

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
14 Summer Street, 4th Floor
Malden, MA 02148
www.mass.gov/dala

Jean Desjardins,
Petitioner¹

v.

Docket No. PH-23-0281

Department of Public Health,
Bureau of Health Care, Safety, and Quality,
Division of Healthcare Facility Licensure and Certification,²
Respondent

¹ Although this case entered the docket of the Division of Administrative Law Appeals with Mr. Desjardins as the respondent, and the Department of Public Health as the petitioner, in an appeal of DPH's a denial of a license application, the applicant has the burden of proof, 105 CMR 158.019(E)(2), and is therefore the petitioner. In an appeal of DPH's suspension, revocation, or refusal to renew a license, DPH has the burden of proof, 105 CMR 158.019(C) and (D), and is therefore the petitioner.

² I adopt DPH's varying spelling of "Healthcare" and "Health Care."

Appearance for Petitioner:

Edward F. Gourke, Esq.
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Pawtucket, MA 02860

Appearance for Respondent:

Rebecca Kaye, Esq.³
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Department of Public Health
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Administrative Magistrate:

Kenneth Bresler

SUMMARY OF DECISION

Department of Public Health's denial of respondent's application for adult day health program license is affirmed because he did not prove that he is suitable and responsible, and in the past, he attempted to obtain another license by submitting false information.

DECISION

The petitioner, Jean Desjardins, appeals the Amended Notice of Intended Agency Action by the Department of Public Health (DPH) denying his application for a license for an adult day health program at 23 Warren Avenue, Woburn. (Mr. Desjardins applied for licenses for adult day health programs at five other locations that this decision discusses. However, only the denial of the application for a license at 23 Warren Avenue, Woburn, is directly on appeal.)

³ Elizabeth Caiazzzi, Esq. conducted the hearing for DPH. After the hearing, Ms. Caiazzzi withdrew her appearance and Ms. Kaye filed an appearance.

I held a hearing on August 2, 2023 by Webex, which I recorded. The recording had a partial gap for one minute: DPH's witness's answers were audible, but not the questions. The parties stipulated to the questions.

Julie Crocker-Wilson testified for DPH. Mr. Desjardins testified for himself. I admitted 37 exhibits for DPH and, at and after the hearing, five exhibits for Mr. Desjardins.

At the hearing, DPH raised the possibility that it would amend the Notice of Intended Agency Action that brought this appeal before the Division of Administrative Law Appeals (DALA). On August 9, 2023 DPH moved to amend. On September 7, 2023 Mr. Desjardins assented to the motion. After confirming with Mr. Desjardins that the August 2, 2023 hearing would suffice for the Amended Notice of Intended Agency Action, I granted DPH's motion. *See* 810 CMR 1.01 (6)(f). I admit the original Notice of Intended Agency Action as Petitioner's Exhibit 38; Mr. Desjardins's appeal as Petitioner's Exhibit 39; and the amended notice as Petitioner's Exhibit 40.⁴

Both parties submitted post-hearing briefs.

Findings of Fact

Adult day health program: regulatory scheme

1. An adult day health program is a non-residential program that helps people who cannot

⁴ For a suspension, revocation, and refusal to renew a license, DPH issues an Agency Notice of Action, 105 CMR 158.019(A), and DPH must prove by a preponderance of the evidence that it acted correctly. 158.019(C) and (D). That is, the Agency Notice of Action is important. In contrast, for a denial of a license application, DPH issues a "notice that an application for licensure...has been denied." 105 CMR 158.019(E)(1). The regulations do not even call it an Agency Notice of Action. Because the applicant must prove "by preponderance of the evidence that he or she is suitable and responsible for licensure," 105 CMR 158.019(E)(2), if DPH issues an Agency Notice of Action for a denial of a license application, as it did here, the notice is not as significant as for a suspension, revocation, and refusal to renew a license. Therefore, amending the notice, even after the hearing, is less significant.

be alone with activities of daily living, such as physical, medication, or social needs. (Crocker-Wilson testimony; 105 CMR 158.004)

2. Before January 2015, Massachusetts did not license adult day health programs. (Crocker-Wilson testimony)

3. On January 2, 2015, DPH issued regulations for the licensure of adult day health programs, 105 CMR 158.000 et seq. (Resp. Ex. 1)⁵

4. DPH instructed existing adult day health programs to apply for licenses. (Crocker-Wilson testimony; see 105 CMR 158.005(B).

5. New programs also had to apply for licenses. (Crocker-Wilson testimony)

6. On March 18 2015, DPH issued a circular letter explaining how existing or new adult day health programs could apply for licenses. (Resp. Ex. 3; Crocker-Wilson testimony)

7. Mr. Desjardins received the circular letter. (Desjardins testimony)

8. On April 1, 2015, DPH began accepting applications for adult day health programs. (Resp. Ex. 3)

9. The circular letter explained that the “initial licensure packet will consist of an application checklist and three forms with supporting documentation, as applicable.” The letter described the forms in detail. (Resp. Ex. 3, p. 2)

10. The circular letter included this information:

- **Change of location (105 CMR 158.022(B)):** A Program that is planning to move to a new location must obtain approval from the Department in advance. The Program must notify the Department in writing at least ninety days in advance of the proposed change in location....

⁵ The current regulations were issued on October 6, 2017. (Resp. Ex. 2) The 2017 regulations did not substantively change the 2015 regulations. (Crocker-Wilson testimony)

(Resp. Ex. 3, p. 6) The bulleted paragraph continued, specifying the documents that a program must submit to DPH “for approval prior to the change in location.” (Resp. Ex. 3, p. 6)

11. DPH has never granted an adult day health program license to Mr. Desjardins or one of his programs. (Crocker-Wilson testimony)

Mr. Desjardins

12. Mr. Desjardins has an associate’s degree from Newbury Junior College in finance; a bachelor’s degree from Northeastern University in accounting; and a master’s degree from Cambridge College in education. (Resp. Ex. 36, p. 54-55)

42 Charles Street, Dorchester⁶

13. On April 1, 2015, Mr. Desjardins submitted an incomplete and deficient application for an adult day care license for Minai Adult Day Care LLC at 42 Charles Street, Dorchester. (Resp. Ex. 5; Crocker-Wilson testimony)

14. The application did not attach a floor plan of the program, as requested and required. (Resp. Ex. 5, p. 1; Crocker-Wilson testimony)

15. Without a floor plan, the application could not be complete, and DPH could not assess the safety of the adult health day program. (Crocker-Wilson testimony)

16. Page 2 of the application was nearly blank. The only thing that Mr. Desjardins had filled in was a checkmark indicating that the application was for an adult day health program. He did not list the program’s name, address, telephone number, fax number, applicant point of contact, or point of contact’s telephone number or email address. (Resp. Ex. 5, p. 2) However, the information appeared elsewhere in the application. (Resp. Ex. 5, e.g., p. 1)

17. DPH considered the missing information to be a deficiency in the application.

⁶ This application is not directly the subject of this appeal.

(Crocker-Wilson testimony)

18. Page 3 of the application left the total square footage of the participant area blank (Resp. Ex. 5, p. 3), which DPH considered to be a deficiency in the application. (Crocker-Wilson testimony)

19. Page 6 of the application reads, "If a corporation, please list the officers and directors (or board of trustees if non-profit) of the corporation." (Resp. Ex. 5, p. 6)

20. Mr. Desjardins filled in his name, but not title, or address. He did not list anyone else. (Resp. Ex. 5, p. 6)

21. DPH considered the missing information to be a deficiency in the application. (Crocker-Wilson testimony)

22. Page 6 of the application, which asked for owners' names, was blank (Resp. Ex. 5, p. 6), which DPH considered to be a deficiency. (Crocker-Wilson testimony)

23. Pages 9 to 17 of the application were blank; Mr. Desjardins filled in no information.

24. Page 9 asked whether any of the corporate officers, directors, or owners had operated any other health care facility.

25. Page 10 asked for the criminal history of corporate officers, directors, or owners, and the applicant's financial capacity.

26. Page 11 asked about the compliance of the corporate officers, directors, or owners with Massachusetts laws relating to taxes, child support, and motor vehicle registration.

27. Pages 12 and 13 consisted of a long application statement that was supposed to be, but was not, signed and notarized. (Resp. Ex. 5, pp. 9-13)

28. Page 12 of the application included this statement:

I understand that the failure to file a complete and accurate application for an initial license...may constitute grounds for denial or revocation of a license; and that the Department may not accept an incomplete application.

(Resp. Ex. 5, p. 12)

29. Pages 14 and 15 asked about the history of the corporate officers, directors, or owners with health facilities and insurance.

30. Pages 15 and 16 asked for financial information (although it unclear whether it applied to adult day health programs, as opposed to other operations licensed by DPH).

