



STATE OF WISCONSIN
Department of Children and Families

In the Matter of

Doors to Explore Family Child Care

PROPOSED DECISION

ML-09-0445

A petition was filed on November 24, 2009, under Wis. Stat. § 227.44. The petitioner contests the payment refusal action reflected in the notice issued by the Wisconsin Department of Children and Families (Department) on November 14, 2009. The hearing was begun on June 16, 2010 with the Department's case, and then was continued and completed with the petitioner's case on September 8, 2010 at the Division of Hearings and Appeals (DHA) in Madison, Wisconsin. Exhibit P-4 was withdrawn by petitioner's attorney.

The record was held open for consecutive written closing arguments with the Department's closing argument due by September 29, 2010, and the petitioner's argument due by October 20, 2010. Both written closing arguments were timely submitted to DHA (with a copy sent to the other party). The Department's closing argument is marked as Exhibit as R-14, and is received into the hearing record. The petitioner's counsel, Attorney Miller Watson's closing argument is marked as Exhibit P-10, and is received into the hearing record.

The issue for determination is whether the Department correctly refused to make family child care provider payments to the petitioner from the Wisconsin Shares Program.

There appeared at that time and place, the following persons:

PARTIES IN INTEREST:

Petitioner: Dorris Ollie
Doors to Explore Child Care
203 E. Chambers Street
Milwaukee, WI 53212

By: Attorney Felicia Miller-Watson
Miller-Watson Law Office, LLC
2602 West Silver Spring Drive, lower
Glendale, WI 53209

Respondent:
Department of Children and Families

By: Attorney Nancy Wettersten
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, WI 53703

Administrative Law Judge:
Gary M. Wolkstein
Division of Hearings and Appeals

ISSUES FOR HEARING

The general issues for adjudication are as follows:

- I. Whether there was a reasonable suspicion that petitioner had violated provisions of the Wisconsin Shares Program.
- II. Whether the Department appropriately exercised its discretion in refusing to make child care provider payments to petitioner.

FINDINGS OF FACT

1. Doors to Explore Family Child Care Center (Doors to Explore) is located at 230 E. Chambers Street in Milwaukee, WI 53212. It was licensed as a family child care center with a probationary license from August 24, 2009 until the expiration of the probationary license on February 28, 2010. See Exhibits R-1, R-2, and R-8.
2. The petitioner, Dorris Ollie, is the owner and licensee of Doors to Explore Exhibit R-1.
3. The petitioner has eight children of her own who are ages 14, 13, 9, 8, 1, and twins at 10 months. The location of where some or all of her children resided during day care hours is questionable. See Exhibit R-14.
4. The license for that facility allows it to care for a maximum of 8 children and to be in operation from 6 AM to 11 PM, seven days per week, for children ages 6 weeks to through 12 years of age. Exhibit R-2.
5. During September, 2009, petitioner sought Shares reimbursement for 100% attendance for all children authorized for the center. Such perfect attendance does not appear likely. Bates testimony and Exhibit R-7, pg1.
6. During the first two weeks of November, 2009, petitioner billed the Shares program for full-time care for three school-aged children. Bates testimony and Exhibit R-7, pg.3.
7. The Department's contracted investigator, Ken Kelly of O'Brien & Associates made a site visit to Doors to Explore on October 26, 2009 at 5:15 p.m. See Exhibit R-5.
8. Doors to Explore was closed due to influenza on October 26, 28, 29, and 30, 2009, but was open on October 27, 2009. See Exhibit P-1.

