



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

PROPOSED DECISION

Walking With God Child Care

ML-09-0315

On September 29, 2009, the petitioner filed a hearing request pursuant to Wis. Stat. § 227.44. The petitioner contests the authorization/payment refusal action reflected in a notice issued by the Wisconsin Department of Children and Families (Department) on September 25, 2009. Following a prehearing conference, a hearing was conducted on February 2, 2010, at Milwaukee, Wisconsin.

The issue for determination is whether the Department had reasonable suspicion to refuse payments to the petitioner's family child care center effective September 25, 2009.

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

PARTIES IN INTEREST:

Petitioner:

Walking With God Child Care,
Tara Taylor
Walking With God Child Care
2431 North 46th Street
Milwaukee, WI 53210;

By:
Attorney Craig Johnson
Sweet and Associates, LLC
2510 East Capitol Drive
Milwaukee, WI 53211

Respondent:

Department of Children and Families, by

Attorney Eric Volkmann
Department of Children and Families
201 East Washington Avenue, 2nd Floor
Madison, Wisconsin, 53703

Also present: Attorney Nancy Wettersten, DCF; Peter Swinford, AFSCME; Jim Bates, Section Chief, Fraud Detection Investigation Unit, DCF; Beatrice Riojas, Supervisor, Bureau of Early Childhood Regulation, DCF; Robert Hietala, Senior Auditor, Fraud Detection Investigation Unit, DCF.

Administrative Law Judge:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner is licensed as a family child care provider, located in Milwaukee County, Wisconsin.
2. The Department of Children and Families (Department) began a fraud detection investigation unit (FDIU) to detect and investigate fraud in the Wisconsin Share Child Care subsidy program. The FDIU has what is called a 'red flag system' which looks at quantitative data to see if there are any 'red flags' which could point investigators to look at providers who have questionable practices. In this case, the FDIU reviewed records for petitioner's facility and found two red flags: the number of children of employees at the petitioner's center was questionably high and the number of children authorized for care versus petitioner's facility's capacity was questionably high.
3. On September 24, 2009 the Department made a visit to petitioner's child care facility. No one was at the facility and the Department was unable to gain access to the facility.
4. On September 25, 2009, the Department issued a letter to the petitioner. That letter declared that the Department was refusing to make CC payments from September 25, 2009, forward, "based on a reasonable suspicion that you have violated provisions of the Wisconsin Shares program." The violated provisions are not identified, and no factual allegations are made in the letter. The authorizing statute for the action at that time was Wis. Stat. §49.155(7)(d). See Exhibit R-3. The petitioner then appealed to this Division.

DISCUSSION

I. INTRODUCTION

The petitioner is a child care provider. Some parents of the children in the petitioner's care are eligible for the Wisconsin Shares child care (CC) subsidy due to low income. On September 24, 2009 the Department of Children and Families (Department) made a visit to petitioner's child care facility. No one was at the facility and the Department was unable to gain access to the facility. On September 25, 2009, the Department issued a notice to the petitioner declaring that the Department was refusing to make CC payments to the petitioner from September 25, 2009, forward.

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

(7) REFUSAL TO PAY CHILD CARE PROVIDERS. 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:

- (a) The person has been convicted of a felony or misdemeanor that the department or county department determines substantially relates to the care of children.
- (b) The person is the subject of a pending criminal charge that the department or county department determines substantially relates to the care of children.
- (c) The person has been determined under s. 48.981 to have abused or neglected a child.
- (d) *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.*

(emphasis added)

No code language has been promulgated to provide direction in the implementation of Wis. Stat. §49.155(7)(d). Less significantly, no published policy has been prepared by the Department regarding implementation of par. (d).

II. REASONABLE SUSPICION OF VIOLATION.

At hearing, the Department cited Wis. Stat. §§49.155(7)(4) (previously (7)(d) and (6m) at the time of refusal) as the basis for their finding of reasonable suspicion. The former is cited above. The latter provides that a provider must maintain records that show each child's arrival and departure times:

(6m) Child care provider recordkeeping. With respect to attendance records, a child care provider shall do all of the following:

- (a) Maintain a written record of the daily hours of attendance of each child for whom the provider is providing care under this section, including the actual arrival and departure times for each child.
- (b) Retain the written daily attendance records under par. (a) for each child for at least 3 years after the child's last day of attendance, regardless of whether the child care provider is still receiving or eligible to receive payments under this section.

