

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Dep't of Early Education and Care,  
Petitioner

Docket No. OC-19-0125 -

December 11, 2024

v.

Yesenia Cruz,  
Respondent

**Appearance for Petitioner:**

Leah Potash, Esq.  
Assistant General Counsel  
Dep't of Early Education and Care  
51 Sleeper St., 4th floor  
Boston, MA 02210

**Appearance for Respondent:**

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**Administrative Magistrate:**

Mark L. Silverstein, Esq.

**SUMMARY OF RECOMMENDED DECISION**

**Family Child Care, Group and School-Age Licensing - Emergency Suspension and Refusal to Renew Child Care Provider License - Sufficient Basis.**

The Massachusetts Department of Early Education and Care (EEC) issued an emergency order on February 13, 2019, pursuant to M.G.L. c. 15D, § 10 and 102 C.M.R. § 1.07(5)(a), suspending and refusing to renew the license of a family child care provider allowing her to provide this care in designated areas of her home. Following a hearing, it is recommended that the emergency order be sustained. EEC proved that the instances of provider noncompliance it alleged as grounds for the emergency order had occurred and gave the agency reasonable cause to conclude that the noncompliance posed a risk to the lives, health and safety of children enrolled in the

provider's family child care program. While the provider appeared to have corrected several types of noncompliance with regulatory requirements that EEC observed during visits to the provider's home between December 15, 2011 and a final visit on January 17, 2019 (including safe sleep and playpen-related deficiencies and incomplete attendance records for the child care children enrolled in the provider's program), EEC staff observed other types of violations on multiple occasions including during the final visit. These included having assistants caring for child care children who were unlicensed or were not fully trained; missing or incomplete child care and medical records; electrical hazards including uncovered electrical outlets; stairwells without child gates; hazardous materials that were improperly stored and/or accessible to children; outdoor play area hazards; and unsanitary conditions including lack of soap for washing, trash in and near the licensed family child care area in the provider's apartment; and premises in disrepair.

## RECOMMENDED DECISION

### *Introduction*

Respondent Yesenia Cruz, who was licensed by the Massachusetts Department of Early Education and Care (EEC) to provide family child care for up to ten enrolled child care children in her home in Dorchester, Massachusetts, appealed EEC's February 13, 2019 emergency order immediately suspending, and refusing to renew, her family child care provider license and directing her to immediately cease providing child care in her home.<sup>1</sup> EEC took this action pursuant to M.G.L. c. 15D, § 10 and 102 C.M.R. § 1.07(5)(a), based upon Ms. Cruz's "lengthy history of regulatory violations regarding the health and safety of children" in her care that, in the agency's view, had "created an emergency situation endangering the life, health and safety of children attending [her] program."<sup>2</sup> The violations in question were of EEC's regulations

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<sup>1</sup>/ EEC's order was entitled "Order to Protect Children: Notice of Emergency Suspension, Notice of Refusal to Renew and Notice of Ability to Fine." Ms. Cruz's license expired subsequently.

<sup>2</sup>/ EEC Order at 10, bottom para. M.G.L. c. 15D, § 10 provides in pertinent part that:

Subject to the requirements of chapter 30A, the department may suspend, revoke, make probationary, refuse to issue or renew the license of any person, assess a civil fine within the limits prescribed by this section, or impose any other sanctions it considers appropriate, in accordance with rules and regulations promulgated by the board [of early education and care; *see* M.G.L. c. 15D, § 1A. This action may be taken if the person: fails to comply with applicable rules and regulations, furnishes or makes any misleading or false statements relative to any submission required under the rules and regulations, refuses to submit any reports or make available any records required by the rules and regulations or refuses to admit representatives of the department at any reasonable time for purposes of investigation or inspection.

governing the licensing of early child care and education services, including family child care programs and their administration. *See* 606 C.M.R. § 7.00 *et seq.* The emergency order stated that EEC staff had observed such violations when they visited Ms. Cruz's home in 2014, 2016 and 2017, on several occasions in 2018 (including a visit that agency staff conducted on October 12, 2018), and again on January 15, 2019.

Ms. Cruz filed a timely appeal challenging EEC's action on February 21, 2019. She denied the allegation that the life, safety or health of any child in her care was ever endangered, and requested a hearing "to explain my circumstances and to request a further opportunity to work with EEC to restore my good standing."

EEC forwarded the appeal to the Division of Administrative Law Appeals (DALA) on February 27, 2019, together with a letter requesting, on behalf of both parties, that DALA hold a hearing on the emergency family child care license suspension. DALA scheduled a hearing for March 19, 2019, but both EEC and Ms. Cruz requested that I hold a prehearing conference on that date in lieu of an emergency hearing. EEC appeared for the conference, but Ms. Cruz did not appear, and no one appeared on her behalf. Accordingly, I scheduled the hearing for 2:00 p.m. on April 2, 2019 (a date the parties had proposed previously), and identified the order to be adjudicated as whether EEC had "reasonable cause to believe that the licensee's failure to comply with any applicable regulation resulted in an emergency situation which endangers the life, health, or safety of children or staff present in the program or facility," *quoting* 102 C.M.R. § 1.07(5)(b). I also set a deadline (March 28, 2019) for filing a prehearing memorandum and

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EEC's regulations in effect in 2019 provided, at 102 C.M.R. § 1.07(5)(a), that the agency "may suspend any license or approval without a prior hearing if failure of the licensee to comply with any applicable regulation results in an emergency situation which endangers the life, health, or safety of children or staff present in the program or facility."

proposed hearing witnesses and exhibits. *See Order re Hearing* (Mar. 19, 2019).

EEC filed a prehearing memorandum listing three hearing witnesses and including ten proposed hearing exhibits. Ms. Cruz filed no prehearing memorandum or identification of proposed witnesses or exhibits. However, in my March 19, 2019 Order I assumed that Ms. Cruz would testify, and I allowed her to present testimony from two persons who, per EEC's emergency order, were present at Ms. Cruz's home during an unannounced staff visit on January 15, 2019, when Ms. Cruz was away in the Dominican Republic—a regular family child care assistant who spoke with the visiting EEC staff; and another woman, who was with three additional children in an upstairs room or apartment, and who gave conflicting information to visiting EEC staff regarding her identity and whether she was an EEC-approved caregiver. *Id.*; *Order re Hearing* at 3; see also EEC Emergency Order (Feb. 13, 2019) at 4-5.

I began the hearing as scheduled on April 2, 2019 at DALA in Malden, Massachusetts. I recorded this hearing session digitally. At the outset of this first hearing session, I admitted EEC's ten proposed hearing exhibits (Exhs. 1-10) into evidence, without objection. Each of the parties waived an opening statement.

During this initial hearing session, EEC presented the testimony of the three witnesses its prehearing memorandum identified: Jandira Sanchez, Patricia Halpin and Kelly Meehan. Ms. Sanches, an EEC Family Child Care Licensor at EEC's Metro Region–Boston, conducted most of the agency's inspections at Ms. Cruz's home between December 2011 and January 2019. Family Child Care Supervisor Patricia Halpin, and Regional Director Kelly Meehan, both of whom were managers at EEC's Metro Region–Boston office, accompanied Ms. Sanches during the final inspection on January 15, 2019. At Ms. Cruz's unopposed request, each of EEC's witnesses was sequestered prior to testifying.

I scheduled a second hearing session to accommodate Ms. Cruz's request (made for the first time at the outset of the first hearing session) that a Spanish language translator be available when she testified. I conducted this second hearing session on May 8, 2019 at DALA in Malden, Massachusetts, and it, too, was recorded digitally. Ms. Cruz testified on her own behalf at this session, with translation provided via telephone conference by Emily Rojas, a certified senior language interpreter employed by LanguageLine Solutions. Ms. Cruz offered no other witness testimony.

During the second hearing session I marked three additional exhibits in evidence at EEC's request—Exhs. 11(a), (b) and (c)—without objection. As a result, there are a total of 13 exhibits in evidence. Each party's counsel made a closing statement after Ms. Cruz's testimony and cross-examination concluded. I then closed the evidentiary record. Neither party filed a post-hearing memorandum.

### *Findings of Fact*

Based upon the testimony, hearing exhibits and other evidence in the record, and the reasonable inferences drawn from them, I make the following findings of fact:

1. As of April 1, 2019, Yesenia Cruz owned and resided at 411 Seaver Street in Dorchester, Massachusetts, a two-family residential frame house ("the Cruz home").

(a) The Cruz home was divided into two apartments, one on each floor. Each apartment had a separate entrance from street level. Ms. Cruz rented the lower floor apartment (Apt. #1) to tenants. Ms. Cruz lived in the second floor apartment (Apt. #2) with her four children, aged (in late 2014) 16, 11(twins) and 1.

