



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

M.E.E.L.S. House of Compassion

ML-07-0154

Pursuant to a petition filed on July 3, 2007, under sec. 227.42, Wis. Stats. and sec. 49.45(5), Wis. Stats., to review a decision by the Department of Children and Families (f/k/a the Department of Health and Family Services) to revoke the petitioner's group foster care license, a hearing was held on June 8, 2009. The record was held open until August 3, 2009 for the submission of simultaneous briefs to the Division of Hearings and Appeals (DHA). The parties timely submitted their briefs to DHA.

In her prior DHA appeal, the petitioner appealed the county agency's substantiation of neglect in her prior CAPTA appeal in Case No. ML-07-0209 before ALJ Nancy Gagnon. The underlying facts in that prior CAPTA appeal were basically the very same facts as the instant group foster home revocation case. In her decision in ML-07-0209 issued September 18, 2008, ALJ Gagnon concluded that: "1) The petitioner failed to provide adequate supervision for the child K.O. from April 13-17, 2007; and 2) The petitioner's supervisory failures during the April 13-17, 2007 period did not seriously endanger K.O.'s physical health, and hence did not constitute "neglect" under Wis. Stats. §48.981(1)(d). See Exhibit R-6.

The Department's exhibits from that CAPTA hearing in ML-07-02029 are indicated as Exhibits 1-5, and the Department's supplemental exhibits in the instant case are marked as Exhibit R6-R-9. The petitioner's exhibits from the CAPTA hearing are Exhibits A-G. The petitioner's supplemental exhibits for the instant appeal are Exhibit H, I and J. The admissibility of Exhibits R-7 was challenged during the hearing by Attorney Lauten, and Attorney Bursinger withdrew Exhibit R-7.

There were four prehearing conferences in the instant case prior to the June 8, 2009 hearing. In the March 17, 2009 Final Prehearing Report and at the start of the June 8, 2009 hearing, ALJ Wolkstein confirmed that he would take administrative notice of the "Findings of Fact" reached by ALJ Gagnon in her decision in petitioner's CAPTA Case No. ML-07-0209, and that those findings of fact and the initial exhibits (Exhibits 1-5) would be incorporated into the hearing record of this revocation appeal. The parties in the instant appeal did not object to or contest the adoption and incorporation of those findings of fact or exhibits made by ALJ Gagnon in ML-07-0209.

The issues for determination in the instant appeal are whether the Department correctly revoked the petitioner's group foster care license for M.E.E.L.S House of Compassion based upon: a) the licensee or her agent committing an action or creating a condition relating to the operation or maintenance of the group foster home that directly threatened the health, safety and welfare of a child under her care; and/or b) petitioner or her employees committing actions that constitute a substantial failure by the applicant or employee to protect and promote the health, safety and welfare of a child as required by WI Stat §48.68(1).

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

PARTIES IN INTEREST:

Petitioner:

Audrey White
M.E.E.L.S House of Compassion
8530 W. Denver
Milwaukee, WI 53212

By: Attorney Patricia A. Lauten
Jeffrey S. Hynes Associates, S.C.
2300 N. Mayfair Road, Suite 390
Milwaukee, WI 53226

Respondent:

Wisconsin Department of Children and Families
201 East Washington Avenue
Madison, WI 53708-8916

By: Attorney Debra Bursinger
Office of Legal Counsel
201 East Washington Avenue, Rm G200
PO Box 8916
Madison, WI 53708-8916

