

COMMONWEALTH OF MASSACHUSETTS  
Division of Administrative Law Appeals

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DAISY AGUILAR,  
*Petitioner*

Docket No. OC-23-0251

v.

DEPARTMENT OF EARLY  
EDUCATION AND CARE,  
*Respondent*

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DEC 21 2023

**Appearance for Petitioner:**

Daisy Aguilar, *pro se*

**Appearance for Respondent:**

Leah Potash, *Esq.*  
Department of Early Education and Care

**Administrative Magistrate:**

Eric Tennen

**SUMMARY OF RECOMMENDED DECISION**

More than 12 years ago, the Department of Children and Families substantiated various reports of abuse and/or neglect against the Petitioner. When the Petitioner applied for a family day care license in 2022, these past allegations subjected her to a discretionary review. As part of that process, she was allowed to present evidence to explain her past and what she has been doing since. Although it appears the Petitioner has significantly changed her life, and these events are well behind her, the Department of Early Education and Care nevertheless denied her application. Because the Department's decision was within its discretion, I recommend it be affirmed.

**INTRODUCTION**

Pursuant to 102 Code Mass. Regs. § 10.8(2)(a) and 606 Code Mass. Regs. § 14.14(2), the Petitioner timely appeals a decision by the Department of Early Education and Care ("DEEC" or "the Department") denying her application for a family childcare license. On October 23, 2023, I

conducted a virtual hearing on the WebEx platform, with the consent of both parties. The Petitioner testified and called two additional witnesses (her mother, Daisy Robles, and her son, Juan Vargas, Jr.); the Respondent presented one witness, John Beatty, the analyst who initially reviewed the Petitioner's application for DEEC. I entered 15 exhibits into evidence on behalf of the respondent (R1-R15) and three on behalf of the Petitioner (P1-P3).<sup>1</sup>

### **FINDINGS OF FACT**

1. The Petitioner applied for a family childcare license in 2022. (Beatty Testimony.)
2. When someone applies for a license, they are automatically subjected to a background check, which looks at, among other things, criminal history and prior involvement with the Department of Children and Families ("DCF"). (Beatty testimony.)
3. Some prior conduct is automatically or presumptively disqualifying. 606 Code Mass. Regs. § 14.10(1) & (2). Other prior conduct may trigger a discretionary review process. *Id.* at § 14.10(3). (Beatty testimony.)
4. As part of the Petitioner's background review, DEEC found information that triggered its discretionary review process: eight DCF reports (for seven incidents) supporting prior allegations of abuse and/or neglect by the Petitioner.<sup>2</sup> The dates ranged from August 2005 through August 2011. (Exs. R5-R12.)
5. DEEC also turned up older criminal charges that did not result in convictions. DEEC did

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<sup>1</sup> After the hearing, I left the record open for the Petitioner to submit additional exhibits, which she ultimately did. I have marked those documents collectively as Exhibit P3.

<sup>2</sup> DCF investigations of alleged abuse or neglect are initiated by reports authorized under G.L. c. 119, § 51A. The results of those investigations, and whether they are supported or unsupported, are recorded in reports governed by G.L. c. 119, § 51B. These are colloquially referred to as "51A" and "51B" reports. The documents admitted into evidence are all 51B reports, because they contain the results of the various investigations.

not ultimately factor these into its final determination. (Beatty testimony; Ex. R3.)

6. The substance of the 51B reports involved a variety of conduct arising out of the Petitioner's tumultuous relationships with her ex-husband and her then current partner. The conduct involved allegations of direct abuse and/or neglect of her children and exposing them to incidents of domestic violence:

- In 2005, she took her children to Florida after her ex-husband had obtained custody. She went with her partner who had been accused of sexual abuse of a child under 14 and had served six years in prison for shaking his infant son.
- In 2006, the Petitioner violated her divorce agreement that stipulated that she would not let that same partner be with her children. There were also concerns with a continual pattern of violent behavior between the two of them.
- In 2010, the Petitioner slapped her 10-year-old daughter in the face and punched her in the stomach. DCF also supported allegations of neglect against both parents who were "in the midst of a bitter custody battle and it appears the children are unfairly caught in the middle."
- Also in 2010, allegations of neglect were supported against the Petitioner and her ex-husband because their son had suffered a series of serious medical injuries: a broken arm; fractured clavicle (after falling down some stairs); and an injury to his face.
- In 2011, DCF substantiated neglect for three different episodes in which she exposed her children to physical incidents of domestic violence between her and her partner. At least one time, the police were called to the home.