(b) Ms. Cruz's second-floor apartment had a stairway leading to a finished attic

that she and her children also used. There was an emergency exit from Ms. Cruz's second floor apartment to the roof above part of the first floor apartment.

(c) Through March 2019, Ms. Cruz had rented the first floor apartment of her house to an unrelated family. The rent she received from the first floor apartment tenants allowed her to make the monthly mortgage payments on the house. The tenants departed prior to April 1, 2019, leaving Ms. Cruz without the income she needed to make her mortgage payments. She obtained a brief mortgage payment deferment, but as of that date, Ms. Cruz needed to find a new tenant for the first floor apartment in order to be able to make mortgage payments on the house. (Cruz testimony in response to questions by the Administrative Magistrate.)

2. Between December 2011 and February 2019, Ms. Cruz was licensed by the Massachusetts Department of Early Education and Care (EEC), pursuant to M.G.L. c. 15D and EEC's regulations, to provide family child care in specified areas of her second floor apartment at 411 Seaver Street in Dorchester.

(a) The December 2011 license allowed Ms. Cruz to provide family child care in specified areas of her apartment (the living room, dining room, kitchen and playroom) for up to six family child care children. The child care children in Ms. Cruz's family child care program were placed there through Nurtury, Inc., a private early education and care provider. (Sanches direct testimony).<sup>3</sup>

(b) On December 28, 2014, EEC issued a new family child care provider license to Ms. Cruz (No. 9020928) specifying the same child care children care area in her second-floor apartment, and the same family child care children capacity. This license was scheduled to expire on December 28, 2017. (Exh. 1: family child care provider license dated Dec. 28, 2014.)

(c) As of July 8, 2016, EEC had increased the capacity of Ms. Cruz's licensed family child care program from six to ten enrolled family child care children. (See Exh. 4:

letter, Jandira Sanches, Bilingual Family Child Care licenser to Yesenia Cruz dated Jul. 11, 2016 regarding family child care program capacity increase, and related visit to Ms. Cruz's home on Jul. 8, 2016; Sanches direct testimony.)<sup>4</sup>

(d) On or about December 26, 2017, EEC renewed Ms. Cruz's family child care provider license for three years, subject to the completion of EEC Safe Sleep Training by Ms. Cruz and her licensed assistants. (See Exh. 5: letter, Jandira Sanches to Yesenia Cruz dated Dec. 26, 2017.)<sup>5</sup>

(e) Ms. Cruz continued to operate her family child care program at her home until February 13, 2019, when EEC issued an emergency order suspending, immediately, Ms. Cruz's family child care provider license refusing to renew it further, and directing Ms. Cruz to cease providing family child care at her home. (EEC Order dated Feb. 13, 2019, at 2.)

3. EEC family child care licenser Jandira Sanches was assigned as Ms. Cruz's family child care licenser beginning in December 2011 and continuing through January 2019.

(a) In addition to being fluent in Spanish, which Ms. Cruz spoke regularly, Ms. Sanches also had experience training family child care license holders to meet EEC's child care safety and health requirements. She had experience assisting licensed family child care providers in improving the quality of their family child care programs after their licenses were issued; when the license were modified (for example, to increase child care children capacity); or when visits to a family child care provider's home revealed

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<sup>3/</sup> The 2011 family child care license is not in the record, but its issuance is not disputed.

<sup>4/</sup> The record does not include any document granting the family child care capacity increase to ten children, but the capacity increase as of July 8, 2016 is not disputed.

<sup>5/</sup> The record does not include the renewal of Ms. Cruz's family child care provider license in 2017, but the renewal is not disputed.

instances of noncompliance with the requirements of EEC's regulations regarding child care, safety and health and related recordkeeping. (Sanches direct testimony.)

(b) Ms. Sanches's first visit to the Cruz home was on December 15, 2011, two weeks before EEC issued the original child care provider license to Ms. Cruz. She did so to observe child care-related conditions outside the house and inside Ms. Cruz's apartment. Ms. Sanches made additional inspection visits to check on compliance with the license and EEC's regulations governing licensed family child care at various times over a seven-year period—once in 2012 (on July 12, 2010); three times in 2014 (on June 13, October 21 and December 3, 2014); once in 2016 (on July 8, 2016); twice in 2017 (on December 15 and 29, 2017); twice in 2018 (on March 28 and October 12, 2018); and, for the last time, on January 15, 2019. EEC Metro Boston Regional Director Kelly Meehan and EEC Metro Boston Region Family Child Care Supervisor Patricia Halpin accompanied Ms. Sanches during the January 15, 2019 visit. (Sanches direct testimony; Halpin direct testimony; Meehan direct testimony; Exh. 2: Chronology of site visit observations prepared by Ms. Sanches; *see also* the attached Appendix summarizing the violations that were observed during EEC staff visits to 411 Seaver Street and the second-floor apartment between December 15, 2011 and January 15, 2019).

(c) Ms. Sanches kept notes of her observations during each visit to the Cruz home. Following the January 15, 2019 visit, when she was accompanied by Family Child Care Supervisor Patricia Halpin and Regional Director Kelly Meehan, both of whom were managers at EEC's Metro Region–Boston office, Ms. Sanches used her visit notes to prepare a chronology of the instances of noncompliance she observed during each visit to the Cruz home. (*See* Exh. 2: Chronology dated Jan. 22, 2019; *see also* Exhs. 4-9



(followup reports regarding visits conducted between July 8, 2016 and January 15, 2019; Sanches direct and redirect testimony; Halpin direct testimony, cross-examination and redirect testimony.)

(d) Beginning with her visit to the Cruz home on July 8, 2016, Ms. Sanches prepared a report on the instances of noncompliance she observed during each of her visits to the Cruz home. She mailed each of these reports to Ms. Cruz, and discussed the instances of noncompliance they noted with Ms. Cruz with her for the purpose of identifying the corrections Ms. Cruz needed to make in order to bring her family child care program into compliance. She used an EEC "Provider Transaction History Report" form to prepare these reports. (Exhs. 4-9: followup reports regarding visits conducted between July 8, 2016 and January 15, 2019; Sanches direct and redirect testimony; Halpin direct testimony, cross-examination and redirect testimony.)

*December 15, 2011 Pre-Licensing Visit*

4. On December 15, 2011, Ms. Sanches conducted a pre-license visit at Ms. Cruz's home and observed conditions that required correction under the license that the agency would issue on December 29, 2011.

(a) During this pre-license visit, Ms. Sanches observed that the second floor apartment's rear exit led to an open area through which one could walk onto the roof above part of the first floor apartment. She observed no baby gate or other type of gate that would block a child from creeping or walking into the open area.

(b) Ms. Sanches also observed that daycare furniture in Ms. Cruz's dining room and play room was not secured to the wall and could become a falling hazard.

(c) Ms. Sanches found that Ms. Cruz's child care space's first aid kit was missing

a tweezers, thermometer, scissors, and a CPR mouth guard. The kit lacked a list of emergency contact numbers, including those for ambulance services, police, poison control, and a health center. It also lacked backup person contact information. Ms. Sanches also observed no liquid soap or paper towels where family child care children would be washing their hands.

(Exh. 2 at 5; Sanches direct testimony.)<sup>6</sup>

*July 12, 2012 Visit*

5. Ms. Sanches made a followup visit to Ms. Cruz's home on July 12, 2012, nearly seven months after EEC had issued Ms. Cruz a family child care provider license allowing her to care for up to six child care children. She found several instances of noncompliance with EEC regulatory requirements. A smoke detector was beeping, indicating low battery power or a different malfunction. The shelves in the playroom were not secured to the wall. The first aid kit was still missing a tweezers and a CPR mouth guard. Two of the children in Ms. Cruz's child care program did not have a medical record on file. (Sanches direct testimony; Exh. 2 at 5.)

*June 13, 2014 Visit*

6. In early 2014, Ms. Cruz requested that EEC increase her family child care program's child care capacity from six to ten children. On June 13, 2014, Ms. Sanches visited Ms. Cruz's apartment relative to this request. (*See* Finding 2(a).) She observed several instances of noncompliance with regulatory requirements.

(a) Ms. Sanches observed three children sleeping in space within Ms. Cruz's apartment that EEC had not licensed for Ms. Cruz's family child care program. When

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<sup>6</sup>/ For a summary of Ms. Sanches's observations during the December 15, 2011 pre-licensing visit

Ms. Sanches requested that Ms. Cruz's assistant move these children to a licensed area, Ms. Cruz's licensed child care assistant stated that the licensed area was used to sleep infants or to separate children by age. Ms. Sanches observed the assistant changing a child's diaper without using any barrier between the child and the changing mat, and without sanitizing the mat after diapering the child. In addition, the assistant did not wash her hands or the child's hands after a diaper change.

