COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

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**Department of Early Education and Care**,

Petitioner

v. Docket No. OC-17-087

**Elvia Santizo**,

Respondent

**Appearance for Petitioner**:

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**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF RECOMMENDED DECISION**

Department of Early Education and Care (EEC) suspended child care provider’s license on an emergency basis and acted to revoke it. EEC may continue the suspension and may revoke the license on the bases that provider left one child care provider to care for nine children, whereas six children is the maximum for one provider; and child care program put a child to sleep alone behind a closed door. EEC may not continue the suspension and may not revoke the license on the bases that the tenants living above the child care space were household members who should have undergone background record checks; the child care provider’s relative removed an infant from the child care program and lied to EEC staff members; and an infant was put to sleep in a car seat.

**RECOMMENDED DECISION**

 The petitioner, Elvia Santizo, appeals the action of the respondent, the Department of Early Education and Care (EEC) to suspend her child care license on an emergency basis and to revoke it.

 I held a hearing on April 20 and May 24, 2017, which I recorded digitally. Ms. Santizo and her child care assistant, Margarita Berganza, testified through a Spanish translator. The EEC called as witnesses Johanna Ochoa, a Child Care Licensor, and Kelly Meehan, the Regional Director of its Metro Boston office.

 I accepted into evidence 17 exhibits at the hearing. Exhibit 15 is a series of photographs. On my own initiative, I admit Ms. Santizo’s appeal as Exhibit 18.

 Both parties submitted post-hearing briefs. Ms. Santiizo requested that I find as facts things that are not in evidence and I decline to do so.

**Findings of Fact**

 1. Since 2002, EEC has licensed Elvia Santizo to operate a family child care program in her home. (Santizo testimony, Ex. 1, p. 11.)

 2. Ms. Santizo lives at 15 Endicott Avenue, Revere. (Santizo testimony.)

 3. 15 Endicott Avenue consists of, from the ground up: ground-level space, which may have been a garage at one point, and some of which has been refinished as play space, a bathroom, and a small kitchen; the first floor, which consists of a kitchen, bathroom, living room, and two bedrooms, one belonging to Ms. Santizo, and one that she rented out; and the second floor, which consists of a small kitchen with a dining room table, bathroom, and three bedrooms. (Santizo, Ochoa testimony; Ex. 15.)

 4. To get to the first floor, one has two routes: interior stairs from the lower level to the first floor, or exterior stairs from the ground. (Ex. 15.)

 5. On the outside of the front door of the first floor is a hand-written sign, which presumably was there in January 2017, the time relevant to this appeal, reading: “The tenants enter here only[.] If [you’re] looking for day care go to the first floor or lower level.” (Ex. 15.) (Because this sign, referring to the first floor, was on the first floor, the sign was presumably alternatively describing the lower level as the first floor.)

 6. Residents of the second floor – tenants, as the sign referred to them – entered the first-floor front door and went up interior stairs to the second floor. (Santizo testimony; Ex. 15.) If residents had any other way to get to the second floor, it was not in evidence.

 7. At the top of the interior stairs, there was no door leading to the second floor, that is, no interior front door. The three bedrooms had individual locks on the doors. (Ochoa testimony.)

 8. Inside the first floor, opposite the first-floor front door, was a white solid interior door leading to the first floor, where Ms. Santizo lived and which was one of two levels where she ran her child care program. (Santizo testimony; Ex. 15.)

 9. Ms. Santizo kept the interior first-floor door locked. (Santizo testimony.)[[1]](#footnote-1)

 10. In January 2017, the time that is relevant to this appeal, on the ground-level, the playroom and kitchen was licensed child-care space; on the first floor, the kitchen, living room, and Ms. Santizo’s bedroom was licensed space; and the second floor was not licensed space. (Ex. 17.)

 11. In January 2017, Ms. Santizo’s brother Marcotulio Santizo; his wife, Carmela Santizo; a daughter, Silvia Santizo; and a son lived on the second floor in one bedroom. Mr. Santizo, whom Ms. Santizo allowed to rent out the bedrooms, had rented one to an unrelated tenant. The third bedroom had been rented out in the past but was then vacant. (Santizo, Ochoa testimony.)

 12. Although EEC came to suspect that the second floor was being operated as a boarding house, the City of Revere later inspected it and, in a letter, a copy of which was cc’d to Ms. Santizo, “found no evidence [that] the homeowner is renting out rooms as alleged….” (Ex. 10.)

13. The City of Revere considered 15 Endicott Avenue to be a two-family home. Ms. Santizo called it a two-family home. EEC considered it a single-family home. (Ex. 9; Santizo testimony; Ex. 2, p. 1.)

 14. At 19 Endicott Avenue, next door to Ms. Santizo’s home and child care program, her sister-in-law Pilar Santizo operates a family child care program. (Santizo and Ochoa testimony; Ex. 1.)

