COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Department of Early Education and Care**,

Petitioner

v. Docket No. OC-17-870

**Sachchidanand Jha**,

Respondent

**Appearance for Petitioner**:

Thomas Myers, Esq.

Department of Early Education and Care

51 Sleeper Street

Boston, MA 02210

**Appearance for Respondent**:

Sachchidanand Jha

118 Lewis Road

Belmont, MA 02478

**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF RECOMMENDED DECISION**

EEC revoked the petitioner’s family child care license, alleging that the petitioner violated four provisions of a legal agreement, failed to exercise good judgment when he left one infant on one floor while retrieving a second infant from a different floor, and when he left the second infant to retrieve a portable crib, and violated safety requirements, including those for safe sleep. Revocation is not recommended.

**RECOMMENDED DECISION**

 The petitioner, Sachchidanand Jha, appeals the revocation of his family child care license and other sanctions.

 I held a hearing on February 8, 2018, which I recorded digitally. Mr. Jha represented himself and testified; he called no other witness. EEC called as witnesses Alessandra DePass, one of its licensors, and Patricia Halpin, its Family Child Care Supervisor. I accepted into evidence 11 exhibits: A through J for EEC, and Exhibits 1 and 2 for Mr. Jha. Exhibit 1, in turn, has exhibits marked 1 through 3, which I refer to as Exhibits 1-1, 1-2, and 1-3.

 EEC filed a post-hearing brief. Instead of a post-hearing brief, Mr. Jha argued orally at the end of the hearing.

**Findings of Fact**

 1. A residential building in Belmont has the addresses 118 and 120 Lewis Road. The first floor is 120 Lewis Road; the second floor is 118 Lewis Road. (This decision will refer to “the first floor” and “the second floor.”) (Ex. B.)

 2. Mr. Jha lives with his wife, Ranjana Jha, on the second floor. He has been licensed to operate a family child care program there since 2012. (Ex. B, Jha testimony.)

 3. Mrs. Jha operates what is supposed to be a separate family child care program on the first floor. It is not a residence. (Ex. B, DePass testimony.)

 4. Mr. Jha’s child care program has a maximum capacity of six children. (Ex. B, DePass testimony.)

 5. Mrs. Jha’s program had a maximum capacity of 10 children. (DePass testimony.)

 6. Mrs. Jha’s program employed a child care assistant. Mr. Jha’s program did not employ an assistant. (DePass testimony.)

 7. On December 16, 2015, EEC issued an Order to Protect Children: Notice of Refusal to Renew, Notice of Sanctions, and Notice of Intent to Fine. The Order concerned allegations that Mr. Jha and his wife had commingled their programs and were operating them as one program. (Ex. E.) (That order is not directly on appeal here.)

 8. On April 17, 2017, EEC and Mr. Jha resolved the 2015 Order to Protect Children with a legal agreement. (Exs. B, G; DePass testimony.)

 9. EEC later alleged that Mr. Jha did not comply with provisions 3, 6, 7, and 9 of the agreement. (Ex. B.) Those provisions are:

 3. The Educator shall execute, either himself or through his assistants, all of the substantial tasks of operating his family child care program, including, but not limited to, supervision of children, attending to children’s needs, education of children, and diapering of children.

....

6. The Educator shall maintain separate documentation for the children enrolled in his family child care program and the documentation must be maintained on the Educator’s licensed family child care premises.

....

 7. The Educator may allow his child care children to interact with Ms. Jha’s child care children on a limited basis, including play groups and other structured programming, for no more than six scheduled activity hours per week. The Educator must document any instance in which his child care programming interacts with Ms. Jha’s programming. Scheduled activity hours shall not include the time period when Mr. Jha’s child care children fail to transition quickly from the concluded scheduled interaction activity.

....

9. The Educator shall require that all parents of children enrolled in the Educator’s program to sign a written acknowledgement that the Educator’s program is operated separately and distinctly from Ms. Jha’s program.

....

(Ex. G.)

 10. On June 5, 2017, Ms. DePass conducted an unannounced site visit to verify compliance with the legal agreement. The site visit began at 8:37 a.m.; the time is significant. (Exs. B, D; DePass testimony.)

 11. Ms. DePass saw Mr. Jha on the first floor. He said that he was returning upstairs with two infants who were enrolled in his program. (Exs. B, D; DePass testimony.)