(b) Ms. Sanches found no thermometer in the refrigerator, where perishable food consumed by child care children was stored.

(c) She found that the back exit from Ms. Cruz's apartment was blocked by an unused bouncer seat, toys, furniture, a broom stick and a carpet.

(d) Ms. Sanches observed broken windows within the reach of children along the route to this exit.

(e) She observed that hazardous materials were not stored properly—the kitchen drawers were not child-proof even though they contained knives, cleaning products, plastic bags, serrated materials, and alcoholic beverages. The first aid kit for the licensed child care space was missing adhesive tape, a CPR mouth guard, gauze bandage rolls, gauze pads, scissors and a tweezers.

(f) Ms. Sanches found that some of the day care children's enrollment packets were incomplete, and some of their medical records needed to be updated. Ms. Cruz had not consistently documented child and assistant attendance, and she had not conducted an evacuation drill. Ms. Cruz's professional qualifications as a child care educator had expired, and her regular assistant was missing required documentation (a listing in the

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to Ms. Cruz's home, and during subsequent visits, *see* attached Appendix.

professional qualification registry, medical records, and professional development certificates).

(Sanches direct testimony; Exh. 2 at 4-5.)

7. Based upon Ms. Sanches's observations during the June 13, 2014 visit to Ms. Cruz's home, EEC denied Ms. Cruz's request to increase her child care children capacity from six to ten child care children (Sanchez direct testimony.)

*October 21, 2014 Visit*

8. Ms. Sanches conducted a compliance followup visit to Ms. Cruz's apartment on October 21, 2014. She observed instances of noncompliance with Ms. Cruz's family child care license and applicable regulations that included the following:

(a) There were unsanitary conditions in the bathroom (a trash can without a cover), in the kitchen (a glass door and its frame were stained with water and dust), and on the television and VCR (accumulated dust).

(b) The kitchen drawers and cabinets, which contained knives, cleaning products, plastic bags, a box of matches, a lighter, serrated objects and other hazards, were either not child-proofed or else had a safety lock that was not working.

(c) There were uncovered electric outlets in the playroom and activity room, and hazards to children that included unsecured cans of spray paint and a can with tools in it, trash, and a used air conditioner at the kitchen exit route.

(d) There was no exit sign on the exit route through the playroom, and the exit sign marking the kitchen exit route was ripped.

(e) The first aid kit was missing gauze rolls.

(f) Ms. Cruz's assistant had not completed any professional development training following her licensing in 2013.

(g) Some children's enrollment packets were incomplete, and the medical record for one of the child care children had not been updated.

(Exh. 2 at 4.)

*December 3, 2014 Visit*

9. Ms. Sanches conducted a further followup compliance visit to Ms. Cruz's apartment on December 3, 2014. She observed that the oven door was broken, leaving sharp metal edges exposed. Ms. Cruz's assistant had still not completed any professional development training. Ms. Cruz had hired a new child care assistant (Rosanna Diaz), but the assistant's information did not include a medical record, her CPR training certification, or her family assistant certificate. One of the day care children's enrollment packets was still incomplete. (*Id.*)

*July 8, 2016 Visit, Following Family Child Care Children Capacity Increase*

10. Notwithstanding the instances of noncompliance that Ms. Sanches had observed during her visits in 2014, and EEC's prior denial of Ms. Cruz's June 13, 2014 request to increase her child care children capacity from six to ten, the agency approved this requested increase at some point prior to July 8, 2016, when Ms. Sanches conducted a followup compliance visit to Ms. Cruz's home following the child care children capacity increase. The approved child care children increase reflected an overall impression on Ms. Sanches's part, and on Ms. Halpin's part, that Ms. Cruz had made improvements in how she conducted her family child care program between 2014 and 2016. (Sanchez direct testimony, cross-examination, and redirect testimony; Halpin cross-examination.)

11. Ms. Sanches next visited the Cruz home on July 8, 2016. She noted some improvements in how Ms. Cruz was operating her child care program, but she also observed several violations. There were insufficient play materials within children's reach; dust, pieces of paper and other items were on the living room and dining room floors; there were papers and other items on top of the diaper-changing mat; and a ladder, dolly, sheet of wood and other hazards were accessible to children in the outdoor play area. (Exh. 2 at 3.)

*December 15, 2017 Visit and Ms. Cruz's Response re Corrections Made*

12. Ms. Sanches did not visit the Cruz home again until December 15, 2017. The purpose of that visit was to determine the condition of Ms. Cruz's licensed child care space relative to her request to renew her family child care provider license.

(a) During this visit, Ms. Sanches observed more instances of noncompliance than she had during the July 8, 2016 visit.

(b) Ms. Sanches called Ms. Cruz on December 21, 2017 to discuss the noncompliance she had noted during her visit. Ms. Sanches also told Ms. Cruz during this conversation that she and her assistants were required to participate in "safe sleep" training, and that EEC was offering this training in Spanish at its Boston Metro office on February 22, 2018. Ms. Sanches sent a followup letter to Ms. Cruz on December 26, 2017 that mentioned their December 21, 2017 telephone conversation and the required, upcoming safe sleep training. The letter included EEC's report on the violations observed during the December 15, 2017 visit. It directed that Ms. Cruz review the report, and submit a response showing the corrective action she had taken and when it was completed.

(Sanches direct testimony; Exh. 2 at 3, and attached "Provider Transaction History Report," second and third pages; Exh. 5: Letter, Jandira Sanches to Yesenia Cruz *re* visit conducted on Dec. 15, 2017, with attached "Statement of Non-compliance" listing the instances of noncompliance that Ms. Sanches observed during that visit.)

13. Ms. Cruz informed Ms. Sanches, subsequently, that she had corrected these violations as of December 17, 2017. The violations that Ms. Sanches observed on December 15, 2017 (listed below in italics), and the corrective action that Ms. Cruz reported, included the following:

(a) *Uncovered electrical outlets.* Ms. Cruz reported to Ms. Sanches that she had installed outlet covers.

(b) *Trash on the ground outside.* Ms. Cruz reported that she had picked up the trash and vacuumed the area.

(c) *Incomplete child care children enrollment packets; missing information included physical description, age at admission to program, and other parts of the enrollment form left blank; some children's medical records were incomplete or outdated.* Ms. Cruz reported that she had "completed all the paper work for the children."

(d) *A children's slide led directly to a concreted area in the backyard.* Ms. Cruz reported pushing the slide out of the reach of children.

(e) *In the kitchen, a lighter, serrated materials, oils and other hazards were within the reach of children.* Ms. Cruz reported that she placed "lighters" on a high shelf and "placed baby locks on all the doors" (meaning, apparently, kitchen cabinet doors).

(f) *The stairway to the third level of the house (meaning the attic) was not*

*barricaded (meaning blocked by a child safety gate), and the stairway from the kitchen exit was not sturdy.* Ms. Cruz reported that she had “someone come in and check/fix the stairs for us and make sure it’s all good.”

(g) *Ms. Cruz’s regular assistant (Caroline Rodriguez) could not produce the child care program’s parent handbook for Ms. Sanches. The assistant was also not supervising children napping in the dining room every 15 minutes.* Ms. Cruz reported that she had replaced Ms. Rodriguez with another assistant, who knew where the parent handbook was located. In addition, she had discussed supervision with the new assistant. Ms. Cruz also reported that all of the napping children were now placed in the same area.

(h) *Although Ms. Cruz’s program was licensed for ten child care children, there were an insufficient number of playpens (three) and sleeping mats (four). Some of the sleeping mats were torn, and one playpen “had a hole in it.”* Ms. Cruz reported that she had ordered “some new sleeping materials” for the children.

(i) *The regular assistant had told Ms. Sanches that a six month old infant in the child care program took naps on a plastic mat or in a bouncy seat.* Ms. Cruz reported that she had purchased a play pen for this child, and that it was “located at the right spot for her.”

(j) *The first aid kit was missing a tweezers and cold pack, and some of the child care children’s emergency contact cards were incomplete.* Ms. Cruz reported that she had purchased two new first aid kits and updated the children’s emergency cards.

(Exh. 5: Corrective action completed, and completion dates, reported by Ms. Cruz on Dec. 17, 2017, in reply to Ms. Sanches’s Dec. 15, 2017 letter.)