 15. Ms. Santizo also has a niece named Pilar. (Santizo and Ochoa testimony.)

 16. Ms. Santizo’s elderly father lives on the other side of Ms. Santizo’s home in a separate house. She feeds him three meals a day in her kitchen, which is licensed child care space. (Santizo testimony.)

 17. On or about September 25, 2012, EEC received a complaint alleging that Ms. Santizo was not at her program during all child care hours; she allowed her assistant to care for up to 14 children alone; she used a security camera outside her home to detect the arrival of EEC staff; and during EEC visits, she hid children in her home or her sister’s home. (Ex. 1, p. 12.)[[2]](#footnote-2)

 18. On October 3, 2012, two EEC licensors visited Ms. Santizo’s home unannounced. They waited outside without approaching the home. (Ex. 1, p. 12.)

 19. Twenty-three minutes after the licensors arrived, Ms. Santizo arrived, having been absent. (Ex. 1, p. 12.)

 20. After waiting outside, one licensor rang the doorbell to the lower level and one licensor went to the back door. (Ex. 1, p. 12.)

 21. Ms. Santizo and her child care assistant tried to leave the home through the back door with five children. (Ex. 1, p. 12.)

 22. EEC observed 19 children in Ms. Santizo’s child care program that day, even though she was licensed for a maximum of 10 children at a time. (Ex. 1, p. 12.)

 23. EEC cited Ms. Santizo for overenrollment. It was the third time since 2006. (Ex. 1, p. 12.)

 24. On December 7, 2012, Ms. Santizo signed an agreement with EEC. She agreed to voluntarily surrender her license, effective December 7, 2012. She agreed to a long list of measures, including completing online safe-sleep training. (Ex. 1, p. 15-16.)

 25. Ms. Santizo regained her license on March 25, 2013. It allowed her to take care of six children, including her daughter. The expiration was date March 23, 2016. (Ex. 5.)

 26. On January 22, 2016, Ms. Santizo applied to renew her family child care license. (Ex. 6.)

 27. On her application, Ms. Santizo listed as household members (which included “any person regularly on the premises where you will be providing family child care”) her husband; her father; and her friend Esperanza Patpoco,[[3]](#footnote-3)who rented a bedroom on the first floor. (Ex. 6.)

 28. On her application, Ms. Santizo stated that she had taken a training course on preventing Sudden Infant Death Syndrome (SIDS) in January 2016. (Ex. 5.)

 29. On March 25, 2016, EEC renewed Ms. Santizo’s family child care license through March 24, 2019. It also increased her program’s capacity to 10 children. (Ex. 1.)

 30. On or about December 23, 2016, EEC received complaints about Ms. Santizo’s and her sister Pilar Santizo’s child care programs. According to the complaints, Ms. Santizo allowed more children to attend her program daily than she was licensed for; when EEC licensing staff visited her program, excess children were moved out the back door, through the backyard, and to her sister-in-law’s program; she used unapproved caregivers to supervise children; and she didn’t live at 15 Endicott Avenue. (Ex. 1; Ochoa testimony.)[[4]](#footnote-4)

 31. On January 12, 2017, four EEC staff members went to the vicinity of Endicott Avenue to investigate the complaints against Ms. Santizo’s and her sister’s child care programs, one staff member for the front and back of each of the two programs. (Ochoa testimony.)

 32. When the EEC staff members arrived, they did not know that two things had already happened in Ms. Santizo’s child care program that would concern them, one thing had happened or was about to happen, and more things would happen before their visit was over.

 33. The first thing that had already happened was that Ms. Santizo had left the child care premises sometime before approximately 12:40 p.m. She later testified that she had flu symptoms and had driven to a pharmacy on Broadway in Revere to buy medication, including Tylenol. (Ochoa, Santizo, Berganza testimony.)

 34. Ms. Santizo’s absence left Ms. Berganza, a child care assistant who was licensed to take care of six children (Ex. 16), taking care of nine. (Ochoa testimony.)

 35. The second thing that had already happened was that a mother had left an infant named Joseph for Ms. Santizo to care for. Joseph was not enrolled in Ms. Santizo’s program. Ms. Santizo did not have Joseph’s mother fill out any paperwork. Ms. Santizo never learned Joseph’s last name. (Santizo testimony.)

 36. Ms. Santizo testified that Joseph’s mother, Zina Avi, was a friend and had asked Ms. Santizo to watch the infant for a moment as favor. (Santizo testimony.)

 37. The third thing, which had happened or was about to happen when the EEC staff members arrived near Endicott Avenue, was that Ms. Berganza allowed Joseph to fall asleep in a car seat, in apparent violation of EEC’s safe sleep regulations. (Ochoa testimony.)

 38. Around 12:40 p.m., three EEC staff members were present near Endicott Avenue. Ms. Ochoa arrived around 1:00 p.m. From their vantage point – a park separated them from Ms. Santizo’s home – they saw that the driveway did not have a car parked in it. They also saw two women cleaning the first floor. (Ochoa testimony.)