 12. Mr. Jha took Infant A and some papers from the first floor to the second floor. He placed the infant in a bouncy seat in a bedroom, then left the second floor to retrieve the second infant. He left Infant A alone with Ms. DePass, who by then was on the second floor and who could not see the infant from her place at the dining room table. (Exs. B, D; DePass testimony.)

 13. Mr. Jha returned to the second floor with Infant B and two bags that contained the infants’ diapers, clothing, and bottles of milk. (Exs. B, D; DePass testimony.)

 14. Ms. DePass began reviewing children’s files at the dining room table. Mr. Jha also sat at the dining room table, holding Infant B. Both infants were crying. (Exs. B, D; DePass testimony.)

 15. Mr. Jha switched holding Infants A and B, but was unable to calm them. He placed Infant A in a bouncy seat, but did not secure the straps. Ms. DePass asked him three times to secure the straps before he did so. He placed Infant B in a portable crib. (Exs. B, D; DePass testimony.)

 16. Mr. Jha and both infants were in a bedroom. (Ex. B., DePass testimony.)

 17. Besides one bouncy seat and one portable crib, there was no other equipment or play materials for children on the second floor. (Ex. D, DePass testimony.)

 18. The assistant from Mrs. Jha’s program came to the second floor, entered the bedroom, and helped Mr. Jha calm the infants. (Exs. B, D; DePass testimony.)

 19. Ms. DePass went to the first floor and saw Mrs. Jha caring for seven children. (Exs. B, D; DePass testimony.)

 20. Ms. DePass returned to the second floor and asked the child care assistant to return to the first floor because Mrs. Jha’s program did not have enough caregivers for the children. (Ex. B., DePass testimony.)

 21. Ms. DePass saw Infant A sleeping in the bouncy seat. She asked if there was a portable crib for Infant A. Mr. Jha said that he did not have one on the second floor and that Infant A slept in the bouncy seat. Ms. DePass instructed Mr. Jha to locate a portable crib for Infant A. He went to the first floor and returned to the second floor with a portable crib. (Ex. B., DePass testimony.)

 22. Mr. Jha set up the second portable crib in the second bedroom. He was about to move Infant A, who was sleeping, into the portable crib that Infant B had been in, when Ms. DePass said that would be unsanitary. (DePass testimony.)

 23. Ms. DePass noticed that some electrical outlets did not have covers, a gate was missing at the bottom of the stairs, and the following conditions were accessible to children: a can filled with screws on the living room floor, plastic bags in the kitchen, used brushes on a side table in the living room, and wires on a bedroom floor. (Exs. B, D; DePass testimony.)

 24. On June 12, 2017, Ms. DePass returned to check on Mr. Jha’s compliance with safe sleep requirements and on his securing of signed forms from parents. (DePass testimony.)

 25. Of the two infants enrolled in Mr. Jha’s program, one was on the second floor and one was on the first floor. (DePass testimony.)

26. The signed acknowledgement forms from the infants’ parents were not available on June 5, 2017, but were available on June 12, 2017. (DePass testimony.)

27. The forms read:

Parent Acknowledgement Form

I hereby acknowledge and understand that the child care program licensed to and operated by Sachchidanand Jha is operated separately and distinctly from the child care program licensed to and operated by Ranjana Jha. I understand that if I have any questions about the license of these programs, I may contact Patricia Halpin, EEC Family Child Care Supervisor…

The form provided her telephone number and email address. (Ex. 1-2, 1-3.)

 28. Mr. Jha was ordered to attend, and did attend, a safe sleep training session at EEC. (Ex. D, Jha testimony.)

 29. On September 1, 2017, EEC issued an Order to Protect Children: Notice of Revocation of Family Child Care License, Notice of Sanctions, and Notice of Intent to Fine. (This order is on appeal.)[[1]](#footnote-1)

 30. The Order has three grounds for revocation. (Ex. B.)

 31. The first ground for revocation was Mr. Jha’s alleged failure to comply with the legal agreement. The Order stated in part:

 The Educator did not comply with the terms of the Agreement with EEC by failing to provide EEC with written parent acknowledgement statements signed by the two families enrolled in his program stating that the Educator’s program is operated separately and distinctly from Ms. Jha’s program; failing to provide EEC with documentation verifying the times when child care children enrolled in his program were attending Ms. Jha’s program; failing to maintain child care children’s files on his family child care premises; failing to properly supervise child care children; and failing to tend to the needs of child care children. The Educator’s failure to comply with the Agreement is grounds to revoke his family child care license. *See* 102 CMR 1.07 (4)(a)(1).