31. Pages 16 and 17 resemble pages 12 and 13 and consisted of a long application statement that was supposed to be, but was not, signed and notarized. (Resp. Ex. 5, pp. 16-17)

32. DPH considered the blank pages to be deficiencies in the application. (Crocker-Wilson testimony)

33. Page 18 did not indicate whether the site had been the subject of a fire inspection (Resp. Ex. 5, p. 18), which DPH considered a deficiency in the application. (Crocker-Wilson testimony)

34. Pages 19 and 20 of the application consisted of an Adult Day Health Approved Tests Form. (Resp. Ex. 5, pp. 19-20)

35. Mr. Desjardins filled out the name of the program, its address, his name, and his email address and telephone number. He left the rest of the form blank. (Resp. Ex. 5, pp. 19-20)

36. Mr. Desjardins did not fill out pages 21 through 35 of the application, which consisted of a Clinical Laboratory Improvement Amendments (CLIA) Application for Certification. (Resp. Ex. 5, pp. 21-35)

37. Instead of filling out the CLIA Application for Certification, Mr. Desjardins sought a waiver by placing a checkmark in the box before Certificate of Waiver. (Resp. Ex. 5, p. 21)

38. However, Mr. Desjardins did not fill in the Waiver Request Form with anything other than the address of the adult day health program. (Resp. Ex. 5, pp. 36-37)

39. A deficient application does not give DPH a true picture of what the adult health day program plans to offer, making it harder to approve. (Crocker-Wilson testimony)

40. Mr. Desjardins was obligated to fill out a complete and accurate application for the existing program in Dorchester. (Crocker-Wilson testimony)

41. It is unclear from the record whether DPH accepted this application. *See* 105 CMR 158.009 (DPH shall not accept an incomplete application).

67 Norwood Street, Everett⁷

42. Also on April 1, 2015, Mr. Desjardins submitted an incomplete application for an adult day care license for Minai Adult Day Care LLC at 67 Norwood Street, Everett. (Resp. Ex.

4) The application indicated that it was for a change of location. (Resp. Ex. 4, pp. 2, 3)

43. Mr. Desjardins intended to move his existing day health program from 42 Charles Street, Dorchester, to 67 Norwood Street, Everett, sometime before May 1, 2015. (Resp. Ex. 6)

44. On the first page of the application, “Point of Contact (name of person DPH should contact regarding this application)” is blank, as is the point of contact’s phone number. (Resp. Ex. 4, p. 1) The missing information was significant to DPH. (Crocker-Wilson testimony). However, Mr. Desjardins provided his name and telephone number on the next page. (Resp. Ex. 4, p. 2)

45. The first page of his application had an application checklist consisting of a grid with 19 rows, indicating various forms, certificates, and other documents, and an application fee, and a column for the applicant to indicate whether the items were attached, not attached, or not

⁷ This application is not directly the subject of this appeal.

applicable. None of the 19 rows had a response (Resp. Ex. 4, p. 1), which is one reason that DPH considered the application incomplete. (Crocker-Wilson testimony)

46. The application did not attach a floor plan of the program, as requested and required. (Resp. Ex. 4, pp. 2, 3)

47. Without a floor plan, DPH cannot calculate a program's participant capacity. (Crocker-Wilson testimony)

48. Mr. Desjardins did not fill in any information in the three categories on page 4 of the application: total square footage of the participant area, number of bathrooms, and program capacity. (Resp. Ex. 4, p. 4) DPH considered the missing information significant. (Crocker-Wilson testimony)

49. The Clinical Laboratory Improvement Amendments (CLIA) Application for Certification is a nine-page form within the application for an adult day health program with information to fill in on three pages. (Resp. Ex. 4, pp. 7-15)

50. Mr. Desjardins filled in the name of his program, his email address, its geographic address, and no other information. (Resp. Ex. 4, pp. 7-9)

51. The missing information was significant to DPH. (Crocker-Wilson testimony)

52. The application was missing Form C, the HCFRS Facility Agreement. (See Resp. Ex. 4, between pages 20 and 21) ("HCFRS" stands for "Health Care Facility Reporting System.")

53. The missing form was significant to DPH. (Crocker-Wilson testimony)

54. The application was incomplete and a violation of 158 CMR 158.006.⁸ (Crocker-Wilson testimony)

⁸ This regulation requires an applicant to provide "[a]ny information required by the Department as part of the application package." 158 CMR 158.006(B)(2). (Resp. Ex. 1, p. 6)

55. DPH cannot act on an incomplete application because DPH, without complete information, cannot determine the safety of an adult day health program and its compliance with regulations. (Crocker-Wilson testimony)

56. Presumably, DPH did not accept this application. *See* previous factual finding (implying that DPH did not accept this application) and 105 CMR 158.009 (DPH shall not accept an incomplete application).

Other developments in 2015

57. On June 1, 2015, Mr. Desjardins hand-wrote a letter to DPH, stating in part:

I was at 42 Charles Street and now I am at 67 Norwood St. I'm having some issues that may cause me to relocate[]. I need some time to look for a new place. Also I want you to know that I may open a 2nd site because of the demand that I received in the North Shore (Camb.[,] Somerville, Everett, Malden, Chelsea area).

(Resp. Ex. 8) (various capital letters reduced to lower case) Mr. Desjardins hand-delivered the letter to DPH. (Desjardins testimony)

58. On November 6, 2015, DPH received a complaint that Minai Adult Day Care Center was operating at 530 Second Street, Everett. (Resp. Ex. 9)

59. DPH had not licensed Mr. Desjardins to operate an adult day health program in any location.

60. Mr. Desjardins had not told DPH that he was operating at 530 Second Street, Everett. (Desjardins testimony)

61. The complainant reported the following observations: Participants were in a room with an open stairway to the downstairs, "presenting a significant safety risk to the participants." Only three staff members were in the program for at least 35 participants; one of the staffers was not on the floor with the participants. No adult day health program license was posted. (Resp. Ex. 9)

62. On December 1, 2015, DPH wrote to Mr. Desjardins, informing him of the complaint; stating that it had no record of an application for an adult day health program at 530 Second Street, Everett; and stating:

Because it appears that Minai is an Adult Day Health program requiring licensure, you are required to obtain a license from the Department pursuant to 105 CMR 158.000.

(Resp. Ex. 10)

63. DPH's letter to Mr. Desjardins added that Minai Adult Day Care Center's "continued operation without a pending license application is a violation of Massachusetts law." (Resp. Ex. 10)

64. DPH further stated that it expected Mr. Desjardins to apply for a license within 10 days of receiving the letter. (Resp. Ex. 10)

530 Second Street, Everett⁹

65. On December 4, 2015, Mr. Desjardins hand delivered to DPH an application for an adult day health program license at 530 Second Street, Everett. (Resp. Ex. 17 (DPH letter to Desjardins's lawyer recapitulating application chronology))

66. DPH did not accept his application because it was substantially incomplete. (Resp. Ex. 17)

67. DPH told Mr. Desjardins to complete and resubmit his application. (Resp. Ex. 17)

68. On December 9, 2015, within the required 10 days, DPH received Mr. Desjardins's and Minai Adult Day Care LLC's application for an adult day health program license at 530 Second Street, Everett. (Resp. Ex. 10)

⁹ This application is not directly the subject of this appeal. DPH presented evidence on it for background.

69. The application was missing a floor plan, Board of Health approval for the kitchen, Secretary of State filing, explanation of the property, certificate of occupancy, fire inspection certificate, and resumes. (Crocker-Wilson testimony; Pet. Exs. 11, 12)

70. DPH considered the application incomplete and insufficient. (Crocker-Wilson testimony; Resp. Ex. 17)

71. On December 24, 2015, DPH emailed Mr. Desjardins, asking him to immediately provide a fire inspection certificate, certificate of occupancy, and Board of Health kitchen approval, stating that the documents were required for his application. (Resp. Ex. 12)

72. Mr. Desjardins did not provide the requested documents immediately. (Crocker-Wilson testimony)

73. On January 4, 2016, Mr. Desjardins went to DPH. He had no further documents. He told staff that he would have documents once renovations were complete. (Resp. Ex. 17)

74. On January 27, 2016, Mr. Desjardins submitted a fire inspection certificate and certificate of occupancy, but did not complete the rest of the application. (Resp. Ex. 17)

75. On February 3, 2016, a DPH staff member went to and inspected 530 Second Street, Everett. The staff member was called a surveyor; this surveyor was a registered nurse. (Crocker-Wilson testimony; Resp. Ex. 13)

76. A survey is an onsite visit. (Crocker-Wilson testimony)

77. The surveyor went to the site either because Mr. Desjardins had applied for a license (Resp. Ex. 13) or because DPH had received a complaint that he was operating an unlicensed adult day health program. (Crocker-Wilson testimony)

78. The surveyor wrote a report stating that two of the program's staff members had offered conflicting information about whether the program administered medications to

participants; two bathrooms were too far for participants to reach easily; the participants may or may not have had medical needs; one certified nursing assistant/program aide was insufficient for the 37 participants present that day; and the program did not meet the requirement of one staff member for every six participants. (Resp. Ex. 13)¹⁰

79. On February 24, 2016, DPH and Mr. Desjardins met to discuss the incomplete application. DPH gave him two more months to submit an application. (Resp. Ex. 17)

80. On April 29, 2016, DPH emailed Mr. Desjardins's lawyer, in part:

As you are aware, the Department is waiting for the submission of his complete application for the 530 2nd Street, Everett site. We have extended the deadline for this application, as a courtesy to you, until May 20th.

