



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF THE INSPECTOR GENERAL

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Board of Review
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Jolynn Marra
Inspector General

February 3, 2022

[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NO.: 21-BOR-2504

Dear [REDACTED]:

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter. In arriving at a decision, the Board of Review is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson, MLS
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

CC: Brittany Lucci, Child Care Resource Center
Kelly Coen, Child Care Resource Center

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

██████████,

Appellant,

v.

ACTION NO.: 21-BOR-2504

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions of Chapter 700 of the West Virginia Department of Health and Human Resources' (DHHR) Common Chapters Manual. This fair hearing was convened on January 19, 2022 on an appeal filed with the Board of Review on December 20, 2021.

The matter before the Hearing Officer arises from the Respondent's December 16, 2021 decision to terminate the Appellant's eligibility for Child Care Stabilization Payments.

At the hearing, the Respondent appeared by Kelly Coen, Child Care Resource Center (hereafter, CCRC). Appearing as witnesses on behalf of the Respondent were Brittany Lucci, CCRC; Diane Gillispie, Division of Early Care and Education; and Denise Richmond, Division of Early Care and Education. The Appellant appeared *pro se*. Appearing as witnesses on behalf of the Appellant were ██████████, parent; ██████████ parent; and ██████████, parent. All witnesses were sworn in and the following exhibits were entered as evidence.

Department's Exhibits:

- D-1 Child Care Provider Services Agreement, signed March 31, 2021
- D-2 Child Care Resource Center Letter, undated
- D-3 Child Care Resource Center Letter, dated December 15, 2021
- D-4 Stabilization Grant Policy §§ 2.1-2.3
- D-5 Email Correspondence, dated December 16, 2021
- D-6 Child Care Resource Center Letter, dated January 22, 2019
- D-7 Child Care Benefit Repayment Agreement, dated December 16, 2021

Appellant's Exhibits:

- A-1 [REDACTED] Center Donation Letter, blank
- A-2 CCRC Email Correspondence
- A-3 CCRC Notice, dated December 20, 2021
- A-4 Provider Notification Letters; [REDACTED] Account Charge and Credit Summaries;
Signed [REDACTED] Center Donation Letters

After a review of the record — including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant's child care agency, [REDACTED] Center, was an eligible recipient of Child Care Stabilization payments.
- 2) On December 16, 2021, the Respondent issued a notice advising the Appellant that [REDACTED] Center would be "ineligible for further Child Care Stabilization payments through December 31, 2022" (Exhibit D-5).
- 3) The December 16, 2021 notice (hereafter, Notice) indicated that termination of stabilization payments was because [REDACTED] Center's Out of School Time site (OST) incurred a provider overpayment, refused to enter a repayment agreement, and was currently under a "strike two" violation of the Provider Services Agreement (PSA) (Exhibit D-5).
- 4) The Notice advised that the Appellant would be required to develop a Corrective Action Plan (CAP) to address the PSA violations and enter into a repayment agreement to satisfy the OST overpayment (Exhibit D-5).
- 5) The Notice did not cite the regulations or policy on which the Respondent's decision was based (Exhibit D-5)
- 6) The Notice was not issued to the Appellant thirteen days prior to the Respondent's proposed termination of the Appellant's eligibility to receive Child Care Stabilization payments (Exhibit D-5).
- 7) The Notice did not include information required by West Virginia Common Chapters §§ 710.14.A(3) through 710.14A(10) (Exhibit D-5).

Repayment Agreement

- 8) During the Respondent's October 2018 biannual audit, the Respondent determined that the Appellant was required to complete a repayment agreement by February 4, 2019 due to errors found in [REDACTED] Center OST billing and attendance records (Exhibit

D-6).

- 9) The Appellant did not receive a strike to her Provider Services Agreement (PSA).
- 10) On December 16, 2021, the Appellant entered a repayment agreement and fulfilled the owed repayment (Exhibits D-7 and A-3).