 32. The second ground for revocation was Mr. Jha’s alleged failure to exercise good judgment. The Order stated in part:

 During EEC’s June 5, 2017 unannounced visit to the Educator’s family child care program, the EEC licensor determined the Educator did not properly supervise the infants in his care when the Educator placed Infant A in a bouncy seat and returned to the first floor to retrieve Infant B, leaving Infant A unattended in a bedroom that was not visible to the EEC licensor. Later during the visit, the Educator left Infant B alone with the EEC licensor while he yet again returned to Ms. Jha’s program on the first floor, this time to retrieve a port-a-crib. For these reasons, EEC concluded that the Educator failed on two occasions during the EEC licensor’s visit to adequately supervise an infant in his care. *See* 606 CMR 7.10(5). The Educator's lack of good judgment and failure to adequately supervise two infants in his care are grounds for EEC to revoke his family child care license. *See* 102 CMR 1.07(4)(a)1.

 33. The third ground for revocation was Mr. Jha’s alleged health and safety violations. The order stated:

 The Educator was cited by EEC for failure to abide by EEC safe sleep regulations. *See* 606 CMR 7.11(13)(d), (e). Specifically, the Educator did have not [sic] a port-a-crib on the second floor for Infant A to sleep in and informed the EEC licensor that Infant A sleeps in a bouncy seat, which is a violation of safe sleep procedures. The Educator also demonstrated he was unfamiliar with EEC safe sleep regulations as he attempted to place Infant A in the same port-a-crib that Infant B was previously utilizing. The Educator was unaware that EEC regulations do not allow infants to share the same crib. The Educator’s failure to abide by EEC safe sleep regulations is grounds to revoke his family child care license. *See* 102 CMR 1.07(4)(a)(1).

 The Educator also failed to maintain a physical facility in a safe and sanitary manner that is free of hazards and clutter. *See* 606 CMR 7.07 (10). During the visit of June 5, 2017, the EEC licensor observed a number of physical facility violations in the Educator’s family child care program including a lack of covers on electrical outlets, a missing gate at the bottom of the staircase, and several hazardous conditions accessible to children, such as a tin can filled with screws on the floor in the living room, plastic bags in the kitchen, used paint brushes on a side table in the living room, and wires on the floor in the bedroom. The Educator failed to maintain a physical facility in a safe and sanitary manner that is free of hazards and clutter. *See* 102 CMR 1.07(4)(a)(1).

 34. On September 25, 2017, Mr. Jha filed a response to the Order to Protect Children. (Ex. 1.) He asserted:

A. The two infants who had been on the first floor were participating in interaction time between the two programs.

B. Because the back stairs between the two floors are steep and to ensure safety, he carried one infant at a time. The two trips “did not take more than a few minutes.”

 C. He kept on the second floor records including license, enrollment form, contract attendance sheets, smoke detector log, carbon monoxide detector log, and evacuation log.

 D. The signed acknowledgement forms from the infants’ parents were not available on June 5, 2017, but were available on June 12, 2017.

E. Mr. Jha had decided to bring an infant in compliance with safe-sleep guidelines gradually. For that reason, he had not set up another portable crib.

 F. He called the assistant from the first floor for help because his situation was not routine. He decided that asking for help seemed to be better than to let the infants cry.

 G. Given that the infants were four months old and not turning over, even partially, the tool box and the packaging “in a different room posed no risk.”

**Discussion**

 First ground for revocation: Failure to comply with legal agreement

 EEC may proceed against a licensee if he or she failed to comply with an agreement. 102 CMR 1.07(4)(a)(1). EEC contends that Mr. Jha’s license should be revoked because he failed to comply with four provisions of the legal agreement.

 Provision #3

 The Educator shall execute, either himself or through his assistants, all of the substantial tasks of operating his family child care program, including, but not limited to, supervision of children, attending to children’s needs, education of children, and diapering of children.

(Ex. G, Provision #3.)

 To support its contention that Mr. Jha violated this provision, EEC cites the following:

 🞄 Mr. Jha was unable to calm the two infants.

 🞄 A child care assistant from the first floor assisted Mr. Jha in calming the infants.