 39. The four EEC staff members formulated their plan. (Ochoa testimony.)

 40. Around 1:10 or 1:15 p.m., two EEC staff members went to Ms. Santizo’s home. Two went to her sister’s home. (Ochoa testimony.)

 41. Tricia Halpin, Ms. Ochoa’s supervisor, knocked on the ground-level door of Ms. Santizo’s home, but received no answer. She went to the first-floor door and knocked. (Ochoa testimony.)

42. A woman answered the door, one of the two women whom the EEC staff members had seen cleaning. The woman was Silvia Santizo, Ms. Santizo’s niece who lived on the second floor, but the EEC staff members did not know who she was at the time. (Ochoa testimony.)

43. Silvia Santizo said that she did not speak English and closed the door. Ms. Halpin had Ms. Ochoa, a Spanish speaker, approach the door. (Ochoa testimony.)

44. Ms. Ochoa knocked on the door. When Silvia Santizo answered, Ms. Ochoa said that she and Ms. Halpin were from EEC and they needed access to Ms. Santizo’s child care program through the door behind Silvia Santizo. (Ochoa testimony.)

45. Silvia Santizo said that she was not allowed to let the EEC staff members enter and tried to close the door on them. Ms. Ochoa said that if Silvia Santizo did not allow them in, she would have to call the police to escort them inside. Silvia Santizo relented and let the EEC staff members inside the front door. (Ochoa testimony.)

46. Ms. Ochoa told Silvia Santizo, who had identified herself as a tenant who lived on second floor, that she could go to her apartment and the EEC staff members would take care of things. Silvia Santizo went upstairs to the second floor. (Ochoa testimony.)

 47. The EEC staff members knocked on the first floor’s interior door. Ms. Berganza opened the door. Ms. Ochoa and Ms. Berganza recognized each other because Ms. Ochoa had been the licensor of another child care program where Ms. Berganza had worked. (Ochoa testimony.)

 48. The EEC staff members immediately learned that Ms. Santizo was absent, eight children were present (seven children sleeping or about to go to sleep in the living room plus the infant), and the infant, Joseph, was sleeping in a car seat. He soon woke up. (Ochoa testimony.)

 49. Ms. Berganza was nervous. She said to Ms. Ochoa something along the lines of: “Let me call Pilar.” When Ms. Ochoa questioned why Ms. Berganza would call Pilar Santizo, Ms. Santizo’s sister, Ms. Berganza answered that she wanted to call the other Pilar, meaning Ms. Santizo’s niece, who was apparently a child care assistant in Ms. Santizo’s program. (Ochoa testimony.)

 50. Soon Silvia Santizo appeared on the first floor in the child care program. The EEC staff members still did not know who she was, other than a tenant on the second floor. Silvia Santizo said to Ms. Berganza in Spanish something along the lines of: “Go. I’ll handle it.” (Ochoa testimony.)

51. Ms. Ochoa asked Ms. Santizo who she was, why she was involved, and why she was in the child care space. Ms. Ochoa said something along the lines of: “You said you were just the tenant. I need you to identify yourself.” (Ochoa testimony.)

52. Silvia Santizo identified herself by name, and said that she was Ms. Santizo’s niece and the mother of the infant sleeping in the car seat. (Ochoa testimony.)

53. Silvia Santizo was not the mother of Joseph, the infant, although the EEC staff members did not know it yet. (Ochoa testimony.)

 54. Ms. Ochoa told Silvia Santizo that allegations existed that Ms. Santizo moved excess children to the second floor. Ms. Ochoa asked Silvia Santizo if she could see the second floor and Silvia Santizo said yes. (Ochoa testimony.)

 55. Ms. Ochoa observed no children on the second floor and returned to the first floor. By then, Ms. Santizo had returned to her child care program. She had been gone at least 45 minutes. (Ochoa testimony.)

 56. Because of the allegation that Ms. Santizo lived in Wakefield and not Revere, Ms. Ochoa asked her for her driver’s license. Ms. Santizo said that she didn’t have it with her and that it was in her car. She went to her car to get her driver’s license. (Ochoa testimony.)

 57. After inspecting Ms. Santizo’s driver’s license, which stated that she lived in Revere, Ms. Ochoa questioned Ms. Santizo about a room whose door was closed. Ms. Santizo said that it was her bedroom. Ms. Ochoa asked to see it. Ms. Santizo opened the door. A two-year-old boy named Noel was sleeping on a mat. Thus, during Ms. Santizo’s absence, Ms. Berganza had been caring for nine, not eight, children. According to Ms. Santizo, it was Noel’s first day in her child care program. (Ochoa testimony.)

 58. Ms. Ochoa talked with Ms. Santizo about paperwork for the children in her care. Ms. Ochoa learned that the enrollment package for the sleeping 2-year-old boy, Noel, was incomplete and that there was no paperwork for Joseph, the infant in the car seat. (Ochoa testimony.)

 59. At some point, Ms. Ochoa noticed that Joseph was missing. She also realized that Ms. Santizo did not know Joseph’s last name and possibly first name. (Ochoa testimony.)

