the health, safety or well-being of children. Serious violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.

SUPERVISION OF CHILDREN - The knowledge of and accounting for the activity and whereabouts of each child in care

and the proximity of staff to children at all times assuring immediate intervention of staff to safeguard a child from harm and maintenance of the program of the facility.

SECTION I - ADMINISTRATION

1. The Registrant, and all other caregivers, shall be at least eighteen (18) years of age, able to read, and physically, mentally, and emotionally capable of performing activities normally related to the provision of child care.

. . .

SECTION II - PROGRAM

2. There shall be at least one caregiver present and providing child care at all times when children are in care.

During outside play:

- a. Infants and toddlers shall be supervised by a caregiver present,
- b. Preschoolers and school age children may be monitored from inside the home if their area or play is within sight and earshot of a caregiver.

. . .

5. The majority of an infant or toddlers awake time in child care shall be out of cribs, playpens, walkers, infant swings, and infant seats, in a safe place where s/he may explore freely.

. . .

9. Children shall be attended to when they cry indicating they need assistance.

. . .



SECTION III -GUIDANCE/DISCIPLINE

1. The caregiver shall use positive methods of guidance/discipline which encourage self-control, self-direction, self-esteem and cooperation. Guidance/discipline shall be designed to meet the individual needs of each child including the Registrant's and caregiver's own during the hours children are in care.
2. The caregiver shall treat each child with respect and encourage children to treat each other respectfully. Children shall be given opportunities to learn, socialize and cooperate as individuals, as well as group members. The caregiver shall promote self-esteem and cooperation through positive reinforcement and role-modeling.
- . . .
4. Guidance/discipline shall not include any form of cruel and unusual punishment, including corporal punishment, such as, but not limited to:
  - a. Hitting, shaking, biting, spanking, pinching.
  - . . .
  - e. Inflicting mental or emotional punishment such as humiliating, shaming, threatening or frightening a child.
5. This section does not prohibit a person from using reasonable and necessary force to obtain possession of dangerous objects in the control of the child, for self defense, or for the protection of persons or property.

SECTION V - HEALTH AND SAFETY

1. The Registrant is responsible for the health and safety of children in care.
  - a. The caregiver and children shall wash their hands with soap under warm running water after

diapering, toileting and before meals and snacks.

. . .

8. Smoking tobacco is prohibited in the presence of children who are in care.

. . .

10. 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.

. . .

20. Areas used by children shall be well lighted, well ventilated, clean, free from hazardous substances and sufficient in size to permit children to move about freely.

SECTION VI - RELATIONSHIP BETWEEN REGISTRANT AND DIVISION OF LICENSING AND REGULATION

. . .

9. A violation of any section of the law or regulations regarding a Family Day Care Home may be cause for the revocation of the Registration Certificate.

. . .

11. When violations are found to exist, the Department may offer a registrant the opportunity to develop a program improvement plan whereby the violations will be corrected within a time period specified by the Division. Such opportunity may not be provided when the violation poses risk of harm or is of repeated nature.

If the petitioner has violated any of the above regulations, the Commissioner has the authority to determine what action to take, including whether there is "cause" to revoke a day care registration certificate. 3 V.S.A. § 8814. The Board may only overturn such a decision if it finds that the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion. See Huntington v. SRS, 139 Vt. 416 (1981), Fair Hearing Nos. 10,414, 12,804, 15,027, 15,430 and 16,485.

In this case, credible evidence shows that the petitioner, at one time or another, violated all the above-cited regulations. The most serious, at least in the Board's view, are the petitioner's repeated violations of the provisions regarding guidance and discipline. Although the petitioner was willing to receive training to better understand and handle young children, the incidents observed by the Department's investigator made it reasonable for the Department to conclude that the petitioner lacks the necessary insight and temperament to effectively guide and discipline young children.

The remaining question is whether the Department acted arbitrarily in determining that the petitioner's day care registration should be suspended and revoked. The regulations

single out corporal punishment (as well as lack of supervision and exposure to hazardous situations) as a "serious violation". The Department has the discretion to offer a registrant the opportunity to correct any violation but also has the authority to withdraw such an opportunity when the violation "poses risk of harm or is of a repeated nature." Section VI(11). In this case, it cannot be concluded that the Department abused its discretion in determining that the petitioner's propensity to use harsh language, corporal punishment, and physical threats to children posed an immediate risk of harm. Therefore, the decisions of the Department suspending and revoking the petitioner's day care registration must be upheld. 3 V.S.A. § 3091(d) and Human Services Board Rule No. 17.

# # #