 🞄 When he placed an infant in a bouncy seat, he did not secure the straps.

 🞄 Infant A was swaddled in two blankets; Infant B, in one blanket.

 🞄 Infant A did not initially have a portable crib to sleep in.

 🞄 He attempted to place Infant A in the portable crib previously used by Infant B without first sanitizing it.

 The purpose of the legal agreement was to keep the two child care programs, on the second and first floors, separate. That is revealed in the legal agreement itself (Ex. G), the Order to Protect Children (Ex. B), and Ms. DePass’s testimony. The purpose of Provision #3 is to require that Mr. Jha run his child care program, as opposed to delegating its “substantial tasks” to his wife and her assistant or assistants. That is, the purpose of Provision #3 is to require that Mr. Jha “execute…all of the substantial tasks of operating his family child care program” *himself* or through *his* assistant or assistants. The purpose of Provision #3 is not to require that Mr. Jha “execute…all of the substantial tasks of operating his family child care program” *competently*; that is the purpose of various regulations.

 Of the bulleted points above, the only one that indicates non-compliance with Provision #3 is that Mrs. Jha’s assistant helped Mr. Jha. EEC may have been displeased with Mr. Jha’s acts and omissions summarized in the bulleted points, and it might have been authorized to move against him on different grounds. However, for Mrs. Jha’s assistant to help Mr. Jha comfort the infants for a matter of minutes, while Mr. Jha was speaking with Ms. DePass, does not mean that Mr. Jha was not executing all of the substantial tasks of his program.

 Notice, too, that this provision requires Mr. Jha to perform the “*substantial* tasks,” not the *substantive* tasks, of his program. Mr. Jha correctly pointed out at the hearing that even with the help of his wife’s assistant, he was substantially performing his child care program’s tasks.

If EEC meant “substantive” instead of “substantial,” ambiguous contract terms are interpreted against the drafter, *Leblanc v. Friedman*, 438 Mass. 592, 602 (2003), and EEC almost certainly drafted the legal agreement. (Ex. G (cover letter is by EEC; EEC’s signature block is first; Mr. Jha signed himself, not through a lawyer).)

EEC did not prove by a preponderance of the evidence that Mr. Jha violated this provision. *See Doe v. Sex Offender Registry* Board, 428 Mass. 90 (1998)(preponderance of the evidence is generally the standard in administrative proceedings); *Department of Early Education and Care v. Jane Gelin*, OC-14-749 (DALA 2015)(using preponderance of the evidence in EEC case). I recommend that EEC not revoke his license on the ground that Mr. Jha violated this provision.

 Provision #6

The Educator shall maintain separate documentation for the children enrolled in his family child care program and the documentation must be maintained on the Educator’s licensed family child care premises.

(Ex. G, Provision #6.)

To support its contention that Mr. Jha violated this provision, EEC seems to cite the following:

🞄 When Mr. Jha took Infant A from the first to the second floor, he took several documents with him.

🞄 When Mr. Jha returned to the first floor to get Infant B, he left Infant B unattended on the second floor.

🞄 When Mr. Jha returned to the second floor, he brought two bags that contained the infants’ diapers, clothes, and milk.

Of the bulleted points above, the only one that indicates non-compliance with Provision #6 is that Mr. Jha brought documents from the first floor to the second floor.

EEC assumed that Mr. Jha brought from the first floor to the second floor child-related papers. However, Ms. DePass did not testify about what she saw Mr. Jha bring. The site visit report refers simply to documents. It *also* states that Mr. Jha “brought [the] requested file from the bedroom floor” on the second floor to the dining room table (Ex. D, p. 3) – which would not constitute a violation of Provision #6.

Mr. Jha testified that after he signed the legal agreement, he maintained his program’s documents on the second floor, specifically on a bedroom floor. (The legal agreement did not require him to keep all of his program’s documents on the second floor, but rather, only “documentation for the children enrolled” in his program. (Ex. G.)) Ms. DePass confirmed with her testimony that Mr. Jha brought paperwork that she had requested from a bedroom on the second floor. He testified that the documents that he brought up to the second floor (which doubled as his living quarters) comprised mail that had arrived on the first floor.

EEC did not prove by a preponderance of the evidence that Mr. Jha violated this provision. I recommend that EEC not revoke his license on the ground that Mr. Jha violated this provision.

