

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Angelica Chavez Pena,

Petitioner

v.

Docket No. OC-22-0446

Department of Early Education and Care,

Respondent

Appearance for Petitioner:

Erika Castillo, Esq.

Appearance for Respondent:

Elizabeth Storms, Esq.

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF RECOMMENDED DECISION

The Petitioner appeals a determination by the Department of Early Education and Care (“EEC”) that she is not suitable for licensure as a family childcare provider based on a G.L. c. 119, § 51B report supporting an allegation that she abused her son by striking him in the face. I recommend that the EEC affirm its initial determination because the Petitioner has not met her burden of proving her suitability by clear and convincing evidence. Although she has years of experience as a childcare provider, including as a licensed childcare provider in New York, and her record appears otherwise unblemished, the Petitioner has proffered no explanation or excuse for her conduct, has not acknowledged that she did anything improper, and has not presented evidence that she has addressed whatever factors or circumstances may have precipitated the conduct. There is insufficient assurance that she would not engage in similar concerning conduct as a licensed family childcare provider.

RECOMMENDED DECISION

Angelica Chavez Pena appeals a determination by the Department of Early Education and Care (“EEC”) that she is not suitable for licensure as a family childcare provider. Ms. Pena submitted a notice of claim and requested an adjudicatory hearing concerning the EEC’s determination. The matter was referred to the Division of Administrative Law Appeals (“DALA”).

I held a hearing on March 29, 2024 via the WebEx teleconferencing platform. The hearing was recorded. I admitted Exhibits 1-13 into evidence.

Erin Mee, an EEC Background Record Check Unit specialist, testified on behalf of the EEC. Ms. Pena testified on her own behalf. Ms. Pena testified in Spanish through an interpreter.

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. While living in New York state, Ms. Pena provided care for children with disabilities from 2012 to 2019. This care took place in their home(s). From 2019 to 2020, also in New York, Ms. Pena operated a family daycare program and provided daycare out of an apartment she rented for the purpose. Ms. Pena had licenses from New York for both activities. (Pena Test.; Exhibit 13).
2. Records from the New York State Office of Children and Family Services do not reflect any issues or concerns with respect to Ms. Pena’s New York childcare licenses. (Exhibit 13).
3. Ms. Pena moved to Massachusetts in 2020. (Pena Test.).

4. As part of Ms. Pena's application to become a licensed family childcare provider in Massachusetts, the EEC performed a background records check. (Exhibit 1).
5. As a result of the background check, the EEC learned that the Department of Children and Families ("DCF") had issued a supported 51B report of abuse against Ms. Pena. (Exhibit 1).¹
6. The 51B report supports allegations of abuse by Ms. Pena with respect to her son, who was ten years old at the time of the report. (Exhibit 2).
7. On January 31, 2022, staff from Ms. Pena's son's school reported to a DCF investigator that the child told school staff that his head and mouth hurt and that he had said that his mother had hit him and pulled his hair that morning. There was a red mark and/or some swelling in the area of his lip. (Exhibit 2).²

¹ A 51B report is a "report prepared pursuant to M.G.L. c. 119, § 51B detailing the MA DCF investigation into allegations of abuse or neglect upon a child and a determination by DCF whether there is reasonable cause to believe a child identified in the report has been, or is at risk of being, abused or neglected. A 51B report will either support or unsupport the allegations of abuse or neglect." 606 CMR 14.04.

² The investigative report is an out-of-court statement that describes out-of-court statements by Ms. Pena, her child, staff from her child's school, and others. The report is thus hearsay that also contains hearsay-within-hearsay statements (and in a few instances three layers of hearsay). Insofar as it is a report of what the investigator personally saw and heard, it falls within the category of evidence upon which reasonable people would rely in conducting serious affairs and may be admitted. *See* G.L. c. 30A, § 11(2) (outlining admissibility of evidence in administrative adjudicatory proceedings). Moreover, I conclude that hearsay statements contained within the report are admissible if they bear sufficient indicia of reliability – for example, statements as to which there is no dispute and which are consistent with other evidence. Here, statements about the condition of the child's lip are admissible because the investigator saw the lip the morning of the incident. Likewise, the statements describing what the child told school staff are admissible to show that he *made* the account described. There is no dispute about what the child *told* school personnel (although there is some dispute as to whether what he told them was accurate), and the account given of his report is consistent with other evidence. The admissibility of the statements to establish the *truth* of what the child described stands on a somewhat different footing for the reasons recited in the following footnote.