*December 29, 2017 Visit*

14. Ms. Sanches conducted a “safe sleep” visit to Ms. Cruz’s apartment on December 29, 2017. Its purpose was to followup on the violations Ms. Sanches had observed on December 15, 2017 regarding playpens and sleeping material. Ms. Sanches observed that there were four assembled playpens, two in the playroom and two in the living room, and that each child had his or her own sleeping material. Ms. Cruz’s assistant, Caroline Rodriguez (who was apparently still working, despite the previous assertion to the contrary; *see* Finding 13(g), above), told Ms. Sanches that the six month old child infant was no longer sleeping on a mat. Ms. Sanches did not observe infants being napped in an unsafe manner. However, she observed that one of the playpens had holes, and that the sheets were stained with water and milk marks that appeared to be several days old. This indicated to Ms. Sanches that the playpens and sheets were in poor sanitary condition. (Sanches direct testimony; Exh. 2 at 2; Exh. 6: Letter, Ms. Sanches to Ms. Cruz *re* visit conducted on Dec. 29, 2017, at 1 and attached “visit summary.”)

*March 28, 2018 Visit*

15. In late March 2018, EEC determined that Ms. Cruz had not reported to the agency that she had obtained a restraining order against the father of her youngest child, or a change in the composition of her household—one of her assistants was allegedly living at 411 Seaver Street, in the basement. The determination was based upon the report of EEC investigator Fernando Lazu (who did not testify here) regarding his March 28, 2018 visit to Ms. Cruz’s house to interview her regarding these developments and as well, an alleged assault by Ms. Cruz upon the father of her youngest child while family child care children were present at the Cruz home. The alleged assault was reported to EEC by the father of Ms. Cruz’s youngest child. (*See* Exh. 8:

Investigation Report of EEC Investigator Fernando Lazu dated Oct. 11, 2018 re [Family Child Care] Provider Yesenia Cruz; and accompanying cover letter, Kelly Meehan, Regional Director, to Yesenia Cruz dated Oct. 18, 2018.) Ms. Sanches did not participate in this visit or investigation.<sup>7</sup>

(a) In carrying out his investigation, Investigator Lazu interviewed Ms. Cruz and her licensed assistant, Jennifer Medina, during an unannounced visit to the Cruz home on March 28, 2018. The investigator also interviewed an unnamed person at Nurtury, the program through which children were placed in Ms. Sanches's licensed family child care program. (Exh. 8 at 1.)

(b) Investigator Lazu reported that there was no police report corroborating the allegation that Ms. Cruz had assaulted the father of her youngest child with a kitchen knife. The investigator also reported as unfounded an allegation that Ms. Cruz had "fabricated" the child care children's menus; the allegation was refuted by Nurtury, which provided the food menu that Ms. Cruz used. According to Investigator Lazu's report, Ms. Cruz admitted that there had been a problem with cockroaches in the house, but she had called in an exterminator and showed Mr. Lazu a receipt for his services. The

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<sup>7</sup>/ The restraining order is not in the record. As noted above, Investigator Lazu did not testify. In her narrative summary of the EEC visits to the Cruz home (Exh. 2), Ms. Sanches described an "investigation visit, conducted on 03/28/2018" without naming Investigator Lazu as the person who had conducted the visit and prepared the report. (Exh. 2 at 2.) EEC's February 13, 2019 Order added, in its paragraph describing the March 28, 2018 investigation (at 2, para. 2), that its records also "showed that all of [Ms. Cruz's] Family Child Care assistants used [her] address as their home address at some point." That information did not appear in Investigator Lazu's report or in Ms. Sanches's narrative summary of the March 28, 2018 visit. Exhibits 11(b) and (c) show that in their applications to become Ms. Cruz's regular assistants, Jennifer Medina Rodriguez and Elianny Rafaela Guerrero each identified her residence as 411 Seaver Street, Apartment 2, and consented to have EEC perform background checks and determine her suitability to be a household member. Ms. Cruz testified that the assistants did so in order to make sure they received mail addressed to them, but that they did not live at Ms. Cruz's home. EEC was therefore made aware that these two individuals were seeking approval as members of Ms. Cruz's

report also noted that Ms. Cruz's regular assistant had denied another allegation (also made by the father of Ms. Cruz's youngest child) that Ms. Cruz had "illegal immigrants living in the basement in an illegal apartment," and that the Investigator had found no evidence supporting the allegation. Ms. Cruz admitted to Investigator Lazu that she had been going through a "hard time" with the father of her youngest child; she had obtained a restraining order against him because he had threatened her; and both of them were involved in court dispute regarding the custody of this child and that "exchanges for visitation were now taking place at the police department." Ms. Cruz had also told the Investigator that her regular child care assistant was staying in the basement of her house. (Exh. 8 at 2-4.)

(c) EEC's primary concern was Ms. Cruz's failure to report the restraining order, because a restraining order could impact her ability to care for children, and her failure to report that her regular assistant was living in the house even though she had not been approved by the agency as a member of Ms. Cruz's household. (Exh. 8 at 1-2.)

(d) EEC Regional Director Kelly Meehan forwarded Investigator Lazu's report to Ms. Cruz on October 18, 2018. She directed Ms. Cruz to prepare a response to the report and submit a plan to correct the noncompliance the report had substantiated, particularly Ms. Cruz's failure to report legal proceedings pertinent to her family child care provider license to her licensor (Ms. Sanches) within 14 days. (See Exh. 8: Investigation Report of EEC Investigator Fernando Lazu dated Oct. 11, 2018 re [Family Child Care) Provider Yesenia Cruz; and accompanying cover letter, Kelly Meehan, Regional Director, to Yesenia Cruz dated Oct. 18, 2018.)

(e) It is unclear whether Ms. Cruz filed this plan. However, the record shows no further mention of the failure to report the restraining order or the assistant living in the house, or the correction plan that Ms. Cruz had been told to file. They were not mentioned, for example, in the reports of the subsequent EEC staff visits to the Cruz home on October 12, 2018 or January 15, 2019. (See Exh. 7 (discussed below at Findings 16-17; and Exh. 8 (discussed below at Findings 20-21.)

*October 12, 2018 Visit*

16. Ms. Sanches next visited Ms. Cruz's home on October 12, 2018. She observed that the instances of noncompliance involving safe sleep and child supervision she had noted previously had been corrected. A children's slide whose horizontal run had ended at a hard concrete surface in the backyard had been removed from the backyard, and Ms. Cruz's regular assistant, Jennifer Medina Rodriguez, was supervising napping children throughout napping time. Ms. Cruz had three playpens and five sleeping mats, all of them clean and in good condition, and she told Ms. Sanches that she understood, and was following, safe sleep practices with all of the children. (Exh. 7: Letter, Ms. Sanches to Ms. Cruz re: visit conducted on Oct. 12, 2018; and attached "visit summary.")

17. Ms. Sanches observed other instances of noncompliance during her October 12, 2018 visit, including the following:

(a) *Outdoor play area hazards.* Hazards to children in the outdoor play area included trash on the ground, wood, bed frames, and a box of tools, all within the reach of children.

(b) *Indoor hazards.* Kitchen cabinets and drawers contained serrated items, oils,

batteries and other hazards, but were not child-proofed. There were food crumbs, a bottle cap, pieces of paper and other items on the floor.

(c) *Electrical hazards.* The electrical outlets in the dining room and playroom were uncovered, and there were frayed electrical cords in the living room.

(d) *Stairway and exit hazards.* The stairway leading from the second floor to the attic area was not barricaded, and there was a nail protruding from one of the stairway steps. The landing under the stairway had an uncovered open area.

(e) *Child medical, safety and enrollment record deficiencies.* Although the first aid kit contained all the required materials, some of the children's emergency cards were incomplete, and one child did not have an emergency card. Some of the child care children's enrollment records were missing information, including a physical description and the child's age at admission to Ms. Cruz's program. Some children's medical records were incomplete or outdated.

(f) *Other records-related violations.* Ms. Cruz did not have an emergency plan, but stated that she was working on one. Ms. Cruz's educator license was posted, but her regular assistant's license was not. Ms. Cruz was using an EEC sample parent handbook, but it was incomplete with respect to her particular child care program.

(Sanches direct testimony: Exh. 2 at 2; Exh. 7: attached "visit summary" for Oct. 12, 2018 visit, at 1-4.)

18. Ms. Sanches discussed these observations, and the applicable EEC regulatory requirements, with Ms. Cruz during the October 12, 2018 visit. She also sent a followup letter regarding the visit to Ms. Sanches on October 31, 2018. This letter listed the previously-observed instances of noncompliance violations that Ms. Cruz had reported as having been corrected, and

the instances of noncompliance that Ms. Sanches had noted during the visit. The letter directed Ms. Cruz to make the required corrections and report them to Ms. Sanches by November 8, 2018. (Exh. 7.)

19. There is no evidence in the record, and there was no testimony, that Ms. Cruz submitted this list of corrections to Ms. Sanches or to any other EEC staffperson.