Administrative Law Judge:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner, Audrey White, is a resident of Milwaukee, WI.
2. The petitioner has been licensed to operate a group foster home, named M.E.E.L.S. House of Compassion, which is located at 3179 N. Richards Street, Milwaukee, WI since October, 2005.
3. Foster child K.O., age 15, was placed in the petitioner's group home on April 9, 2007. K.O. came into the child welfare system over 1½ years ago as a result of alleged child neglect and physical abuse by her biological mother (Mother). The Mother has alcohol/drug abuse problems and has been arrested for drug-related problems. K.O. was removed from another group home in March, 2007, because she frequently ran away. The child has a history of depression, running away, occasional marijuana use, is impulsive, manipulative and sexually precocious, and has other emotional problems.
4. K.O. was appropriately "checked in" at the petitioner's group home on April 9, 2007. An information packet was provided to the petitioner by a social worker on that date. The packet did not contain the court order that declares that K.O. is not to have any unsupervised contact with her mother. Petitioner's Exhibit C. K.O.'s regular caseworker, Heather Wright, advised the petitioner on April 9 that K.O. was not to be granted any overnight passes for the next week. On the home's intake form, the Bureau supplied four names with telephone numbers that were listed as appropriate, supportive contacts for the petitioner. One of those contacts was "Grandpa," a non-relative, with a Milwaukee-area telephone number. Petitioner's Exhibit D. Before April 13, 2007 the petitioner's group home

received updated packet materials that stated that K.O. is not to have unsupervised face-to-face contact with her mother.

5. On April 13, 2007, the petitioner registered K.O. at her new school in the morning. Thereafter, K.O. asked the petitioner if she could go to Grandpa's house for the afternoon. K.O.'s older sister was going to be present at Grandpa's, and K.O. wished to visit her. The petitioner telephoned K.O.'s worker, Ms. Wright, and learned that she was out of the office until April 16. The petitioner then decided to drop K.O. off at Grandpa's house, and instructed her to call the petitioner later that day when she was ready to be picked up. The petitioner drove K.O. to a house at 80th and National in West Allis, per K.O.'s direction. K.O. was dropped off at this location, and entered the house. The petitioner did not observe who let her into the house, and did not get out of her vehicle to make contact with the house occupant before driving away. Unbeknownst to the petitioner, K.O.'s mother was in the house.
6. Later on April 13, 2007, K.O. called the petitioner and advised that there was a family emergency. Specifically, K.O.'s biological grandfather was near death in Oconto Falls, and was only expected to live another 24 hours. The petitioner confirmed with the Oconto Falls grandmother that this was so. K.O.'s sister Denise asked to take K.O. with her to Oconto Falls. The petitioner tried to telephone Ms. Wright for guidance, but again received information that Wright was away until April 16. The petitioner told Denise that she could take K.O. to Oconto Falls, but that she had to be returned the next day. No one disclosed to the petitioner that the Mother was riding in the car with K.O. Denise rode with K.O. and the Mother to Oconto Falls, where the grandfather was gravely ill. Denise did not return K.O. the next day; rather, they remained in Oconto Falls. The petitioner made daily telephonic contact with Denise or other adult family members (not the Mother, however), who said that K.O. would be returned by April 17. Denise returned K.O. to the petitioner on April 17, 2008. K.O. was not physically harmed during this incident.
7. K.O. later ran away from the petitioner's group home, and has since been placed elsewhere.
8. On April 18, 2007, a statutory reporter filed a report against the petitioner. The Department's agent, Community Impact Programs Inc. (CIP), investigated the report of alleged maltreatment of K.O. CIP concluded that the child was maltreated by the petitioner, and so advised her in a letter dated June 14, 2007. Exhibit 3. The petitioner requested a CAPTA Review. On August 3, 2007, CIP issued a notice to the petitioner advising that the "substantiated" maltreatment/neglect determination was upheld. Exhibit 5. The petitioner filed an appeal with DHA to contest that decision.
9. In the decision in petitioner's CAPTA neglect case (ML-07-0209) issued September 18, 2008, ALJ Gagnon concluded that: "1) The petitioner failed to provide adequate supervision for the child K.O. from April 13-17, 2007; and 2) The petitioner's supervisory failures during the April 13-17, 2007 period did not seriously endanger K.O.'s physical health, and hence did not constitute "neglect" under Wis. Stats. §48.981(1)(d). See Exhibit R-6 (CAPTA decision).
10. On June 26, 2007, the Department issued a Notice of Revocation of Group Foster Home License for M.E.E.L.S. which is located at 3179 N. Richards Street, Milwaukee, Wisconsin. That notice included three separate reasons for the Department's decision to revoke the petitioner's group foster home license based upon the licensee or her agent creating conditions relating to the operation of the group foster home that directly threatened the health, safety and welfare of a child under her care in violation of WI Stat § 48.715(4)(c), and committing actions that constitute a substantial failure by the applicant or employee to protect and promote the health, safety and welfare of a child as required by WI Stat §48.68(1). See Exhibit R-1.