9. On October 30, 2009, licensing specialists, Jennifer Brees and Judie Wellnitz conducted a site visit of the petitioner's facility and obtained petitioner's attendance records from August 23, 2009 through October 30, 2009. Brees testimony and Ex. R-6, pg 2. Those records indicated some billing errors: a) the parent who worked at McDonalds worked the day shift, but her children were at times reported in day care during the second shift; and b) "Family G" included a parent employee working second shift, but her children were reported there from 3 p.m. to 10 pm at times the mother was not working at the center and was not in any other approved activity. Hietala testimony and Ex. R-6.
10. Exhibit R-9 is provider's daily attendance records from August 23, 2009 through October 31, 2009.
11. Exhibit R-10 is provider's attendance report forms, dated August 23, 2009 through October 31, 2009.
12. On November 14, 2009, the Department issued a notice to the petitioner. That notice declared that the Department was suspending Doors to Explore's Wisconsin Shares payments from November 14, 2009 forward based upon reasonable suspicion that the provider had violated provisions of the Wisconsin Shares program. The authorizing statute for the action was identified as Wis. Stat. §49.155(7)(d). Exhibit R-3. The petitioner then appealed to the Division of Hearings and Appeals (DHA).
13. The Department has not issued Wisconsin Shares payments to the petitioner from November 14, 2009 forward.

DISCUSSION

The petitioner is a child care provider and owner/operator of a family child care center. Some parents of the children in the petitioner's care are eligible for the Wisconsin Shares Child Care subsidy Wisconsin Shares due to low income. On November 14, 2009, the Department issued a notice to the petitioner declaring that the Department was refusing to make Wisconsin Shares payments to the petitioner from November 14, 2009, forward because it had a reasonable suspicion that petitioner had violated provisions of the program.

At issue in this case is whether or not the Department acted within its discretion in refusing to pay petitioner Wisconsin Shares payments based on a reasonable suspicion that she had violated provisions of the program.

The Department initiated its action by relying upon the following statutory provision at Wis. Stat. §49.155(7)(a)(4).

(7) REFUSAL TO PAY CHILD CARE PROVIDERS. (a) The department or the county department ... may refuse to pay a child care provider for child care provided under this section if any of the following applies to the child care provider, employee or person living on the premises where child care is provided:

(1) The person has been convicted of a felony or misdemeanor that the department or county department determines substantially relates to the care of children or the operation of a business.

- (2) The person is the subject of a pending criminal charge that the department or county department determines substantially relates to the care of children.
- (3) The person has been determined under s. 48.981 to have abused or neglected a child.
- (4) **The department or county department reasonably suspects that the person has violated any provision under the program under this section or any rule promulgated under this section.**

This statute provides a mechanism for the Department to discontinue sending taxpayer funds to child care providers if the Department has a reasonable suspicion that the provider is violating provisions of the program. It should be noted citations to provisions of the Wisconsin Statutes and the Wisconsin Administrative Code relate to provisions that were operative as of November 14, 2009, the date of the Department's action. The legislature amended section 49.155(7) with an effective date of February 1, 2010. One effect of this amendment was to re-designate former subparagraph (7)(a)4 as subparagraph (7)(b)4.

Reasonable suspicion has been described as “something more than an inchoate and unparticularized suspicion or hunch.” As a level of suspicion it is considerably less than proof of wrongdoing by a preponderance of evidence and “obviously less demanding than probable cause.” To be “reasonable,” the standard requires that the suspicion be supported by articulable facts that wrongdoing “may be afoot,” even if probable cause is lacking. *United States v. Sokolow*, 490 U.S. 1, 7 (1989). If there is a particularized and objective basis for suspecting violations, then there is a reasonable suspicion. *See Ornelas v. United States*, 517 U.S. 690 695 (1996), citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

If the Department is able to articulate facts to show there is an objective basis for suspecting that the child care provider has been, or is, violating any provision of the Wisconsin Shares program, then it is appropriate, under Wis. Stat. § 49.155(7)(d) (as created by 2009 Act 28, effective July 1, 2009) to refuse to pay the provider. Payments may be suspended while that suspicion is being investigated. Should the suspicion prove to be unwarranted, then payments should be resumed. Should the suspicions be confirmed, then further actions—such as recouping overpayments; license suspension; and in some cases, referral for criminal investigation—may be pursued.