8. When he was interviewed by the DCF investigator, he told the investigator that his mother had told him to put on his boots, but he refused. He stated that his mother began chasing him around the house and that as he was about to enter his bedroom, his mother pulled him by the hair and struck him on the mouth several times with an open hand. In the two interviews he had with the DCF investigator, he provided inconsistent reports as to whether he had been struck on numerous prior occasions. (Exhibit 2).³
9. In her interview with the DCF investigator, Ms. Pena acknowledged that she struck her son that morning, stating that he had been defiant and disrespectful. She denied pulling his hair and denied that she had struck him more than once that morning. Ms. Pena stated this was the only occasion she had hit her son. (Exhibit 2).
10. Ms. Pena observed that her son had a history of fabrication and exaggeration. She expressed skepticism about the red mark seen on his face at school. She said that she would have observed it when he left the house. She wondered whether he could have done it to himself. (Exhibit 2).

³ The DCF investigator credited the child's statements that his mother had struck him on multiple prior occasions rather than his denials. (Exhibit 2). I do not wish to minimize the investigator's conclusion, which is based on his first-hand interactions and is cogently explained, but, unlike the investigator, I do not have the benefit of viewing the child's demeanor or first-hand knowledge of the course of the investigator's communications with the child, Ms. Pena, and others. Nor was the investigator present to testify in greater detail about the events and perceptions described in his account of his interviews or respond to follow-up questions. In view of these limitations, even assuming the admissibility of the statements attributed to the child for purposes of establishing the truth of the matters asserted therein, I make no specific finding as to whether the January 31, 2022 incident was the first occasion on which Ms. Pena struck her son. (I note that the EEC appears to be relying solely on the January 31, 2022 incident and not on the existence of prior incidents.). For similar reasons, I do not make any specific findings as to whether Ms. Pena pulled her son's hair or struck him multiple times that morning.

11. I find that Ms. Pena's son had a mark on his face because she had struck him.

(Exhibit 2).
12. DCF contacted Ms. Pena's son's school, her daughter's daycare, and her children's pediatrician. None noted any concerns about the well-being of the children. (Exhibit 2; Exhibit 5).
13. In a letter dated August 3, 2022, DCF informed Ms. Pena that it would be closing her family's case, stating that it had recently completed an assessment and "determined that further services are not required at this time." (Exhibit 1).
14. Ms. Pena denies that her family had been offered services by DCF. (Pena Test.). The 51B report, however, indicates that Ms. Pena initially declined an offer by DCF to place referrals for home therapy, but later accepted, and that three referrals were made to providers. (Exhibit 2). I find that the referrals were offered, accepted, and were made. It is not clear what, if anything, happened with respect to these referrals. If the referrals were "services," the record before me indicates that these were the only services provided.
15. The EEC informed Ms. Pena that, as a result of the 51B report, she had a potentially disqualifying background. It invited her to provide additional information as part of EEC's review process. (Mee Test.).
16. In response, Ms. Pena provided a candidate statement. In that statement, she gave the following description of what had occurred:

In January of 2022 my ten-year old son was giving me a hard time getting ready, causing me to be late. I woke him up almost 2 hours before we had to leave the house so he had plenty of time to get ready on his own so I could get my daughter who is a baby ready. When we were ready to go, he still had not put on the boots I told him to put on. He refused to put them on and became very disrespectful and gave me an attitude. I smacked his mouth for talking to me the way that he was.

He did not have any marks or blood from the smack and finally he got ready and we left to bring him to school.

(Exhibit 5).

