

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 17,989  
 )  
Appeal of )  
 )

INTRODUCTION

The petitioner appeals a decision of the Department of Social and Rehabilitation Services (SRS) revoking her license to operate an Early Childhood Day Care facility called "Cherished Moments I". 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 revoke the petitioner's license based on these violations.

FINDINGS OF FACT

1. Prior to the events described below the petitioner had been licensed to operate an early Childhood Day Care facility called Cherished Moments I since July 2000. In March 2002 the petitioner opened a second facility called Cherished Moments II. Although this action concerns only Cherished Moments I, the petitioner had closed both facilities by December 2002. The facilities were licensed to provide care up to 30 infants, toddlers, and preschool children. The

findings below involve a continuation of problems that occurred at Cherished Moments I.

2. On February 28, 2001, the Department's Licensing Specialist assigned to the petitioner's district made a routine unannounced inspection of the petitioner's facility and noted the following problems:

- a. children left in highchairs over 30 minutes before being served food,
- b. toddlers had "unguided" play with age-inappropriate toys,
- c. one toddler was running around with a pencil,
- d. a caregiver was arbitrary in dealing with disputes between children,
- e. a caregiver threatened a child with punishment and called him an inappropriate name,
- f. sleeping bags used by the children had long cords attached to them,
- g. staff was not aware of all children's whereabouts at all times,
- h. children did not wash hands before eating, playing with a cat, and after their diapers were changed,
- i. staff personnel files did not contain required references, and

j. staff did not have written job descriptions.

3. After discussing the results of the inspection with the licensor the petitioner signed a form acknowledging the above findings and agreeing to remedy them and to notify all parents of the inspection. The Department subsequently accepted the "Plan for Improvement" filed by the petitioner on March 31, 2001.

4. The Department's licensor made another unannounced visit to the petitioner's facility on June 20, 2001. At that time she noted that the staff were using the same washcloth to clean all the children. Also, one staff member was observed using an age-inappropriate form of discipline (a "timeout") on a very young child. Again, the petitioner acknowledged these problems and submitted a Plan of Correction.

5. The licensor again visited the petitioner's facility on October 26, 2001 after receiving an unspecified complaint. No violations were noted but the licensor discussed with the petitioner some concerns she had regarding the overall quality of the activities offered to the children by the petitioner's program.

6. The licensor made unannounced visits to the petitioner's facility on January 3 and February 2, 2002. No violations were noted and the licensor was encouraged by

progress the petitioner seemed to be making in overall program quality. The Department noted that during this time the petitioner was in a period of "probation" regarding the initial licensing of her second facility.

7. The licensor next visited the facility on June 12, 2002 following another unspecified complaint. On this visit the licensor noted the following problems:

- a. loud music blaring,
- b. several children continuously screeching and fighting,
- c. several children crying for prolonged periods of time without staff intervention,
- d. not enough toys and play materials to go around,
- e. a child left in a swing for over an hour, much of which he spent crying,
- f. a chair left in a dangerous position where children could climb onto it,
- g. a child with a sharp buckle in his mouth,
- h. lack of staff references and job descriptions (despite the prior citation), and
- i. staff qualifications not on file.

8. The licensor directed the petitioner to make corrections regarding the above by June 26, 2002. The

petitioner took issue with several of the licensor's findings, and on the next day she sent the Department a letter specifying her disagreements and requesting another licensor.

9. The petitioner met with the Department's Licensing Chief on June 24, 2002 at which time the petitioner and the Department agreed that the facility would undergo an evaluation from an "Early Childhood Assessment Team". A team of three highly qualified experts was assembled at the Department's direction and expense and was directed to make several visits to the petitioner's facility and make a written report of its findings. The Licensing Chief was concerned that during the meeting the petitioner referred to a particular child in her facility as "a little stinker".

10. All three members of the assessment team testified at the hearing. All of them had impressive credentials and experience in the area of early childhood development. None of them knew each other, the petitioner, or the Department's licensor in advance.