(Resp. Ex. 19)

81. DPH did not grant a license for 530 Second Street, Everett. (Crocker-Wilson testimony) (The record does not reveal if DPH denied the application, as opposed to not acting on it, and if so, on what date.)

82. It is unclear from the record whether DPH accepted this application. *See* 105 CMR 158.009 (DPH shall not accept an incomplete application).

83. The reason or reasons that DPH did not grant a license were unclear. It did not grant a license because of the surveyor's report (Crocker-Wilson testimony); because the incomplete and insufficient application did not enable DPH to assess Mr. Desjardins's suitability and responsibility to receive an adult day health program license (Crocker-Wilson testimony); because DPH ordered Mr. Desjardins to complete his application by May 20, 2016 and he closed

¹⁰ The record does not reveal whether the surveyor's report was a deficiency statement under 105 CMR 158.012. If the surveyor's report was a deficiency statement, the record does not contain Mr. Desjardins's plan of correction under 105 CMR 158.013.

his adult day health program on March 21, 2016 (Resp. Ex. 16 (letter by Desjardins's lawyer to DPH)); or a combination of those reasons.

MassHealth

84. In Massachusetts, Medicaid is part of the program called MassHealth.
mass.gov/topics/masshealth.

85. In Massachusetts, MassHealth is the source of funding for most adult day health programs. (Crocker-Wilson testimony)

86. DPH may deem "an applicant or licensee neither suitable nor responsible to establish or maintain" an adult day health program if a program
owned or operated by the applicant or licensee...has been the subject of proceedings which resulted in the termination of the Program's participation in MassHealth.

105 CMR 158.015(A)(7). (Resp. Ex. 1, p. 8)

87. On February 11, 2016, MassHealth canceled Minai Adult Day Care LLC's
MassHealth provider number effective February 28, 2016. (Resp. Ex. 14)

88. MassHealth did so because a site visit to 42 Charles Street, Dorchester, revealed that
Minai Adult Day Care was no longer there. (Resp. Ex. 14)

89. MassHealth instructed Minai Adult Day Care that it could not bill for services that it
provided after February 28, 2016. (Resp. Ex. 14)

90. On March 16, 2016, Mr. Desjardins learned that MassHealth had canceled his
provider number. (Resp. Ex. 16)

91. On March 21, 2023, Minai Adult Day Care stopped operating at 530 Second Street,
Everett. (Resp. Ex. 16)

100 Temple Street, Somerville¹¹

92. On March 23, 2016, Mr. Desjardins hand-wrote a letter to DPH, stating that he intended to move his adult day health program from 530 Second Avenue, Everett, to 100 Temple Street, Somerville. He asked for permission to do so. (Resp. Ex. 15)

93. Mr. Desjardins's request had at least two problems: Moving an adult day health program requires more than a letter; it requires an application before moving. And Mr. Desjardins's existing adult day health program was not licensed. (Crocker-Wilson testimony)

94. On April 4, 2016, Mr. Desjardins's lawyer (not the one who represented him at the hearing before DALA) wrote to DPH about Mr. Desjardins's applying for a license to operate an adult day health program at 100 Temple Street, Somerville. (Resp. Ex. 16)

95. On April 14, 2016, DPH wrote a letter to Mr. Desjardins's lawyer, stating, among other things, that DPH would evaluate a license application for 100 Temple Street "once he submits a complete application." (Resp. Ex. 17 (emphasis in original))

96. In the April 14, 2016 letter, DPH recapitulated some of its interactions with Mr. Desjardins as follows:

[T]he Department [of Public Health] has been assisting Mr. Desjardins in his request for licensure since November 2015. In November 2015, the Department contacted Mr. Desjardins to inform him that applications for three sites: 67 Norwood Street in Everett, 50 Church Street in Everett,¹² and 42 Charles Street in Dorchester were incomplete.¹³ Mr. Desjardins indicated at that time that each site was closed, but that he was operating MADC [Minai Adult Day Care] out of 530 Second Street in Everett.¹⁴ In December 2015, the Department notified Mr. Desjardins that he needed to seek licensure for MADC at 530 Second Street in Everett within 10 days, as he cannot operate an ADH [Adult Day Health]

¹¹ This site is not directly the subject of this appeal.

¹² The application for this address is not in the record and is not part of this appeal.

¹³ The communication is not in the record.

¹⁴ The communication is not in the record.

Program without a license.¹⁵ On December 4, 2015, Mr. Desjardins arrived in person to hand-deliver his application for 530 Second Street. His application was not accepted because it was substantially incomplete. He was told to complete it and resubmit it. A few days later, on December 9, 2015, he re-submitted the application which was still incomplete. On December 24, 2015, he was notified via email to submit documents required to complete the application.¹⁶ On January 4, 2016, Mr. Desjardins arrived in-person in the Department with no further documentation, but told staff that documentation would be available once renovations were complete. On January 27, 2016 he submitted his Certificate of Occupancy and Fire Certificate, but did not complete the remainder of the application, which is still outstanding.

The Department requested a meeting with Mr. Desjardins to discuss the status of his application. Representatives from the Department met with Mr. Desjardins on February 24, 2016 to discuss the incomplete application for the Everett site. The Department, in good faith, gave him an additional two months to submit his application. The Department followed up with a letter on March 4, 2016 specifically noting which portions of his application were incomplete and how he could complete the application.¹⁷

(Resp. Ex. 17)

97. Although much of the April 14 letter recapitulated the details of Mr. Desjardins's application for 530 Second Street, Everett, DPH wrote it in the context of Mr. Desjardins's announced plan to move his adult health day program to 100 Temple Street, Somerville. (Resp. Ex. 17)

98. On April 27, 2016, Mr. Desjardins hand delivered to DPH a handwritten letter. (Resp. Ex. 18) (Although he had a lawyer, Mr. Desjardins continued to communicate with DPH independently of his lawyer.)

99. Mr. Desjardins headed the letter "Please Urgent Answer." (Resp. Ex. 18)

100. Mr. Desjardins told DPH that he had applied to have his MassHealth provider

¹⁵ Resp. Ex. 10.

¹⁶ Resp. Ex. 12.

¹⁷ The letter is not in the record.

number reinstated, and he planned to bring his application on the next day. (Resp. Ex. 18)¹⁸

101. Mr. Desjardins also told DPH that he intended to open his adult day health program in Somerville on May 2, 2016. (Resp. Ex. 18)

102. Mr. Desjardins's letter (Resp. Ex. 18) asked DPH one question that his lawyer had already asked DPH (Resp. Ex. 16) and which DPH had already answered. (Resp. Ex. 17)

103. Part of Mr. Desjardins's letter is hard to decipher and understand. (Resp. Ex. 18)

104. Mr. Desjardins's plan to open in Somerville in the following week was not acceptable to DPH. (Crocker-Wilson testimony)

105. On April 29, 2016, DPH emailed Mr. Desjardins's lawyer, reporting that he appeared at DPH unannounced and without an appointment on April 27 and 28, 2016. (Resp. Ex. 19)

106. The email did not state that a license applicant needs an appointment (Resp. Ex. 19), but that is the case. (Crocker-Wilson testimony)

107. DPH was concerned that Mr. Desjardins was communicating directly with it and not through his lawyer. (Crocker-Wilson testimony)

108. DPH's email stated in part:

The Department has yet to receive anything from your client in terms of an application, permits, etc...for any proposed Somerville. site. If he were to open the site in Somerville on Monday [May 2, 2106], then he would be operating an ADH program without a license in violation of the regulations, and the Department will act accordingly.

(Resp. Ex. 19) (ellipsis in original)

¹⁸ Because the letter was undated and it was unclear whether Mr. Desjardins had mailed or hand-delivered it, it was unclear which day Mr. Desjardins meant. It was also unclear whether he meant his application to MassHealth or to DPH. However, Petitioner's Exhibit 19 indicates that Mr. Desjardins hand-delivered Petitioner's Exhibit 18 to DPH and meant his application to DPH.