11. Prior to the June 8, 2009 hearing, the Department withdrew reasons #1 and #3 from its June 26, 2007 Notice of Revocation as bases for the group foster home revocation as a result of ALJ Gagnon's decision in petitioner's ML-07-0209 CAPTA appeal. The remaining sole basis for DCF's action to revoke the petitioner's group foster home license was indicated in reason #2 as stated in Exhibit R-1.

DISCUSSION

In general, licensing is done to protect the public in regard to a service or product. In this case, the licensing activity is the operation of a group foster home for children who often have histories of behavior problems, substance abuse problems, and/or physical and sexual abuse problems. The goal of this group foster home is the care and protection of a vulnerable population. Thus, group foster homes are licensed because the children who are placed there are not competent to protect themselves, and society expects them to be well served and protected. (See WI Admin Code, § DCF 57.01.) It is the group foster home operator who, as a responsible and mature adult, must provide care that will protect and nurture these teenagers and their very young children. It is important to remember that the holding of a license is not a right or an entitlement to care for children, it is a *privilege* granted by the Department. It is essential that group foster home licensee demonstrate that they are fit and qualified to care for children.

The Department has been granted the discretionary power to revoke a group foster care license under certain circumstances. This power is delineated in Chapter 48 of the Wisconsin Statutes, and three separate Chapters of the Wisconsin Administrative Code. WI Stat § 48.715(4), provides for the revocation of a license for a day care, foster home, treatment foster home, group home, shelter care facility, child welfare agency and/or a county department.

This section, in the parts relevant here, states as follows:

If the department provides written notice of revocation and the grounds for revocation as provided in sub. (4m) and an explanation of the process for appealing a revocation under this subsection, the department may revoke a license issued under s. 48.66(1)(a) or a probationary license issued under s. 48.69 for any of the following reasons:

****(Note: irrelevant sections (a), (d) & (e), omitted here.)

(b) The licensee or a person under the supervision of the licensee has committed a substantial violation, as determined by the department, of a rule promulgated under s. 48.67, a provision of licensure under s. 48.70(1) or an order under this section.

(c) The licensee or a person under the supervision of the licensee has committed an action or has created a condition relating to the operation or maintenance of the child welfare agency, shelter care facility, group home or day care center that directly threatens the health, safety or welfare of any child under the care of the licensee.

(Emphasis added).

The Department promulgated rules pursuant to the authority to do so under WI Stat § 48.67, for the regulation of licensing duties under § 48.66, Stats. The purpose of this chapter is to protect and promote the health safety and welfare of children placed in group homes. § DCF 57.01, "Authority and purpose." The Department has the power to revoke a group foster care license under WI Stat § 48.715(4) where it determines, in its discretion, that §(b) and/or §(c), above, applies due to a violation of rules or licensing

provisions, or the commission of acts threatening the health, safety or welfare of any child under the licensee's care. In terms of group foster homes, more specificity may be found at WI Admin Code, § DCF 57.56, "License Revocation."

Section 48.68(1), Wis. Stats., stated that the Department (DCF), **in determining whether to issue or continue a license may consider "any action by the applicant, or by an employee of the applicant, that constitutes a substantial failure by the applicant or employee to protect and promote the health, safety and welfare of a child."** (Emphasis added).

In a hearing concerning the propriety of a revocation of a group foster home license, the Department has the burden of proof to establish that the action taken was proper given the facts of the case. The petitioner must then rebut the department's case and establish facts sufficient to overcome the Department's evidence that it took the correct action in determining that the revocation of the license was required.