17. In her response, Ms. Pena also provided two letters of reference. The first, from Thomas Lucey, dated August 11, 2022, states that Ms. Pena had been working for his family for over one year, providing care for his parents and his aunt in their home. Her responsibilities include assisting them with mobility, transfers to and from the bathroom, and other daily living tasks. Mr. Lucey lauds Ms. Pena as “competent, diligent, compassionate, professional, and personable.” (Exhibit 6).
18. The second reference letter is from Sterlin Tejada (dated August 16, 2022). That letter states that for two years Ms. Pena has worked as a nanny for the Tejada family during weekends, family vacations, and emergencies. It reports that Ms. Pena is an excellent nanny and notes that Ms. Pena follows any special regimens indicated by the children’s doctors or parents. (Exhibit 7).
19. Ms. Pena also furnished a certificate of participation from the “Families First’s Virtual Power of Parenting Program” and her transcript from Urban College of Boston for the Fall 2021 and the Spring 2022 semesters. Ms. Pena took courses titled “Child Growth and Development,” “Observing, Recording & Assessing,” “Guidance and Discipline,” and “Early Childhood Curriculum.” (Exhibits 8 & 9).
20. It was Ms. Pena’s own idea to complete the Families First program and enroll in the college courses. (Pena Test.).
21. In addition, Ms. Pena provided a job description for work she had performed as a

teacher assistant in June 2022. (Exhibit 4).⁴

22. Ms. Mee was the EEC Background Check Unit specialist who conducted Ms. Pena’s review. Ms. Mee has worked as a reviewer for five years. (Mee Test.).

23. In conducting her review, Ms. Mee considered the 51B report, as well as the materials provided by Ms. Pena: her candidate statement, letters of reference, transcript from Urban College of Boston, and the certificate from Families First. (Exhibit 1; Mee Test.).

24. In her review of Ms. Pena’s application, Ms. Mee considered the factors set forth in 606 CMR 14.12(f). (Mee Test.; Exhibit 1).

25. Ms. Mee determined that Ms. Pena was “not suitable.” This determination was reviewed and approved by her supervisors. (Mee Test.; Exhibit 1).

26. Ms. Pena filed a Notice of Claim and requested an adjudicatory hearing. (Exhibit 11).

CONCLUSION AND ORDER

Ms. Pena appeals the EEC’s determination that she is not suitable to be licensed as a family childcare provider. For the reasons set forth below, I recommend that the EEC, in its final agency decision, affirm its initial determination that Ms. Pena is not suitable.

A. 606 CMR 14.12 Framework

The supported abuse allegation against Ms. Pena contained in the 51B report is a “discretionary disqualification,” which means that she is not eligible for licensure unless

⁴ Documentation from the New York State Office of Children and Family Services was not obtained until after Ms. Mee conducted her review. (Mee Test.).

she is approved after the EEC review process outlined in 606 CMR 14.12. 606 CMR 14.04. Under that review process, Ms. Pena is required to present “clear and convincing evidence demonstrating [her] suitability ... in light of the concern for children’s safety.” 606 CMR 14.12(2)(e).

The clear and convincing evidence standard is exacting: the “evidence must be sufficient to convey to ‘a high degree of probability’ that the proposition is true The requisite proof must be strong and positive; it must be ‘full, clear and decisive.’”

Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997) (quoting from *Callahan v. Westinghouse Broadcast Co.*, 372 Mass. 582, 584 (1977)).⁵

In determining whether Ms. Pena furnished clear and convincing evidence of her suitability, “due weight” must be given to the following factors:

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

606 CMR 14.12(2)(f).

B. The 606 CMR 14.12(e) factors

⁵ Although Ms. Pena bears the ultimate burden of demonstrating her suitability by clear and convincing evidence, it is not clear that she is thereby required to prove all of the subsidiary facts supportive of her suitability by that exacting standard. For purposes of this decision, I assume that she bears the burden of proving the subsidiary facts supportive of licensure by a preponderance of the evidence. *Cf. Care and Protection of Laura*, 414 Mass. 788, 791-93 (1993) (holding in care and protection cases that, although parental unfitness must be established by clear and convincing evidence, the underlying subsidiary facts only need to be proved by a preponderance of the evidence) (citations omitted).

- 1. Seriousness and specific circumstances surrounding the incident (factor 3); Relationship of the incident to the ability of the candidate to care for children (factor 4)*

Ms. Pena acknowledges that she “smacked” her ten-year-old son in the face because he was “disrespectful” and gave her “an attitude.” Whether she “smacked” him multiple times or (as she stated) only once, she left a visible mark on her child’s face.

I agree with Ms. Mee’s assessment that the January 31, 2022 incident is serious and relates to Ms. Pena’s ability to care for children as a family child care provider insofar as it raises a legitimate question of whether Ms. Pena might physically discipline children in her care. I note specifically that I concur with Ms. Mee’s observation at the hearing that misconduct occurring in the privacy of one’s home is particularly noteworthy when assessing the suitability of a family childcare candidate, who proposes to provide unsupervised care for children in the home.