 60. Ms. Ochoa said to Ms. Santizo something along the lines of: “This is your niece’s son; how could you not know the name? (Ochoa testimony.)

61. Ms. Santizo answered something along the lines of: “I’m going to tell you the truth. The truth is this child does not belong to this day care. It is a friend’s child.” (Ochoa testimony.)

62. Ms. Ochoa asked Ms. Santizo something along the lines of: “That’s not your niece’s son?” Ms. Santizo answered no. (Ochoa testimony.)

63. Ms. Ochoa, who had learned that the infant was on the second floor, directed Ms. Santizo to go upstairs immediately and bring the infant back down to the first floor. (Ochoa testimony.)

 64. When Ms. Santizo brought the infant back down to the first floor, her brother Marcotulio Santizo, also entered the first floor. (Ochoa testimony.)

 65. On February 16, 2017, EEC issued Order to Protect Children: Notice of Emergency Suspension, Notice of Revocation, and Notice of Intent to Fine. (Ex. 1.)

 66. In the introduction to the order, EEC wrote that it had

determined that the family child care program licensed to Elvia Santizo (“Licensee”) is substantially non-compliant with EEC regulations. In addition, EEC has determined that the regulatory non-compliances observed and identified at the Licensee’s family child care program create an emergency situation endangering the health and safety of children present in the program. As a result, EEC hereby suspends immediately the Licensee’s family child care license. *See* 102 CMR 1.07(5)(a). In addition, EEC hereby revokes the Licensee’s family child care license. *See* 102 CMR 1.07(4)(a).

(Ex. 1, p. 1.) Later in the order, EEC relied on 102 CMR 1.07(5)(b) and within 102 CMR 1.07(4)(a), specifically (1) and (3). (Ex. 1, p. 4.)

 67. After the January 12, 2017 visit, EEC cited Ms. Santizo for the following regulatory non-compliances:

 a. The Licensee left her Certified Assistant alone with nine child care children for more than thirty minutes while she left the premises, in violation of 606 CMR 7.10(4)(g);

 b. The Licensee failed to submit background record checks for at least four people living in her family child care home, in violation of 102 CMR1.05(1);

 c. The Educator allowed an unapproved caregiver to take a child care child into unlicensed space in the home, in violation of 606 CMR 7.07(10)(a) and 606 CMR 7.10(3)(a);

 d. The Licensee allowed an infant to sleep in an infant seat, which is a safe sleep violation and a violation of 606 CMR 7.11(13)(e)(2);

 e. An unapproved caregiver provided false information about the identity of a child attending the program, in violation of 102 CMR 1.07(4)(a)(3);

 f. The Licensee was missing enrollment packets for two children enrolled in the program, in violation of 606 CMR 7.04(7)(a);[[5]](#footnote-5) and

 g. EEC observed a two-year-old child napping unsupervised behind a closed door, in violation of 606 CMR 7.10(7)(d).

(Ex. 1; Ex. 8, pp. 5-6.)

 68. As the legal basis for the emergency suspension and revocation (which was different from the citation), EEC cited four bases:

 A. “The Licensee’s program has at least four household members that have not received a background record check...,” invoking 102 CMR 1.05(1).

 B. “An unapproved caregiver provided false information to EEC licensing staff...,” invoking 102 CMR 1.07(4)(a)(3).

 C.

 The Licensee failed to properly supervise children enrolled in her program.

The Licensee failed to properly supervise children attending her family child care program. *See* 102 CMR 1.07(4)(a)(1). The Licensee left nine child care children with a Certified Assistant for over thirty minutes, which is a violation of staff to child ratio requirements. *See* 606 CMR 7.10(4)(g). In addition, the Licensee allowed a two-year-old child to nap unattended behind a closed door. *See* 606 CMR 7.10(7)(d). The Licensee also allowed an unapproved caregiver to take a child care child out of the licensed space and into the unlicensed second floor of the home. *See* 606 CMR 7.07(10)(a) and 606 CMR 7.10(3)(a).

D. “The Licensee violated safe sleep requirements...,” invoking 102 CMR 1.07(4)(a)(1) and 606 CMR 7.11(13)(e)(2). (Ex. 1, p. 5)(some underlining omitted).

69. On February 22, 2017, Ms. Santizo appealed. (Ex. 18.)

 70. EEC refers to both “the Licensee” and “the Educator.” (Ex. 1, pp. 1, 11.) This decision also refers to the child care provider.

**Discussion**

Suspension and revocation

102 Code of Massachusetts Regulations 1.07(5)(a) allows EEC to

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.

(Emphasis added.) The *licensee* must fail to comply, not an outsider who is not under her professional control.

 102 Code of Massachusetts Regulations 1.07(4)(a)(1) allows EEC to revoke a child care program’s license if the licensee “failed to comply with any applicable regulation.” The *licensee* must fail to comply.