11. The assessment team made four separate visits to the petitioner's facility between July 8 and July 17, 2002. Their report (dated July 22, 2002) and their testimony at the hearing included details about the following problems:

- a. children were confined in high chairs, swings, baby seats, and small gated play areas "almost all the time",
- b. staff rarely engaged children in conversation and activities ("learning environment was nonexistent"),
- c. at playtime toys and materials were simply "dumped on the floor", little attempt was made to engage children with age-appropriate materials, certain popular activities were overcrowded, and there was an over-reliance on showing videos,
- d. staff did not have defined responsibilities for certain children, as a result children were often unsupervised and left alone in a confined situation ("lots of crying" and crying children often left unattended),
- e. staff seemed insufficiently trained and knowledgeable about working with small children ("no curriculum or planned activities"),
- f. staff did not engage with children at meals,
- g. diapering area and procedures were not sanitary,
- h. garbage cans were overflowing,
- i. bleach bottles were not dated for use,
- j. staff was careless in preparing and distributing bottles to children, and

k. cleaning procedures were suspect (floor did not appear to be mopped in the evening but was done in the morning, raising concerns of insects and vermin coming in overnight).

12. On July 26, 2002, the Department's licensor made another unannounced visit to the petitioner's facility after the Department received a complaint from a parent that her child had been injured and that the facility was "in chaos". At this time she found that the petitioner's staff records were still deficient and that one staff member had not been trained in CPR. The licensor noted that staff was about to take children on an excursion out of the facility without a first-aid kit. When the licensor attempted to inquire of certain staff their knowledge of the facility's first-aid procedures the petitioner became agitated and interrupted her, saying, "this shit has to stop".

13. On September 6, 2002, the Department notified the petitioner of its intent to revoke her license at that facility due to most of the above findings. Following a Commissioner's Review hearing held on October 16, 2002, the Department (in a notice dated December 4, 2002) affirmed its decision to revoke.

14. The fair hearing in this matter was held on April 11, 2003. At that time the Department presented credible evidence regarding the above-described inspections. The petitioner did not present any evidence directly refuting any of the above. A parent and a former staff person at the facility testified that they felt the facility provided good care to children. Several parents submitted written materials stating that they thought the facility did a good job with their children.

15. The petitioner maintains that when the licensor visited her in June 2002 it was during a prolonged rainy spell and that staff and children had been inside for several days. Similarly, the petitioner maintains that when the assessment team and the licensor visited her in July 2002 some of her regular staff was on vacation. The petitioner admitted that things were "chaotic" at the facility during these times.

16. However, the gist of the petitioner's defense is that the violations were minor, the investigators were biased, and that the Department is applying the regulations unfairly. She said the Department's licensor was motivated by personal animosity toward her and that the other Department personnel involved in the case and the assessment team "were all in it together". However, when pressed by the hearing officer on

this point, the petitioner could not offer any reason why the licenser would not like her or why the Department would wish to single her out in this manner.

17. By their credentials and demeanor, all the Department's witnesses struck the hearing officer as highly competent, professional, and unbiased.

ORDER

The decision of the Department revoking the petitioner's license to operate this Early Childhood Child Care Program is affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing its day care licensing and registration programs, 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 "Early Childhood Programs Licensing Regulations", effective February 12, 2001. 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:

I.A.2. The program and curriculum shall provide developmentally appropriate activities, equipment and materials in sufficient quantity and variety to meet the needs and interests of children being served.

The curriculum shall promote:

- a. social skills (for example: opportunities for sharing, caring and helping);
- b. positive self-concepts (for example: encouraging children to draw pictures and tell stories about themselves and their families);
- c. language and literacy (for example: reading books, songs, conversation, story telling, scribbling and drawings);
- d. physical development in both indoor and outdoor settings, strengthening large and small muscles and encouraging eye-hand coordination, body awareness, rhythm, and movement (for example: finger plays, obstacle courses and puzzles);
- e. sound health, safety and nutritional practices in the daily routine (for example: handwashing and

giving opportunities to help prepare and serve food); and

- f. creative expression and appreciation for the arts (for example: creating art work as process rather than product, dance, movement, dramatic play, music and materials that represent a variety of cultures).