*January 15, 2019 Visit*

20. Ms. Sanches made an unannounced visit to Ms. Cruz's home on January 15, 2019.

She was accompanied during this visit by Patricia Halpin, the Family Child Care Supervisor of EEC's Metro Region, and by Kelly Meehan, EEC Metro Region-Boston's Regional Director. Ingrid Mendes, a representative of Nurtury, Inc. (the private provider who had referred child care children to Ms. Cruz), also participated in the visit and assisted with Spanish translation.

(a) The purpose of this visit was to followup on the instances of noncompliance that Ms. Sanches had observed during her October 12, 2018 visit to the Cruz home.

(b) Ms. Cruz was not at home because she had traveled to the Dominican Republic to visit her mother, who was undergoing a surgical procedure. She had left "lists" for her child care assistant to help her care for the child care children while Ms. Cruz was away.

(c) When the EEC staffpersons and Nurtury representative arrived, it took ten minutes for someone to open the front door. Jennifer Medina Rodriguez, Ms. Cruz's assistant, opened the door and stated that Ms. Cruz was out of the country.

(Halpin direct testimony and cross-examination; Meehan direct testimony and cross-

examination; Cruz direct testimony and cross-examination; Exh. 2: Ms. Sanches's chronology of visits to 411 Seaver Street, at 1; Exh. 9: EEC Report regarding the Jan. 15, 2019 visit to 411 Seaver Street, at 1.)

21. The three EEC staffpersons observed instances of noncompliance during their unannounced January 15, 2019 visit, including the following:

(a) *Outdoor play area hazards.* Upon approaching the house, Ms. Halpin and Ms. Sanches observed a broken driveway gate, three vehicles in the driveway and trash cans; and no acceptable outdoor play area.

(b) *Smoke detector malfunction.* The EEC staffpersons heard the smoke detector in the front hall entryway beep continuously for approximately ten minutes. It was not clear how long, or how often, the smoke detector had been beeping before they arrived.

(c) *Stairway hazard.* When Ms. Halpin, Ms. Meehan and Ms. Sanches climbed the single flight of stairs to Ms. Cruz's second floor apartment, they noticed that the gate at the top of the stairs was broken.

(d) *Electrical hazard.* In the living room, which was part of the licensed child care space, the EEC staffpersons observed electrical wires "bunched together" on the floor, where they were accessible to children.

(e) *Other indoor hazards.* There was a small, open storage area under a stairway in which the EEC staffpersons observed cans of paint, trash and plastic bags that were accessible to children. There was also a large dining table in the living room that limited the floor space available for child care children.

(f) *Children in unlicensed space; Children being cared for by unlicensed assistant; and family child care assistant mis-identified.* Licensed child care assistant

Jennifer Medina Rodriguez, who was approved by EEC to be a regular child care assistant for six children, was caring for six children in the second floor playroom. Ms. Meehan noticed nine bowls filled with macaroni and cheese in the kitchen, suggesting that more than six children were being cared for. Ms. Rodriguez explained that some of the children had an extra bowl of macaroni and cheese. The EEC staffpersons noticed that there was no gate barring access by children to the stairs leading from the second floor apartment to the finished attic area, which was not part of Ms. Cruz's licensed child care space. They also heard children on the level above the second floor. Ms. Halpin and Ms. Meehan climbed the stairs, found an unopened door in the attic area, and knocked. When the door was opened, they observed three children with a person they did not know who identified herself initially as "Yoselin Bautista." The EEC staffpersons knew that to be the name of a certified child care assistant. However, the person claiming to be "Yoselin Bautista" supplied the wrong date of birth and could not supply Ms. Bautista's correct address. Ultimately, she identified herself as Lucia Rodriguez, Ms. Cruz's sister, who did not have any EEC-issued child care certification. The three children in the finished attic area were among the children who had been placed in Ms. Cruz's family child care program by Nurtury. As a result, Jennifer Medina Rodriguez was the only licensed child care assistant present during the January 15, 2019 visit and, as a result, she was responsible for the nine children on the premises—three more than the six for whom she was licensed to provide care.

(g) Ms. Mendes called Nurtury, and learned that Ms. Cruz had told Nurtury that she would be out of the country for an unspecified time and that two licensed child care children would be operating her family child care program in her absence—Jennifer



Medina Rodriguez (who was at the Cruz home when EEC staff visited on January 15, 2019, but who was responsible for too many children) and Yoselin Bautista, who was not at the Cruz home during the January 15, 2019 visit. Because the children were in the care of an unqualified person (in the attic) or staff not licensed to care for more than six children, Ms. Halpin and/or Ms. Mendes asked Nurtury to pick up all of the child care children at Ms. Cruz's home. Ms. Rodriguez told Ms. Halpin and/or Ms. Mendes that she was no longer living there and had moved to a different address "down the street." The EEC staffpersons told Ms. Rodriguez that she could not continue to run the family child care program, and that the program could not resume and had to remain inactive until Ms. Cruz returned.

(Halpin direct testimony and cross-examination; Meehan direct testimony and cross-examination; Sanches direct testimony; Exh. 2 at 1; Exh. 9 at 1; Exh. 10; EEC letter to "Jennifer Medina-Rodriguez" (sic), dated December 15, 2016, notifying her of approval as regular assistant to family child care provider, with permission to be alone on child care premises with up to six children for up to 24 hours in a 12-month period.)

22. Following the January 15, 2019 visit, Ms. Halpin reached Ms. Cruz in the Dominican Republic by telephone. She told Ms. Cruz that her child care children had been placed in backup care because she had left her program to be operated by unqualified caregivers while she was out of the country; that the program would have to remain inactive until EEC legal staff reviewed it; and that, upon returning, Ms. Cruz was to call EEC to schedule a meeting to discuss the findings from the January 15, 2019 visit. Ms. Halpin also mailed to Ms. Cruz a copy of her narrative report of the visit, a follow-up visit summary, and a list of observed instances of noncompliance as to which Ms. Cruz was to submit a correction plan stating the date on which

the corrections had been made. (Exh. 9 at 1, and attached visit summary.)

23. On January 28, 2019, Ms. Cruz reported to EEC that she was not caring for child care children. (Emergency Order to Protect Children (Feb. 13, 2019) at 2.)

*EEC's Emergency Order*

24. On February 13, 2019, EEC issued to Ms. Cruz, pursuant to M.G.L. c. 15D, § 10 and 102 C.M.R. § 1.07(5)(a), an emergency order that immediately suspended, and refused to renew, her family child care provider license and directed her to immediately cease providing child care in her home.

(a) The order stated that EEC had taken this action based upon Ms. Cruz's "lengthy history of regulatory violations regarding the health and safety of children" in her care that, in the agency's view, had "created an emergency situation endangering the life, health and safety of children attending [her family child care] program."

(b) The order identified the instances of noncompliance in question as violations of EEC's regulations governing the licensing of early child care and education services, including family child care programs and their administration.

(c) The order also stated that its staff had observed instances of noncompliance when they visited Ms. Cruz's home in 2014, 2016 and 2017, on several occasions in 2018 (including a visit that agency staff conducted on October 12, 2018), and again on January 15, 2019.

25. Ms. Cruz filed a timely appeal challenging EEC's action on February 21, 2019.

*Discussion**1. Family Child Care Provider Licensing Revocation and Suspension; Issue to be Decided; and Burden of Proof*

EEC is designated by statute as the “lead agency of the commonwealth for administering and providing early education and care programs and services to children . . .” M.G.L. c. 15D, § 2(a). The agency “licenses and approves all family child-care homes and no family child-care home may operate without a license.” *Jha v. Dep't of Early Education and Care*, C.A. No. 2084CV01639, Mem. of Decision and Order on Cross-Motions for Judgment on the Pleadings at 5 (Mass. Suffolk Super. Ct., Jun. 15, 2020), *citing* M.G.L. c. 15D, 6(a).

The statute directs EEC to adopt regulations “relative to the requirements for licensure and approval of . . . Family child care homes or large family child care homes . . .” M.G.L. c. 15D, § 8(a). EEC had done so, and the regulations, 102 C.M.R. § 1.01 *et seq.*, were in effect when the agency first issued a family child care license to Ms. Cruz in late December 2011. The regulations provided then (as they do now) that the agency may visit and inspect any facility or program requiring an EEC license to determine whether it is “being operated in compliance with the law and any [EEC] regulations governing such programs.” *Jha*; Mem. of Decision at 6, *quoting* 102 C.M.R. § 1.06(1). If any licensed early education and child care facility or program is not in compliance with any EEC regulation, the agency may impose sanctions that include “ceasing the enrollment of new children” in the facility or program and “reducing the number of children a program . . . is licensed to serve.” *Id.*, *quoting* 102 C.M.R. § 1.07(3)(a).