(Exs. R5-R12.)

7. The Petitioner tried to appeal two of the cases but was unable to attend the hearings; her appeals were thus dismissed. She was not aware of her appellate rights soon enough to appeal the other findings. She nevertheless agreed that DCF was the correct forum to attack the validity of those findings. (Petitioner testimony.)
8. This came up because, at the hearing, the Petitioner challenged the veracity of all the

DCF reports. She detailed a complicated history with her ex-husband, who she says was vindictive. (Petitioner testimony; Exs. P1-P3.)

9. Her son was around nine years old when many of these incidents took place. He, and the Petitioner's mother, testified as to their memory of this time period. They generally corroborated each other's testimony that the Petitioner's ex-husband was manipulative. Her son, for example, explained how her ex would sometimes tell him what he should say in court and get upset when he did not follow the script. (Robles, Vargas, and Petitioner testimony.)
10. While I do not doubt at least some of what they recounted was true, it is largely beside the point. This hearing is not the forum to dispute the 51B findings.
11. Rather, during the discretionary review process, the Petitioner was given a chance to explain her past. That is part of the standardized procedure. Whenever someone's application triggers this process, they are given an application requesting certain materials and allowing them to explain their past conduct in what is called a "candid statement." (Beatty testimony.)
12. The Petitioner filed a very thorough and helpful response, containing her candid statement and glowing references. (Beatty testimony; Ex. 3.)
13. Mr. Beatty also followed up with the Petitioner by phone a few times. (Beatty testimony.)
14. Once the application is complete, the reviewer—here Mr. Beatty—conducts the review by considering a series of factors listed in 606 Code Mass. Regs. § 14.12(f):
  1. Time since the incident(s);
  2. Age of the candidate at the time of the incident(s);

3. Seriousness and specific circumstances surrounding the incident(s);
4. Relationship of the incident(s) to the ability of the candidate to care for children;
5. Number of criminal offenses or findings of abuse/neglect;
6. Dispositions of criminal offenses and findings of abuse/neglect;
7. Relevant evidence of rehabilitation or lack thereof; and
8. Other relevant information, including information submitted by the candidate.

(Beatty testimony.)

15. At the hearing, Mr. Beatty explained how he weighed the factors. For example, he was aware the last incident took place over 10 years ago but was concerned about the number of supported allegations within a relatively small window of time. He also noted the seriousness of the incidents and that they were for violent behavior. (Beatty testimony.)
16. On the other hand, he weighed this against the evidence of rehabilitation:
  - Two strong character references: one from a friend who witnessed the Petitioner take care of her children lovingly and babysit for her; another from a mom whose daughter the Petitioner cared for as a PCA.
  - The fact that she had worked in child related fields, including earning her Lead teacher certificate 13 years prior.
  - The length of time since the last incident.

(Beatty testimony; Ex. 3.)

17. Ultimately, he would have approved the Petitioner's application. But he is just the first level of review. His report and recommendation are reviewed by a supervisor. After that they are reviewed by someone in the legal department. All three reviewers must agree the license should be approved. Here, only he did, and the Petitioner's application was ultimately denied. (Beatty testimony.)
18. DEEC concluded that the DCF matters raised "substantial concern due to the number

and alleged violent actions.” It acknowledged the age of the incidents, and that the Petitioner seems to have moved past “this poor portion of her life.” However, “[g]iven the overall amount of disqualifying issues which show a concerning pattern of behavior, the candidate is not suited to be in the care of children within an EEC setting, as she may have an adverse impact upon them.” (Ex. R4.)

