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-18-0549

**Strawberry Child Care**,

Respondent

**Appearance for Petitioner**:

Caroline Hayes Lopez, Esq.

Thomas Myers, Esq.

Department of Early Education and Care

51 Sleeper Street, 4th Floor

Boston, MA 02210

**Appearance for Respondent**:

Joseph P. Crimmins, Esq.

Aaron A. Spacone, Esq.

Posternak Blankstein & Lund

800 Boylston Street

Boston, MA 02199-8004

**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF RECOMMENDED DECISION**

Departmentof Early Education and Care may suspend and revoke the license of a child care facility because its personnel violated regulations regarding supervision of children, good judgment during an emergency, educator-to-children ratios, and sound administration of the program.

**RECOMMENDED DECISION**

The respondent, Strawberry Child Care, appealed the suspension and revocation of its license by the Department of Early Education and Care (EEC).

I held a hearing on October 23 and 24, 2018, which I recorded digitally. EEC called the following witnesses: Timothy Smith, an investigator for EEC; Elizabeth Dillon, a Program Supervisor for EEC; and Maria Torres Martinez, Regional Director for EEC’s Lawrence office. Strawberry Child Care called Monica Ryan, Strawberry Child Care’s owner and operator; and Nedesna Pachane, a teacher at Strawberry Child Care.

On the first day of the hearing, the hearing room was filled with many people. When I granted EEC’s motion to sequester witnesses, many of the people left. Strawberry Child Care’s witness list included Betty Mejia, Laura Pavon, Claudia Gonzalez, Sandy Ordonez, and Nuria Sosa. Strawberry Child Care ultimately did not call them as witnesses. I assume that some, if not all, of them were the prospective witnesses who left the hearing room on the first day of hearing. I discuss the significance of this observation below.

I accepted into evidence 21 exhibits for EEC and 5 for Strawberry Child Care.

EEC’s Exhibit 4 is a thumb drive of the surveillance recording of September 13, 2018. It has no audio. Because it portrays Child A and other children, I have impounded it. Strawberry Child Care’s Exhibit 2 is a video tour of the Strawberry Child Care facility that Ms. Ryan made to accompany her direct-examination testimony.

Because Strawberry Child Care’s Exhibit 3 contains the names of Child B’s parents and can easily lead to Child B’s name being revealed, I asked Strawberry Child Care to redact the parents’ names and submit a new Exhibit 3. Strawberry Child Care agreed to, but did not do so. I have impounded Strawberry Child Care’s Exhibit 3. (Although the parties did not designate or refer to the child as “Child B” during the hearing or in their submissions, it makes sense to so designate the child, to differentiate him from Child A.)

On October 25, 2018, the day after the hearing ended, Strawberry Child Care’s two lawyers at the hearing wrote a letter to me under Rule 3.3(a)(3) of the Supreme Judicial Court Rules of Professional Conduct. They wrote:

At yesterday’s hearing…Monica Ryan offered testimony with respect to her conversations with an individual identified as [Ms.][[1]](#footnote-1) Rodriguez currently residing in Columbia. Undersigned counsel believes that her testimony in this regard was not accurate and should not be accepted as true for purposes of the resolution of this matter.[[2]](#footnote-2)

Both parties submitted post-hearing briefs. Strawberry Child Care’s brief alleges facts that are not in evidence and I have not considered them.

**Findings of Fact**

The child care program

1. Strawberry Child Care is located at 124 Watertown Street, Watertown. (Pet. Ex. 1.)

2. Strawberry Child Care’s most recent license was issued on March 1, 2017. The license allowed it to care for a total of 84 children: 28 infants, 27 toddlers, 20 preschoolers, and 9 of a mixed group of toddlers and preschoolers. (Pet. Ex. 1.)

3. Strawberry Child Care’s owner, licensee, and program director is Monica Ryan. (Pet. Ex. 21.)

4. Strawberry Child Care’s assistant director is Betty Mejia. (Ryan testimony.)

5. Whether Strawberry Child Care has administrators other than Ms. Ryan and Ms. Mejia is not in evidence. The only non-educator support staff mentioned in evidence was Ms. Rodriguez. (Ryan testimony.)

6. Strawberry Child Care had two infant rooms, called Infant One and Infant Two. (Ryan, Smith testimony.)[[3]](#footnote-3)

7. The two infant rooms had different children assigned to them, but educators (which is what EEC calls child care providers) went back and forth between the two rooms (Smith and Ryan testimony), making it harder to determine if Strawberry Child Care was maintaining the proper educator-to-child ratios.

8. What witnesses called and what this recommended decision calls “the crib area” has seven cribs. It appears to be a separate room, separated from an infant room by a low wall. Between the crib area and the infant room is a half-door with glass in it. The wall is about three feet high, although its exact height is not in evidence. (Smith and Ryan testimony; Pet. Ex. 16; Resp. Ex. 2.)

September 13, 2013[[4]](#footnote-4)

9. During a visit to Strawberry Child Care on September 13, 2013, EEC discovered that the ratio of educators to children in the toddler room, one educator for seven children, violated its regulations. (Pet. Ex. 19, p. 4.)

10. During the same visit, EEC also discovered that Strawberry Child Care had eight infants in a room licensed for seven infants. (Pet. Ex. 19, p. 4.)

11. During the same visit, EEC found other alleged violations of its regulations (Pet. Ex. 19, p. 4), but did not include these allegations in its Order to Protect Children, which it issued in 2018 and is the subject of this recommended decision.

October 23, 2014 EEC visit

12. During a visit to Strawberry Child Care on October 23, 2014, EEC discovered that one infant room had one educator for seven infants; the second infant room had one educator for five infants; and a preschool educator cared for 11 children alone at one time and 13 children at another time. These ratios violated EEC regulations. (Pet. Ex. 18, p. 3.)

13. On October 23, 2014, EEC found other alleged violations of its regulations (Pet. Ex. 18, p. 3), but did not include these allegations in its Order to Protect Children, issued in 2018.

Child B’s scratches, January 25, 2018

14. On January 25, 2018, Child B sustained two scratches, from the back of his ear to the nape of his neck. (Resp. Ex. 3, p. 4; Pet. Ex. 17, p. 1.)

15. On that date, at 10:03 a.m., Strawberry Child Care conducted an evacuation drill. During the drill, it placed three infants, including Child B, in one evacuation crib. (Pet. Ex. 17, p. 1.)

16. Ms. Ryan concluded that a surveillance video showed that one infant scratched Child B. (Pet. Ex. 17, p. 5.) (This video is not in evidence.)

17. An EEC investigator viewed the video, and because of the distance between the camera and evacuation crib, and because events happened so quickly, she did not conclude that another infant scratched Child B. However, she did conclude that Ms. Ryan’s explanation was plausible. (Pet. Ex. 17, p. 5.)

18. Personnel at Strawberry Child Care were not aware of the scratches until Child B’s mother contacted Strawberry Child Care in the afternoon, at some time before 4:22 p.m. (Pet. Ex. 17, p. 4.)