102 C.M.R. § 1.07(5) provides that EEC “may suspend any license or approval” it issued to a family child care provider “without a prior hearing if failure of the licensee to comply with any applicable regulation results in an emergency situation which endangers the life, health, or safety of children or staff present in the program or facility.” A continuing failure to comply with

regulatory requirements may allow EEC to conclude, reasonably, that these instances of noncompliance placed the life, health or safety of children in a licensed family child care facility or program at risk. *Jha*; Mem. of Decision at 7-8. This conclusion is particularly reasonable when noncompliance involves having more child care children than the facility or program's license allows, having unlicensed or uncertified adults caring for child care children, not following safe sleep practices, or allowing child care children to be cared for outside of the licensed premises even if these are adjacent to a licensed space (for example, in an adjacent room or in an upstairs or downstairs apartment, not specified in the family child care license). *Id.*

Because the EEC regulations are "preventative" as to the life, safety and health of child care children, it is irrelevant that instances of noncompliance with regulatory requirements governing a family child care facility or program license did not appear to have caused any physical harm to a child in the care of a licensed family child care provider. Even when that is the case, EEC may conclude reasonably that "refusal to comply" with the regulatory requirements in question "placed the children in [the license-holder's] care *at risk* of physical harm or death." *Jha.*; Mem. of Decision at 8 (emphasis added.)

EEC has the burden of proving that the instance or instances of noncompliance in question occurred, and created an "emergency situation" that endangered the child care children in the licensed provider's family child care program. EEC must prove all of the elements of its case affirmatively, and cannot rely upon the provider's failure to contest all of the elements of noncompliance the agency alleges. *See Dep't of Early Education and Care v. Santizo*, Docket No. OC-17-087, Recommended Decision at 18-19 (Mass. Div. of Admin. Law App., Aug. 10, 2017). In addition, the suspension of the family child care license must be based upon the provider's failure to comply with specific regulatory requirements, not the failure of an outsider who is not under the provider's professional control to comply. *Id.* (a family child care provider

was not responsible for the false statement by her niece to EEC staffpersons during a site visit regarding the parentage of one of the child care infants observed in the licensed child care space; therefore, the niece's false statement was not the submission, by the provider of a misleading or false statement justifying the suspension or refusal to renew her family child care license pursuant to 102 C.M.R. § 1.07(4)(a)3.)

*Santizo* provides examples of noncompliance that each justified suspending or revoking a family child care license. In that case, the evidence showed that the family child care provider had violated staff-to-children ratio requirements by leaving a single assistant to care for nine children—three more than the maximum number of child care children the EEC regulations allowed a single child care provider to supervise, *see* 606 C.M.R. § 7.10(3)(a), while the provider left the premises for at least 45 minutes. EEC alleged a similar type of noncompliance here, except that the provider's absence from the child care premises was for several days. The evidence in *Santizo* also showed that the provider had allowed a day care child to sleep behind a closed door, in violation of 606 C.M.R. § 7.10(7)(d). While that type of noncompliance was not alleged here, the point is that any (or several, or all) instances of noncompliance, if proven, give EEC a reasonable basis for perceiving a risk of harm to the life, health or safety of child care children in the provider's care that warrants sanctioning a family child care provider, including license suspension, revocation or non-renewal.

## *2. Instances of Noncompliance Proved*

The issue to be decided here, therefore, is whether, as of early February 2019, EEC concluded reasonably that the instances of noncompliance its staff observed during visits to Ms. Cruz's home over a seven-year period—particularly during the last two visits, on October 12, 2018 and January 15, 2019—had created an emergency situation that endangered the life, health, or safety of children present in her family child care program.

During her visits to Ms. Cruz's home between December 15, 2011 and January 15, 2019, EEC family child care licenser Jandira Sanches observed numerous instances of noncompliance, most of which she had seen during two or more visits. During their last visit to the Cruz home on January 15, 2019 before EEC issued its emergency order, Ms. Sanches, EEC Metro Boston Regional Director Kelly Hart Meehan, and Family Child Care supervisor Patricia Halpin observed many of the violations Ms. Sanches had observed during her prior visits over the preceding seven years, including the October 12, 2018 visit.

The chart included as an Appendix to this Recommended Decision summarizes the types of noncompliance that EEC staff observed during each of the visits to Ms. Cruz's home during the time period in question, their frequency, and whether they appeared to have been corrected prior to the final visit on January 15, 2019. A few were corrected; some appeared to have emerged again after having been corrected, and many persisted over the course of the eleven visits that EEC staff made to Ms. Cruz's home between and including the first visit on December 15, 2011 and the final visit on January 15, 2019.

I review, next, the instances of noncompliance observed during these visits, the regulatory requirements they violated, and whether or not they were proven to have occurred, including whether or not they were corrected after having been observed.

*a. Noncompliance Related to Licensed Child Care Space*

This type of observed noncompliance included the following, most of which were not corrected by the time of the final EEC visit on January 15, 2019:

(1) *Child care children being cared for in unlicensed space.* See 606 C.M.R. §§ 7.07(10)(a)(child care must be provided only in space approved by EEC). Ms. Sanches observed this type of noncompliance during her visit to the Cruz home on June 13, 2014. She did not observe it again during seven subsequent visits she made starting in late 2014 and continuing

through 2018. However, Ms. Sanches, Ms. Halpin and Ms. Murphy observed family child care children in unlicensed space on January 15, 2019, the last visit made by EEC staff to the Cruz home before the agency issued its emergency order. This type of noncompliance was not corrected as of the final EEC visit, therefore.

(2) *Exit, entrance and/or stairwell-related hazards.* See 606 C.M.R. §§ 7.07(1)(exits and evacuation routes must be kept clear of obstructions) and 7.07(11)(a)(where child care program serves children younger than three years old, barriers are required at the top and bottom of stairwells opening into areas used by children unless prohibited by building or fire department regulations). EEC staff observed this type of noncompliance during six of the 12 visits to the Cruz home between December 2014 and January 2019, including the last visits on January 15, 2019. This type of noncompliance was not corrected as of the final EEC visit, therefore.

(3) *Electrical outlets not covered.* See 606 C.M.R. §§ 7.07(10)(o)(electrical outlets must be made inaccessible by a safety device or covering). This type of noncompliance was first observed by Ms. Sanches during her October 21, 2014 visit to the Cruz home. Ms. Sanches did not observe it during her December 3, 2014 and July 8, 2016 visits. She observed it again, during her December 15, 2017 visit, but not during her subsequent visits on . After not being observed during subsequent visits, Ms. Sanches, Ms. Halpin and Ms. Meehan observed uncovered electrical outlets during the January 15, 2019 visit. This type of noncompliance was not corrected as of the final EEC visit, therefore.

(4) *Furniture in dining room or playroom not secured to a wall.* See 606 C.M.R. §§ 7.07(13)(indoor equipment, materials and furnishings must be sturdy, safely constructed and installed, and must also be non-tippable and “free from . . . other hazards that may be dangerous to children.”) This type of noncompliance was observed by Ms. Sanches during her first two visits (On December 15, 2011 and on July 12, 2012). She did not observe it during her 2016 and

2017 visits. She observed it again on December 15, 2017, but not during any subsequent visit.

This type of noncompliance appears to have been corrected as of the final EEC visit, therefore.

(5) *Hazardous objects and/or materials not stored properly.* For example, knives and serrated objects, cleaning products, kitchen bags, a lighter, oils, and batteries were not stored in child-proofed drawers and cabinets. *See* 606 C.M.R. §§ 7.07(1)(physical facilities must be kept free of hazards and clutter), and 7.07(13)(g)("[e]ducators must ensure that all hazardous objects, including but not limited to matches, lighters, toxic materials, sharp objects, plastic bags and purses are locked or inaccessible to children.") This type of noncompliance was observed during each of Ms. Sanches's five visits in 2014 and 2016; she did not observe it during her December 29, 2017 or March 28, 2018 visits; but it was observed again during each of the last two visits (on October 12, 2018 and on January 15, 2019). This type of noncompliance was not corrected as of the final EEC visit, therefore.

(6) *Unsanitary conditions, trash and/or premises in disrepair*—for example, a bathroom trash can without a cover; a glass door and its frame in the kitchen stained with water and dust; pieces of paper on the floor; and accumulated dust on the television and VCR. *See* 606 C.M.R. §§ 7.07(1)(physical facilities must be kept clean and free from hazards and clutter); 7.07(10)(m) (refuse garbage must be kept in lined and covered containers), and 7.07(13)(b)(educator must keep all equipment, materials, furnishings, toys and games clean). Ms. Sanches observed this type of noncompliance during six of her first 10 visits to the Cruz home, including her last solo visit to Ms. Cruz's house on October 12, 2018. It was not observed during the final EEC staff visit on January 15, 2019. While this suggested correction, the ongoing pattern of observed unsanitary conditions over the course of seven years of visits does not show its definitive correction by the time EEC staff conducted their final visit.