19. The Petitioner then timely appealed. While the appeal was pending, the Department agreed to conduct a further review and gave the Petitioner a chance to submit additional documents. She submitted supplemental information: her Bachelor of Arts in Psychology from Bay Path University in 2018, an offer of employment as a college success coach at the High School of Commerce, and certification that she completed a Restorative Conferences training program, and letters from her daughters. (Exs. R4, R13-R15.)<sup>3</sup>

20. The Department again reviewed her total application and again denied it:

After consideration of the newly submitted materials and recognition of the candidate’s recent life achievements, this reviewer is still going to remain with the initial determination of Not Suitable. The original determination spoke much to the candidate’s pattern of exposing her children to concerning situations involving her ex-husband and having exposed them to a new partner who has an extremely concerning past which included prison time, sexual and physical abuse towards minors.

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<sup>3</sup> The Petitioner submitted various documents at this hearing about the DCF cases, some of which she did not submit to DEEC at any time during its review process. Counsel for DEEC argues I should not consider them at this hearing. The Petitioner counters that she was never sure the exact grounds for her denial and thus not sure what documents she should submit. I am admitting the documents into evidence. However, I do not place much weight on them because they shed no additional light on the allegations. They mostly confirm what the Petitioner argues—that this time period was marred by her caustic relationship with her ex-husband and partner. But they do not directly address many of the specific allegations in the 51B reports. I do not believe they would have made a difference if they had been supplied to DEEC. Nevertheless, they are now part of this record for the Department to review.

The candidate has made commendable strides in improving her life as shown through her college degree, employment offer, training completions and the lack of any other disqualifying events now in 12 years. However, these do not alter the facts of the past, and the determination will remain as Not Suitable.

(Ex. R4.)

## DISCUSSION

At issue here is DEEC's discretionary review of the Petitioner's application. In conducting its review, DEEC looks for "clear and convincing evidence demonstrating the candidate's suitability for licensure, employment or affiliation in light of the concern for children's safety." 606 Code Mass. Regs. § 14.12(e). This standardized process requires DEEC to review various factors. *Id.* at § 14.12(f). The Department must then document the reasons for its final determination. *Id.* at § 14.12(g).

Because the Department conducted a discretionary review, on appeal, I am limited to analyzing whether it abused its discretion. *DEEC v. Carvajal-Rojas*, OC-17-754 (DALA June 29, 2018).<sup>4</sup> Under this standard, the decision will be affirmed unless the decisionmaker "made a

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<sup>4</sup> In a separate decision issued today, Magistrate Pomarole disagrees with this standard of review. *EEC v. Jarominski*, OC-22-0329. I admit DALA's prior decisions have been less than consistent in stating the standard of review; but we have never reviewed cases *de novo*. Rather, we generally review license denials for an "abuse of discretion." Many prior cases involved similar facts—an applicant was denied a license in the discretionary review process because of a history of 51B reports. *Diaz v. EEC*, OC-19-1065 (DALA Nov. 30, 2022); *Carvajal-Rojas, supra*; *Han v. EEC*, OC-15-0437 (DALA May 14, 2018). In some cases, we even issued summary decisions when the basis of the discretionary denial was 51B reports because there were no issues of fact in dispute. *Jusino-Mercado v. EEC*, OC-17-906 (DALA Jun. 6, 2018); *Reyes v. EEC*, OC-17-086 (DALA Aug. 1, 2017).

In only one case did DALA recommend reversing the department's decision. *EEC v. Metherall*, OC-18-0483 (DALA Aug. 27, 2019). *Metherall* criticized the Department's failure to "consider all relevant information," which is commonly considered an abuse of discretion. *See Com. v. Kolenovic*, 471 Mass. 664, 672 n.9 (2015) ("abuse of discretion standard confirms that an appellate court is entitled to correct a decision that is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."). To be fair, it also found the Petitioner

clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives” *Miller v. Miller*, 478 Mass. 642, 653 (2018), quoting *L.L. v. Commonwealth*, 470 Mass 185, n. 27 (2014). An abuse of discretion also occurs if the reviewer fails to exercise any discretion. *Com. v. Fredette*, 56 Mass. App. Ct. 253, 259 n.10 (2002).<sup>5</sup>