Wis. Stat. §49.155(6m)(a) and (b).

The problem with citing to this statute section as the basis for the Department's reasonable suspicion is that at the time of their decision on September 25, 2009 to refuse payments to petitioner's facility, the facility's records were not the basis for the reasonable suspicion.

It is no secret that the Wisconsin Shares Child Care subsidy has undergone a lot of scrutiny in its efforts to run the program over this past year. Press coverage has grabbed headlines alleging serious fraud in the program by providers. The Department began a fraud detection investigation unit (FDIU) to detect and investigate fraud in the program. The FDIU has what is called a 'red flag system' which looks at quantitative data to see if there are any 'red flags' which could point investigators to look at providers who have questionable practices. In this case, the FDIU reviewed records for petitioner's facility and found two red flags: the number of children of employees at the petitioner's center was questionably high and the number of children authorized for care versus petitioner's facility's capacity was questionably high. According to the Section Chief for the FDIU, red flags initiate investigations and are not the basis for payment refusals, and no provider has been refused payment on the basis of red flags. Because of the red flags found in the petitioner's case, the FDIU set out to investigate the facility and conducted a site visit on September 24, 2009. No direct testimony was given by an investigator as to what was discovered at petitioner's facility on that date; however, the Section Chief described a site visit that day which was reported to him wherein petitioner's facility was closed, the blinds were closed and no one answered the door. No evidence was presented as to what time of day this visit was made or how long the investigator was at the facility. The Section Chief did testify that because there was no access granted by the facility on that date and that there was no evidence of children in care there on that date, that it caused reasonable suspicion for the Department and the notice was issued to petitioner the following day.

At hearing, the Department attempted to introduce the facility's attendance records, but they were objected to based on relevance because the records were not received by the Department until after the decision to refuse payments was made. That objection was sustained. If the records were questionable and then they caused reasonable suspicion, and then the notice to refuse payments was issued, that would be one thing; however that was not the case here. As such, I do not find that the Department correctly used Wis. Stat. §49.155(6m)(a) and (b) as the basis for reasonable suspicion.

The Department also cited the following statutory provision as the basis for finding reasonable suspicion to stop payments to petitioner's facility:

(d) 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.

Wis. Stat. §49.155(7)(d).

The Department did not cite any violation of "any provision under the program under this section or any rule promulgated under this section," other than its attempt to introduce the records that were objected to and not accepted into evidence at hearing. If the facility failed in anything it would be that the facility was not accessible to the investigator sometime on September 24, 2009. However, as the Section Chief explained, a facility that is closed one day is not a violation in and of itself. At best, the following rule might apply:

(2) INSPECTION. Pursuant to s. 48.73, Stats., the department may visit and inspect any family child care center at any time during licensed hours of operation. A department licensing representative shall have unrestricted access to the premises identified in the license, including access to children served and staff and child records and any other materials or other individuals having information on the family child care center's compliance with this chapter.

Wis. Adm. Code §DCF 250.12(2). However, to take this provision to literally mean that an investigator shall have unrestricted access, any time an investigator shows up at a facility unannounced, would be impractical. Child care centers do take field trips, walks, and other outings that might take caregivers and children away from a facility. The investigation does not show that the investigator was there at 8 a.m. and stayed there for hours, or all day, and no one was there. It does not show that the Department had records from that day to show that petitioner would have been barred from not being at the facility that day. It does not show that a second visit was made and no one was there to answer. The investigation that led to the suspension of payments does not show that the Department had records to support a reasonable suspicion of violations of recordkeeping on September 25, 2009. Based on the evidence presented to me, I find that the agency acted prematurely in refusing petitioner's payment and did so without a reasonable basis.

CONCLUSION OF LAW

The Department did not have reasonable suspicion to refuse payments to the petitioner's family child care center effective September 25, 2009 as: (1) DCF only visited the facility on one occasion and was not able to give any details regarding that visit, including the time, duration, or actions taken and (2) the facility's records were not obtained until after DCF decided to refuse payments.

NOW, THEREFORE, it is

ORDERED

That the Division of Early Care and Education shall provide payment to the petitioner for authorized child care furnished from September 25, 2009, forward. These actions are to be completed within 30 days of the date of the Secretary's Final Decision, if adopted therein. **IT IS FURTHER ORDERED**, that in all other respects the petition for review herein is 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 12th day of
March, 2010.

Kelly Cochran
Administrative Law Judge
Division of Hearings and Appeals