Death of Child A, September 13, 2018

19. On September 13, 2018, Child A was a four-month-old girl. (Smith and Ryan testimony.)

20. At approximately 10:53 a.m., as revealed by a surveillance video, Child A was on her back on a mat in an infant room. She slowly and with much effort turned from back to belly. An educator, Claudia Gonzalez, sat within an arm’s-length of Child A, but somewhat turned away from Child A as she bottle-fed another child. She seemed unaware of Child A. (Pet. Ex. 4.)[[5]](#footnote-5)

21. At approximately 10:55 a.m., Child A, who was unable to roll back onto her back, was on her belly with her legs thrashing. (Pet. Ex. 4.)[[6]](#footnote-6)

22. Also at approximately 10:55 a.m., Child A dropped her head and her face into the mat. She raised her head again, then dropped it again. (Pet. Ex. 4.)

23. At approximately 10:56 a.m., Child A seemed to be struggling. Her feet and leg movements were slower and seemed less exuberant.[[7]](#footnote-7) Ms. Gonzalez glanced briefly in Child A’s direction, but did not seem to notice her. (Pet. Ex. 4.)

24. At approximately 10:57 a.m., Child A continued to seem to struggle. Her feet and leg movements remained slow and seemingly less exuberant. The educator seated within an arm’s-length of Child A looked a bit longer in her direction, but did not seem to notice her.

25. Also at approximately 10:57 a.m., another child crawled over Child A. Ms. Gonzalez did not seem to notice. (Pet. Ex. 4.)

26. At approximately 10:58 a.m., Child A seemed to be face down in the mat. She moved only occasionally. Another educator, Laura Pavon, picked up Child A and put her into a seat at a table. (Pet. Ex. 4.)

27. At approximately 11:13 a.m., an educator took Child A to the crib area for a nap. (Pet. Ex. 4; Resp. Ex. 4.)

28. Between approximately 12:22 and 12:52 p.m., a period of 25 minutes, Ms. Gonzalez took a break. During that time, no one checked on Child A or the other napping children in the crib area. (Resp. Ex. 4; Pet. Ex. 5, p. 10; Pet. Ex. 13, p. 6.)

29. At other times, an educator stood at the low wall. The surveillance video shows only the educator’s legs. The positioning of her legs indicates that the educator turned occasionally toward the cribs. (Pet. Ex. 4.)

30. According to the nap timesheet, Ms. Gonzalez checked Child A at 12:40, 1:00, 1:20 p.m. (Pet. Ex. 14.) The timesheet was not accurate. (Ryan testimony.)

31. At approximately 2:15 p.m., Ms. Gonzalez checked on Child A and found her cold to the touch. (Pet. Ex. 4, Ex. 5.)

32. Also at approximately 2:15 p.m., Ms. Gonzalez picked up Child A, and handed her to Ms. Pavon, who placed Child A on a changing table in the infant room. (Pet. Ex. 4; Pet. Ex. 5, p. 5.)

33. At no time did anyone from Strawberry Child Care perform cardiopulmonary resuscitation (CPR) on Child A. (Pet. Ex. 4.)

34. At approximately 2:16 p.m., when Ms. Ryan learned that Child A was having an emergency, she called the Watertown Police Department on a landline. (Ryan testimony; Pet. Ex. 5, p. 9.)

35. After an exchange of information, Ms. Ryan disconnected the call to the Watertown Police Department and ran to another floor in the building to summon help from a medical office. (Ryan testimony; Pet. Ex. 5, p. 9; Pet. Ex. 4.)

36. Ms. Ryan did not enter the infant room during the emergency. (Pet. Ex. 4.)

37. At approximately 2:19 p.m., a medical technician who worked in the building responded to Strawberry Child Care. (Because she was wearing scrubs, various accounts referred to her as a nurse, but she was determined to be a medical technician.) (Pet. Ex. 5, p. 10.)

38. Also at approximately 2:19 p.m., soon after the medical technician began CPR, a Watertown police officer arrived and took over administering CPR. (Pet. Ex. 4; Pet. Ex. 5, p. 10.)

39. Other first responders arrived. One opened a door that led from outside the facility to the infant room. (Pet. 4.)

40. Child A was transported to a hospital. (Pet. Ex. 8, p. 2.)

41. Child A died. (Pet. Ex. 9, p. 1.)

42. The cause of Child A’s death is not in evidence.

September 17, 2018 visit by EEC and DCF

43. On September 17, 2018, Timothy Smith, an EEC investigator, visited Strawberry Child Care with an investigator from the Department of Children and Families (DCF). (Pet. Ex. 5.)

44. Because some of the educators spoke Spanish and not English, one educator, Ms. Pachane, who is bilingual, translated for the investigators. (Pet. Ex. 5, p. 5; Pet. Ex. 6, p. 5; Smith testimony.)

45. Among the educators with whom the investigators spoke were Ms. Gonzalez, Ms. Pavon, and Ms. Ordonez. Ms. Pachane translated these interviews. (Pet. Ex. 5, pp. 6, 11, 12.)

46. The investigators spoke with Ms. Ryan and Ms. Mejia in English. (Ryan testimony.)

47. Ms. Gonzalez told the investigators the following (Pet. Ex. 5, p. 5; Pet. Ex. 6, p. 6; Smith testimony):

A. She had noticed on September 13, 2018 that Child A was able to roll over.

B. She put Child A to nap on her back.

C. She took a break from approximately 12:22 to 12:52 p.m. (*See* Pet. Ex. 13, p. 6.)

D. She checked on Child A before and after her break.

E. At approximately 2:15 p.m., Ms. Gonzalez went to wake up Child A. She found Child A on her side, not quite face down, and cold to the touch.

F. She handed Child A to Ms. Pavon, who put her on changing table in the infant room.

G. Ms. Pavon performed CPR on Child A.

H. Ms. Pavon appeared about to faint and said she could not continue. Ms. Pachane took over CPR.

48. Ms. Pachane told the investigators that she saw Ms. Pavon performing CPR, but Ms. Pavon did not look well, so she took over compressions. She did not perform mouth-to-mouth resuscitation on Child A. (Pet. Ex. 5, p. 7; Smith testimony.)

49. Ms. Mejia told the investigators that Ms. Pavon had performed CPR on Child A. (Pet. Ex. 5, p. 4; Smith testimony.)

50. Despite Ms. Pachane’s and Ms. Mejia’s reports to the investigators that Ms. Pavon performed CPR, Ms. Pavon did not tell the investigators that she had performed CPR, but did say she touched Child A on the legs, arms, and chest, and was about to start CPR. (Pet. Ex. 5, p. 6; Pet. Ex. 6, p. 6.)

51. At least one educator told the investigators that Child A had been put down for a nap at 12:30 p.m.,[[8]](#footnote-8) when the actual time was approximately 11:13 a.m.

52. Mr. Smith learned that on September 13, 2018, Ms. Pavon had supervised four infants in one infant room alone, in violation of an EEC regulation. Ms. Mejia covered for Ms. Pavon for part of the time. (Smith testimony.)[[9]](#footnote-9)

53. Mr. Smith also learned that on September 13, 2018, Ms. Ordonez had supervised four infants in one infant room alone, in violation of an EEC regulation. The room called Infant One had one educator for four infants throughout the day. (Smith testimony.)

54. Mr. Smith asked for various documents, including CPR certificates for Strawberry Child Care’s personnel. (Smith testimony.)

55. Child A’s Daily Form reports that she was put down for a nap at 12:30 p.m. (Pet. Ex. 5), whereas she was actually put down at approximately 11:13 a.m.