In this case, a central issue for determination is whether the Department correctly issued a June 25, 2007 notice to the petitioner revoking the petitioner's group foster care license for M.E.E.L.S House of Compassion based upon the licensee or her agent creating conditions relating to the operation of the group foster home that directly threatened the health, safety and welfare of a child under her care. The prehearing and hearing records are clear that basically the very same facts were the basis for the CAPTA neglect case as are the basis for the group foster home revocation action. In the decision in petitioner's CAPTA neglect case (ML-07-0209), ALJ Gagnon concluded that: "1) The petitioner failed to provide adequate supervision for the child K.O. from April 13-17, 2007; and 2) The petitioner's supervisory failures during the April 13-17, 2007 period did not seriously endanger K.O.'s physical health, and hence did not constitute "neglect." However, in that CAPTA case, "neglect" is defined at Wis. Stats. §48.981(1)(d):

(d) "Neglect" means failure, refusal or inability on the part of parent, guardian, legal custodian or other person exercising temporary or permanent control over a child, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

This revocation action has been zealously contested by petitioner's attorney both during the four prehearing conferences and during the hearing. However, a fundamental issue in this case appears to be whether the petitioner's failure to provide necessary and adequate supervision for the child K.O. from April 13-17, 2007 establishes the factual and legal basis for the Department to correctly revoke the petitioner's group foster home license under WI Stat § 48.715(4)c), even if those actions did not meet the definition of "neglect" for purposes of a CAPTA appeal in s. 48.981(1)(d), Wis. Stats. because the petitioner's failures did not "seriously endanger KO's physical health."

During the hearing and in its brief, the Department presented three central arguments for why the Department correctly revoked the petitioner's group foster care license based upon the licensee or her agent committing an action or creating a condition relating to the operation of the group foster home that directly threatened the health, safety and welfare of a child under her care (arguments #1 & #2); or that constituted a substantial failure by the applicant or employee to protect and promote the health, safety and welfare of a child (argument #3): 1) Audrey White's action in dropping KO at a residence without verifying who was present at the address directly threatened the health, safety and welfare of KO; 2) Audrey White's actions which allowed KO to have continued contact with her mother from April 13-17, 2007 directly threatened the health, safety and welfare of KO; and 3) Audrey White's actions in dropping KO off at a residence without verifying who was present, in allowing KO to have overnight passes and contact with her mother between April 13-17, in not retrieving KO on April 14 from Oconto Falls, and in not informing BMCW of KO's whereabouts were substantial failures to protect and promote the health, safety and welfare of KO. See Attorney Bursinger's brief.

As indicated in Finding of Fact #3 above, K.O., age 15, was placed in the petitioner's group home on April 9, 2007. K.O. came into the child welfare system years ago as a result of alleged child neglect and physical abuse by her biological mother. KO's mother has alcohol/drug abuse problems and has been arrested for drug-related problems. K.O. was removed from another group home in March, 2007, because she frequently ran away. The child has a history of depression, running away, occasional marijuana use, is impulsive, manipulative and sexually precocious, and has other emotional problems.

The underlying legal and factual issue of KO's health, safety and welfare must be viewed in this revocation case in the overall context of this very vulnerable 15 year old with all the emotional and familial problems described in the above paragraph. The Department established that KO was placed at M.E.E.L.S. on April 9, 2007 and that prior to April 13, 2007, Audrey White was provided with information on KO that included her history of abuse and neglect at the hands of her mother, a history of sexualized behavior with older men, physical abuse by men and boys, drug use, and a history of truancy and running away. See Exhibit R-6, and Exhibits C, D, and 4.