109. On May 18, 2016, DPH received Mr. Desjardins's application for 100 Temple Street, Somerville. (Resp. Ex. 20)

110. The application was not complete. It was missing a Secretary of State form, Criminal Offender Record Information (CORI) forms, disclosure forms, and floor plans. (Crocker-Wilson testimony)

111. An incomplete application reflects on an applicant's ability to follow DPH's regulations. (Crocker-Wilson testimony)

112. Page 8 of the application asked whether the applicant had ever had Medicaid certification revoked. (Resp. Ex. 20, p. 8)

113. Mr. Desjardins left the answer to that question blank, not answering "yes" or "no." (Resp. Ex. 20, p. 8)

114. Because Medicaid is part of MassHealth, and MassHealth canceled Mr. Desjardins's provider number, he should have answered "yes" to this question. (Crocker-Wilson testimony)

115. Mr. Desjardins's leaving that box blank left DPH wondering whether Mr. Desjardins erroneously omitted an answer or did so intentionally and fraudulently. (Crocker-Wilson testimony)

116. DPH considers Mr. Desjardins's leaving that box blank to violate two regulations, one requiring adult day health programs to have a MassHealth provider number and one requiring a program to report that it did not have a MassHealth provider number.¹⁹ (Crocker-Wilson testimony)

¹⁹ DPH did not identify these two regulations. One regulation that it meant may have been 158.015(A)(7), which, as discussed above, allows DPH to deem an applicant or licensee "neither suitable nor responsible to establish or maintain" an adult day health program if it "has been the subject of proceedings which resulted in the termination of the Program's participation in MassHealth."

117. On pages 11 and 12 Mr. Desjardins signed and had notarized a statement that included this language:

I certify, under the pains and penalties of perjury...that the information provided in and submitted with this document is accurate and correct to the best of my knowledge....

I understand that the failure to file a complete and accurate application for an initial license...may constitute grounds for denial or revocation of a license; and that the Department may not accept an incomplete application.

....

I certify that I have read and understand the statutory and regulatory requirements applicable to licensure and operation; and understand that the failure to meet these requirements may be grounds for the denial, revocation or refusal to renew a license....

(Resp. Ex. 20, pp. 11-12)

118. Page 13 of the application asked for a fire inspection certificate. In response, Mr. Desjardins attached a certificate of inspection from the City of Somerville's building inspector.

(Resp. Ex. 20, pp. 13-15)

119. The record does not reveal whether an inspection certificate constituted the fire inspection certificate that the application required.

120. The inspection certificate was for the church where Mr. Desjardins wanted to locate his adult day health program, not for the program itself. (Resp. Ex. 20, pp. 13-14)²⁰

121. On page 18 of the application, Mr. Desjardins was again asked whether he had ever had Medicaid certification revoked. (Resp. Ex. 20, p. 18)

122. On page 19, Mr. Desjardins answered "no." (Resp. Ex. 20, p. 19)

²⁰ In her testimony, Ms. Crocker-Wilson implied that the adult day health program needed a separate certificate, but she did not explain why a certificate for the church did not suffice and how a certificate for the program would differ.

123. On pages 21 and 22, Mr. Desjardins signed and had notarized a second statement that included this language:

I certify, under the pains and penalties of perjury...that the information provided in and submitted with this document is accurate and correct to the best of my knowledge....

I understand that the failure to file a complete and accurate application for an initial license...may constitute grounds for denial or revocation of a license; and that the Department may not accept an incomplete application.

....

I certify that I have read and understand the statutory and regulatory requirements applicable to licensure and operation; and understand that the failure to meet these requirements may be grounds for the denial, revocation or refusal to renew a license....

(Resp. Ex. 20, pp. 21-22)

124. Once again, Mr. Desjardins did not reveal that MassHealth had canceled his provider number. (Crocker-Wilson testimony)

125. Mr. Desjardins's failure to reveal that MassHealth had canceled his provider number caused DPH concern about his truthfulness. (Crocker-Wilson testimony)

126. The incompleteness of this application did not allow DPH to evaluate Mr. Desjardins for his responsibility and suitability, which are requirements for a license. (Crocker-Wilson testimony)

127. DPH did not issue an adult day health program license for this location. (Crocker-Wilson testimony)

128. On May 27, 2016, DPH emailed Mr. Desjardins the following email:

I have completed my first review of your application to establish an Adult Daycare center at 100 Temple street in Somerville, MA. The following are my initial comments and problems with your application:

- You have submitted two CORI release forms for the same person (Maria). I need

CORI forms for both owners (Jean AND Maria). Also, I will need valid photo ID's before I can run the background checks.

- I need a resume from Maria Desjardins.
- The number you provided for your LLC (474757627) does not match anything on the Secretary of State website
- The application is missing HCFRS enrollment Form A.
- The program information form indicates that you are not performing any tests on-site, but the approved tests form indicates that you will be performing Urinalysis tests.
- CMS form 116 is incomplete and cannot be submitted in its current state.
- You have submitted several waivers for requirements relating to the physical plant of the facility. Since this is a NEW facility, waivers for physical plant requirements will be tough to come by. A new facility MUST be in full compliance with physical plant requirements before opening.
- Is the facility currently being used as a church?

The following are questions I have regarding the floor plan you submitted with the application:

- What floor is the facility on? It appears to be in the basement of a church. Regulations require that a program be located on ground level with at least two means of egress (105 CMR 158.045(A)(3))
- How wide are the hallways? Any hallway being used by participants must be at least 5 feet wide (105 CMR 158.045(N)(1))
- Where is the dedicated staff toilet and break area (105 CMR 158.045(I))?
- How many toilets are in the facility? The program capacity form indicates there are 7, which would be appropriate for the capacity you are requesting, but I only count 2 in the floor plan. (105 CMR 158.045(G))
- Do all the corridors have ADA compliant handrails? For more information on the handrail requirement, please see the attached circular letter.

Those are my questions/comments for now. I'm sure I will have more as you send me your responses and I spend more time with the application.

(Resp. Ex. 21) (The record does not reveal why DPH did not contact Mr. Desjardins's lawyer.

Mr. Desjardins might have ended representation by that lawyer.)

129. On June 3, 2016, Mr. Desjardins submitted another document to DPH (Resp. Ex. 22) but it still did not complete the application. (Crocker-Wilson testimony)

130. On or after June 3, 2016, Mr. Desjardins submitted still another document to DPH

(Resp. Ex. 23, p. 1) but it still did not complete the application. (Crocker-Wilson testimony)

131. Between June 23 and July 11, 2016, DPH and Mr. Desjardins had an email exchange about the toilets that would be available to participants. (Resp. Ex. 24)

132. On June 23, 2016, DPH emailed in part:

Last we spoke you said you would provide me with a new floor plan that shows you have 7 toilets because what you submitted only shows 4. What is the status of this?....Let me know what you want to do....so I can move forward with your application.

(Resp. Ex. 24, p. 2)

133. On June 29, 2016, DPH emailed Mr. Desjardins to state, in part:

If I am reading the floor plan correctly, it appears that your facility is 3 floors. The regulations state that the program be located "on [the] *ground level*...."

Will your participants need to go up and down stairs to use the bathrooms? Do you have elevators?

(Resp. Ex. 24, p. 1) (emphasis in original)

134. On the same day, Mr. Desjardins responded, "I am changing nothing[.] whatever the surveyor decides it's fine[.] I leave everything in the hand of God." (Resp. Ex. 24, p. 1)

135. On July 11, 2016, Mr. Desjardins emailed DPH: "Hi[.] ok[.] I'll go along with whatever number of bathrooms DPH is willing to approve...." (Resp. Ex. 24, p. 1) (The record does not reveal whether DPH and Mr. Desjardins emailed each other between June 29 and July 11, 2016.)