Genuine CPR certificates

56. On January 25, 2018, Ms. Ryan and Betty Mejia attended and completed a training course in CPR that the American Red Cross conducted. (Resp. Ex. 5.)

57. Because Strawberry Child Care delayed in paying the American Red Cross, the Red Cross did not issue CPR certificates to Ms. Ryan and Ms. Mejia right after they completed training. (Ryan testimony; Pet. Ex. 20, p. 4; Resp. Ex. 5 (notation reads “(Waiting for payment).”)

58. In October 2018, as part of the preparation for the hearing in this appeal, Strawberry Child Care paid the American Red Cross, which issued certificates of completion for Ms. Ryan and Ms. Mejia, showing a completion date of January 25, 2018. (Ryan testimony; Resp. Ex. 5.)

59. On September 13, 2018, when Child A died, Ms. Ryan and Ms. Mejia had been trained in CPR, but did not have valid CPR certificates.

Falsified CPR certificates

60. The Certificate of Completion for Nuria Sosa stated that she had completed a course in Adult and Pediatric First Aid/CPR taught by Jackeline Fernandez on November 30, 2017. The certificate ID was GVG850, a unique number assigned only to Ms. Sosa’s certificate. (Pet. Ex. 7, p. 9; Smith testimony.)

61. The purported Certificate of Completion for Betty Mejia stated that she had completed a course in Adult and Pediatric First Aid/CPR taught by Jackeline Fernandez on November 30, 2017. The certificate ID was GVG850, which was the number assigned to Ms. Sosa’s certificate. (Pet. Ex. 7, p. 18.)

62. The purported Certificate of Completion for Ms. Ryan stated that she had completed a course in Adult and Pediatric First Aid/CPR taught by Jackeline Fernandez on November 30, 2017. The certificate ID was GVG850, which was the number assigned to Ms. Sosa’s certificate. (Pet. Ex. 7, p. 19.)

63. The purported certificates for Ms. Mejia and Ms. Ryan look like blurry photocopies of Ms. Sosa’s certificate.

64. The attendance sheet for the November 30, 2017 training in first aid and CPR shows Nuria Sosa, but not Ms. Ryan or Ms. Mejia. (Pet. Ex. 12.)

65. The purported certificates for Ms. Mejia and Ms. Ryan were falsified. They were falsified by someone at Strawberry Child Care.

66. On September 14, 2018, Ms. Ryan emailed to Mr. Smith various first aid and CPR certificates of Strawberry Child Care’s personnel, including falsified certificates for her and Ms. Mejia. (Pet. Ex. 7.)

Order to Protect Children

67. On September 20, 2018, EEC issued an Order to Protect Children: Notice of Emergency Suspension, Notice of Revocation, and Notice of Ability to Fine. (Pet. Ex. 2.) That is, EEC suspended Strawberry Child Care’s license on an emergency basis (which entitled Strawberry Child Care to an expedited hearing), and revoked its license (which also entitled Strawberry Child Care to a hearing, but not an expedited one.) [[10]](#footnote-10)

68. On October 17, 2018, EEC amended the Order to Protect Children. (Pet. Ex. 21.) All references in this recommended decision to the Order to Protect Children are to the amended order, unless noted.[[11]](#footnote-11)

69. A summary paragraph of the Order to Protect Children reads:

The Department of Early Education and Care (“EEC”) has determined that Strawberry Child Care (“Program”) committed serious regulatory violations that endanger the health, safety, and welfare of children and warrant the emergency suspension of its Group and School Age child care license. See 102 CMR 1.07(4)(a)1. Program educators failed to administer CPR during an infant’s medical emergency, failed to exercise good judgment during an emergency, and failed to adequately supervise infants enrolled in the program. The Program was also poorly administered during an emergency. Therefore, EEC is exercising its legal authority to immediately suspend the Program’s child care license (#9028473) and is seeking to revoke the Program’s child care license. See G.L. c. 15D, §10 and 102 CMR 1.07(5)….

(Pet. Ex. 21, p. 1.)

70. The Order to Protect Children relied on five bases. (Pet. Ex. 21.)

71. The first of five bases in the Order to Protect Children is that “[t]he Program failed to adequately supervise infants in its care.” (Pet. Ex. 21, p. 6, heading (underline deleted).)

72. To support its basis that Strawberry Child Care failed to adequately supervise infants, EEC alleged three sub-bases (depending on how one counts):

A. Educators did not use good judgment at all times, in violation of 606 CMR 7.10(5)(b).

B. Educators were not close enough to intervene with Child A, were not positioned to maximize their ability to see and hear Child A, and were not aware of Child A’s activities at all times, in violation of 606 CMR 7.10(5)(c)-(e).

C. In January 2018, a second child, Child B, sustained two scratches on its neck. (Pet. 21, pp. 4-5.)

73. The second of five bases in the Order to Protect Children is that Strawberry Child Care was not soundly administered in an emergency. EEC cited 102 CMR 1.07(4)(a)(1) and 606 CMR 7.04(1). (Pet. Ex. 21, p. 7.)

74. The third of five bases in the Order to Protect Children is that “The Program’s staff failed to exercise good judgment and failed to administer CPR to an infant during an emergency ….” (Pet. Ex. 21, p. 7, heading (underline deleted).) EEC cited 606 CMR 7.09(8) and 7.11(7)(a).

75. The fourth of five bases in the Order to Protect Children is that “[t]he Program did not maintain proper staff-to-child ratios in its infant classrooms.” (Pet. Ex. 21, p. 8, heading (underline deleted).) EEC cited 606 CMR 7.10(2)(a) and (b), 7.10(9)(b)1, and 7.10(1). EEC alleged that Strawberry Child Care violated proper ratios on September 13, 2018, the day that Child A died, and on two earlier dates, September 13, 2013 and October 23, 2014. (Pet. Ex. 21, p. 8.)

76. The fifth of five bases in the Order to Protect Children is that Strawberry Child Care personnel provided false and misleading information to EEC. EEC cited 102 CMR 1.05(1) and 1.05(1)(a)(2); 1.06(3); 1.07(4)(a)1 and 3; and 1.07(5); and 606 CMR 7.04(1). (Pet. Ex. 21, pp. 8-9.)

77. To support its basis that Strawberry Child Care personnel provided false and misleading information, EEC alleged three sub-bases.

A. On September 17, 2018, Strawberry Child Care personnel told Ms. Smith that two personnel had performed CPR on Child A, when none did.

B. On September 17, 2018, Strawberry Child Care personnel reported that Child A had been placed in a crib to nap on September 13, 2018 at approximately 12:30 p.m., whereas it was approximately 11:30 a.m.

C. On September 14 and 27, 2018, Ms. Ryan provided falsified CPR certificates for herself and Ms. Mejia. (Pet. 21, pp. 8-9.)

78. On September 27, 2018, Strawberry Child Care timely filed its Notice of Claim – Emergency Suspension and Revocation, in effect, appealing the Order to Protect Children. (Resp. Ex. 3.)