It is possible that there were mitigating or other factors that might lessen the assessment of the incident’s seriousness or reduce its relationship to the provision of childcare. Evidence of such factors would need to come from Ms. Pena, who is in the best position to provide such evidence and, in any case, is the party bearing the burden of proof in this appeal. Ms. Pena, however, does not proffer any explanation or justification. She does not say whether she lost control of her temper or instead struck her child because she simply believed that his disrespect warranted this type of physical response. Moreover, although she denies striking her child on prior occasions, she does not explain what was unique or exceptional about that morning or about her son’s behavior on that occasion.

Ms. Pena suggests that DCF social workers assigned to her family in the wake of the supported abuse findings had no suggestions for her and did not take her family's situation particularly seriously. That may be true (I make no such finding one way or another), but even if it is, I do not accord substantial weight to the opinions of unnamed social workers who have not testified and whose notes or reports (if any) are not in the record.

2. Time since the incident(s) (factor 1); Age of the candidate at the time of the incident (factor 2)

Because Ms. Pena was 29 years old at the time of the incident, her conduct cannot be attributed to immaturity or youthful inexperience. Nor is there any reason to conclude that the passage of time has reduced the concerns arising from the January 31, 2022 incident.

3. Relevant evidence of rehabilitation or lack thereof (factor 7)

There is no meaningful evidence of rehabilitation. Ms. Pena expresses no regret and tenders no acknowledgement that her action was in any way inappropriate. Her pursuit of additional education is positive and commendable, but Ms. Pena gives no indication that she pursued it to address whatever factors may have caused the January 31, 2022 incident, and I have no evidence to suggest that it had that effect.

4. Number of [...] findings of abuse/neglect (factor five).

There is only one finding of abuse here. I also note that, whether it is considered under factor five (number of findings) or factor seven (other information), Ms. Pena has an unblemished record from the New York Office of Children and Family Services. This evidence provides at least some support for concluding that the January 22, 2022 incident was isolated and not part of a history of abusive conduct likely to repeat itself should Ms.

Pena become a licensed family childcare provider. Nevertheless, the fact that there is no record of prior incidents is insufficient assurance that future incidents of physical discipline will not occur because there is no explanation why the events leading to the January 31, 2022 incident were unique (and unlikely to reoccur) and no evidence of rehabilitation.

5. *Dispositions of [. . .] findings of abuse/neglect (factor six).*

DCF closed Ms. Pena's family's case after an assessment determining that the family was no longer in need of services. From the perspective of suitability, this is a positive development and certainly better than if DCF had kept the case open. But I note that neither party has provided me with any information regarding the legal or practical standards DCF employs in making such determinations. I do not know what information the DCF obtains, the standards under which it evaluates this information, or the particular information upon which it relied in this particular case. So, while this factor must be considered, I find it difficult to accord it substantial weight.

6. *Other relevant information, including information submitted by the candidate (factor eight).*

The two reference letters Ms. Pena submitted are positive. In addition to the letters' praise for Ms. Pena's work, these letters, like Ms. Pena's record from New York, is some evidence that Ms. Pena's work is not characterized by physical abuse.

C. Conclusion

It is possible that the January 22, 2022 incident truly was an isolated event that is not indicative of the manner in which Ms. Pena would provide services as a licensed family childcare provider. Her clear record from New York, her letters of recommendation, and the fact that there is only one supported finding of abuse, are all

evidence supportive of that hypothesis. That evidence, however, is insufficient for Ms. Pena to meet the exacting burden of establishing her suitability by clear and convincing evidence.

The absence of other incidents or issues in the record might have warranted greater weight if Ms. Pena had offered some explanation for what had occurred on January 22, 2022. Such an explanation, if credited, could have perhaps indicated that the incident was unlikely to reoccur – either because it arose from unique circumstances or because Ms. Pena resolved the underlying issues or circumstances that led to it. Based on the record before me, however, and mindful of both the overarching “concern for children’s safety” that animates the applicable regulations and Ms. Pena’s burden of establishing her suitability by clear and convincing evidence, I recommend that the EEC’s final agency decision affirm the initial determination that Ms. Pena is unsuitable.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Timothy M. Pomarole

Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: February _____, 2025