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I.A.3. The program and curriculum shall provide:

- a. individual, small group and large group activities;
- b. children with many opportunities for success through open-ended activities (for example: blocks, play dough, and sand/water) and praising effort, not just results;
- c. an environment of respect for individual and cultural diversity (for example: acknowledging and respecting each child's unique qualities and integrating positive cultural experiences into daily activities); and
- d. opportunities for children to solve problems, initiate activities, experiment and gain mastery through learning by doing.

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I.A.6. Infants and toddlers shall have ample opportunities to move about freely in a safe area. When infant chairs, infant/toddler swings, high chairs or playpens are used for supervised play their usage shall not exceed 1/2 hour period for every 3 hour interval.

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I.B.1. The Program shall be designed to meet the strengths, interests and needs of each child.

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I.C.7. Children shall be attended to when they cry.

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V.A.2. 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, unstable furnishings and equipment, pools, window covering pull cords, telephone and electrical cords, poisonous plants, asbestos, wells, chips and dust from lead paint, traffic, toxic substances, pressure treated wood containing creosote or pentachlorophenol, and other hazards.

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V.G.2. Properly dispensed soap and disposable paper towels shall be available and accessible too the children at each handwashing area.

V.G.4. Children shall wash their hands with soap under warm running water:

- upon arrival
- before eating
- after using the toilet or have their diaper changed
- after handling animals
- after playing outside

V.G.5. Staff shall wash the hands of children who are unable to wash their own.

V.G.6. Staff shall wash their hands with soap for at least 10 seconds under warm running water:

- upon arrival at the facility
- before preparations of food or bottles
- before feeding a child
- after diapering a child
- after using the toilet or helping a child use the toilet
- after cleaning up after a sick child or injured child

- after handling items soiled with blood or bodily fluids
- after handling animals
- before and after giving medications

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II.B.8 Each staff member shall have a written work, education, training, and experience history on file that documents the staff member's ability to perform the duties of his or her job description.

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II.B.11 At least one staff person shall be present who is certified in Infant/Child CPR. 1/1/02 all paid staff shall obtain training, in rescue breathing, airway obstruction and infant/child CPR from the American Red Cross, American Heart Association or other state recognized organization providing equivalent training.

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III.D.5 Each newly hired staff member (even those not employed in direct care) shall have at least three positive written references from people who are not their relatives. These references may be taken over the telephone by representatives of the program from persons who are unrelated to the potential staff person which attest to his/her ability to perform the duties required by the job description. Each reference obtained over the telephone shall be dated and signed by the program's representative and shall include the name and the telephone number of the person who gave the reference.

III.D.6. There shall be a written job description for each staff position. The person responsible for supervising and evaluating the position shall be identified in the job description. All staff members shall receive supervisory feedback on a regular basis.

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I.A.1. The program director shall manage the program design and curriculum to ensure the provision of developmentally appropriate activities and materials.

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VI.6. The Division may deny the issuance or re-issuance of a license if it is found that the applicant has not complied with these regulations or has demonstrated behavior, that indicates an unwillingness or inability to care adequately for children.

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. Although it can be argued that no single violation on any one occasion was particularly serious, the evidence is clear that over time the petitioner exhibited a troubling lack of wherewithal to bring her facility into compliance with the letter and overall spirit of the regulations, especially in the realms of staff records and

training, curriculum, and guidance. The incidents and deficiencies repeatedly observed by the licensor and the independent assessment team, and the petitioner's unsupported insistence on personalizing the Department's concerns, make it reasonable for the Department to conclude that the petitioner lacks the necessary insight and temperament to effectively operate and manage an early childhood day care program. Thus, it cannot be concluded that the Department abused its discretion in determining that the petitioner's license to operate such a program should be revoked. 3 V.S.A. § 3091(d) and Human Services Board Rule 17.

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