**Discussion**

What Child A died from

The cause of Child A’s death is not in evidence. For example, neither a death certificate nor autopsy report is in evidence. EEC may or may not want me to assume that she died from suffocation – that because she was able to roll from her back to belly, but not back again, because she was unable to keep her head off the mat that she laid on before her nap, and because educators did not check her during her nap frequently enough, including during Ms. Gonzalez’s 25-minute break, she rolled onto her side or belly during her nap and suffocated. *See* Ex. 6, p. 3 (person who filed report with DCF believed that Child A died of asphyxiation).

Without knowing why Child A died and whether a child dying for that reason generally demonstrates signs of distress that an educator can detect, or whether the cause of death results in a quiet death that more supervision could not have prevented, I cannot know whether more supervision by educators could have kept Child A alive. But that does not directly matter. EEC’s regulations require children to be supervised. 606 CMR 7.10(5).

Ms. Ryan’s credibility

Ms. Ryan testified twice that she ran through the infant room to open an emergency door for first responders. She testified a third time that she believed she had done so. However, the surveillance video (Pet. Ex. 4) does not show her in the infant room during the emergency at all.

After viewing the video during cross-examination and not seeing herself, Ms. Ryan conceded that she did not go through infant room and did not open an emergency door for first responders.

Her incorrect testimony undermined her credibility.

Ms. Ryan testified that she scanned the falsified CPR certificates to send to EEC without looking at them. Since she had to look at them to confirm that she had certificates for all of her staff, I don’t find this part of her testimony credible.

Ms. Ryan testified as follows: Ms. Rodriguez, who volunteers in Strawberry Child Care’s office for three to four months every year, was responsible for not paying the Red Cross and, she assumed, for falsifying the CPR certificates for Ms. Ryan and Ms. Mejia. After Ms. Ryan learned about the issues involving the certificates, but before coming up with her explanations, she telephoned Ms. Rodriguez in Columbia to ask questions. Ms. Rodriguez stated that she had forgotten to pay the Red Cross. Ms. Ryan did not ask her about the falsified certificates.

I found the following parts of Ms. Ryan’s testimony not believable: She did not ask Ms. Rodriguez if she falsified the certificates, despite Ms. Ryan’s curiosity. Strawberry Child Care entrusted paying bills to a volunteer, a volunteer who is not there year-round. Ms. Ryan implied that Ms. Rodriguez would return again for a three-to-four month stint as a volunteer (assuming that Strawberry Child Care was still operating) – despite her failure to pay an important bill and despite Ms. Ryan’s assumption that Ms. Rodriguez had falsified CPR certificates, an act that endangered Strawberry Child Care’s license.

Even before Ms. Ryan’s lawyers, under Rule 3.3(a)(3), disavowed Ms. Ryan’s testimony regarding Ms. Rodriguez, I found that she lacked credibility. Rule 3.3(a)(3) does not specify what is to happen after a lawyer discloses a witness’s false statement to the tribunal. Rather, the rule gives me discretion. *See* Rule 3.3 Comment 10 (“It is for the tribunal then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.”)

I strike Ms. Ryan’s testimony about Ms. Rodriguez. That is perhaps unnecessary because it was not credible. Because I do not find Ms. Ryan credible and because of my discretion under Rule 3.3, I do not accept the rest of her testimony, except for non-controversial and routine facts.

Who falsified the CPR certificates and why

I do not know who falsified the CPR certificates. I do not need to determine who did so. I note that only Ms. Ryan and Ms. Mejia had access to personnel files where the CPR certificates were kept. (Ryan testimony.) Ms. Ryan’s testimony that Ms. Rodriguez had access to CPR certificates has been struck.

It is unclear why CPR certificates were falsified, although it was possibly to save the money of paying for real ones. But when someone takes the time and effort to falsify such documents, which are important to a child care facility, the reason cannot be benign.

Ms. Pachane’s English language ability

At the hearing, Strawberry Child Care asked that Ms. Pachane testify through a Spanish-English translator. A telephone translation service provided translation.

However, I note three things. One, after the Watertown Police Department reported that none of Strawberry Child Care’s staff were evidently fluent in English (Pet. Ex. 8, p. 1) and EEC included that observation in its Order to Protect Children (Pet. Exs. 2, 21), Strawberry Child Care, in its response, denied it and described Ms. Pachane as “fluent in English and Spanish.” (Pet. Ex. 3, p. 10.) Two, during the hearing, Ms. Pachane answered a few questions in Spanish without waiting for the questions to be translated from English to Spanish. That is, she knows English. Three, Ms. Pachane testified – through a translator – that her English was “very good.”

First basis: Failure to adequately supervise infants

EEC’s first basis for its Order to Protect Children, that Strawberry Child Care failed to adequately supervise infants, has three sub-bases.

Strawberry Child Care and its educators did not use good judgment at all times while supervising children, in violation of 606 CMR 7.10(5)(b)

606 CMR 7.10(5) itself requires “all licensees and educators” to “exercise appropriate supervision of the children in their care…to ensure their health and safety,” including during naps. 606 CMR 7.10(5)(b) goes on to state that to determine “the appropriate level of supervision,” licensees and educators “must use good judgment at all times and must consider” five factors, including “the chronological age and developmental needs of each child” and “the behavioral characteristics of each child.” 606 CMR 7.10(5)(b).

To support this sub-basis, EEC cited a few situations.

In its post-hearing brief, EEC argued that Strawberry Child Care failed to adequately supervise Child A after she rolled onto her stomach and could not keep her head up and when another child crawled over her. (EEC Br. 7-8.) An educator, even though seated within arm’s-length of Child A, was turned slightly away from and seemed to be unaware of what was happening to Child A. (Pet. Ex. 4.) This violation, when combined with other violations of other regulations, warrants the suspension and revocation of Strawberry Child Care’s license. I recommend that EEC suspend and revoke its license.

In its post-hearing brief, EEC emphasized that after Child A was placed in a crib for a nap, educators did not enter the crib area for periods of 16 minutes, 35 minutes, 37 minutes, and 39 minutes. (EEC Br. 8.) While it may be true that educators did not *enter* the crib area for those periods (I watched portions of the surveillance during the hearing and while writing this recommended decision, but did not time the periods), an educator *did* stand *at* the wall *overlooking* the crib area. Although a measurement of the wall is not in evidence, testimony and exhibits (*e.g.*, Smith testimony; Pet. Ex. 16, Resp. Ex. 2) indicate that it is roughly three feet high, about thigh-high for an adult. An educator standing at the wall could easily look into the crib area without entering it. The surveillance video shows only the legs of an educator standing at the wall. The positioning of the educator’s legs indicates that the educator did occasionally turn toward the cribs. Even when the educator stood with her back to the wall, she could have turned her torso and face toward the cribs.

Strawberry Child Care introduced its summary (Resp. Ex. 4) of the surveillance video. (Pet. Ex. 4.) According to the summary, between 11:25 a.m. (the summary uses the video’s time stamps), when Child A was placed into a crib, and 2:16, p.m., when Child A was found unresponsive, one educator or another entered the crib area, including to check on napping children, five times. One educator or another looked at napping children 33 times, apparently by looking *into* the crib area. I have watched a short excerpt of the surveillance video (I did not watch the two-and-three-quarters hours of video between the 11:25 a.m. and 2:16 p.m. time stamps) and the beginning of Strawberry Child Care’s summary of it seems to be accurate. I asked EEC to inform me if it contested the accuracy of the summary; EEC did not contest it.