Provision #7

 The Educator may allow his child care children to interact with Ms. Jha’s child care children on a limited basis, including play groups and other structured programming, for no more than six scheduled activity hours per week. The Educator must document any instance in which his child care programming interacts with Ms. Jha’s programming. Scheduled activity hours shall not include the time period when Mr. Jha’s child care children fail to transition quickly from the concluded scheduled interaction activity.

(Ex. G, Provision #7.)

To support its contention that Mr. Jha violated this provision, EEC apparently cited the following: Mr. Jha “failed to provide the EEC licensor with documentation verifying the times when child care children enrolled in his program were attending Ms. Jha’s program.” (EEC cited this as evidence of Mr. Jha’s violation of Provision #6, but apparently meant #7.)

The background to this provision is that the children enrolled in Mr. Jha’s program were allowed to have limited activities with the children enrolled in Mrs. Jha’s program or at least be present on the first floor. (Depass, Jha testimony.) Mr. Jha referred to it as “interaction time.” (Jha testimony.)

On the attendance sheet for May through August 2017, Mr. Jha wrote various general notes, including these: “Interaction 30 min. everyday AM / 30 min. PM Play,” “M-F 30 min AM / 30 min PM,” “Interaction time 8-8:30 / 4:30-5:00,” and “Interaction 8-8:30 / 12-12:30.” (Ex. 1.)

Mr. Jha testified that he generally adhered to a schedule for interaction time. His testimony on this point is not inherently unbelievable. Coordinating interaction between the two day care programs may even have required adhering to a schedule.

In its post-hearing brief, EEC wrote:

During EEC’s June 5, 2017 unannounced visit to the Respondent’s family child care program, the EEC licensor determined that the Respondent failed to provide documentation verifying the times when child care children enrolled in his program were attending Ms. Jha’s program. Mr. Jha later submitted a schedule that stated that his child care children interact with Ms. Jha’s child care children on a daily basis from 8:00-8:30 A.M. and from 4:00-4:30 P.M.

 This excerpt requires some unpacking. The first sentence can be read two ways: One, Mr. Jha did not provide *any* documentation of interaction time. Or two, he did not provide *adequate* documentation. That is, his documentation was too general.

 The Order does not reveal how the first sentence from the brief should be read. The Order has only one sentence, which is quoted above. The site visit report (Ex. D) has only one sentence on this topic, similar to the one sentence in the Order. Ms. DePass did not testify about this topic.

 The second sentence from the brief’s excerpt – “Mr. Jha *later* submitted a schedule…” – indicates that the first reading of the first sentence – Mr. Jha did not provide documentation at all – is incorrect. However, that reading and the second sentence have problems. When did Mr. Jha submit the documentation, namely the schedule? That information does not appear in exhibits. Ms. DePass did not testify about it. Neither did Mr. Jha.

In addition, Mr. Jha’s schedule of interaction time is on the attendance sheet for children enrolled in his child care program. I assume that Ms. DePass would have reviewed the attendance sheet – and if it were not available, she would have mentioned it in her site visit report and testified about it. I assume that if the attendance sheet was not available, EEC would have mentioned it in its Order.

 I simply do not know what to make of the allegation that Mr. Jha violated Provision #7. And not knowing what to make of it, I cannot credit it.

 Finally, I note that the EEC’s brief is factually incorrect. It states that Mr. Jha’s documented interaction time was 4:00 to 4:30 P.M., whereas it was 4:30 to 5:00 P.M. for the most part. EEC’s brief continued:

EEC’s June 5, 2017 visit was conducted at 12:00 P.M. The EEC licensor observed Mr. Jha’s child care children present in Ms. Jha’s program when she first arrived, which was not during one of the established times provided by Mr. Jha.

 This, too, is factually incorrect. Ms. DePass arrived at 8:37 a.m., not noon. (Ex. D; DePass testimony.) *Even if Ms. DePass did arrive at noon*, the interaction schedule for June was 8:00-8:30 a.m. and 12:00-12:30 p.m. (Ex. 1.) That is, Ms. DePass arrived during interaction time, not after it.

At most, what EEC has proved, without even intending to, is that the interaction schedule was inaccurate on June 5, 2017 by seven minutes. However, that is not what the Order alleged. The Order alleged that Mr. Jha did not provide EEC with the interaction schedule. EEC did not prove by a preponderance of the evidence that Mr. Jha violated Provision #7. I recommend that EEC not revoke his license on the ground that he violated Provision #7.