(7) *Smoke detector not maintained in an operable condition*—in this case, a smoke



detector that was beeping, indicating that the device needed a new battery. *See* 606 C.M.R. § 7.07(15)(d)(2) (smoke detector required by 606 C.M.R. § 15(d)1 must be “maintained in operable condition,” and if it battery-operated, the batteries must be “replaced at least annually, or more often as necessary . . . .”) Ms. Sanches observed this type of noncompliance during her July 12, 2012 visit to Ms. Cruz’s home. She did not observe it during her visits in 2014, 2016, 2017 or 2018. However, a smoke detector was beeping during the EEC staff visit on January 15, 2019. This type of noncompliance was not corrected as of the final EEC visit, therefore.

*b. Health and Safety-Related Noncompliance*

Ms. Cruz appeared to have corrected several types of noncompliance related to the health and safety of family child care children before the final EEC visit to her home on January 15, 2019.

One such type of noncompliance was the absence of required items from the program’s first aid kit. Ms. Sanches observed missing first aid kit items were during five of her seven visits between December 15, 2011 and December 15, 2017, including adhesive tape, band aids, gauze pads, gauze roller bandage, scissors, tweezers, thermometer and CPR mouth guard. The applicable regulation is 606 C.M.R. § 7.11(c)(reciting first aid supplies that licenser must maintain). However, no items were observed as missing from Ms. Cruz’s family child care program first aid kit during any visit in 2018, or during the last visit on January 15, 2019.

Another noncompliance that Ms. Cruz corrected was safe sleep and playpen violations. This was a type of noncompliance that was not noted during visits between 2011 and 2014, but that appeared during Ms. Sanches’s three visits to the Cruz home in 2016 and 2017. During those visits, Ms. Sanches observed an inadequate number of playpens for napping children, and damaged playpens and sleeping mats; and neither Ms. Cruz nor her regular family child care assistant was observing napping children every 15 minutes. *See* 606 C.M.R. §§ 7.11(13)(d)

(3)(b)(licensee must provide separate mat cot, sofa, portacrib, playpen, bassinet or bed, and blanket for each child present during the day); and 7.11(13) (d)(3)(c) (licensee must provide sleeping materials that are in good repair and clean); and 606 C.M.R. § 7.10(7)(d) (“[e]ducator must visually observe napping children at least every 15 minutes). However, these instances of noncompliance were not observed during the 2018 visits or during the last visit on January 15, 2019.

I credit Ms. Cruz for correcting these instances of noncompliance. While EEC proved that these types of noncompliance were observed, and occurred, during Ms. Sanches’s visits in 2016 and 2017, they were not noted during any of the 2018 visits, or during the final visit on January 15, 2019. As a result, these types of noncompliance cannot be said to have created, by the time EEC issued its emergency order in early 2019, an emergency situation that endangered the life, health, or safety of children or staff in Ms. Cruz’s family child care program.

The same cannot be said, however, regarding other types of noncompliance that Ms. Sanches observed during her visits between December 15, 2011 and October 12, 2018, and that she, Ms. Halpin and Ms. Meehan observed during the last visit on January 15, 2019. Several examples follow:

(1) *Children’s childcare or medical records were incomplete, and emergency information for child care children was missing or incomplete. See 606 C.M.R. §§ 7.04(7)(licensee must maintain record for each child that includes name, date and birthday of child, physical description or current photograph of child, child’s parents and their contact information, and information on child’s allergies, medications and their possible side effects), and 7.11(5)(d)(licensee must ensure that current contact information for child care children, and each child’s current contact information and medical information are “easily and readily available at all times” and accompanies the children anytime they leave the facility in the care of family child*

care provider staff). This type of noncompliance was observed by Ms. Sanches during seven of her ten visits to the Cruz home between December 15, 2011 and October 12, 2018, and by Ms. Sanches, Ms. Halpin and Ms. Meehan during their January 15, 2019 visit.

(2) *Missing emergency plan and/or emergency numbers* (for example, telephone numbers for police, fire and ambulance service). See 606 C.M.R. § 7.11(7)(f) (“[I] licensee must have a written plan detailing procedures for meeting potential emergencies including but not limited to missing children, the evacuation of children from the program in the event of a . . . natural disaster, loss of power, heat or hot water or other emergency situation,” and specifying information that the plan must include). First observed on December 15, 2011, and seemingly corrected, this type of noncompliance was again observed On December 15, 2017, and on October 12, 2018. While not observed during the last visit on January 15, 2019, it is not reasonable to conclude that this type of noncompliance had been corrected as of that date, given its history of reappearing twice after appearing to have been corrected, including during the next-to-last visit on October 12, 2018.

*c. Noncompliance Related to Educator Qualifications and Professional Training*

During each of her 2014 visits, Ms. Sanches observed that a person assisting Ms. Cruz with family child care children was unlicensed, had not been not fully trained, or misidentified themselves as being licensed tp care for child care children. The same type of noncompliance was also observed by Ms. Sanches, Ms. Halpin and Ms. Meehan during their visit to the Cruz home on January 15, 2019.

These types of noncompliance were proven. They violated several of EEC’s regulations: 606 C.M.R. §§ 7.09(1), which provides that a family child care licensee “must ensure that the program is staffed by appropriate numbers of persons with experience and/or education in providing education and care to children from birth to age 14;” 606 C.M.R. §7.09(2), which

provides that the licensee “must employ educators who, by prior education, training, experience and interest in fostering development and early childhood education, are qualified to meet the needs of children enrolled, and who meet the qualifications for their respective positions;” 606 C.M.R. § 7.09(10), which provides that the licensee “must obtain evidence that personnel are currently certified, licensed or registered where applicable laws and regulations require certification, licensure or registration, including, but not limited to, driver’s license and EEC registration;” and 606 C.M.R. §7.09(15)(c), which specifies the qualifications of a child care provider’s assistants, including ability to implement provider’s curriculum, activities and routines; and requires that in a program licenced to provide care to seven or more child care children, a regular assistant may provide care only under the supervision of a licensee or certified assistant. Noncompliance with these requirements is extremely serious, in terms of risk to the safety of child care children in a licensed family child care program. It leaves family child care children cared for by unqualified, untrained and/or misidentified individuals.

While Ms. Sanches observed noncompliance with these regulatory requirements during each of her 2014 visits to the Cruz home, she did not observe it during her 2016, 2017 or 2018 visits. Although that suggested correction, this serious noncompliance was again observed during the January 15, 2019 visit. *See* Findings 27(f) and (g) (having traveled to the Dominican Republic to visit a family member, Ms. Cruz had left nine child care children in the care of one aide licensed to care for six children, and another licensed aide who was not present at the home when EEC staff visited on January 15, 2019; in addition, three of the children were in the care of an unqualified and unidentified person in the home’s attic). (*See* Finding 21(f).) There had been, thus, no correction of noncompliance with requirements that family child care assistants be licensed or fully trained before EEC issued its emergency order suspending Ms. Cruz’s family child care provider license and denying its renewal.

*d. Other Types of Noncompliance Observed*

(1) *Misidentifying, or misrepresenting the identity of, a person present in the child care space as Ms. Cruz's certified or regular assistant. See Findings 27(f) and (g).* This type of noncompliance violated 102 C.M.R. § 1.07(4)(a)3 (EEC may make probationary, or may suspend, refuse to renew, revoke, or refuse to issue a license or approval if it finds that, among other things, "the applicant or licensee submitted any misleading or false statement or report required under 102 C.M.R. 1.00 through 8.00 *et seq.*"). As I noted above, this type of noncompliance was observed during the January 15, 2019 visit by all three of EEC's witnesses, when Ms. Cruz was away; it involved and affected nine child care children; and one of the persons at the home who was caring for these children misrepresented not only her credentials but also her identity. This left EEC, as of January 15, 2019, with no reliable information about who was caring for the children in Ms. Cruz's family child care program; whether they were caring for more child care children than their licensing allowed; and whether they were qualified child care personnel. These instances of noncompliance defeated the very purpose of family child care—to ensure the safety of enrolled child care children) and exposed the children to a potentially serious health and safety threat. *See Jha* (discussed above at 28-29); Mem. of Decision at 7-8.