Non-Compliance with the Provider Service Agreement

- 11) In May or June 2020, [REDACTED] Center received a strike for non-compliance with her PSA (Exhibit D-2). The Appellant resolved the issue of non-compliance by reimbursing tuition charges to the client that was erroneously billed (Exhibit D-3).
- 12) On March 31, 2021, the Appellant signed a new PSA (Exhibit D-1). The PSA specified that "allowable charges by the provider shall be limited to reasonable one-time registration fees, transportation fees, late fees and charges for time not approved by the agency. The provider shall inform the parent of these fees prior to enrollment. The provider shall inform parents of any increase in charges at least thirty days in advance" (Exhibit D-1).
- 13) The PSA stipulated that, "During the COVID-19 public health crisis, as determined by DHHR's Division of Early Care and Education, additional charges by the provider to the parents shall be prohibited" (Exhibit D-1).
- 14) On December 15, 2021, the Respondent issued a notice advising the Appellant that a complaint had been received that the Appellant was charging families for lunches and that the charges doubled per week (Exhibit D-3).
- 15) The December 15, 2021 notice advised that the Appellant would receive a second strike for non-compliance of her PSA for charging families for lunches (Exhibit D-3).
- 16) The Respondents' determination that the Appellant was non-compliant with the March 2021 PSA was based on an anonymous complaint.
- 17) On May 10, 2020 [REDACTED] Center issued a letter providing families with the opportunity to make voluntary one time, monthly, or biweekly donations "to help with the purchases of cleaning supplies, masks, gloves, disposable utensils, employee support, the list goes on" (Exhibits A-1 and A-3).
- 18) Parent donations were not mandatory.
- 19) Parents were not billed for lunches or solicited for donations for lunches (Exhibits A-1 and A-3).

APPLICABLE POLICY

Child Care Stabilization Grant Policies and Procedures §§ 2.2.4 and 2.3 provide in pertinent parts:

To be eligible for Child Care Stabilization payments, the provider must have a Provider Services Agreement (PSA) in good standing. Providers are not eligible for Child Care Stabilization payments when:

- The provider is in violation of any section of the PSA.
- The Provider is behind or has reneged on a repayment agreement.

Child Care Subsidy Policy and Procedures Manual (CCS Manual) §§ 8.8-8.8.2.2.2 provide in pertinent parts:

A Corrective Action Plan is used when a subsidy program non-compliance exists. Consistent unwillingness or inability to comply with the service contract should be addressed with a corrective action plan.

The second time the provider violates the service agreement, the case manager shall contact the provider by telephone or letter to schedule an individual training session on the service agreement. At this time, the case manager will develop a Corrective Action Plan.

Child Care Provider Regulation Policy and Procedures Manual (CCP Manual) §§ 3.0, 3.2.2-3.2.8, and 3.4-3.4.10 provide in pertinent part:

Complaints about a variety of issues and situations may be received on child care providers from parents and the general public.

The specialist gathers information which confirms or regutes that a violation or non-compliance has occurred. Complaints regarding violation of or non-compliance with standards shall be investigated in the following manner:

- The investigation is to begin within five (5) working days and a conclusion date targeted for thirty days after onset of the investigation.
- The investigation may include, but is not limited to: record reviews, reviews of related documents, observation, interview of witnesses and interview of collateral contacts. The investigation generally includes an on-site visit and is unannounced.
- At the end of the investigation, the family child care regulatory specialist must determine, in an objective manner, if the complaint is substantiated. The child care regulatory specialist shall discuss findings with the provider at the completion of the investigation.
- The investigation is to be entered into FACTS and a corrective action plan completed if necessary. There shall be written notification to the provider at the conclusion of each investigation.