102 Code of Massachusetts Regulations 1.07(4)(a)(3) allows revocation if the “licensee submitted any misleading or false statement or report required under 102 CMR 1.00 through 8.00 *et seq.*” The regulation does not govern *anyone’s* submission of any misleading or false statement or report. It governs a *licensee’s* submission.

As I wrote in *Department of Early Education and Care v. Jane Gelin*, OC-14-749 (DALA 2015):

 It goes without saying that the following are legitimate sources of alarm: to have a person with a criminal history staying in a residence that houses a child care program; to have a person leave such a residence to sell narcotics; and to have narcotics, a narcotics-trafficking operation, and unlicensed firearms in such a residence. Nonetheless, I cannot decide this case based on alarm or appearances. I cannot engage in results-driven reasoning. Ms. Gelin has a right under due process and Article 30 of the Massachusetts Declaration of Rights (Massachusetts has “a government of laws and not of” people) to have the fate of her license decided under the Code of Massachusetts Regulations as it is written….

 EEC does not have a regulation that says in effect: If something alarming happens in or near a child care program (for example, a child who was not enrolled in the program dies in a van outside the program, *Department of Early Education and Care* *v.* *Gloria Luna*, OC-12-613 (DALA 2013); a child care provider’s son has firearms in the attic of a residence that houses a program, *Gelin*; or a child care provider’s niece lies about being an infant’s mother and takes him out of the program’s space), the child care provider can be disciplined. In the absence of such a broad regulation, EEC may discipline a child care provider only for violating a specific regulation.

 EEC’s four bases for the emergency suspension and revocation

Ms. Santizo allegedly had at least four household members who had not received a background record check. 102 CMR1.05(1).

102 CMR 1.05(1) requires a “household member” of a family day care to undergo a background record check. (The regulation also requires “any person regularly on the premises when family day care children are present” to undergo such a check, but EEC is not proceeding under that provision. *See* Order to Protect Children: Notice of Emergency Suspension, Notice of Revocation, and Notice of Intent to Fine (referring to “household members” and not “regularly on the premises”); and Petitioner’s Post-Hearing Brief and Closing Argument (same).) In its brief, EEC argued that the five second-floor residents (Ms. Santizo’s brother, sister-in-law, and two offspring, and their unnamed tenant) were subject to this requirement.

General Laws Chapter 15D, Section 1A does not define “household” or “household member.” However, it does define “Family child care home,” and a key component of that definition is “a private residence.”

606 Code of Massachusetts Regulations 7.02 defines “Household Member” as “[a]ny person other than the educator who resides in the family child care home for 30 consecutive days or more.”

The issues are thus: What constitutes a home in which a family child care program is located? Are all parts of a multi-family residence, such as a two-family house, a “family child care home” and the same “private residence”? Is 15 Endicott Street a one-family or two-family dwelling?

EEC did not take a clear position on the first two legal questions. It twice asserted that its laws and regulations do not state whether both parts of a two-family dwelling are or can be considered one family child care home. (EEC Br. 3 (“EEC law and regulations do not specify as to whether a two-family home can be considered a single large family child care home….” and “state law does not dictate whether both units in a two-family home can qualify as a large family child care home…”).) However, it also argued that

a rational reading of the statute…dictate[s] that the residents on the top floor of the Respondent’s home should be considered household members.

(EEC Br. 3.) EEC did not offer any support for its conclusory contention. A rational reading of the statute actually points to a different conclusion.

Under EEC’s reading of the statute, all residences in a multi-residence dwelling are in the same household, that is, the same residence. Common sense tells us that that is not so. Under EEC’s interpretation, a 30-unit or a 100-unit apartment building is a single residence and household; hundreds of people, some of them strangers to each other, are in the same household.

EEC’s reading of the statute, that all residences in a multi-residence dwelling are in the same household, collapses under its own verbal weight. Under EEC’s reading, the term “multi-residence” house, dwelling, or building would make no sense. It would be a contradiction in terms. A duplex house, a three-decker, and a six-unit apartment building would not be multi-residence dwellings. The duplex would be a single residence, the three-decker would be a single residence, and the six-unit apartment building would be a single residence. Under the EEC’s interpretation, describing each of those dwellings as a “single residence” would be redundant. Each one would be simply a residence.

Now to turn to the factual determination of whether 15 Endicott Street is a one-family or two-family dwelling. Among the factors that can determine whether space belongs to one or two residences are these: How does the municipality regard it? Is there one address or are there two? Is there one owner or set of owners (such as a married couple) or are there two – one for each floor? Do relatives or non-relatives reside in the space? Are housing costs (rent or mortgage payments) shared or separate? Are utilities shared or separate? (In this case, there is nothing in the record about utilities.) Is there one kitchen or two? Is there one bathroom or more than one? How is the space physically structured, including with exterior and interior doors and locks? None of these factors is dispositive.

 In *Department of Early Education and Care v. Suzette Monteiro*, OC-16-22 (DALA 2016), a child care provider’s parents lived in an in-law apartment in the same home with the same address as hers. The town considered the residence to be a single-occupancy home. However, the dispositive factor was that when the child care provider’s mother consented to a background check, she stated that she lived in the provider’s household.