Turning to this case, the Department’s decision is certainly within the range of reasonable alternatives. Even if I disagree with the Department, that is not enough to overturn its decision. Indeed, at first blush, the Department’s determination seems unduly harsh since the Petitioner’s troubling conduct last occurred over 10 years ago. Mr. Beatty agreed, since he would have granted the Petitioner’s application. These incidents arose out of toxic relationships—the Petitioner realized this, she fixed it, and she has made tremendous strides since then. The trajectory of her life suggests she has left her past behind her.

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provided clear and convincing evidence of her fitness.

<sup>5</sup> Here, that would have occurred if the Department believed that the Petitioner’s past was automatically disqualifying. There is some language in the Addendum that could be interpreted as the Department taking that position: “The candidate has made commendable strides in improving her life . . . *However, these do not alter the facts of the past*, and the determination will remain as Not Suitable.” (emphasis added). That would be an inflexible response that fails to consider the dynamic transformations persons can undergo.

Given the entire review process, and the context of that quote, I find the Department fully considered the Petitioner’s post-incident history, i.e. her evidence of rehabilitation. I interpret the Department’s statement to mean the Petitioner’s circumstances today are not enough to overcome her history, but additional circumstance in the future might be. Indeed, perhaps even just the passage of time might put enough distance between the Petitioner and her past to make clear it is no longer a concern. *Cf. Commonwealth v. Pon*, 469 Mass. 296, 318-319 (2014) (“In addition, as the passage of time since the offense lengthens, the risk of recidivism lessens, and the case for enabling full-fledged participation in the work-force becomes even stronger and the burden on the public weaker.”).

That said, this is a recommended decision. If, upon review, the Department interprets that statement to mean something else, it should consider vacating the decision.



However, I do not possess the expertise to know what may or may not be a red flag such that an applicant still poses some risk. That is why DEEC is given the discretion to make these decisions. *Nguyen v. EEC*, OC-18-0430 (DALA Mar. 12, 2020) (The “primary concern” of EEC’s suitability determination “is the safety of children for whom the provided would furnish child care in her home[.]” I simply look to whether, on this record, a decisionmaker could reasonably believe the Petitioner is not yet eligible for a license. *See Carvajal, supra* (no abuse of discretion when background check revealed two supported findings of domestic violence against an adult member of household); *DEEC v. Correa*, OC-16-584 (DALA Apr 18, 2017) (no abuse of discretion in denying license when record of DCF history including three supported findings of neglect).

### CONCLUSION AND RECOMMENDED ORDER

DEEC could have granted the Petitioner her license and that would have been a reasonable outcome; but denying her application is also among the range of reasonable alternatives. I recommend the decision be **affirmed**.<sup>6</sup>

SO ORDERED.

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<sup>6</sup> If I was reviewing the evidence *de novo*, I would recommend the department issue Ms. Aguilar her license. Standards of review matter. I can defer to the Department’s decision, even if I disagree with it—which I do. Without reviewing every factor, it is clear to me the circumstances that led to the 51B reports were unique to that time in Ms. Aguilar’s life. She recognizes that and has taken steps to both distance herself from her conduct and assure it will not be repeated. Additionally, she has taken care of children responsibly and lovingly since then. She has also worked in child-related fields and received a teaching certificate. I do not believe she would do anything to put herself, or children, at risk. If anything, given her experiences, she would likely be more careful than most since she is very aware of what can trigger DCF involvement.

If after reviewing both decisions issued today, the Department agrees that hearings before DALA provide *de novo* review, then my recommendation in this case would be different. By releasing both these decisions together, I am hopeful the Department will explain its ultimate conclusions adopting or not adopting our recommended decisions.

DIVISION OF ADMINISTRATIVE LAW APPEALS

*Eric Tennen*

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Eric Tennen  
Administrative Magistrate

DEC 21 2023