While Ms. Gonzalez was on break for 25 minutes, no one checked on Child A or the other sleeping children. This violation (but not violations entailing periods of 16 minutes, 35 minutes, 37 minutes, and 39 minutes), when combined with other violations of other regulations, warrants the suspension and revocation of Strawberry Child Care’s license.

Educators were not close enough to intervene with Child A, were not positioned to maximize their ability to see and hear Child A, and were not aware of Child A’s activities at all times, in violation of 606 CMR 7.10(5)(c)-(e)

To repeat, 606 CMR 7.10(5) requires “all licensees and educators” to “exercise appropriate supervision of the children in their care…to ensure their health and safety,” including during naps. 606 CMR 7.10(5)(c)-(e), which EEC cited, goes on to state:

(c) Educators must be in sufficient proximity to children at all times in order to be able to intervene quickly when necessary.

(d) Educators must be positioned to maximize their ability to see and/or hear children in their care.

(e) Educators must be aware of children’s activities at all times.

It is unclear what EEC alleged by citing these provisions. Did EEC allege that educators were not close enough to Child A while she napped, under 606 CMR 7.10(5)(c)? No educator was close during Ms. Gonzalez’s 25-minute break; I find a violation of this provision. Did EEC allege that educators were not positioned to maximize their ability to see and hear children in their care, under 606 CMR 7.10(5)(d)? The issue is not whether an educator was positioned to maximize her ability to see and hear Child A. The regulation is written to require an educator to maximize ability to hear and see *children* collectively in his or her care. Not in evidence is how many educators were present, including those not on the surveillance camera, how many children were present, and their location. It may have been that an educator or educators were positioned to maximize their ability to see and hear all children in their care. I do not find a violation of this provision.

When EEC cited 606 CMR 7.10(5)(e), which of Child A’s activities did it allege that educators were unaware of? Did EEC allege that educators were unaware of Child A rolling over on the mat before her nap? Did EEC allege that educators were unaware of the specifics of Child A’s nap? When an educator was unaware of Child A rolling over on the mat, I find that she violated this provision.

Child B’s scratches

The third sub-basis of the first basis for the Order to Protect Children is that Child B ended up with two scratches on his neck on January 25, 2018. (Pet. Ex. 21, pp. 4-5; EEC Br. 9.) This sub-basis is lacking factually and legally, leading me to suspect that EEC did not pay close attention to it and did not rely heavily on it.

The allegation is factually lacking in that EEC did not introduce the video of the incident that it contended led to Child B’s scratches. A video exists (EEC Br. 9), but is not in evidence. EEC asked me, in effect, to rely on a written description of the video by a person who did not testify at the hearing. (Pet. Ex. 17, p. 5.) I decline to give the statement “probative effect,” because it is not “the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” G.L. c. 30A, § 11(2).

The allegation is legally lacking in that EEC did not directly cite a regulation that this incident allegedly violated. In the Order to Protect Children, this allegation appears in the Statement of Facts, not the Legal Basis for Emergency Suspension and Revocation, and thus lacks a citation to a regulation. (Pet. 21, pp. 4-5.) In its brief, EEC did not argue which regulation this incident violated. Only in its investigation report (Pet. Ex. 17) did EEC cite a regulation, 606 CMR 7.10(5).

EEC has assumed a violation of a regulation, but has not proved it. It seems to have asked me to find that Strawberry Child Care did not adequately supervise Child B because “[a]n EEC investigation determined that the Program did not ensure adequate supervision of the infant.” (EEC Br. 9.)

I don’t have enough facts to apply to the law and determine whether Strawberry Child Care on January 25, 2018 failed to “exercise appropriate supervision of the children in their care…to ensure their health and safety.” 606 CMR 7.10(5). I decline to find that because Child B ended up with an injury, Strawberry Child Care therefore violated this regulation.

EEC has generally proved that Strawberry Child Care failed to adequately supervise infants. I recommend that EEC suspend or revoke Strawberry Child Care’s license on this basis. Although EEC did not prove that lack of supervision led to Child A’s death, it did not need to. Whether or not more supervision could have prevented Child A’s death, her death is a tragic reminder of the need for vigilant supervision and child care facilities’ compliance with 606 CMR 7.10(5).

Second basis: Strawberry Child Care was not soundly administered in an emergency

EEC cited 102 CMR 1.07(4)(a)(1) and 606 CMR 7.04(1). The second regulation provides in part:

The licensee must ensure that the program is soundly administered by qualified persons designated with specific administrative and program responsibilities.

(Pet. Ex. 21, p. 7.) The regulation does not explicitly refer to an emergency.

In its brief, EEC faulted Ms. Ryan for the following on September 13, 2018: She did not tell the 911 operator what floor Strawberry Child Care was located on or the quickest way inside. She did not remain on the phone with the 911 operator to continue providing and receiving information, or give the phone to anyone else with instructions to remain on the phone. She did not personally administer CPR to Child A or direct anyone to do so. She did not enter the infant room and did not open its emergency door to the parking lot. EEC also faulted Ms. Mejia for not assisting during the emergency. (EEC Br. 4.)

EEC seems to have faulted Ms. Ryan for both not remaining in her office on the telephone with the Watertown Police Department and at the same time not going to the infant room, where Child A was, to personally administer CPR. EEC did not specify what additional information Ms. Ryan could have learned and provided to the police, other than the floor where Strawberry Child Care was located, by remaining in her office.

EEC seems to be alleging three sub-bases of this basis: (1) Ms. Ryan, (2) Ms. Mejia, and (3) other educators did not respond adequately during the emergency. Ms. Ryan’s acts and omissions may or may not have demonstrated poor judgment and her response may or may not have been adequate, but her acts, omissions, and response did not demonstrate unsound administration, which is what the regulation bars.

The record lacks evidence about what Ms. Mejia did during the emergency. Thus, EEC cannot prove a violation of this regulation based on Ms. Mejia’s acts and omissions.

As for rank-and-file educators, it is far from clear that this regulation applies to them. I doubt that non-administrators can be responsible for administration. A child program must be “soundly administered *by* qualified persons,” but those qualified persons are not responsible for soundly administering the program and complying with this regulation. Rather, “[t]he *licensee* must *ensure* that the program is soundly administered by qualified persons.” 606 CMR 7.04(1) (emphasis added).

It is also far from clear that this regulation applies to this emergency. Administration of a child care program is not the same as the program’s emergency response. Administration is an ongoing endeavor. I doubt that it can be measured during an emergency lasting four minutes, from the time that Child A was discovered to need medical care to the arrival of the technician from the medical office.

I recommend that EEC not suspend and revoke Strawberry Child Care’s license on this basis.

Educators failed to exercise good judgment and failed to administer CPR to an infant during an emergency

606 CMR 7.09(8) reads:

Educators must exercise good judgment at all times and demonstrate an ability to handle emergency situations appropriately.

606 CMR 7.11(7)(a) reads: “The educator must handle all emergency situations in an appropriate manner.”

*No one* employed by Strawberry Child Care administered CPR – not breath compressions and not mouth-to-mouth resuscitation – to Child A when she was discovered unresponsive. That is certainly a failure to handle an emergency appropriately.

I recommend that EEC suspend and revoke Strawberry Child Care’s license because it hired educators without guaranteeing that they could exercise good judgment and handle an emergency.

Program did not maintain proper educator-to-child ratios in its infant classrooms

EEC cited 606 CMR 7.10(1); 7.10(2)(a) and (b); and 7.10(9)(b)1. EEC alleged that Strawberry Child Care violated proper ratios on September 13, 2018, the day that Child A died, and on two earlier dates, September 13, 2013 and October 23, 2014.

The most important regulation in this context is 606 CMR 7.10(9)(b)1, which caps the number of infants in one group at seven. It requires one educator for three infants, and two educators for four to seven infants.

606 CMR 7.10(1) reads:

The licensee must maintain sufficient numbers of qualified staff to promote the health, safety, growth and development of each child. Assignment of staff must take into account the physical environment, requirements of the activities children are engaged in, and the developmental levels and behavioral traits of children in care.

606 CMR 7.10(2) reads:

Ratios. The program must have the number of educators necessary to:

(a) ensure adequate supervision of the group at all times;

(b) provide individual attention to children; …

September 13, 2013

During a visit to Strawberry Child Care on September 13, 2013, discovered that Strawberry Child Care had eight infants in a room licensed for seven infants. (Pet. Ex. 19, p. 4.) Thus, Strawberry Child Care violated 606 CMR 7.10(9)(b)1.

During the same visit, EEC also found that the ratio of educators to children in the toddler room, one educator for seven children, violated its regulations. (Pet. Ex. 19, p. 4.) Although EEC did not apparently cite 606 CMR 7.10(9)(b)2 in its Order to Protect Children, it did cite it in its brief. (EEC Br. 10.) That regulation requires one educator for four toddlers, and two educators for five to nine toddlers. Strawberry Child Care violated this regulation, 606 CMR 7.10(9)(b)2.

October 23, 2014

During a visit to Strawberry Child Care on October 23, 2014, EEC discovered that one infant room had one educator for seven infants at the beginning of the day until another educator arrived; the second infant room had one educator for five infants at the beginning of the day until another educator arrived; and a preschool educator cared for 11 preschoolers alone at one time and 13 at another time. (Pet. Ex. 18, p. 3.)

The first two situations violated 606 CMR 7.10(9)(b)1. Although EEC did not apparently cite 606 CMR 7.10(9)(b)3 in its Order to Protect Children, it did cite it in its brief. (EEC Br. 10.) That regulation requires one educator for ten preschoolers. Strawberry Child Care violated this regulation, 606 CMR 7.10(9)(b)3.

September 13, 2018

The surveillance video showed that on September 13, 2018, one educator was frequently alone with four infants, and one educator was alone with seven infants when a second educator left the room. This, according to Mr. Smith, who viewed the video in its entirety. (Pet. Ex. 5, p. 3.)

Ms. Pavon admitted to Mr. Smith to having been alone with four infants on September 13, 2018 and that the two infant rooms did not have the proper educator-to-infant ratio during a half-hour. (Pet. Ex. 5, p. 6.)

Strawberry Child Care’s post-hearing brief calls the two earlier ratio violations “isolated incidents” and “minor compliance issues.” (Strawberry Child Care Br. 12, 13.) As for the ratio violations on September 13, 2018, Strawberry Child Care questioned them in passing in a half-sentence that did not deny them. (Strawberry Child Care Br. 12.)

These are not minor compliance issues. Educator-to-children ratios are probably the bedrock of adequate supervision. And if they are minor issues, Strawberry Child Care’s inability to comply calls into question its ability to comply with regulations in general.

The ratio violations, when combined with other violations of other regulations, warrant the suspension and revocation of Strawberry Child Care’s license. I recommend that EEC suspend and revoke its license.

Strawberry Child Care personnel provided false and misleading information to EEC

The fifth of five bases in the Order to Protect Children is that Strawberry Child Care personnel provided false and misleading information to EEC. To support this basis, EEC cited three situations. EEC cited 102 CMR 1.05(1) and 1.05(1)(a)(2); 1.06(3); and 606 CMR 7.04(1). (Pet. Ex. 21, pp. 8-9.) I will first review the factual allegations to determine their accuracy. I will then relate the facts to the regulations.

Strawberry Child Care educators told an EEC investigator that two personnel had performed CPR, when no one had done so

Ms. Gonzalez told Mr. Smith that Ms. Pavon performed CPR on Child A and that Ms. Pachane took over from her. Ms. Pachane said the same thing: Ms. Pavon performed CPR on Child A and that Ms. Pachane took over. Ms. Mejia also told Mr. Smith that Laura Pavon had performed CPR on Child A. (Pet. Ex. 5, pp. 4, 5, 7; Smith testimony.)

In its response to the Notice to Protect Children, Strawberry Child Care said it did “not challenge the falsehood of those statements….” (Pet. Ex. 3, p. 14.)

To counter this allegation, without denying it, Strawberry Child Care has broached four separate arguments: Investigators’ aggressive questions distorted the educators’ responses; the educators’ responses lost nuance during translation; at least one educator did not answer the investigators as alleged; and the educators did not intend to intend to deceive the investigators

In its response to the Notice to Protect Children, Strawberry Child Care alleged that EEC and DCF investigators

conducted their interviews in an exceedingly aggressive manner, and made it clear before hearing from anyone that they believed Program educators to have acted negligently. This approach frightened and intimidated Program educators who were already extremely traumatized by the Incident.

(Pet. Ex. 3, p. 2; *see also* p. 14 (similar), p. 18 (referring to “antagonistic manner.”) None of the alleged facts in these sentences are in evidence, especially since Strawberry Child Care chose to call only two witnesses, not including Ms. Gonzalez, Ms. Pavon, or Ms. Mejia. The demeanor of the DCF investigator is not in evidence. However, Mr. Smith was so low-key on the witness stand that I had to ask him to keep his voice up. Although it is possible that he is an “exceedingly aggressive” interviewer, I have no reason to believe that he is. This argument does not appear in Strawberry Child Care’s brief; Strawberry Child Care has apparently dropped it.

Strawberry Child Care advanced its second argument in its response to the Notice to Protect Children (Pet. Ex. 3, p. 14 (referring to “a language barrier”), p. 18 (“intricate CPR-related questioning could have been lost in translation”)) and in its cross-examination of EEC’s witnesses, when Strawberry Child Care emphasized that Ms. Pachane was not a professional translator. In its brief, Strawberry Child Care mentioned this issue in passing (Strawberry Child Care Br. 8) but did not develop it and may have dropped it.

It was not a promising argument. The Spanish ability of the *ad hoc* on-site translator, Ms. Pachane, are excellent; her English ability ranges between “very good” (Pachane testimony) and “fluent.” (Pet. Ex. 3, p. 10 (Strawberry Child Care’s response to Order to Protect Children).) The investigators’ questions are barely in evidence. There is certainly no evidence that the “CPR-related” questions were “intricate.” (Pet. Ex. 3, p. 18.) Nor does it make sense that the questions were intricate. Investigators wanted to know if anyone performed CPR, and if so, who. The educators’ statements that Ms. Pavon and Ms. Pachane performed CPR on Child A seem straight-forward, and not susceptible to having lost any nuance in translation.