During the hearing in her brief, Attorney Lauten zealously represented the petitioner. In the conclusion of her brief, Ms. Lauten argued that the Department's decision to issue the June 26, 2007 revocation notice and continue with the revocation action after ALJ Gagnon's findings and order lacked the requisite evidence and as a result was arbitrary and capricious. Attorney Lauten's brief, page 14. Ms. Lauten cited to Westring v. James regarding the definition of "capricious" as a "decision is capricious if it is so unreasonable as to shock the sense of justice and indicate lack of fair and careful consideration." Westring v. James, 71 Wis. 2d 462, 477, 238 N.W.2d 695, 702-703 (1976). Ms. Lauten then cited to Olson v. Rothwell regarding the definition of "arbitrary" – an arbitrary action "is the result of an unconsidered, willful and irrational choice of conduct and not the result of the winnowing and sifting process." Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N.W.2d 86 (1965).

Ms. Lauten also argued that the Department was incorrectly charging Audrey White with committing an action or creating a condition relating to the **operation** of the group home directly threatening the health, safety and welfare of any child under the care of the licensee per 48.715(4)(c), Wis. Stats. She proceeded to dissect the term, "operation" in regard to whether the petitioner's actions in this revocation case applied to the "operation" of the group foster home. She also asserted that the petitioner's actions did not violate the transportation policy established by M.E.E.L.S or any other policy of the group foster home. Such argument while appearing to undermine the Department's case under the microscope of legal definitional argument did not undermine the Department's overall case for petitioner's violation of 48.715(4)(c), Stats.

Attorney Lauten also challenged the meaning of "substantial" in the Department's contention that the petitioner's actions constituted a **substantial** failure by the applicant or employee to protect and promote the health, safety and welfare of a child per Section 48.68(1), Wis. Stats. Ms. Bursinger responded in her brief that the very purpose in placing a child at a group foster home is the child's need for increased supervision and a safe environment. The fact that petitioner failed to provide any supervision to KO between April 14-17 is a "substantial" failure to protect KO when supervision is the very purpose of the placement.

As noted above, one of Attorney Lauten's central arguments was that the Department's decision to issue the revocation notice and continue with the revocation action after ALJ Gagnon's decision was arbitrary and capricious. The petitioner's representative also asserted that there was no substantial evidence to support the revocation, and as a result the revocation case was so clearly unfair that an award of attorney fees was deserved. Petitioner's brief, page 15. The issues of whether petitioner committed an action threatening KO's safety and welfare or created a substantial failure to protect and promote KO's safety and welfare were indirectly addressed and analyzed as petitioner's failure to provide necessary supervision for KO from April 13,-17, 2007 by ALJ Gagnon in pertinent part of the Discussion Section of her decision in ML-07-0209:

. . . I agree that the petitioner displayed a significant lapse in judgment when she dropped off a manipulative, run-away prone teen girl outside an unfamiliar address. The petitioner should have observed who was at the residence on April 13. The possible bad actors at an unfamiliar location were numerous: the Mother, drug sellers, K.O.'s adult boyfriend who is being investigated for sexual assault (Exhibit 2), or just someone who might facilitate another run away attempt.

The "drop-off" judgment error was then followed by a second error in judgment. K.O. called the petitioner, indicated that there was family emergency, and asked to be allowed to go to Oconto Falls with her older sister to visit a grandfather who was expected to die within 24 hours. The petitioner did confirm the grandfather's status, and unsuccessfully attempted to reach the caseworker for direction. She allowed K.O. to make the trip, unaware that the Mother was along for the ride. While in Oconto Falls, the child was under the same roof as the Mother, but other responsible adults were present at all times. When K.O. remained in Oconto Falls for more than the requested 24 hours, the petitioner maintained daily telephonic contact with adults in the household. The petitioner should have, of course, driven to Oconto Falls by the second day to retrieve this child, as she was not supposed to be away on an overnight pass, and the child had been given the opportunity for a last visit with the terminally ill grandfather. However, she did not do this, which was another error in judgment. I conclude that the petitioner failed to provide necessary supervisory care to K.O. from April 13 – 17, 2007.

(Emphasis added).