Provision #9

The Educator shall require that all parents of children enrolled in the Educator’s program to sign a written acknowledgement that the Educator’s program is operated separately and distinctly from Ms. Jha’s program.

(Ex. G, Provision #9.)

To support its contention that Mr. Jha violated this provision, EEC cited the absence of the parent acknowledgement forms from Mr. Jha’s records. He did not dispute their absence.

 On April 17, 2017, Mr. Jha signed the legal agreement, requiring him to collect acknowledgements from parents. By June 5, 2017, seven weeks later, the date of EEC’s site visit, Mr. Jha had not done so.

 On June 7, 2017, one parent signed a Parent Acknowledgment Form. On June 8, 2017, a second parent did so. (Ex. 1-2, 1-3.) Mr. Jha had only two children enrolled in his program. EEC was able to see these signed forms on June 12, 2017, when Ms. DePass returned to Mr. Jha’s program. (DePass testimony; Ex. C.)

 Although Mr. Jha delayed in collecting the forms, the delay was not for seven weeks. One child enrolled in his program at the end of May 2017 (Jha testimony), a little more than a week before the parent signed the form. In addition, EEC drafted the form (Mr. Jha so testified and the wording of the form (Ex. 1-2, 1-3) confirms his testimony) and did not immediately send it to Mr. Jha. (Jha testimony.) He did not testify as to how long it took EEC to send him the form. Finally, Mr. Jha gave the form to a parent, who delayed returning it. (Jha testimony.) He did not testify as to how long it took the parent to return the form.

 Even if Mr. Jha was responsible for a delay in collecting a signed form from the parent of the one child enrolled in his program in April 2017, the effect of the delay was negligible. It is not as if Mr. Jha refused to correct a hazard to children for weeks. Nor is it as if Mr. Jha had not collected important health information about the child for weeks.

 The two children’s parents had the information that EEC wanted them to have. They had it for an unknown amount of time before they signed and returned the forms. The signed forms simply ensured that EEC knew that they had the information.

 It would be an abuse of discretion for EEC to revoke Mr. Jha’s license because he had not complied with an overly strict reading of Provision #9. It would be an abuse of discretion even if Mr. Jha’s supposed non-compliance was combined with other allegations against him.

 In general, administrative agencies have broad discretion over procedural aspects of matters before them. However, they must not abuse discretion. That is, their decisions must be reasonable. *Doe, Sex Offender Registry Board No. 209081 v. Sex Offender Registry Board*, 478 Mass. 454, 457 (2017). It would not be reasonable for EEC to revoke Mr. Jha’s license wholly or partly based his supposed non-compliance with this provision. I recommend that EEC not do so.

Second ground for revocation: Failure to exercise good judgment and to adequately supervise two infants

 As for the second ground for revocation, EEC alleges that Mr. Jha violated two regulations, one that requires child care providers to “exercise appropriate supervision of the children in their care in order to ensure their health and safety at all times,” 606 CMR 7.10(5), and one that requires them to “exercise good judgment at all times and demonstrate an ability to handle emergency situations appropriately.” 606 CMR 7.09(8).

 EEC alleges that Mr. Jha violated both regulations by doing two things: leaving Infant A on the second floor when he went to get Infant B on the first floor, and leaving Infant B when he went to get a portable crib. (Ex. B.)

 Mr. Jha argued that it was safer and more prudent for him to carry one infant at a time, especially because the back stairs are steep. Ms. DePass testified that the stairs were not steeper than other stairs she sees and climbs. I do not credit Mr. Jha’s claim about the steepness of the stairs. I do, however, accept his point that it was safer and more prudent for him to carry one infant at a time. EEC did not present testimony about whether one person can safely pick up two infants, and I do not know how it is possible.

 It is unclear how Mr. Jha could have followed Ms. DePass’s instruction to get a second portable crib without leaving Infant B. The record lacks evidence about the dimensions, weight, and bulkiness of the portable crib, but it may not have been feasible or safe to carry both a portable crib and an infant on the stairs. The record also lacks evidence about how long Mr. Jha was gone, but it was presumably not more than a few minutes.

 I suspect, without knowing, that had Mr. Jha carried both infants upstairs at the same time, and carried Infant B while retrieving the portable crib, EEC would have cited him for not exercising sound judgment.