Strawberry Child Care’s third argument is to call into doubt whether one educator, at least, had reported that a fellow educator had performed CPR on Child A. Strawberry Child Care advanced this argument through the direct-examination testimony of Ms. Pachane. Instead of calling Ms. Gonzalez to testify, Strawberry Child Care had Ms. Pachane testify about the investigators’ interview with Ms. Gonzalez, which Ms. Pachane translated. Ms. Pachane indirectly testified that Ms. Gonzalez did not tell investigators that she saw CPR performed.

Strawberry Child Care has apparently dropped this argument, which I cannot locate in its post-hearing brief. This, too, was not a promising argument. Strawberry Child Care has already admitted that educators made false statements about CPR. (Pet. Ex. 3, p. 14.) In addition, Ms. Pachane is not highly credible. She testified that investigators did not ask her about the events of September 13, 2018, when Child A died, but only which room she was assigned to. I am skeptical that that is so.[[12]](#footnote-12)

Strawberry Child Care’s last argument is that the educators did not intend to deceive the investigators. It argues that because the educators knew that a surveillance video could confirm or refute their interview answers, any false statements must have been unintentional. (Strawberry Child Care Br. 14.) This is, at best, an unconvincing argument. Strawberry Child Care could have but did not call as witnesses Ms. Gonzalez, Ms. Pavon, or Ms. Mejia, educators on its witness list. Furthermore, EEC regulations govern false statements, not *intentionally* false statements.

The law does allow arguments in the alternative. However, it is hard to make them convincingly and Strawberry Child Care does not acknowledge that between its response to the Order to Protect Children and its post-hearing brief, it has tried on different arguments against this allegation.

I find this factual allegation true.

Strawberry Child Care educators reported that Child A had been placed in a crib to nap at approximately 12:30 p.m.

According to the Order to Protect Children, on September 17, 2018, Strawberry Child Care educators reported that Child A had been placed in a crib to nap on September 13, 2018 at approximately 12:30 p.m., whereas the actual time was approximately 11:30 a.m. (Pet. 21, pp. 8-9.) (*See* Pet. Ex. 5, p. 3 (Strawberry’s Child Care’s admitted this allegation).)

I find this factual allegation true. *See* note 8 *supra*.

Child A’s Daily Form incorrectly reports that she was put down for a nap at 12:30 p.m. (Pet. Ex. 5.) However, that allegation does not appear in the Order to Protect Children. In its brief, Strawberry Child Care refers briefly to “discrepancies” in “Child A’s recorded sleep time.” It may be a reference to Child A’s Daily Form, although it is unclear what Strawberry Child Care means by “discrepancies” in the plural. Strawberry Child Care calls these discrepancies at most “a mistake due to memory issues.” (Strawberry Child Care Br. 14.) This argument is undeveloped (Who forgot what and did what when?) and unsupported by the evidence. In any event, because this allegation does not appear in the Order to Protect Children, EEC may not proceed against Strawberry Child Care on it. See my Notice of Hearing, dated October 2, 2018.

Falsified CPR certificates

The CPR certificates for Ms. Ryan and Ms. Mejia that Ms. Ryan sent to EEC were falsified. Strawberry Child Care does not contest their falsity. (Strawberry Child Care Br. 14.)

I find this factual allegation true.

I now quote the regulations that EEC cited and discuss the facts’ application to them.

102 CMR 1.05(1) reads:

Applicants and Family Day Care. Any applicant, licensee, provider, family day care approved assistant, family day care household member, and any person regularly on the premises when family day care children are present shall have a background free of conduct which, in the judgment of the Office[[13]](#footnote-13), bears adversely upon applicant’s or licensee’s ability to care for children.

The regulation continues:

1. Such conduct shall include, but not be limited to the following:

….

2. engaging in, or having engaged in, any other conduct, criminal or otherwise, determined by the Office to impair the applicant’s or licensee’s ability to care for children;…

EEC cited this regulation but did explain how it bars false statements. EEC has left it to me to surmise that EEC has argued that providing false statements to its investigators and falsifying CPR certificates impaired Strawberry Child Care’s ability to care for children. Providing false statements to investigators and falsifying CPR certificates is blameworthy conduct but that doesn’t mean that mean that it impaired Strawberry Child Care’s ability to care for children. EEC must reach for and discuss a relevant regulation, not (1) merely cite (2) a regulation that only “kind of sort of” applies. *Department of Early Education and Care v. Sylvie Charles*, OC-17-977 (DALA 2018)(citing *Holloway v. U.S.*, 845 F.3d 487, 492 n.5 (1st Cir. 2017).) I recommend that EEC not suspend or revoke Strawberry Child Care’s license under this regulation.

102 CMR 1.06(3) reads:

Availability of Information. The applicant or licensee shall make available any information requested by the Office to determine compliance with any Office regulations governing such programs, by providing access to his/her facilities, records, staff and references. The provider, approved assistant, household members, and other persons who are regularly on the premises, and any staff

members shall provide the Office with all information required in any Office regulations governing such programs.

EEC does not allege that Strawberry Child Care violated this regulation. It is possible, but again, EEC has left it to me to surmise, that EEC intends this regulation to be read in conjunction with the next ones.

102 CMR 1.07(4)(a)1 and 3 read:

Probation, Suspension, Revocation, and Refusal to Issue or Renew Licenses and Approvals.

(a) Grounds. The Office may make probationary, suspend, refuse to renew, revoke, or refuse to issue a license or approval if it finds any of the following:

1. the applicant or licensee failed to comply with any applicable regulation, or any deficiency correction order, notice of sanction, suspension, agreement or terms of probation;

….

3. the applicant or licensee submitted any misleading or false statement or report required under 102 CMR 1.00 through 8.00 *et seq.*

The question arises: What does “required under 102 CMR 1.00 through 8.00 *et seq.*” modify? Does it modify only “report” or does it also modify “statement”? That is, may an applicant or licensee be disciplined for submitting a misleading or false statement, under any circumstances, whether or not it is required under 102 CMR 1.00 through 8.00 *et seq.*; or must the statement be required under 102 CMR 1.00 through 8.00 *et seq.*?

EEC does not address this question. I assume that “required” under 102 CMR modifies both statement and report – just as “misleading or false” modifies both statement and report. Which regulation in 102 CMR required Strawberry Child Care to give statements to EEC? EEC did not specify. I surmise the following: By citing 102 CMR 1.06(3), which, in effect, required Strawberry Child Care to provide information to EEC during its site visit, and 102 CMR 1.07(4)(a)1 and 3, which barred Strawberry Child Care from submitting false or misleading statements that 102 CMR requires, EEC meant to argue that 102 CMR 1.07(4)(a)3 governs educators’ false statements to its investigator and the falsified CPR certificates.

Even if I assume correctly – that “required” modifies “statements” – and surmise correctly – that EEC intends these two regulations to be read in conjunction – this is too much of a stretch. The words “submit” as “required” in 102 CMR 1.07(4)(a)3 suggest a child care program’s regularized submission under a schedule, not its compliance with investigators’ *ad hoc* requests in response to a particular situation or emergency. I recommend that EEC not suspend or revoke Strawberry Child Care’s license under this regulation.

606 CMR 7.04(1), which I quote and discuss above, provides in part:

The licensee must ensure that the program is soundly administered by qualified persons designated with specific administrative and program responsibilities.