In her brief, Attorney Bursinger argued that given KO's history of drug use, sexualized behavior and abuse, running away, as well as impulsive, manipulative behavior, she was clearly at risk of harm due to petitioner's actions. The Department correctly concluded that petitioner's action in dropping KO at a residence without verifying who was present at that address directly threatened the health, safety and welfare of KO. Bursinger brief, pages 5 & 6. Furthermore, when petitioner failed to inquire whether KO would have contact with her mother in Oconto Falls, failed to retrieve KO when she was not returned on April 14, and failed to make contact with BMCW between April 13-16 to inform of the whereabouts of KO, those actions failed to promote or protect her welfare and safety. Given the past abuse and neglect suffered by KO at the hands of her mother, allowing KO to have direct contact with her mother over a five day period without proper supervision and without the knowledge and permission of BMCW directly threatened the health, safety and welfare of KO.

The hearing record establishes that KO was a vulnerable child with numerous behavior and emotional problems including impulsivity and manipulative behavior. The petitioner's actions with regard to KO between April 13-17, 2007 failed in several ways to protect this child. KO could have been physically or sexually abused by her mother or unknown men, could have used drugs, could have run away. Ms. Bursinger stated on page 9 of her brief:

. . . the entire purpose of placing her under Ms. White's care at M.E.E.L.S. was to have Ms. White supervise her activities, contacts and whereabouts. From April 13-17, 2007 Ms. White could not even be sure where KO was and did not know what types of activities KO engaged in or who she had contact with. This is complete contrary to the reasons KO was placed at M.E.E.L.S. To fail to be available to guide KO's activities, supervise her contacts and her whereabouts is to substantially fail to provide the services meant to be provided by Ms. White.

During the period of April 13-17, 2007, the petitioner engaged in actions or created conditions that directly threatened the health, safety and welfare of a child placed in her case. Attorney Lauten argued in part that KO did not suffer any physical harm during that period. However, Attorney Bursinger correctly argued that the Department is not required to demonstrate that KO suffered any physical harm. Instead, the Department may revoke a group foster home license if the petitioner has committed any action or created a condition that “directly threatens” a child’s health, safety and welfare. Based upon the entire hearing record, it is clear that petitioner’s actions failed to provide needed and required supervision to KO for a period of five days which was a direct threat to KO’s health safety and welfare. Moreover, petitioner’s actions substantially failed to protect and promote the health, safety and welfare of KO. The Department met its burden of proof to establish that it correctly revoked the petitioner’s group foster care license for M.E.E.L.S. House of Compassion based upon: a) the licensee or her agent committing an action or creating a condition relating to the operation or maintenance of the group foster home that directly threatened the health, safety and welfare of a child under her care; and b) petitioner or her employees committing actions that constitute a substantial failure by the applicant or employee to protect and promote the health, safety and welfare of a child as required by WI Stat §48.68(1). Accordingly, for the above reasons, I conclude that the Department’s June 26, 2007 revocation of the petitioner’s group foster home license was warranted and must be sustained.

CONCLUSIONS OF LAW

1. The Department correctly issued a June 25, 2007 notice to the petitioner revoking the petitioner's group foster care license for M.E.E.L.S House of Compassion based upon the licensee or her agent creating conditions relating to the operation of the group foster home that directly threatened the health, safety and welfare of a child under her care in violation of WI Stat § 48.715(4)(c).
2. The Department correctly revoked the petitioner’s group foster care license based upon the petitioner or her employees committing actions that constitute a substantial failure by the applicant or employee to protect and promote the health, safety and welfare of a child as required by WI Stat §48.68(1).

NOW, THEREFORE, it is **ORDERED**

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

REQUEST FOR A REHEARING

This is a final administrative decision. You may petition for an administrative rehearing by submitting a specific written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. This request must be received by the Division within 20 days of the date of this Order. The process for requesting a rehearing petition is contained in Wisconsin Statutes § 227.49.

APPEAL TO CIRCUIT COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of a rehearing, if you ask for one). For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, Second Floor, Madison, Wisconsin, 53703. The process for appeals to the circuit court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this _____ day of
March, 2010.

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