136. Ultimately, Mr. Desjardins did not give DPH the information it needed to approve the application for 100 Temple Street, Somerville. (Crocker-Wilson testimony)

137. On July 21, 2016, Mr. Desjardins emailed DPH, stating that he was interested in returning to 67 Norwood Street, Everett. He continued, "Please let me know ASAP." (Resp. Ex. 25)

138. Emailing DPH about operating an adult day health program at a previous site that was unlicensed is not the proper way to return to a previous site. (Crocker-Wilson testimony)

139. Also on the same day Mr. Desjardins emailed DPH to ask if he would be receiving waivers for 100 Temple Street, Somerville. (Resp. Ex. 26)

140. The email indicated that Mr. Desjardins was interested in operating an adult day health program at both 100 Temple Street and 67 Norwood Street, Everett. (Pet. Exs. 25, 26)

141. On August 4, 2016, Mr. Desjardins emailed DPH, asking whether he would be licensed to operate an adult day health program at 100 Temple Street, Somerville. (Resp. Ex. 27)

142. On August 5, 2016, DPH responded that Mr. Desjardins needed to submit another form because MassHealth had canceled his provider number. The email indicated that DPH had told Mr. Desjardins the same thing in a conversation. (Pet. 27)

143. With this email, DPH gave Mr. Desjardins another chance to become licensed to operate an adult day health program at 100 Temple Street, Somerville. (Crocker-Wilson testimony)

144. DPH also responded that it would not issue a license for 100 Temple Street, Somerville, until the application was complete and the location complied with regulations. (Pet. 27)

145. On August 15, 2016, DPH again requested that Mr. Desjardins submit the form related to MassHealth's cancellation of his provider number. (Resp. Ex. 29)

146. On August 16, 2016, Mr. Desjardins submitted the form that DPH had requested. (Resp. Ex. 28)

147. On August 17, 2016, Mr. Desjardins emailed DPH in part, "...I am very sorry for answer[ing] no instead of yes on the disclosure form." (Resp. Ex. 29)

148. On August 18, 2016, Mr. Desjardins emailed DPH, stating in part, "In addition to 100 Temple[,], I want to go back to 530 second street," Everett. (Resp. Ex. 29)

149. The rest of 2016 passed without any further development or activity that is in the record.

150. 2017 passed without Mr. Desjardins's submitting any further application. (Crocker-Wilson testimony)

151. On March 29, 2018, DPH issued a booking sheet, which initiates a survey, for 100 Temple Street, Somerville. (Resp. Ex. 30)

152. The notes to the booking sheet stated that the fire inspection certificates were long expired and that the floor plan indicated that some of the bathrooms were downstairs. (Resp. Ex. 30)

153. The application was still deficient, but DPH thought that perhaps a survey would be the next step in getting 100 Temple Street, Somerville, licensed for an adult day health program. (Crocker-Wilson testimony)

154. On March 30, 2018, DPH conducted a survey. (Crocker-Wilson testimony; Resp. Ex. 31.)

155. The survey noticed the following deficiencies:

- In general, the physical plant and operations were substantially out of compliance.
- Glass bottles and trash surrounded the entrance.
- The program was in a church basement, not on the ground level, as required.
- The site had only two bathrooms. Neither was handicapped accessible. Neither had required call bells.
- The site did not have a staff bathroom.

- The space identified as the nurse's office was not handicapped accessible. It did not contain storage space for medical supplies, let alone the required locked space.

- The space identified as the kitchen had stained and soiled floors and walls, pest and mouse traps, a broken water heater, no cooking or food storage equipment, and nothing to safely maintain the temperature of catered food.

- The program failed to post or possess various required certificates.

- The owner said that he did not have a current list of staff, could not remember any of their names, and had no personnel records. He could not document that the program had the required activities director, social worker, nurse, or program aides.

(Resp. Ex. 31)

156. At the end or during the survey, Mr. Desjardins told DPH's two surveyors, "We do not wish to continue this process. This isn't going to work in this building." He said that he would withdraw his application for a license. (Resp. Ex. 31)

157. Also on March 30, 2018, Mr. Desjardins handwrote a letter to DPH withdrawing his application for an adult day health program at 100 Temple Street, Somerville. (Resp. Ex. 31)

100 Everett Avenue, Chelsea²¹

158. On July 9, 2018, Mr. Desjardins applied for an adult day health program license for Minai Adult Day Care LLC at 100 Everett Avenue, Unit 7, Chelsea. (Resp. Ex. 33)

159. The application was missing the initial licensure form, fire inspection certificate, certificate of occupancy, small scale floor plan, health care facility reporting forms, and approved tests form. (Crocker-Wilson testimony; Resp. Ex. 34)

160. The first page of the application had an application checklist consisting of a grid

²¹ This application is not directly the subject of this appeal.

with 19 rows, indicating various forms, certificates, and other documents, and an application fee, and a column for the applicant to indicate whether the items were attached, not attached, or not applicable. The page had only one response, and it was unclear which of two rows it referred to. (Resp. Ex. 33, p. 1)

161. The application contained a second version of the same grid (it was unclear why the application had two of them), which had eight check marks, rather than the requested “Y” for “yes,” “N” for “no,” and “N/A” for “not applicable.” (Resp. Ex. 33 p. 19)

162. Page 26 of the application asked whether the applicant had ever had Medicaid certification revoked. Mr. Desjardins answered yes. (Resp. Ex. 33, pp. 26-27)

163. On August 26, 2018, Mr. Desjardins withdrew his application for a reason or reasons that is or are not in the record. (Resp. Ex. 35; Crocker-Wilson testimony)

23 Warren Avenue, Woburn²²

164. In an application that DPH received on October 21, 2022, Mr. Desjardins applied for an adult day health program license for Mount Moriah Adult Daycare at 23 Warren Avenue, Woburn. (Resp. Ex. 36)

165. The application was missing various documents, including a certificate of occupancy and health care facility reporting forms. (Crocker-Wilson testimony)

166. On November 1, 2022, DPH emailed Mr. Desjardins stating, “It appears that half of the initial licensure application is missing,” including CORI forms. The email noted that the application needed to be notarized. (Resp. Ex. 37)

167. Because the application was missing a floor plan, DPH could not determine whether participants could safely occupy the site. (Crocker-Wilson testimony; see Resp. Ex. 23 (floor

²² This application is the subject of this appeal.

plan is not checked))

168. DPH considered the application to contain inconsistencies. (Crocker-Wilson testimony)

169. DPH considered the application to be inconsistent about the number of participants, which made it hard or impossible to determine the number of staff members that the program should have and the number of bathrooms that the site should have. (Crocker-Wilson testimony (citing Resp. Ex. 36, pp. 18, 24))

170. Page 18 stated that the “estimated number of potential clients within the Company’s geographic scope is 30.” Page 24 stated that the “Requested Program Capacity” was 35. Page 28 stated that the number of participants per day would be 36. (Crocker-Wilson testimony; Resp. Ex. 36)

171. One inconsistency in the application is that one page stated that the program would have four full-time staff members and one part-time staff member (Resp. Ex. 36, p. 16), whereas another page showed five full-time staff members. (Resp. Ex. 36, p. 28)

172. In addition to the inconsistency in the number of prospective staff members, DPH considered the number insufficient. It calculated that for the number of potential participants, the program should have six and a quarter staff members. (Crocker-Wilson testimony)

173. DPH considered the application to contain inconsistencies about the kitchen and these inconsistencies to be important. (Crocker-Wilson testimony)

174. On page 1 of the application, following “Board of Health Kitchen Approval – If applicable,” Mr. Desjardins filled in “N/A.” (Crocker-Wilson testimony; Resp. Ex. 36)

175. Pages 24 and 25 of the application do not show a kitchen on the floor plans. (Crocker-Wilson testimony; Resp. Ex. 36)

176. On page 29 of the application, following “Does the Program prepare meals onsite?” Mr. Desjardins checked the box for “no.” (Resp. Ex. 36)

177. On page 40 of the application, following “Kitchen,” Mr. Desjardins checked the box for “N/A.” (Crocker-Wilson testimony; Resp. Ex. 36, p. 40, 10 boxes from the bottom)

178. However, immediately after, following “If meals are cooked on-site, the Program has a full kitchen approved by the local Board of Health,” Mr. Desjardins marked the box for “Met,” as in the program met that requirement. (Crocker-Wilson testimony; Resp. Ex. 36, p. 40)

179. Five boxes down the same page, following “Use of Kitchen Area,” Mr. Desjardins checked the box for “N/A.” (Resp. Ex. 36, p. 40, 5 boxes from bottom)

180. Even if the site did not have a kitchen, DPH was concerned that the site did not meet requirements, such as having a counter for snacks to be prepared or to keep delivered food at the proper temperature. (Crocker-Wilson testimony)²³

181. Mr. Desjardins checked the box next to “Qualified Cook” and

Sufficient hours to manage kitchen functions (if applicable), and to fulfill required responsibilities[,] including managing meal services and kitchen, preparing menus, food procurement and maintaining sanitary conditions.

(Resp. Ex. 36, p. 34)²⁴

182. DPH also considered the application to contain inconsistencies about bathrooms.
(Crocker-Wilson testimony)

²³ It is unclear why DPH expressed this concern at the hearing, because Mr. Desjardins indicated with a box on the application that the program “site includes a clean and sanitary food preparation area equipped with a refrigerator, a sink, adequate counter space, and adequate food storage.” (Resp. Ex. 36, p. 40) Only in its post-hearing brief but not at the hearing did DPH identify this answer as being an inconsistency about the program’s kitchen. (DPH Br. 12)

²⁴ Only in its post-hearing brief but not at the hearing did DPH identify this answer as being an inconsistency about the program’s kitchen. (DPH Br. 12)

183. Page 24 stated that the site had three bathrooms. On page 25, the floor plan showed three bathrooms. On page 26, the floor plan for a different floor showed six bathrooms. (Resp. Ex. 36)

184. Although DPH requires that half of an adult day health program site's bathrooms be handicapped accessible, neither floor plan indicated which bathrooms, if any, were handicapped accessible. (Crocker-Wilson testimony)

185. Although DPH requires that staff members have their own separate bathroom, neither floor plan indicated which bathroom was designated for them. (Crocker-Wilson testimony)

186. DPH considered the application to contain an inconsistency about electronic records. (Crocker-Wilson testimony)

187. On page 28 of the application, following "Does the Program utilize Electronic Health Records?" Mr. Desjardins checked the box marked "no." On page 38, following "Electronic records, if utilized, comply with all requirements of [105 CMR] 158.000...", Mr. Desjardins marked the box for "Met," as in the program met that requirement. (Crocker-Wilson testimony; Resp. Ex. 36)

188. DPH considered the application to contain inconsistencies about point-of-care testing, that is medical testing at the program's location, such as monitoring a diabetic participant's blood glucose. (Crocker-Wilson testimony)

189. On page 29, following "Does the Program conduct point-of-care lab testing?" DPH considers the answer blank. (Resp. Ex. 29; Crocker-Wilson testimony)

190. However, the box following the question might be checked "no." (Resp. Ex. 29)

191. On page 36, following "The Program complies with 105 CMR 180.000: The

Operation, Approval and Licensing of Clinical Laboratories and 42 CFR Part 493 and has applied for CLIA certificate of waiver for point-of-care testing as applicable,” Mr. Desjardins marked the box for “Met,” as in the program met that requirement. (Resp. Ex. 36; Crocker-Wilson testimony)

192. On page 25 of the application, the floor plan does not indicate a sink in the nurse’s room but conducting point-of-care testing requires a sink. (Resp. Ex. 36, p. 25; Crocker-Wilson testimony)

193. Apparently, DPH accepted this application, *see* 105 CMR 158.009 (DPH shall not accept an incomplete application), because DPH denied it.

Notice of Agency Action

194. Although DPH never ordered Mr. Desjardins to cease operating at any location, the inconsistencies in his applications demonstrated to DPH that he was not suitable to operate an adult day health program. (Crocker-Wilson testimony)

195. Other reasons why DPH denied Mr. Desjardins’s application for a license at 23 Warren Avenue, Woburn, were that DPH considered Mr. Desjardins’s various applications to have been misleading and to contain misrepresentations; he had not been forthcoming about MassHealth’s cancellation of his provider number; and two surveys revealed dirty and unsafe environments. (Crocker-Wilson testimony)

196. On March 24, 2023, DPH issued a Notice of Intended Agency Action. (Resp. Ex. 38)

197. On April 5, 2023, Mr. Desjardins timely appealed²⁵ without answering the Notice of

²⁵ Because 105 CMR 158.019(E) does not specify an appeal deadline, the default deadline is 30 days from “the date that the agency notice of action is sent to a Party.” 801 CMR 1.01(6)(b).

Intended Agency Action.²⁶ (Resp. Ex. 39)

198. On August 9, 2023, DPH issued an Amended Notice of Intended Agency Action, which is the basis of this appeal. (Resp. Ex. 40) (This decision will call it “the amended notice.”)

199. The amended notice read in part:

The Department of Public Health (the Department) has received the Respondent’s application for a license to operate an Adult Day Health Program (Program) at 23 Warren Avenue, in Woburn. For the reasons stated herein, the Department is unable to approve Respondent’s application for licensure.

Pursuant [to] 105 CMR 158.010, the Department *shall not* (emphasis, Petitioner’s²⁷) approve an application for an original license unless the Department determines that the applicant complies with the requirements of 105 CMR 158.000 and is “suitable and responsible to establish or maintain a Program.” The Petitioner alleges that Respondent is not so suitable or responsible.

Pursuant to 105 CMR 158.017, a lack of suitability or responsibility is a full and adequate ground to deny a license to operate a program and the Respondent has failed to show the Department that he is suitable and responsible, as described below:

- 1) Pursuant to 105 CMR 158.015, full and adequate grounds for deeming an applicant neither suitable nor responsible to establish or maintain a Program include a determination by the Department that “a Program owned or operated by the applicant or licensee has been the subject of proceedings which resulted in the suspension, denial, or revocation of the license of that Program or has been the subject of proceedings which resulted in the termination of the Program’s participation in MassHealth.

Evidence adduced at hearing demonstrates that MassHealth terminated the Respondent’s MassHealth provider agreement on February 11, 2016, effective February 28, 2016 (*See*, Petitioner’s Exhibit 14).

- 2) Pursuant to 105 CMR 158.015, full and adequate grounds for deeming an applicant neither suitable nor responsible to establish or maintain a Program include that the applicant has acted in a manner resulting in jeopardy to the health, safety, or welfare of any individual.

²⁶ Although 801 CMR 1.01(6)(d)1 requires a non-agency party to answer an agency notice of action, I do not find the absence of a substantive answer by Mr. Desjardins to be significant.

²⁷ That is, DPH’s emphasis. DPH was initially the petitioner.

Evidence adduced at hearing demonstrates that on February 3, 2016, the Department observed numerous safety violations related to the unlicensed adult day health center owned by the Respondent. These safety violations included: inconsistent reports of medication being administered in the center, lower-level bathrooms that were too far away and difficult for participants to reach, and insufficient staff for their daily census. (See Petitioner's Exhibit 13) These violations, among others, jeopardized the health, safety, and welfare of those individuals entrusted to his care in his unlicensed center.

Further, Respondent admitted during the hearing that he knowingly did not notify the Department that he had opened the Second Street, Everett ADH (the subject of the investigation in Exhibit 13), despite having submitted multiple applications for *other* locations. Failing to do so meant the Department was unaware that he was practicing not only an unlicensed program but in violation of the physical plant and other requirements enacted to ensure the health and safety of the vulnerable population being served.

- 3) Additionally, pursuant to 105 CMR 158.015(B), factors which have a significant bearing on the suitability and responsibility of an applicant include: the applicant or licensee has obtained or attempted to obtain a license by fraud or misrepresentation or by submitting false information.

As shown in Petitioner's Exhibit 20 and as admitted by the Respondent during the hearing on August 2, 2023, the Respondent attempted to obtain a license by fraud or misrepresentation or by submitting false information when he omitted important information and submitted false information to the Department. In the Respondent's May 18, 2016 application for Minai Adult Daycare at 100 Temple Street, Somerville, MA 02145, he refused to answer the question related to "Compliance History" as to whether he had Medicaid Certification revoked. Alarming, he signed this application under the penalties of perjury on May 16, 2016 (Exhibit 20, page 12). In that same application, on the "Suitability Application", Respondent checked "no" when asked if he had had a Medicaid Certification revoked (Exhibit 20, page 18). But he had. Respondent signed this, too, under the penalties of perjury on May 16, 2016.

- 4) Further, pursuant to 105 CMR 158.015(B), factors which have a significant bearing on the suitability and responsibility of an applicant include: the applicant has failed to demonstrate that he has competence and experience in operating a Program.

Prior to the instant application regarding a Woburn ADH, the Respondent submitted applications to for licenses for many other locations (including 42 Charles Street, Dorchester; 67 Norwood Street, Everett; 50 Church Street, Everett; 100 Temple Street, Somerville[]), between 2015 and 2018. Evidence adduced at hearing demonstrated that all of those applications contained deficiencies, were incomplete, contained fraudulent responses, or the proposed

plans that were, on their face, in violation of space, physical plant, or other regulatory violations. As a result, the Department was unable to grant licenses for any of those locations. As Mrs. Crocker-Wilson testified, the 2022 Woburn ADH application, the denial of which gives rise to the instant Amended Notice of Agency Action, also contains deficiencies.

For the reasons outlined above, the Department found and finds grounds to refuse the Respondent's application for licensure which, in sum, include his prior termination of participation in MassHealth; his subsequent actions in attempting to obtain a license by omitting information or lying about the prior termination by MassHealth; Respondent's actions that resulted in the jeopardy to the health, safety, and welfare of individuals in his unlicensed program; and Respondent's history of incomplete applications and utter inability or unwillingness to comply with regulatory requirements.

Based on these findings, the Department was and is still unable to find Respondent suitable and responsible to establish or maintain a Program. As a result, the Department reiterates the denial of your application for licensure.

(Resp. Ex. 40)

Discussion

An adult day health program

means any entity, however organized, whether conducted for profit or not for profit that:

- (1) Is community-based and non-residential;
- (2) Provides nursing care, supervision, and health related support services in a structured group setting to persons 18 years of age or older who have physical, cognitive, or behavioral health impairments; and
- (3) Supports families and other caregivers thereby enabling the participant to live in the community.

105 CMR 158.004.

DPH will not and cannot approve an application for a license or renewal license unless DPH (1) "has conducted an inspection or other investigation"; (2) "has determined that the applicant complies with 105 CMR 158.000" (the entire regulatory scheme); and (3) determined that the applicant "is suitable and responsible to establish or maintain a Program." 105 CMR 158.010.

Those are key criteria for an applicant: suitability and responsibility. The regulations do not define the terms.

Although the regulations' definition section, 105 CMR 158.004, does not define the key criteria, the regulations do amplify what suitability and responsibility mean. For example, DPH must find an applicant not suitable or responsible if:

A Program owned or operated by the applicant or licensee has been the subject of proceedings which resulted in the suspension, denial, or revocation of the license of that Program or has been the subject of proceedings which resulted in the termination of the Program's participation in MassHealth.

105 CMR 158.015(A)(7). DPH may find an applicant not suitable or responsible if

(1) The applicant or licensee has failed to demonstrate that he or she has competence and experience in operating a Program.

....

(6) The applicant or licensee has obtained or attempted to obtain a license by fraud or misrepresentation or by submitting false information.

105 CMR 158.015(B). The list of factors in 105 CMR 158.015(B) is not all-inclusive; DPH may find an applicant not suitable or responsible on other grounds. *Id.* ("Factors which have a significant bearing on the suitability and responsibility of an applicant or licensee include, but are not limited to...").

The purposes of 105 CMR 158.010 and 158.015 appear to overlap with those of 158.107(A), which, according to DPH's reading, require it "to deny, revoke, or refuse to renew a license" of the following grounds:

- (1) The applicant or licensee is not suitable or responsible to operate a Program.
- (2) The applicant or licensee has failed to remedy or correct a cited violation by the date specified in a written notice from the Department....
- (3) There are deficiencies in the Program which jeopardize the health or safety of participants.
- (4) There are deficiencies in the Program which seriously limit the capacity of

the Program to provide adequate care.

(5) The Program has been found in violation of the same or a similar regulation twice or more within a 12 month period.

(6) The Program has been denied, or does not maintain, a local board of health certificate, occupancy permit, or local fire inspection certificate.

(7) The Program has failed to comply with the requirements of 105 CMR 158.000.

(8) The applicant or licensee has been convicted of, pleaded guilty or nolo contendere to, or has, in a judicial proceeding, admitted facts sufficient to find that he or she is guilty of:

(a) Abuse, mistreatment or neglect of any person;

(b) Rape, felonious assault, or any other felony against a person; or

(c) A felony involving the misuse of funds in connection with the Medicaid or Medicare program...and the misuse of participant funds.

(9) The licensee has changed the location of a Program without prior approval of the Department.

An applicant has the burden of proving to DALA by a “preponderance of the evidence that he or she is suitable and responsible for licensure under 105 CMR 158.000.” 105 CMR 158.015(E)(2).

An administrative agency’s decision may be affirmed on different grounds.

Bank of America, N.A. v. Commissioner of Revenue, 474 Mass. 702, 703 (2016); *Case of Camara*, 71 Mass. App. Ct. 8, 10 (2007).

Mr. Desjardins is not suitable or responsible

Mr. Desjardins has failed to prove by a preponderance of the evidence that he is suitable or responsible to operate an adult day health program.

On April 1, 2015, he submitted an incomplete and deficient application for an adult day care license at 42 Charles Street, Dorchester. (Pet. Ex. 5; Crocker-Wilson testimony) Also on April 1, 2015, he submitted an incomplete application for an adult day care license at 67 Norwood Street, Everett. (Resp. Ex. 4) On December 4, 2015, Mr. Desjardins submitted a substantially incomplete application for an adult day health program license at 530 Second Street, Everett. (Resp. Ex. 17) On May 18, 2016, Mr. Desjardins submitted an incomplete

application for 100 Temple Street, Somerville. (Resp. Ex. 20) On June 3, 2016, and on or after June 3, 2016, Mr. Desjardins submitted two other documents for 100 Temple Street (Resp. Ex. 22, Resp. Ex. 23, p. 1) but they did not complete the application. (Crocker-Wilson testimony) On March 29, 2018, DPH issued a booking sheet for 100 Temple Street, Somerville; the notes stated that the fire inspection certificates were long expired and that the floor plan indicated that some of the bathrooms were downstairs. (Resp. Ex. 30) On July 9, 2018, Mr. Desjardins applied for an adult day health program license at 100 Everett Avenue, Unit 7, Chelsea (Resp. Ex. 33); the application was missing the initial licensure form, fire inspection certificate, certificate of occupancy, small scale floor plan, health care facility reporting forms, and approved tests form. (Crocker-Wilson testimony; Resp. Ex. 34) In October 2022, Mr. Desjardins applied for an adult day health program license for 23 Warren Avenue, Woburn (Resp. Ex. 36); the application was missing various documents, including a certificate of occupancy and health care facility reporting forms. (Crocker-Wilson testimony) An incomplete application reflects on an applicant's ability to follow DPH's regulations. (Crocker-Wilson testimony) An applicant's serious inability to fill out required paperwork indicates that the applicant will not be suitable or responsible to operate an adult day health program, because such operation requires (1) a lot of paperwork and (2) compliance with a lot of regulatory requirements.

On November 6, 2015, DPH received a complaint that Minai Adult Day Care Center was operating at 530 Second Street, Everett. (Resp. Ex. 9) DPH had not licensed Mr. Desjardins to operate an adult day health program there or in any location. Nor had he told DPH that he was operating at 530 Second Street, Everett. (Desjardins testimony) Since DPH has never licensed Mr. Desjardins to operate an adult day health program, any program that he has operated since DPH's regulations came into force has been unlicensed. An applicant's operation of an

unlicensed adult day health program indicates that the applicant will not be suitable or responsible to operate a licensed adult day health program, because operating an unlicensed program demonstrates an unwillingness or inability to abide by a regulatory scheme.

According to the complaint that DPH received about 530 Second Street, Everett, participants were in a room with an open stairway to the downstairs, endangering them; and 35 participants were served by only three staff members, one of whom was not on the floor with the participants. (Resp. Ex. 9)

On February 3, 2016, a DPH surveyor went to and inspected 530 Second Street, Everett. (Crocker-Wilson testimony; Resp. Ex. 13) The surveyor found that two of the program's staff members had offered conflicting information about whether the program administered medications to participants; two bathrooms were too far for participants to reach easily; the participants may or may not have had medical needs; one certified nursing assistant/program aide was insufficient for the 37 participants present that day; and the program did not meet the requirement of one staff member for every six participants. (Resp. Ex. 13)

On March 30, 2018, a DPH surveyor went to and inspected 100 Temple Street, Somerville. (Crocker-Wilson testimony; Resp. Ex. 31.) The surveyor noticed that in general, the physical plant and operations were substantially out of compliance; glass bottles and trash surrounded the entrance; the program was in a basement, not on the ground level, as required; the site had only two bathrooms, neither of which was handicapped accessible or had required call bells; the site did not have a staff bathroom; the space identified as the nurse's office was not handicapped accessible and did not contain storage space for medical supplies, let alone the required locked space; the space identified as the kitchen had stained and soiled floors and walls, pest and mouse traps, a broken water heater, no cooking or food storage equipment, and nothing

to safely maintain the temperature of catered food; the program failed to post or possess various required certificates; Mr. Desjardins said that he did not have a current list of staff, could not remember any of their names, and had no personnel record; and could not document that the program had the required activities director, social worker, nurse, or program aides. (Resp. Ex. 31)

The two inspections and the complaint to DPH indicated that Mr. Desjardins could not operate a program that safely cared for participants or complied with DPH's regulations. For an applicant to be unable to operate a program that safely cares for participants or complies with DPH regulations indicates that the applicant is not suitable or responsible to operate such a program.

(This is aside from 105 CMR 158.017(A)(3), which requires DPH, in its reading of its regulation, to deny an application when "deficiencies in the Program...jeopardize the health or safety of participants." 105 CMR 158.017(A)(3) does not apply here, because the deficiencies raised by the inspections and complaint were at 530 Second Street, Everett, and 100 Temple Street, Somerville, whereas the application at issue was for 23 Warren Avenue, Woburn. This is also aside from 105 CMR 158.015(A)(2), which requires DPH, in its reading of its regulation, to deny an application if the applicant "acted in a manner resulting in jeopardy to the health, safety, or welfare of any individual." 105 CMR 158.015(A)(2). The record simply does not contain evidence that for, example, the location of two bathrooms at 530 Second Street, Everett, which were too far for participants to reach easily, jeopardized anyone's health, safety, or welfare.)

Thus, Mr. Desjardins failed to prove that he is suitable or responsible to operate an adult day health program even though DPH denied his application for a license for 23 Warren Avenue, Woburn, on different grounds, namely four grounds in the Amended Notice of Agency Action.