In the instant case, Ms. Santizo owns the entire house. It has one address. And most of the second floor residents are her relatives. However, the first and second floors each have a kitchen and bathroom. With signs, doors, and locks, Ms. Santizo distinguished the child care space from the second floor residence. (Whether Ms. Santizo used the ground-level or first-floor entrance when her child care program was *not* in session, that is, which door she used as a resident of the first floor, rather than as the operator of a child care program, is not in evidence. If she used the ground-floor entrance, that would indicate that the first and second floors were separate residences. If she used the first floor, it might not be a factor either way, just as a single address and single ownership is not a factor either way.)

Two more indications exist that the first and second floors were separate residences:

Ms. Santizo *rented* the second floor to her brother and allowed *him*, in turn, to rent out the rooms. That is, he controlled the second floor.

15 Endicott Street is a two-family house. The second-floor residents were not in Ms. Santizo’s household. They were not required to undergo background record checks.

In its brief, EEC writes that Ms. Santizo “did not establish any real or significant boundaries between the alleged top floor unit and the day care facility” (EEC Br. 3) and twice that she did not make it clear where one residence ended and the other began. (EEC Br. 4.) EEC is incorrect. Ms. Santizo had a solid door with a strong-looking lock, not, say, an unlocked screen door. She had a sign establishing a boundary between entrances for the second-floor residents and for her child care facility.

EEC continued: “The sole barrier between the two allegedly distinct areas of a home was a door that the Respondent claimed was always locked.” (EEC Br. 3.) It is unclear what else EEC expected. A locked door is often the sole barrier between two distinct residences.

EEC further continued: “However, during the January 12, 2017 visit…a top floor resident…walked into the licensed day care space and removed an unrelated infant from the Program.” This proves that Ms. Santizo’s child care program had questionable security, not that the second-floor residents were household members.

Next EEC wrote:

Clearly, residents who have bedrooms on the top floor of the home have clear and unfettered access to the day care space, as evidenced by the fact that S[i]lvia Santizo knew exactly how to enter the program and remove a child from the program.

(EEC Br. 4.) It is not clear at all that all five residents, including the unnamed non-relative, had “clear and unfettered” access to the child care space. There is no evidence of that. To the contrary, the evidence shows that the door to the child care space was kept locked. The fact that Silvia Santizo knew how to enter the child care space when the door was unlocked is unremarkable. Anyone who lived on the second floor knew how to do it theoretically: Enter the interior door – the only interior door on the first floor – opposite the exterior door. The fact that Silvia Santizo removed the infant from the program on January 12, 2017 is not evidence that (1) she had clear and unfettered access to the child care space in general; (2) her father, mother, or brother had clear and unfettered access to the child care space in general; (3) the unnamed unrelated tenant had clear and unfettered access in general; or, (4) and this is the important point, that she or the other four residents of the second floor were members of Ms. Santizo’s household. This “clear and unfettered” argument evokes the “any person regularly on the premises” provision in 102 CMR1.05(1), but EEC is not proceeding under that provision.

EEC wrote: “It belies credulity that S[i]lvia Santizo and other family members who are related to the Respondent are restricted from the child care space.” (EEC Br. 4.) No one is arguing that Ms. Santizo’s close relatives – her brother, sister-in-law, niece, and nephew – who live as close as they could and still maintain a separate household – upstairs – have never been to her home or are restricted from it, which doubles as child care space. Presumably, Ms. Santizo rents to relatives so that they *can* visit her easily when her child care program is not operating. Presumably, Silvia Santizo was familiar with the first floor and how to enter it. That still doesn’t prove that she was a household member.

EEC also wrote that it “would argue that this household member [Silvia Santizo] had access with regularity.” (EEC Br. 4.) EEC is making an argument without any basis in the record. *Even if it were true*, it would not prove that Silvia Santizo was a household member. That is EEC’s theory of the case, not that she was a “person regularly on the premises.” 102 CMR 1.05(1).

 I do not have to reach the fact that EEC did not prove – and did not even try to prove – that the second-floor residents had lived there for 30 or more consecutive days. It is not enough for EEC to state that “Respondent does not contest…that these individuals have resided in the home for at least thirty consecutive days.” (EEC Br. 3.) It is for EEC to prove all elements of its case, not to rely on Ms. Santizo’s non-contesting of those elements. *Deacon Transportation, Inc. v. Deparment of Public Utilities*, 388 Mass. 390, 394 (1983)(party with burden of proof must affirmatively prove its case, not rely on the opposing party’s “failure to produce countervailing evidence”).

I do not recommend that EEC continue to suspend or to revoke Ms. Santizo’s license on the basis that at least four household members had not received a background record check.

An unapproved caregiver allegedly provided false information to EEC licensing staff. 102 CMR 1.07(4)(a)(3).