In the present case, the Department's case was rather weak, but it did establish the low level of “reasonable suspicion” that the provider was violating provisions of the program. The Department's witnesses and its exhibits established that the petitioner had violated some provisions of the attendance record keeping and reporting requirements of the Shares Program.

During her cross examination of Mr. Hietala, Attorney Miller-Watson did undermine some of the reliability of his testimony by establishing that Mr. Hietala did not contact the provider, parents or any employees of Doors to Explore to interview them, and that his investigation was very limited in time period. In his testimony, Mr. Hietala admitted that he did not complete a thorough investigation of the petitioner's billing records during the entire period in question in this case. However, such testimony does not undermine the other parts of the Department's case to establish reasonable suspicion that the petitioner violated some rules and policies of the Shares program, as indicated in Findings of Fact # 5, #6, #8 and #9 above.

The Department established that petitioner at times was billing the Department from the child's authorized child care schedule (enrollment based), rather than from the actual accurate attendance records. The petitioner in her testimony was unable to refute the Department's case. As a licensed

child care provider, petitioner had an obligation to maintain accurate records of the children in her care, and submit accurate billing statements to the Shares Program for payment. Specifically:

The licensee shall maintain a current, accurate written record of the daily attendance and date of birth of each child for the length of time the child is enrolled in the program. The actual time of arrival and departure for each child shall be recorded if hours of arrival and departure vary among children.

Wis. Admin Code DCF 251.04(6)(b).

The Department witnesses' testimony and exhibits confirmed some inaccurate attendance record keeping and some discrepancy between petitioner's child care attendance records and her billing. During the hearing, petitioner's testimony was rather vague, and she responded with generalities to the Department's allegations of violations. The petitioner was unable to refute with specific testimony or evidence the instances of inaccurate billing asserted by the department.

Furthermore, the petitioner's credibility was an important issue at the hearing. The Department's attorney undermined the petitioner's credibility in two specific situations. First, there was an issue at the hearing as to whether petitioner timely and properly notified her licensing workers that she was closing her day care during a period in October, 2009. The petitioner offered Exhibit P-1 to demonstrate that she timely notified her licensing workers and her children's parents **on October 25, 2009** that her child care center would be closed due to an outbreak of the influenza illness on October 26, 28, 29, and 30, 2009 (but not October 27th). However, Attorney Wettersten corrected argued that if Exhibit P-1 was not backdated by the petitioner how did she know on October 25, 2009 that she would be able to work and not need to close the facility on October 27, 2009? The petitioner was unable to offer any explanation for the contradiction. Ms. Wettersten argued that petitioner backdated the October 25, 2009 letter when she already knew that her day care had been open on October 27th.

Second, Ms. Wettersten argued convincingly that the petitioner's description of her childcare routine, and the manner in which she cared for her own eight children was not credible. The petitioner asserted that her children were cared for by her mother at her mother's house during day care hours. The petitioner alleged that her children (including infants) would leave her home before 6:00 a.m., seven days per week, remain at her mother's home, and not return to petitioner's home until 11:00 p.m. when the day care closed. That explanation is not believable.

Based on the hearing testimony and evidence, there is some evidence that petitioner was inaccurately submitting some attendance records. Maintaining and submitting false attendance records is a violation of the program. Billing Wisconsin Shares for children during times when the children are not in care, is a violation of the program. In light of this limited evidence, I find that petitioner violated some aspects of the Shares programs. Therefore, the Department had a reasonable suspicion and was justified in refusing payments to petitioner.

A simple reading of the statute would suggest that the Department may refuse to pay for as long as the Department reasonably suspects that the provider has violated the rules. If and when the suspicion is eliminated, the Department may start making payments for authorized care that was provided. However, in this case, the petitioner's probationary license expired on February 28, 2010.

CONCLUSIONS OF LAW

1. The Department had a reasonable suspicion that petitioner violated provisions of the program.
2. The Department's refusal to make Wisconsin Shares payments was consistent with Wis. Stat. § 49.155(7)(d). and within its discretion.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby Dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making. The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2011.

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals

Cc: