

[REDACTED]

APPELLANT

v.

MARYLAND STATE DEPARTMENT

OF EDUCATION,

OFFICE OF CHILD CARE

* BEFORE STUART G. BRESLOW,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE OF
* ADMINISTRATIVE HEARINGS
*
* OAH No.: MSDE-OCC-27A-19-23510

* * * * *

DECISION

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STATEMENT OF THE CASE

On July 25, 2019, the Maryland State Department of Education's Office of Child Care (OCC) notified the Appellant that her certificate of registration to operate a family child care home was being suspended, on an emergency basis, for up to forty-five days. On July 29, 2019, the Appellant requested a hearing to appeal the emergency suspension.

On August 8, 2019, I held the requested hearing at the office of the OCC, Region [REDACTED] located in [REDACTED], Maryland, pursuant to Code of Maryland Regulations (COMAR) 13A.15.14.07. The Appellant appeared without representation. [REDACTED] Assistant Attorney General, represented the OCC.

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the OCC, and the Rules of Procedure of the Office of Administrative Hearings

(OAH) govern the procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.15.14; COMAR 28.02.01.

ISSUE

Did the OCC properly suspend the Appellant's family child care certificate of registration on an emergency basis?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the OCC's behalf:

- OCC Ex. 1 - Certificate of Registration, issued May 2, 2018
- OCC Ex. 2 - Child Care Information System listing of Associated Parties, dated July 30, 2019
- OCC Ex. 3 - Family Child Care Home Inspection Report, dated July 24, 2019
- OCC Ex. 4 - OCC Summary of Findings, dated July 24, 2019
- OCC Ex. 5 - Letter from [REDACTED] to Appellant, dated July 25, 2019
- OCC Ex. 6 - Request for Hearing, dated July 29, 2019

I admitted the following exhibits on the Appellant's behalf

- APP Ex. 1 - Letter from [REDACTED] PhD and [REDACTED] PhD to the OCC, undated
- APP Ex. 2 - Letter from [REDACTED] To Whom it May Concern, dated August 3, 2019
- APP Ex. 3 - Letter from [REDACTED] To Whom it May Concern, dated August 5, 2019

Testimony

The following individuals testified on behalf of the OCC: [REDACTED] Licensing Specialist, OCC, Region [REDACTED] and [REDACTED] Licensing Supervisor, OCC, Regions [REDACTED] and [REDACTED]

The Appellant testified and presented no other witnesses.

FINDINGS OF FACT

Based on the evidence presented, I find the following facts by a preponderance of the evidence:

1. On May 2, 2018, the OCC issued the Appellant a family child care certificate (Certificate) of registration. The Certificate was in effect at all relevant times. The Appellant has provided daycare services since 2009.
2. The Certificate authorizes the Appellant to provide care for up to eight children, with no more than two children being under the age of two, at her residence, [REDACTED] Maryland (Home).
3. Child care in the Home is limited to the main level and two upstairs bedrooms. The basement may not be used for child care.
4. The OCC approved one substitute caregiver listed on the Appellant's Certificate, her daughter, [REDACTED]. Her other daughter, [REDACTED] age 16, is not an approved substitute caregiver.
5. The Appellant is a single mom. Her husband died on [REDACTED] 2015 and the income she receives as a daycare provider is her family's sole source of income.
6. On July 24, 2019, at 2:10 p.m., [REDACTED] OCC Licensing Specialist, went to the Home to conduct an annual mandatory inspection. As Ms. [REDACTED] approached the Home, she observed the Appellant and her son in a vehicle, attempting to leave the Home. She asked the Appellant to stop and requested that she return to the Home so that she could conduct the annual inspection. The Appellant agreed and returned to the Home.
7. Upon her entry to the Home, Ms. [REDACTED] observed an infant, approximately 18 months old, in a portable crib sleeping. Additionally, there was a nine-year-old child watching television in the room with the infant. When asked if there was anyone authorized to supervise

the infant, the Appellant claimed her daughter, [REDACTED] who was upstairs, was eighteen, and an authorized substitute.

8. The Appellant's daughter is actually sixteen years old and is not an authorized substitute. When confronted with this information by Ms. [REDACTED] the Appellant eventually conceded that her daughter was not an authorized substitute and was sixteen-years-old.

9. During the inspection, Ms. [REDACTED] was surprised by the absence of items typically found in a daycare home, such as play toys for the children. The toys and other equipment were found in the basement of the Home. The Appellant knew that her Certificate specifically excludes providing daycare services in her basement; however, because the temperature on the main level of the Home was oppressive, the Appellant took the children in her care to the basement, where they would be more comfortable because it was cooler than the main level. Using the basement for childcare in the Home is a violation of the fire code because there was only one exit in the basement in the event of an emergency rather than the required two exits.

10. Ms. [REDACTED] found other violations during her inspection of the Home. They include two emergency forms that were not updated annually; an empty soap bottle in the bathroom; a child's health inventory form was not completed and signed by the child's physician; no written agreement for two children in the Appellant's care; no record of the last fire/emergency drill; the emergency escape route floor plan was not posted; and finally, the first aid kit was incomplete.

DISCUSSION

The Maryland General Assembly has declared that minor children are incapable of protecting themselves, and when parents have relinquished the care of their minor children to

others, certain potential risks arise that require “compensating measures.” Md. Code Ann., Educ. § 9.5-102(a) (2018). Consequently, Maryland has adopted the following policies:

- (1) To protect minor children whose care has been relinquished to others by the child’s parent;
- (2) To resolve doubts in favor of the child when there is a conflict between the interests of a minor child and the interests of an adult; and
- (3) To encourage the development of child care services for minor children in a safe, healthy, and home-like environment.

Id. 9.5-102(b).

In furtherance of these policies, the OCC may summarily suspend a family child care home’s certificate of registration if it finds that the public health, safety, or welfare imperatively requires emergency action. Md. Code Ann., State Gov’t § 10-226(c)(2)(i) (2014).¹ That suspension may continue for a period of not more than forty-five calendar days. COMAR 13A.15.13.06A.

The purpose of the emergency suspension is to allow the OCC up to forty-five days to conduct an investigation of a family child care home based on information the OCC has received about the home or residents of the home. The forty-five day period allows the OCC time to conduct a thorough investigation and protects children until the OCC can determine what further action, if any, is warranted. The purpose of this hearing is not to make a final decision regarding the alleged violations. The issue is whether the OCC had a reasonable basis to believe the Appellant committed them and, if so, to determine whether a suspension is warranted. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (due process is satisfied by a predetermination opportunity to respond coupled with post-termination administrative procedures as provided by law). Any doubts about the safety of the children in a family child care home are resolved in favor of the children, not the adult provider. Md. Code Ann., Educ. § 9.5-102(b)(2) (2018).

¹ “The filing of a hearing request may not stay an emergency action.” COMAR 13A.15.14.03C(5).

As the moving party, the OCC has the burden to prove that the emergency suspension is consistent with the law and regulations. The OCC must meet the burden by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009); *see Schaffer v. Weast*, 546 U.S. 49, 56 (2005). I have concluded that the evidence shows that the standard has been met for the emergency suspension.

The evidence is unrefuted that the children in the daycare Home were alone with no adult caregiver or an approved substitute present when Ms. [REDACTED] visited the Home. At first, the Appellant tried to convince Ms. [REDACTED] that her daughter, [REDACTED] was eighteen and an approved substitute, but when the Appellant was confronted with information that Ms. [REDACTED] was able to confirm through the Child Care Information System, the Appellant relented and acknowledged that her daughter was only sixteen and not an approved authorized substitute. A substitute is an adult who is responsible when the provider is absent. COMAR 13A.15.01.02B(31). A substitute must be eighteen-years-old or older. COMAR 13A.15.06.03(D)(1). As such, [REDACTED] cannot have responsibility for supervising a child in care. COMAR 13A.15.08.01A.

The failure of the Appellant to either be in the Home at all times while performing daycare services or having an approved substitute in her absence placed the children in her care at risk. First, there was no one authorized within line of sight of the infant. The child could have choked, fallen from the crib, or any number of other dangerous situations could have occurred with no one present to observe the infant or able to provide assistance in the event of an emergency. The Appellant acknowledged during her testimony that she was wrong to have left the Home to take her son to the pool without an approved substitute to watch the children at the Home. She was obviously shaken and distraught during her testimony over her lapse of judgement; however, it is precisely this lack of judgement that placed the children in her care at great risk. A sixteen-year-old, who was upstairs while an infant was sleeping, is not in a position

to provide any aid if, for example, the infant choked on something. First, she would likely not hear anything if she was upstairs and second, she was not in the line of sight. Finally, even if she discovered, for example, that the child was choking, she may not have known how to provide emergency care. Additionally, the OCC maintains a list of authorized substitutes for every family child care provider. In order to be approved, a person must submit to an investigation by the OCC of his/her fitness to care for children, including a check of the child abuse and neglect registry. COMAR 13A.15.06.03D(3).

The Appellant's failure to either remain at the Home, or have an authorized substitute in the Home caused the Appellant to violate the most important regulation governing daycare providers, that is, ensuring the safety and security of each child at all times. COMAR 13A.15.07.7A. The Appellant does have an approved substitute, her daughter, [REDACTED] but she was not present in the Home at the time the Appellant left the Home to take her son to the pool.

The Appellant committed another violation of her Certificate by using her basement for the children in her care to use for playtime. The Appellant knew, at the time, and acknowledged during her testimony, that the basement could not be used for daycare because it was specifically excluded from the Certificate. The basement did not satisfy applicable fire codes. The basement has only one means of ingress and egress and the fire code requires at least two. The Appellant testified that she is currently undertaking a construction project to install another means of egress and will seek modification of her Certificate, once complete, to allow children to play in her basement. She did not know whether a building permit was obtained before starting construction. The Appellant's reason for allowing children to play in the basement when it was not authorized was due to excessive heat on the first floor of her Home. She allowed children to play in the basement because it was cooler than the first level of the Home. Again, the Appellant

exercised poor judgment in allowing children to play in her basement. Fire codes are promulgated for the protection of the public. By not having two means of egress from the basement, the Appellant placed children at risk in the event of a fire that blocked the only route of escape. This is a very important safety concern. There are no exceptions in the Certificate to allow children to play in an area that is not authorized. By allowing children to play in the basement caused the Appellant to violate COMAR 13A.15.05.04A.

Ms. [REDACTED] found numerous other violations during her inspection. She observed two emergency forms that were not updated annually in violation of COMAR 13A.15.03.02A. There was an empty soap bottle and no trash liner in a trashcan in the bathroom, a violation of COMAR 13A.15.05.03B. The Appellant testified that the soap dispenser had just spilled, but nevertheless, it was empty and of no use to children until it was refilled. Having soap available to wash a child's hands after toileting is an important hygiene matter and prevents the spread of germs.

A child's health inventory form was not completed, signed and dated by the child's physician in violation of COMAR 13A.15.03.02A. If a child is transported to a hospital, this form travels with the child so that medical personnel will have a history before initiating a treatment plan for the child. Not having a history could result in wasted precious time for a child brought to an emergency room.

There were two missing written agreements between the Appellant and two of the children's parents. These documents are important because they set forth the responsibilities and obligations of both a child's parents and the daycare provider. This resulted in a violation of COMAR 13A.15.03.03A.

The Appellant was unable to locate when the last fire/emergency drill was performed. This is important to verify that a drill had taken place and how recent it had occurred. Practice for an emergency is essential to make sure that escape is conducted efficiently and expeditiously

as well. Failure to provide the requested information resulted in a violation of COMAR

13A.15.03.03F. The emergency escape route was not posted in violation of COMAR

13A.15.10.01B(1). Posting assists emergency responders to understand the layout of the Home

so they can respond quickly to an emergency without having to guess where particular rooms are located within the Home.

Finally, there were missing items, such as a thermometer, gauze roll and pads, safety pins, tweezer and fragrance free soap in the Appellant's safety kit in violation of COMAR

13A.15.10.01H(1). These items are necessary in the event of an incident that requires immediate first aid that can be treated by the Provider. Not having these items limits the Appellant's ability to address and treat minor medical issues that may arise.

The Appellant provided three letters of reference from parents of children that are currently, or have recently been in her care. There is no doubt that these parents are sincere in their praise of the Appellant. I also have no doubt that the Appellant truly cares for the children in her care and that she provides a nurturing and loving environment for the children. I am troubled, however, by the Appellant's blatant disregard of the conditions contained in the Certificate. She was remorseful and acknowledged the violations, but she apparently did not appreciate the risk to the children in her care when she left the Home without an authorized substitute and allowed children to play in her basement. She knew these were violations of her Certificate, yet she decided to leave the Home anyway. The Appellant testified that her daycare program is her family's only source of income. While I sympathize that a suspension of her Certificate will likely cause a financial burden, there are simply no exceptions or excuses for failing to abide by applicable regulations and her Certificate.

The mission of the OCC to protect children is best served by a proactive approach to regulatory compliance. It is charged to "encourage the development of child care services for

minor children in a safe, healthy, and home-like environment.” Md. Code Ann., Educ. § 9.5-102(b)(3). The law is clear that in order to protect children who are in the care of others doubts must be resolved in favor of the child “when there is a conflict between the interests of a minor child and the interests of an adult....” Md. Code Ann., Educ. § 9.5-102(b)(2). For all these reasons, I uphold the emergency suspension.

CONCLUSION OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the OCC properly suspended the Appellant’s family child care certificate of registration on an emergency basis, effective July 25, 2019, and that the emergency suspension shall remain in effect for no more than forty-five days from that date. Md. Code Ann., Educ. § 9.5-102(b)(2) & (3)(2018); Md. Code Ann., State Gov’t § 10-226(c)(2) (2014); COMAR 13A.15.13.06A.

ORDER

I **ORDER** that the OCC’s emergency suspension of the Appellant’s family child care certificate of registration is **AFFIRMED** for a period not to exceed forty-five days from July 25, 2019.

August 9, 2019
Date Decision Issued

Signature Appears on Original

Stuart G. Breslow
Administrative Law Judge

SGB/cj
#181465

REVIEW RIGHTS

This is the final decision of the Maryland State Department of Education. A party aggrieved by this final decision may, within thirty (30) days of the date of this decision, file a petition for judicial review with the Circuit Court for Baltimore City, if any party resides in Baltimore City or has a principal place of business there, or with the circuit court for the county in which any party resides or has a principal place of business. Md. Code Ann., State Gov't § 10-222(c) (Supp. 2018); Md. Rules 7-201 through 7-210. A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. The Office of Administrative Hearings is not a party to any review process.

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