EEC did not prove by a preponderance of the evidence that Mr. failed to appropriately supervise the two infants to ensure their health and safety, and failed to exercise good judgment. I recommend that EEC not revoke his license on these grounds.

 Third ground for revocation: Health and safety violations

 To support its contention that Mr. Jha violated this provision, EEC cited the following:

 🞄 Mr. Jha did not have a portable crib for Infant A, who instead slept in a bouncy seat, in violation of safe sleep procedures.

 🞄 Mr. Jha demonstrated his unfamiliarity with safe sleep procedures by trying to put Infant A in the portable crib that Infant B had previously been in. “The Educator was unaware that EEC regulations do not allow infants to share the same crib.”

 🞄 Mr. Jha did not have electrical outlets covered; a gate was missing from the bottom of the stairs; and accessible to children were a tin can filled with screws on the living room floor, plastic bags in the kitchen, used paint brushes on a side table in the living room, and wires on a bedroom floor.

 In its Order, EEC cited 606 CMR 7.11(13)(d) and (e), regarding sleeping, and not its Policy Statement: Safe Sleep for Infants, www.mass.gov/files/documents/2016/08/qe/safe-sleep-infants.pdf. Therefore, I examine whether Mr. Jha violated the regulations, not the policy.

 The relevant parts of the regulations read:

(13) Sleep, Rest and Quiet Activity.

....

(d) 3. The licensee must:

….

b. provide a separate mat, cot, sofa, portacrib, playpen, bassinet or bed, and blanket for each child present at any time during the day;

c. provide sleeping materials that are individually marked and in good repair and clean; and

d. ensure safe and sanitary storage of blankets and bed linens.

….

(e) Programs serving infants must:

….

2. nap infants in an individual crib, portacrib, playpen or bassinet;

….

606 CMR 7.11(13)(d) and (e).

 Mr. Jha did not have a portable crib for Infant A, who instead slept in a bouncy seat, in violation of 606 CMR 7.11(13)(d) and (e). He demonstrated his unfamiliarity with the regulations by trying to put Infant A in the portable crib that Infant B had previously been in.

 However, it would be an abuse of discretion, that is unreasonable, for EEC to revoke Mr. Jha’s license wholly or partly based his violation of and unfamiliarity with these sleep-related regulations. The punishment would not be commensurate with the infraction – especially because Mr. Jha completed safe sleep training soon after the infraction. I recommend that EEC not revoke his license wholly or in part based his violation of and unfamiliarity with sleep-related regulations.

 As for other alleged safety violations, EEC cited 606 CMR 7.07(10). It states, in relevant part:

Indoor Space. The indoor space must be clean, safely maintained, well-ventilated and well-lit, of sufficient size for the children served, and must encourage play and learning.

I interpret the phrase “for the children served” to explicitly modify “sufficient size,” and not the other requirements, such as “safely maintained.” My interpretation is based on the placement of commas and the location of the phrase “for the children served” before the word “and.”

 Mr. Jha should have covered electrical outlets covered, installed a gate at the bottom of the stairs, and put away a tin can filled with screws on the living room floor, plastic bags in the kitchen, used paint brushes on a side table in the living room, and wires on a bedroom floor. Nonetheless, these conditions did not present a risk to infants who were not mobile. They were the only children enrolled in Mr. Jha’s program. There was no evidence that children from Mrs. Jha’s program spent time on the second floor. It would be an abuse of discretion, that is, unreasonable, for EEC to revoke Mr. Jha’s license wholly or partly on these conditions. I recommend that EEC not do so.

**Conclusion and Order**

 EEC did not prove all the allegations against Mr. Jha. While EEC did prove the remaining allegations against Mr. Jha, for EEC to revoke Mr. Jha’s license on those grounds would abuse EEC’s discretion. Revocation is not recommended.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: May 22, 2018

1. The 2017 Order to Protect Children incorporated the 2015 Order to Protect Children and the legal agreement. (Ex. B, p. 1 n.1, p. 2 n.2.) (References in this decision to “the Order” mean the 2017 Order to Protect Children.) This incorporation has no discernible legal effect, such as reviving the 2015 Order. Therefore, evidence about the October 4, 2015 site visit (DePass testimony; Ex. I), which was the basis for the 2015 Order, is barely relevant. [↑](#footnote-ref-1)