102 Code of Massachusetts Regulations 1.06(3) in effect requires a licensee to provide EEC with information that it requests during site visits to determine a licensee’s compliance with regulations. 102 Code of Massachusetts Regulations 1.07(4)(a)(3) authorizes EEC to revoke a child care program’s license if the licensee “submitted any misleading or false statement or report required under 102 CMR 1.00 through 8.00 *et seq.*”

EEC does not have a clear position about whether it is moving against Ms. Santizo because she or because Silvia Santizo made the false statement. EEC initially moved against Ms. Santizo in part because an “*unapproved caregiver* provided false information to EEC licensing staff....” (Ex. 1, p. 5)(emphasis added.) *See also* Ex. 1, p. 3 (reference that “Licensee’s niece provided false information” but no mention that licensee did so). In its brief, EEC repeatedly refers to the *respondent’s* lying to it. (EEC Br. 6.) There is a potential procedural problem with EEC’s changing its theory of the case, without notice, sometime between its order against Ms. Santizo and its post-hearing brief.

The potential problem remains potential and has no practical significance for two reasons. One, Ms. Santizo is not prejudiced by EEC’s change in theory. In her brief, Ms. Santizo assumes that *she*, not her niece, made a false statement about the infant’s parentage. (Santizo Br. 5.) Two, EEC has not proved that Ms. Santizo was the one who made the false statement about the infant’s parentage. I sat through the hearing, have listened to the complete recording once, and have listened to parts of the recording a second time. Both parties may know that Ms. Santizo made a false statement about the infant’s parentage and have written their briefs accordingly, but that is not a fact in the record and they haven’t stipulated to it. Therefore, it is not before me.

If EEC is still proceeding against Ms. Santizo because Silvia Santizo made false statements, as it initially proceeded, the regulation doesn’t apply to Silvia Santizo. It applies to a licensee, Ms. Santizo.

 Ms. Santizo was not present before or when Silvia Santizo lied about being the infant’s mother. For Ms. Santizo to have caused Silvia Santizo’s false statement, Ms. Santizo would have had to call Silvia Santizo and instruct her to lie. However, there is no evidence that Silvia Santizo lied at Ms. Santizo’s direction. And it is not clear that the regulation governs licensees’ indirectly making false statements.

I do not recommend that EEC continue to suspend or to revoke Ms. Santizo’s license on the basis that Silvia Santizo provided false information to EEC licensing staff.

 Ms. Santizo allegedly failed to properly supervise children enrolled in her program. 102 CMR 1.07(4)(a)(1), 606 CMR 7.07(10)(a), 7.10(3)(a), (4)(g), and (7)(d).

102 Code of Massachusetts Regulations 1.07(4)(a)(1) allows EEC to revoke a child care program’s license if the licensee “failed to comply with any applicable regulation.” EEC alleges that Ms. Santizo failed to comply with four substantive regulations.

1. 606 Code of Massachusetts Regulations 7.07(10)(a) requires that “[c]hild care…be provided only in space approved by the Department.” General Laws Chapter 15D does not define “child care.” Neither does 102 CMR 1.02 nor 606 CMR 7.02. However, General Laws Chapter 15D, section 1A and 606 CMR 7.02 do define “child care *center*” and a definition of “child care” may be derived from it: “nonresidential custody and care during part or all of the day separate from their parents.”

 Ms. Santizo testified that she did not ask Silva Santizo to take the infant to the second floor. There is no evidence or indication to the contrary. *See Department of Early Education and Care v. Suzette Monteiro* (child care provider acquiesced to violation of EEC order by her mother). Ms. Ochoa was apparently with Ms. Santizo when the infant was taken to the second floor. Ms. Santizo apparently did not have the opportunity to instruct Silvia Santizo to take the infant to the second floor. Ms. Santizo testified that her niece did so to help her. That account is entirely plausible.

I do not recommend that EEC continue to suspend or to revoke Ms. Santizo’s license on the basis that the infant was provided child care in unlicensed space.

606 Code of Massachusetts Regulations 7.10(3)(a) is a minor regulation about staff-to-children ratio. 606 Code of Massachusetts Regulations 7.10(4)(g) requires that two child care providers be present for seven to ten children. Ms. Santizo violated it by being absent for at least 45 minutes. Only one child care provider was present for nine children. I recommend that EEC continue to suspend and to revoke Ms. Santizo’s license on the basis that she left one child care provider present for nine children.

 606 Code of Massachusetts Regulations 7.10(7)(d) requires: “When children are placed in a separate room for naps, the door must remain ajar.” This regulation was violated at Ms. Santizo’s child care program.

I recommend that EEC continue to suspend and to revoke Ms. Santizo’s license because a child was placed to sleep behind a closed door.

Ms. Santizo allegedly violated safe sleep requirements. 102 CMR 1.07(4)(a)(1), 606 CMR 7.11(13)(e)(2)

606 Code of Massachusetts Regulations 7.11(13)(e)(2) requires that “[p]rograms serving infants…nap infants in an individual crib, portacrib, playpen or bassinet.” EEC’s

“Policy Statement: Safe Sleep for Infants,” which it cites in its brief (EEC Br. 2 n.2), repeats and amplifies this provision from the regulation:

Each child must nap in an individual crib, port-a-crib, playpen or bassinet….Car seats and other sitting devices are not allowed *for routine sleep*.

mass.gov/edu/docs/eec/licensing/policies/safe-sleep-infants.pdf (emphasis added).

 EEC’s own interpretation of its regulation is that it applies to *routine* sleep. Apparently, a child care program may put an infant to sleep in a car seat and then transfer it to a crib. That is what Ms. Berganza testified she planned to do: take the infant from the crib, where he was crying, rock him to sleep in the car seat, and then return him to the crib. Ms. Santizo’s child care program did have a crib. (Ex. 15.)

 There is no evidence that Ms. Santizo’s program routinely put infants to sleep in a car seat. Nor could there be any such evidence, at least not with this infant. It was Joseph’s first day at Ms. Santizo’s child care program and the car seat arrived with him. (Berganza testimony.) Therefore, there was no routine.

 I do not recommend that EEC continue to suspend or to revoke Ms. Santizo’s license on the basis that an infant was put to sleep in a car seat.

 Ms. Santizo’s credibility and conduct at the hearing

 My recommended decision does not turn largely on Ms. Santizo’s credibility and conduct at the hearing. Nonetheless, to the extent that it matters, Ms. Santizo undermined her credibility by being evasive and uncooperative under cross-examination. Cross-examination to establish seemingly simple but important matters was unnecessarily protracted. She attributed her long and unresponsive answers to her Guatemalan culture, in which people answer expansively, not simply what they’re asked.

On December 7, 2012, Ms. Santizo signed an agreement with EEC, which included a detailed description of her attempt on October 3, 2012 to take five children from her overenrolled child care program out the back door of her home. (Ex. 1, p. 12.) At the hearing, Ms. Santizo denied having transferred children between her program and her sister’s program. She acknowledged having signed the agreement but denied having done what it said she did. (Santizo testimony.) Ms. Santizo either signed an untrue statement on December 7, 2012 about the events of October 3, 2012, or testified untruthfully on April 24, 2017 that she had not done various things on October 3, 2012. Either way, she undermined her credibility.

Ms. Santizo returned late from hearing breaks and kept the hearing from resuming, not once but twice. Her inability to follow my instructions to resume the hearing after a 10-minute break throws doubt on her ability to follow regulations and instructions from EEC. *See Commonwealth v. Houghton*, 47 Mass. App. Ct. 904, 100 (1995)(“The demeanor of a witness in a courtroom has been considered evidence even if the witness does not take the stand.”).

Relevant factors in disciplining a child care provider

 EEC is required to consider, before disciplining a child care provider, “any non-compliance at the facility or program,” “any previous non-compliances,” and other factors. 102 CMR 1.07(2)(a) and (e). Ms. Santizo has been cited for overenrollment three times since 2006. (Ex. 1, p. 12.) One aspect of overenrollment is that a child care program does not have enough child care providers. On January 12, 2017, Ms. Santizo again did not have enough child care providers at her program, this time because she had left her facility. EEC may properly conclude that Ms. Santizo will continue being unable to consistently have enough child care providers in her program, and may discipline her accordingly.

**Conclusion and Order**

 I recommend as follows: EEC may continue the suspension and may revoke Ms. Santizo’s license on the bases that she left her assistant to care for nine children, three children more than the maximum for one provider; and her child care program put a child to sleep alone behind a closed door. EEC may not continue the suspension and may not revoke her license on the bases that her relatives and their tenant on the second floor should have undergone background record checks; her niece removed an infant from the child care program and lied to EEC staff members; and an infant was put to sleep in a car seat.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: August 10, 2017

1. Although I found Ms. Santizo not to be credible, see below, I have no reason to doubt her testimony on this point. The photographs of the door, one from the hall opposite the front door, and one from inside the first-floor space, show a door lock. The lock did not have a keyless manual device, such as a lever, on either side of the door. From inside the first-floor space, where Ms. Santizo lived and ran her child care program, a key attached to a cord hung on a doorknob. There was no testimony about this key. However, I assume that it hung there to provide an emergency exit from the first floor. The key indicates, without proving, that the first and second floors were separate residences. (Ex. 15.) [↑](#footnote-ref-1)
2. These allegations and the ensuing investigation and consequences of it are not directly the subject of this appeal. They are, however, relevant background. [↑](#footnote-ref-2)
3. The handwritten letters on the application are unclear. The first three letters are “Pat”; the last letter is “o.” [↑](#footnote-ref-3)
4. There is some discrepancy between Exhibit 1 and Ochoa’s testimony about the allegations in the complaint. Ultimately, it is not significant, because the complaint is background information. [↑](#footnote-ref-4)
5. Ms. Ochoa was cited for the missing paperwork, but it was not a legal basis for the emergency suspension and revocation, which is the subject of her appeal. [↑](#footnote-ref-5)