CCP Manual §§ 5.3.1- 5.3.1.9, §§ 13.4-13.4.1.3 and West Virginia Common Chapters §§ 710.14.A-710.14.B provide in pertinent parts:

Adequate notice of a Departmental decision affecting benefits shall be mailed via first class mail, or provided in writing in a face-to-face contact, to the applicant or recipient and must include the following information:

1. The action or proposed action to be taken;
2. The reason(s) for the action provided in terms readily understandable by the applicant or recipient and specifying all applicable policy manual sections;
3. The right to a fair hearing;
4. The time period for requesting a hearing;
5. The circumstances under which assistance may be continued pending a hearing decision;
6. Notice that the Appellant may be required to refund any assistance rendered during the hearing process if the Hearing Official upholds the Department's decision;
7. Notice that a pre-hearing conference will be held for the applicant or recipient if she requests one in order to discuss the adverse action.
8. The right to be assisted by a person of the applicant's or recipient's choice, including legal counsel, at any pre-hearing conference and hearing;
9. The fact that the applicant or recipient may bring witnesses to the hearing at the applicant's or recipient's own expense; and
10. The names, addresses, and phone numbers of any legal services organizations serving the area in which the applicant or recipient resides.

Notice shall be mailed at least thirteen-days before the effective date of any action or decision which may be adverse to the applicant or recipient.

Child Care regulatory staff persons are required to provide written notification of any decision reached with regard to the regulatory status of a provider. Any non-compliance should be communicated using the Child Care Corrective Action Notice (Day-0615). Notices should be sent whenever the child care regulatory staff issues corrective action, provides follow-up on the results of an investigation, determines the provider has not met the terms of the corrective action plan, takes any other action or makes a determination that impacts the regulatory status of the provider.

DISCUSSION

The Respondent's decision to terminate the Appellant's eligibility for Child Care Stabilization payments was based on the Appellant's outstanding OST site overpayment repayment agreement and a "Strike Two" violation of the Appellant's PSA. The Appellant disagreed with the Respondent's termination of her eligibility for Child Care Stabilization payments and argued that she did not violate her PSA by charging parents for lunches.

To prove that the Respondent correctly terminated the Appellant's eligibility for Child Care Stabilization payments on December 16, 2021, the Respondent had to demonstrate by a preponderance of the evidence that the Appellant received proper advanced notice of negative action. Further, the Respondent had to prove that the Appellant was behind on a repayment agreement and in violation of the Provider Services Agreement.

Notice

To ensure the Appellant's right to due process, the Respondent is required to issue a thirteen-day advance written notice to the provider before the onset of negative action unless the advanced notice is not required due to safety concerns. The advanced written notice must contain the reason for the negative action and the regulation or policy sections which the negative action was based on. Pursuant to the West Virginia Common Chapters, the notice must be issued via first-class mail or provided in writing in a face-to-face contact. The evidence reflected that the December 16, 2021 notice was emailed to the Appellant, which does not sufficiently meet the notice criteria.

The Respondent was required to include the Appellant's right to a fair hearing and details pertinent to requesting a fair hearing. Further, the Respondent was required to include additional information as outlined in WV Common Chapters § 710.14. The Respondent's December 16, 2021 notice failed to provide this required information. Although the Respondent's notice failed to include the Appellant's right to a fair hearing, the Appellant's right to due process was not prejudiced as she was able to obtain a fair hearing regarding the Respondent's December 16, 2021 negative action. Because the Respondent's notice failed to meet the notice requirements provided by policy, the evidence verified that the Respondent failed to provide the Appellant with proper advanced notice of negative action before terminating her eligibility for Child Care Stabilization payments.

Repayment Agreement

Pursuant to the evidence, the Appellant was required to enter into a repayment agreement by April 4, 2019 due to errors found in [REDACTED] Center's OST billing and attendance records. The evidence verified that until December 16, 2021, the Appellant was behind on complying with the repayment agreement. On December 16, 2021, the Appellant rectified the repayment owed. Because the Respondent did not issue proper notice at the time the Appellant was behind on compliance with the repayment agreement and the Appellant has resolved the repayment owed, the issue of the Appellant's Child Care Stabilization payment eligibility related to non-compliance with a repayment agreement is now moot.

Non-Compliance with the Provider Services Agreement

The evidence did not verify the specific date that the Appellant received a first-strike for PSA non-compliance, however, the evidence indicated that it occurred in May or June 2020. The parties agreed that once the Appellant was notified of the issue related to the strike, the Appellant resolved the non-compliance.