(2) *Unreported restraining order Ms. Cruz had obtained against the father of her children. (See Finding 15).* This type of noncompliance violated 606 C.M.R. § 7.04(15)(d)2 (a licensed family child care provider must report to EEC, in writing, within five days of their occurrence, the "initiation of any legal proceedings . . . brought against an educator, household member of the licensee or person regularly on the premises of the family child care program," including "any criminal or delinquency complaint listed in the Department's Background Record Check regulations . . ."). EEC's primary concerns were that a restraining order and its attendant

circumstances could impact adversely Ms. Cruz's ability to care for children. More to the point, because EEC was not informed of this significant development of concern, the agency could not have taken timely action to investigate and intervene as necessary to prevent the lives, safety and well-being of the family child care children for whom Ms. Cruz was caring

(3) *Unreported change in composition of Ms. Cruz's household within seven days of the change* (her child care assistant moving into Ms. Cruz's second floor apartment as of March 2018; *see* Finding 15.) This type of noncompliance violated 606 C.M.R. § 7.04(16)(b). It left EEC without accurate information about who else was present when family child care children and licensed staff were present, and whether their presence was authorized by Ms. Cruz's family child care license.

### 3. Conclusion

EEC proved the occurrence of all of the instances of noncompliance that Ms. Sanches observed between late December 2011 and October 12, 2018, and that she, Ms. Halpin and Ms. Meehan observed during the January 15, 2019 visit. Ms. Cruz corrected several of the types of noncompliance that Ms. Sanches had observed during her visits. However, most of them were observed to have reappeared or repeated either when Ms. Sanches made her last solo visit to the Cruz home on October 12, 2018 or during the final visit on January 15, 2019 before EEC issued its emergency order to Ms. Cruz. These included incomplete attendance records for the child care children enrolled in Ms. Cruz's licensed family child care program; assistants caring for child care children who were unlicensed or not fully trained; missing or incomplete child care and medical records; electrical hazards including uncovered electrical outlets; stairwells without child gates (to prevent children from falling down stairs and sustaining injuries); hazardous materials that were improperly stored and/or accessible to children; outdoor play area hazards;

and unsanitary conditions including lack of soap for hand-washing, trash present inside Ms. Cruz's second floor dwelling; and areas of the house that were in various states of disrepair. All of these instances of noncompliance were chargeable to Ms. Cruz as the owner of the home and as the holder of a family child care provider license allowing her to operate a family child care program at the home. It was her responsibility as license holder to correct them when Ms. Sanches brought them to her attention. She attempted to do so over a seven year period, but the observed instances of noncompliance remained mostly, or partially, uncorrected over that period of time.

Per 102 C.M.R. § 1.07(5), each of these instances of noncompliance was a separate ground for suspending and refusing to renew Ms. Cruz's family child care provider license, because each evidenced "an emergency situation which endangered the life, health or safety of children or staff present" in Ms. Cruz's family child care program at her home. *See Santizo* (discussed above at 30-31). Considered together, the instances of noncompliance observed to have continued, repeated or reappeared as of the January 15, 2019 visit by EEC staff to Ms. Cruz's home allowed the agency to conclude, reasonably, that there had developed an emergency situation that endangered the life, health, or safety of children or staff present in Ms. Cruz's family child care program. These included the presence of more children than her licensed assistant had authority to care for, children being cared for by an unlicensed caregiver, and children being cared for beyond areas of Ms. Cruz's apartment that were licensed for use by her family child care program. They also included missing information on child care children; electrical hazards; stairway safety hazards; obstructions in the licensed family child care space; and improperly stored and secured hazardous items and substances that child care children could reach.

EEC's conclusion was reasonable even though there was no evidence that any of the

observed instances of noncompliance appeared to have caused any physical harm to a family child care child in Ms. Cruz's care. EEC was not required to prove that any such harm actually occurred. *Jha*; Mem. of Decision at 8 (*see* above at 29.) Because the EEC regulations are "preventative" as to the life, safety and health of child care children, what mattered was that the instances of noncompliance observed during the eleven visits EEC staff made over a seven-year period—particularly those that were not corrected—"placed the children in [the license-holder's] care at risk of physical harm or death." *Id.* That this risk existed as a result of the noncompliance instances observed and proven to have occurred here is not seriously disputed.

In reaching this conclusion, I make no adverse determination regarding Ms. Cruz's character, or her suitability to be licensed as a family child care provider if she were to apply anew for a license and satisfied EEC's licensing requirements. I decide only the reasonableness of EEC's conclusion, as of February 2019, to issue the emergency order suspending and refusing to renew the family child care provider license Ms. Cruz held at that time, because the instances of noncompliance observed at her home through January 15, 2019 posed a risk to the life, safety and health of the family child care children in her care.

In recommending that EEC's February 2019 emergency order be affirmed, I note that achieving and maintaining full compliance with the regulatory requirements applicable to a licensed family child care program is a difficult and full-time task for a licensed family child care provider who operates such a program as a sole proprietor. Nonetheless, compliance (and the cost of coming into and remaining in compliance) is mandatory because the life, health and safety of other people's children (and her own children when, as here, they shared the licensed premises) requires a heightened degree of attention. It also requires potentially costly, and relatively immediate, remediation of instances of noncompliance that may prove to be beyond a license holder's resources.



This appears to have been true for Ms. Cruz as of early 2019. She had experienced mortgage payment difficulties after losing her rent-paying tenant. She had become a licensed family child care provider in the hope of earning an income that could pay her home expenses while caring for her own family. Caring for up to six family child care children, let alone ten children, may have seemed both feasible and financially sensible. Ms. Cruz's determination to maintain her home in good condition by herself, was commendable, but, in retrospect, unrealistic. The repairs and maintenance required by an older home appeared to have outpaced remediation with minor non-structural fixes. There was no evidence that she had assistance with repairs and maintenance from a household member, or that she had any contractor on call to perform this work. That may have been on account of a tight family budget. Remaining in compliance with regulatory requirements, all of which were critical to family child care children safety and health, became impossible ultimately, especially when Ms. Cruz needed to travel overseas on account of her mother's health situation.

The challenge Ms. Cruz faced evokes sympathy, but that does not create a right to remain licensed to provide family child care when compliance with applicable requirements becomes unfeasible, or even impossible, for whatever reasons. Given the potential and unacceptable risk that the observed instances of noncompliance posed to the child care children in Ms. Cruz's care, and the time Ms. Cruz was given to come into compliance (a period of more than seven years), EEC had no choice but to err in favor of children's lives, and family child care health and safety, and issue the emergency order it did in February 2019.

### *Disposition*

For the reasons stated above, I recommend that the Department of Early Education and Care's February 13, 2019 emergency order that immediately suspended, and refused to renew,

Yesenia Cruz's family child care provider license and directed her to immediately cease providing child care in her home be affirmed.

SO ORDERED.

This is a recommended decision of the Division of Administrative Law Appeals. The parties are hereby notified that, pursuant to 801 C.M.R. § 1.01(11)(c)1, each of them has 30 days to file with the Department of Early Education and Care any written objections to this recommended decision, which may be accompanied by a supporting brief. A final agency decision in this matter will be issued by the Commissioner of the Department of Early Education and Care.

DIVISION OF ADMINISTRATIVE LAW APPEALS

*/s/ Mark L. Silverstein*

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Mark L. Silverstein  
Administrative Magistrate

Dated: December 11, 2024

*The Appendix to Recommended Decision: Table of EEC Visits to the Cruz Home and Instances of Noncompliance Observed, 2012-19, follows on the next page.*

EEC VISIT DATE Noncompliance Observed	12/15/2011 Pre-license visit	7/12/2012 Followup of prior visit	6/13/2014 Child capacity increase	10/21/2014 Compliance visit	12/03/2014 Compliance followup visit	7/8/2016 After child capacity increase	12/15/2017 License renewal requested	12/29/2017 Followup re child safe sleep	3/28/2018 Unreported restraining order etc.	10/12/2018 Followup visit	1/15/2019F Followup visit
Assistant unlicensed / not fully trained / misidentified			X	X	X						X
Attendance records incomplete			X								
Child care / medical records incomplete/ missing/ expired		X	X	X	X	X	X			X	X
Children in unlicensed space			X								X
Electric hazards (uncovered outlets, frayed cords, wires accessible to children)				X			X			X	X
Emerg. plan / tel. #s missing	X						X			X	
Enrollment packets missing information about children			X	X	X		X			X	X
Evacuation drill not documented/ no exit signs			X	X							
Exit, entrance and/or stairwell-related hazards	X		X	X			X			X	X
First aid kit missing items	X	X	X	X			X				
Furniture blocking licensed child space in dining room											X
Furniture in dining room or playroom not secured to wall	X	X					X				
Hazardous objects/ other materials not stored properly / accessible to children			X	X	X	X	X			X	X
Outdoor play area hazards						X	X			X	X
Safe sleep/ playpen violations						X	X	X			
Smoke detector beeping		X									X
Unreported restraining order / household composition change									X		
Unsanitary conditions, trash, and/or premises in disrepair	X		X	X		X	X			X	