

petitioner's day care. (In addition, the petitioner had an infant child of her own at home.) Because of the schedules of the parents of these children, the petitioner was no longer able to leave the house every morning to pick up her daughter from kindergarten. However, the petitioner located a day care in the town where her daughter went to kindergarten that would pick her daughter up from school and take her to the day care. The petitioner or her husband are thus able to pick the daughter up at day care at their convenience.

The department denied the petitioner's request for a subsidy for this day care because a public school is available for the petitioner's daughter in the town where she lives, and the petitioner could care for her in her home after school if her daughter went to that school. The petitioner, however, does not want to remove her daughter from her present kindergarten because her daughter has adjusted well to the school there. The petitioner has exhausted all other means of getting her daughter home from kindergarten rather than having the day care pick her up and care for her until she or her husband can pick her up themselves.

ORDER

The department's decision is affirmed.

REASONS

SRS Manual §§ 4032 and 4032.1 include the following provisions:

4032 Eligibility Criteria

Day Care services can be authorized to any family that meets the "Service Need" and "Eligibility Standard" as defined below.

4032.1 Service Need

Service need is broadly established when day care is necessary to support a family goal of "self-support" or "protection."

Need for day care to support a goal of self-support or protection is evidenced in the following family situation:

In a family in which only one parent is a resident of the home, that parent must fit one of the following categories. In a family in which both parents are residents of the home, each parent must fit one of the following categories:

a. Employed;

Service Need shall be limited to the days and hours during which:

1. No regular public school program is available for the eligible child; and
2. No parent is available to provide adequate and necessary supervision.

There is no dispute in this matter that the petitioner meets the "eligibility standard" for day care--i.e., that she qualifies income-wise. The issue is whether a "regular public school program is available for the eligible child" and whether the petitioner is otherwise "available to provide adequate and necessary supervision" for the child (see above). In the petitioner's case, the issue boils down to whether the regulations contemplate the petitioner being able to receive a day care subsidy that would allow her

daughter to finish the school year in another town. The hearing officer concludes they do not.

The petitioner struck the hearing officer as a sincere individual who, without question, has her daughter's best interests at heart. However, she presented no evidence that her daughter would be unduly traumatized or harmed if she were to change schools at this time. Although the petitioner would prefer that her daughter remain in the kindergarten she now attends, and no doubt has good reasons for this preference, it cannot be concluded that the conditions of the regulation (regarding the availability of public school and the parent herself--see above) are met.²

The hearing officer and the Board cannot agree with the petitioner that the department's regulations "discriminate" against registered day care providers. Parents who have jobs where they cannot care for children have no choice but to seek outside day care. Parents who themselves operate registered day care facilities are simply not in this position. It is not discriminatory for the department to subsidize the day care of only those parents who cannot provide it themselves.

It would be unfortunate if the petitioner elected to close her day care rather than to remove her daughter from her present kindergarten or to continue paying for that daughter's day care without a subsidy. If the hearing officer or the Board were in a position of discretion, they might well grant the petitioner an exception to the

regulation because of the petitioner's seemingly-unique circumstances.³ Neither the hearing officer nor the board are in such a position however. By law, they must uphold the department's decision if that decision is in accord with the applicable regulations. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19. Absent evidence that a public school program is not "available" to the petitioner's daughter, it must be concluded that the department's decision fully comports with the regulations cited above. The department's decision is, therefore, affirmed.

FOOTNOTES

¹The petitioner had been employed in another day care before she moved. She received a day care subsidy to have her child enrolled at this day care facility (when she was not at school) because the petitioner wasn't considered "available to provide adequate and necessary supervisions" of the child while she was working. See SRS Manual § 4032.1 (infra).

²Unfortunately, by removing her daughter from kindergarten before the school year is over, the petitioner would not get the full benefit of the tuition she paid. However, alternative schooling (in her home town) would be free. The fact that the petitioner paid a non-refundable tuition does not render the public school "unavailable" to her daughter.

³Because of the uniqueness of the petitioner's situation, it seems unlikely that the department would be setting a harmful "precedent" if it granted the petitioner an exception.

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