Following the Appellant's resolution of the 2020 PSA non-compliance, the Respondent and the Appellant entered into a new PSA in March 2021. No evidence was entered to verify that the

Appellant was non-compliant with any PSA terms in March 2021. As the first-strike PSA violation was resolved prior to the current PSA, the Hearing Officer must determine whether the Appellant was non-compliant with the terms of the March 2021 PSA.

The Respondent argued that the Appellant was determined to be non-compliant with the terms of the current PSA based on an anonymous complaint that the Appellant was billing parents for lunches. The PSA stipulated that the Appellant may only charge parents for registration fees, transportation fees, late fees, and charges for time not approved by the agency.

To prove that the Appellant was non-compliant with the PSA, the Respondent had to demonstrate by a preponderance of the evidence that the Appellant was billing parents for lunches. The Respondent's policy stipulates that a complaint of provider non-compliance must be investigated and documented in FACTS. The policy provides that information gathering includes interviews with the provider and parents, record reviews, statement verification, and observations.

During the hearing, the Appellant testified that she was not notified of the complaint until receipt of the Respondent's December 15, 2021 notice. The Respondent testified that the basis to substantiate that the Appellant had committed PSA non-compliance was based on an anonymous report that she was billing parents for lunches. No evidence was entered to verify that the Respondent had conducted any interviews, reviewed any documents, or complied with other policy requirements regarding investigating provider complaints.

During the hearing, the Appellant presented credible parent witnesses who testified that donations were not mandatory and that they had never received charges for lunches. No evidence was entered to verify that providing parents with an opportunity to donate to [REDACTED] Center violated any policy or terms of the March 2021 PSA. The Appellant's evidence contained billing statements and completed donation forms which reflected no charges to parents for lunches. The preponderance of evidence failed to verify that the Appellant billed parents for lunches or violated the March 2021 PSA.

Additional Notes:

The policy stipulates that the Respondent shall complete a Corrective Action Plan with the Appellant upon the second occurrence of PSA non-compliance. The Respondent testified that this step is required upon the conclusion of the ineligibility period, not at the implementation of the second strike. The Respondents' interpretation of the policy stipulation is incorrect. The policy clearly specifies that when the second PSA violation occurs, the case manager shall contact the provider and schedule an individual training session on the services agreement, develop a Corrective Action Plan, and stipulates that if the provider refuses to sign, the PSA shall be cancelled within thirteen days. Had the Respondent correctly determined that a strike two successive PSA non-compliance occurred, the Respondent would have been required to conduct PSA training and Corrective Action Plan development with the Appellant at the time the second strike was implemented.

CONCLUSIONS OF LAW

- 1) The Respondent was required to issue a thirteen-day advance written notice of negative

action before terminating the Appellant's eligibility to receive Child Care Stabilization payments.

- 2) The preponderance of evidence verified that the Respondent failed to issue sufficient advanced written notice before terminating the Appellant's eligibility to receive Child Care Stabilization payments.
- 3) The Respondent incorrectly terminated the Appellant's eligibility for Child Care Stabilization payments on December 16, 2021.
- 4) Providers that are behind on a repayment agreement are ineligible to receive Child Care Stabilization payments.
- 5) Because the Respondent did not issue proper notice when the Appellant was behind on compliance with the repayment agreement and the Appellant resolved the repayment owed, the issue of the Appellant's Child Care Stabilization payment eligibility related to non-compliance with a repayment agreement is moot.
- 6) Providers in violation of any section of the Provider Services Agreement (PSA) are ineligible to receive Child Care Stabilization payments.
- 7) To prove that the Appellant was non-compliant with the PSA, the Respondent had to demonstrate by a preponderance of the evidence that the Appellant was billing parents for lunches.
- 8) The preponderance of evidence failed to verify that the Appellant billed parents for lunches or that the Appellant committed any other violation of the March 2021 PSA.
- 9) The Respondent incorrectly implemented a second strike of non-compliance of the Appellant's PSA.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Respondent's decision to

terminate the Appellant's eligibility for Child Care Stabilization payments

ENTERED this 3rd day of February 2022.

Tara B. Thompson, MLS
State Hearing Officer