

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-04/14-310
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Child Development Division (Department) citing her family day care for a violation of the Department's regulations following a site visit to the petitioner's day care on December 11, 2013. The issue is whether the Department reasonably interpreted and applied its regulations when it determined that a violation of its regulations occurred on the date of the site visit.

The petitioner filed her appeal on December 20, 2013. The Department conducted a Commissioner's Review of the matter resulting in a decision dated April 14, 2014 upholding the violation, and petitioner submitted a letter dated April 21, 2014 stating that she was requesting a fair hearing before the Human Services Board. A telephone status conference was held on May 9, 2014, during which the parties agreed to a schedule for the Department to file a motion for summary judgment and petitioner to file a response. The Department filed its motion on May 28, 2014, and petitioner

filed her response by letter dated June 6, 2014. Another telephone status conference was held on June 17, 2014 to hear argument from the parties regarding the Department's motion and petitioner's response. During the status conference the parties agreed that there is no dispute as to the facts in this case, and that petitioner's appeal is based on her dispute of the Department's interpretation and application of its regulations. Accordingly, the following findings of fact are based on the parties' filings and their representations during the status conference on June 17, 2014.

FINDINGS OF FACT

1. Petitioner operates a licensed family day care home in St. Albans, Vermont. Petitioner is the Registrant for the day care.

2. On December 11, 2013, a Licensing Supervisor for the Department's Child Development Division conducted a site visit at petitioner's day care.

3. Upon arriving at petitioner's residence, the Licensing Supervisor found that the day care was providing

care for seven non-school age children,¹ including one child under the age of two.

4. At the time of the Licensing Supervisor's site visit, petitioner had two caregivers on duty in addition to herself.

5. Petitioner stated that the seventh child at her day care, age five, arrived only five minutes before the Licensing Supervisor, and he was only going to be there for a half hour until petitioner could take him to his pre-school.

6. Petitioner further stated that she had never exceeded six children at her day care before the December 2013 site visit, that she did not intend to violate the regulation, and that she would not have had seven children in her home if she had understood the requirements. Petitioner suggested that the regulations be reworded to provide more clarity so that other providers will not find themselves out of compliance with the Department's day care rules.

ORDER

The Department's decision is affirmed.

¹ Non-school age children are those children who have not attained the age required by law to attend school or who do not attend a full day school session. See Regulations for Family Day Care Homes, Definitions, "SCHOOL AGE CHILD," effective October 7, 1996. Children who have attained the age of six are required to attend school. 16 V.S.A § 1121.

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 and the violation can be

considered in whether the facility is eligible for special status regarding subsidies.

The Department's Regulations for Family Day Care Homes provide as follows in relevant part:

A registrant may provide care in their home to six (6) children at any on (sic) time and, in addition to the six may care for up to four (4) school-age children for not more than 4 hours daily per child. (See Options on Next Page).

THE FOLLOWING LIMITS APPLY IN REGISTERED FAMILY DAY CARE HOMES

During the School Year:

OPTION A:

Six children any age including up to two children under the age of two per caregiver. These children may be replaced when their stay ends.

Four school age children not to exceed four hours per child. These children may not be replaced by other school age children when their stay ends.

VT Regulations for Family Day Care Homes, Section II.1 and Option A. The primary issue presented by this case is whether the Department reasonably interpreted this language. In particular, the parties dispute whether this regulation allows a provider to have more than six non-school age children at a day care at one time, and they dispute the effect of having more than one caregiver present.

The Department argues that Option A limits the number of non-school age children at day care to six, and that additional caregivers do not allow for an increase in the total number of children. Instead, the Department argues that the presence of additional caregivers only allows more of the six children to be under the age of two. For example, with one caregiver, two of the six children may be under two, while with two caregivers, up four of the six children may be under two.

In response, petitioner points to the definitions of "registrant" and "caregiver" in the regulations, and argues that Option A allows her to exceed six children if she has another caregiver on duty.² Specifically, petitioner argues that because the definitions of "registrant" and "caregiver" are different, "Option A, as outlined on page 7, implies that for each caregiver in the home, as long as the registrant provides the majority of the care, you may exceed six children of any age including up to two children under the age of two." Petitioner's June 6, 2014 Letter, page 2.

² "REGISTRANT" is defined as "The person named on the Registration Certificate who is the person providing child care services in the home a majority of the time actual child care is being provided." "CAREGIVER" is defined as "The Registrant, or other person, over eighteen (18) years of age, who provides child care at the Family Day Care Home and who has read and understood these regulations." VT Regulations for Family Day Care Homes, Definitions.

Given that the sole purpose of the Department's regulations is to protect the health and safety 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 regulations. See, e.g., Fair Hearing Nos. J-10/11-625, Y-07/11-402, and H-07/09-379. The fact that such violations may also be considered in whether certain facilities attain special status regarding eligibility for subsidies does not affect or alter the Department's discretion in these matters.

Applying the foregoing standard of review to the regulation at issue in this case, it must be concluded that the Department reasonably interpreted the regulation to allow for no more than six non-school age children, *including*, within that group of six, up to two children of two years or less for each caregiver present. Accepting petitioner's report that the seventh child at her day care arrived five minutes before the site visit, and that he only needed to be there for about a half hour, there still is no dispute that seven non-school age children were present when the Licensing Supervisor arrived on the date of the site visit. Therefore,

based on the above findings, the Board concludes that the Department did not abuse its discretion when it determined that petitioner had violated the applicable regulation on December 11, 2013.

The Department's decision in this case is fully supported by the evidence and clearly constitutes a reasonable interpretation of its own regulations, and accordingly, it must be affirmed by the Board. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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