Sound administration of a child care program includes its administrators’ not falsifying CPR certificates and ensuring that its educators do not give false statements to investigators. I recommend that EEC suspend and revoke Strawberry Child Care’s license under this regulation.

102 CMR 1.07(5), 1.07(4)(a)1

102 CMR 1.07(5) reads:

1. The Office may suspend any license or approval without a prior hearing if failure of the licensee to comply with any applicable regulation results in an emergency situation which endangers the life, health, or safety of children or staff present in the program or facility....

(b) The sole issue at the hearing shall be whether the Office has reasonable cause to believe that the licensee's failure to comply with any applicable regulation resulted in an emergency situation which endangers the life, health, or safety of children or staff present in the program or facility....

EEC had reasonable cause to believe that Strawberry Child Care’s violations of regulations regarding educators’ supervision of children, educators’ exercising good judgment during an emergency, educator-to-children ratios, and sound administration of the program (as it related to personnel giving false statements and falsified CPR certificates to investigators), endangered the life, health, and safety of children in the facility.

102 CMR 1.07(4)(a)1 reads:

Probation, Suspension, Revocation, and Refusal to Issue or Renew Licenses and Approvals.

(a) Grounds. The Office may...suspend... [or] revoke...if it finds any of the following:

1. the applicant or licensee failed to comply with any applicable regulation...

Strawberry Child Care failed to comply with regulations regarding educators’ supervision of children, educators’ exercising good judgment during an emergency, educator-to-children ratios, and sound administration of the program (as it related to personnel giving false statements and falsified CPR certificates to investigators).

EEC’s decision to suspend and revoke Strawberry Child Care’s license was supported by substantial evidence, and was not arbitrary, capricious, or otherwise based on an error of law. *Lincoln Pharmacy of Milford, Inc. v. Commissioner of Division of Unemployment Assistance*, 74 Mass. App. Ct. 428, 431 (2009); *Department of Early Education and Care v. Cynthia Hoyt*, OC-17-034 (DALA 2017).

**Conclusion and Order**

Because Strawberry Child Care failed to comply with various regulations, I recommend that EEC suspend and revoke its license.

DIVISION OF ADMINISTRATIVE LAW APPEALS

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Kenneth Bresler

Administrative Magistrate

Dated: December 5, 2018

1. Because Ms. Ryan ascribed a transgression, described below, to Ms. Rodriguez, and because Ms. Ryan’s lawyers have disavowed her testimony regarding Ms. Rodriguez, I have deleted Ms. Rodriguez’s first name. That is, because she has been accused of doing something that there is no evidence for, I have protected her privacy. [↑](#footnote-ref-1)
2. It is to the lawyers’ credit that they wrote such a letter and complied with Rule 3.3(a)(3). Such letters and compliance are all too rare. [↑](#footnote-ref-2)
3. I told the parties during the hearing that I was having trouble distinguishing between Infant One and Infant Two and what happened in them, if, in fact, relevant events happened in both rooms. I understand that relevant events happened in only Infant Two, which I refer to as “the infant room.” [↑](#footnote-ref-3)
4. I list incidents on September 13, 2013, October 24, 2014, January 25, 2018, and September 13, 2018 chronologically, not in their order of importance. The date of September 13, 2013 is correct. By coincidence, Child A died five years later on the same day of the year. [↑](#footnote-ref-4)
5. The Watertown Police Department determined that the surveillance video’s time stamps were approximately 15 minutes ahead of actual time. (Pet. Ex. 9, p. 1.) EEC determined that the time stamps were approximately 12 minutes ahead. (Pet. Ex. 5, p. 9.) The parties have accepted the latter determination. (EEC Br. 3 n.1; Strawberry Child Care Br. 3 n.2.) I have subtracted 12 minutes from the times on the surveillance video. [↑](#footnote-ref-5)
6. EEC argues that Child A was struggling (*e.g.*, Smith testimony.) Strawberry Child Care argued that Child A was exhibiting normal behavior. Neither party called an expert witness on this point. EEC did not try to have its witnesses declared to be experts To me, the father of two former infants, now adults, Child A’s thrashing at that time seemed normal. [↑](#footnote-ref-6)
7. Again, the parties disagreed on Child A’s condition. In the absence of expert testimony, I can only characterize what seems to me to be Child A’s condition and behavior. [↑](#footnote-ref-7)
8. I find this as a fact, not because I can find it in the evidence – I cannot – but because EEC alleged it in its Order to Protect Children (Pet. Ex. 2, p. 5) and Strawberry Child Care admitted it in its response. (Pet. Ex. 3, p. 3.) If Ms. Gonzalez so reported, it should appear in the investigation report (Pet. Ex. 5) on page 5. It does not. In its brief, when EEC wrote, “Program educator Claudia Gonzalez reported to Mr. Smith on September 17 that she had placed Child A to nap at 12:30 p.m.” (EEC Br. 5), EEC did not cite to the evidence. [↑](#footnote-ref-8)
9. When Mr. Smith watched the surveillance video (Pet. Ex. 4), he learned that one educator was frequently alone with four infants, and one educator was alone with seven infants when a second educator left the room. (Smith testimony.) [↑](#footnote-ref-9)
10. In Strawberry Child Care’s response to the Order to Protect Children, it stated that it

    is also subject to an Enrollment Freeze of its Brookline facility, effective September 21, 2018. That Enrollment Freeze was based on common ownership and direction of the two facilities, and it cited the same set of allegations set forth in the Order. This memorandum shall also serve as the Appellant’s request for administrative reconsideration of the Enrollment Freeze, pursuant to 102 CMR § 1.08(1)(a).

    (Pet. Ex. 3, p. 5.) This request was to EEC and not the Division of Administrative Law Appeals. However, in the last paragraph of its response, Strawberry Child Care “request[ed] this tribunal” to “reverse and/or vacate the Enrollment Freeze at the Brookline facility….” (Pet. Ex. 3, p. 19.) Strawberry Child Care repeated that request in its post-hearing brief. (Resp. Br. 15.) The enrollment freeze at the Brookline facility is not before me for two reasons. One, both the original and amended Order to Protect Children (Pet. Exs. 2, 21) carry this caption: “In re: Large Group and School Age License No. 9028473/Issued to: Strawberry Child Care/*124 Watertown Street, #D1/Watertown*, MA 02472-2576.” (Emphasis added.) EEC’s suspension and proposed revocation of Strawberry Child Care’s license in *Watertown* is before me. Two, I haven’t seen EEC’s filing against the Brookline facility. I don’t even know the facility’s name. If the Brookline facility has appealed, I haven’t seen its appeal. I can’t reverse or vacate an EEC action that I haven’t seen and that has not, to my knowledge, been appealed. [↑](#footnote-ref-10)
11. Strawberry Child Care, which filed a response (Pet. Ex. 3) to the original Order to Protect Children (Pet. Ex. 2), moved for permission to file an amended response to the amended Order to Protect Children. I granted it, but Strawberry Child Care did not file an amended response. [↑](#footnote-ref-11)
12. Thus, to defend its license, Strawberry Child Care relied on two witnesses, Ms. Pachane, who was not highly credible, and Ms. Ryan, whose credibility has been demolished. [↑](#footnote-ref-12)
13. The Office for Children, a predecessor to EEC. [↑](#footnote-ref-13)