Supposed inconsistencies in the application for 23 Warren Avenue, Woburn

One of the four grounds in the amended notice is that Mr. Desjardins's application for 23 Warren Avenue contained inconsistencies. Before I examine the amended notice, I examine whether the application contained inconsistencies.

DPH considered Mr. Desjardins's last application, the one for 23 Warren Avenue, Woburn (Resp. Ex. 36), to contain inconsistencies about the kitchen and these inconsistencies to be important. (Crocker-Wilson testimony) On the application, Mr. Desjardins stated or implied six times that his program would not have a kitchen. (Resp. Ex. 36, pp. 1, 24, 25, 29, 40 (twice)) The supposed inconsistency derives from the place on the application where, following "If meals are cooked on-site, the Program has a full kitchen approved by the local Board of Health," Mr. Desjardins marked the box for "Met," as in the program met that requirement. (Resp. Ex. 36, p. 40)

That question was somewhat ambiguous; it used the word "if." It was especially ambiguous for a program that had indicated that it would not have meals cooked on-site.

Mr. Desjardins did check the box next to "Qualified Cook" and

Sufficient hours to manage kitchen functions (if applicable), and to fulfill required responsibilities[,] including managing meal services and kitchen, preparing menus, food procurement and maintaining sanitary conditions.

(Resp. Ex. 36, p. 34) That question, too, was somewhat ambiguous. On one hand, it read "if applicable." On the other hand, it did state that a cook would manage the kitchen, which implied that there was a kitchen.

The application was ambiguous on the topic of whether the program would have a kitchen but that is not the same as the application's being inconsistent.

DPH considered the application to be inconsistent about the number of participants. (Crocker-Wilson testimony) While page 24 stated that the “Requested Program Capacity” was 35, and page 28 stated that the number of participants per day would be 36, page 18 stated that the “*estimated number of potential clients within the Company’s geographic scope is 30.*” (Emphasis added).

The application may not have been inconsistent about the number of participants. The last question was hedged – it used “estimated” and “potential” – and also qualified: It asked about participants in the program’s geographic scope, not participants. In addition, the question was also possibly vague. What is a “Company’s geographic scope”? DPH’s regulations do not define “geographic scope.” They do use the term “geographic area” once without defining it. 105 CMR 158.030(I).

DPH considered the application to be inconsistent about whether the program would use electronic records.

On page 28 of the application, following “Does the Program utilize Electronic Health Records?,” Mr. Desjardins checked the box marked “no.” On page 38, following “Electronic records, if utilized, comply with all requirements of [105 CMR] 158.000...,” Mr. Desjardins marked the box for “Met,” as in the program met that requirement. (Crocker-Wilson testimony; Resp. Ex. 36)

The second question was somewhat ambiguous; it used the word “if.” The program had indicated that it would not have electronic records. The application was not clearly inconsistent on whether the program would use electronic records.

DPH considered the application to be inconsistent about point-of-care testing. (Crocker-Wilson testimony) While on page 29, following “Does the Program conduct point-of-care lab

testing?,” DPH considers the answer blank (Crocker-Wilson testimony), the box following the question might be checked “no.” (Resp. Ex. 29) The floor plan does not indicate a sink in the nurse’s room, even though conducting point-of-care testing requires a sink (Resp. Ex. 36, p. 25; Crocker-Wilson testimony), thus indicating that Mr. Desjardins did not intend the program to conduct point-of-care testing.

On page 36, following “The Program complies with 105 CMR 180.000: The Operation, Approval and Licensing of Clinical Laboratories and 42 CFR Part 493 and has applied for CLIA certificate of waiver for point-of-care testing as applicable,” Mr. Desjardins marked the box for “Met,” as in the program met that requirement. (Resp. Ex. 36; Crocker-Wilson testimony) However, the question is ambiguous. It refers to applying, not for an adult day health program license, but for a *waiver*. The question refers to a waiver for point-of-care testing, which sounds as if a program may waive point-of-care testing, which is what the application seemed to indicate: The program would not conduct point-of-care testing. Furthermore, the question adds “as applicable.” Applicable to what? Applicable to a waiver? Applicable to point-of-care testing? Or applicable to the program? The question contains enough ambiguities, including what it means to comply with 105 CMR 180.000 and 42 CFR Part 493, that it cannot be fairly said that the application was inconsistent on the topic of point-of-care testing.

Amended notice

I’m not sure what to make of the fact that neither party addressed the amended notice in their briefs; that Mr. Desjardins did not respond to the original notice; but that the notice was apparently important enough that DPH amended it. (Not only did DPH not discuss the amended notice, in its post-hearing brief, but it asked me to make findings of law that do not appear in the amended notice. I decline to make those findings of law.) I hesitate to discuss the amended

notice, especially since DPH is not required to prove that its amended notice was correct; Mr. Desjardins must prove that he is suitable and responsible. Nonetheless, the amended notice is before me. Therefore, I discuss it.

According to the amended notice (Resp. Ex. 40), Mr. Desjardins did not meet the requirements that an adult day health care program's license-holder be suitable and responsible as demonstrated by four grounds.

1st ground for amended notice

The first ground on which DPH found Mr. Desjardins not to be suitable and responsible was under 105 CMR 158.015(A)(7):

A Program owned or operated by the applicant or licensee has been the subject of proceedings which resulted in the suspension, denial, or revocation of the license of that Program or has been the subject of proceedings which resulted in the termination of the Program's participation in MassHealth.

Although DPH quoted the entire regulation, the amended notice indicated that DPH did not rely on the clause about "the suspension, denial, or revocation of the license of that Program," but rather on the clause about MassHealth.

At the hearing, I asked DPH a legal question and a factual question: How significant is it that the regulation mentions proceedings? Is there evidence that MassHealth conducted a proceeding or proceedings before canceling Mr. Desjardins's provider number? (Recording 2:22) DPH could not or did not answer the first question. (Nor did DPH discuss this question in its post-hearing brief, other than to ask that I find that 105 CMR 158.015(A)(7) applies without explaining why. (DPH Br. 13)) DPH stated that Mrs. Crocker-Wilson's testimony would answer the second question, but Mrs. Crocker-Wilson did not know whether MassHealth had conducted a proceeding or proceedings.

It is clear that MassHealth canceled Minai Adult Day Care's MassHealth provider

number. (Resp. Ex. 14) However, it is not clear that MassHealth's cancellation without a proceeding or proceedings meets the full parameters of the regulation. DPH's denial of Mr. Desjardins's application on this ground is not affirmed.

2nd ground for amended notice

The second ground on which DPH found Mr. Desjardins not to be suitable and responsible was under 105 CMR 158.015(A)(2):

The applicant or licensee has acted in a manner resulting in jeopardy to the health, safety, or welfare of any individual.

In support of this ground, DPH cited its survey on February 3, 2016, at 530 Second Street, Everett (Resp. Ex. 13), during which DPH alleged that it

observed numerous safety violations related to the unlicensed adult day health center owned by the Respondent. These safety violations included: inconsistent reports of medication being administered in the center, lower-level bathrooms that were too far away and difficult for participants to reach, and insufficient staff for their daily census.

(Resp. Ex. 40)

Although DPH's summary of its surveyor's report twice refers to "safety violations," the surveyor's report identified violations and possible violations of *requirements*, not of *safety*. DPH did not present evidence, documentary or testimonial, that the safety of any individual was jeopardized, as 105 CMR 158.015(A)(2) requires. It did not cite the regulations where these requirements (such as the location of a program's bathrooms) appear. For the program's staff members to provide the surveyor with inconsistent reports of whether the program administers medications is problematic but does not constitute a safety violation. In effect, DPH asks me to assume and find that (1) the program at 530 Second Street, Everett, violated and possibly violated requirements for an adult day health program, and therefore that (2) the program also violated at least one individual's safety. These are unfair assumptions that I decline to make.

The amended notice refers to “These safety violations *included*” and “violations, *among others*, [that] jeopardized the health, safety, and welfare” of program participants. (Emphasis added) I decline to affirm DPH’s denial of the license application on the basis of unspecified jeopardies to the health, safety, and welfare of individuals.

The amended notice continued that Mr. Desjardins

knowingly did not notify the Department that he had opened the Second Street, Everett ADH..., despite having submitted multiple applications for *other* locations. Failing to do so meant the Department was unaware that he was practicing not only an unlicensed program but in violation of the physical plant and other requirements enacted to ensure the health and safety of the vulnerable population being served.

(Resp. Ex. 40) (emphasis in original) Again, DPH asks me to assume and find that because the program at 530 Second Street, Everett, violated regulatory requirements – which were mainly unspecified – “enacted to ensure...health and safety,” it also jeopardized the health and safety of the participants. This is another unfair assumption – based on unspecified allegations about “other requirements” – that I decline to make.

3rd ground for amended notice

The third ground on which DPH found Mr. Desjardins not to be suitable and responsible was under 105 CMR 158.015(B)(6), which appears among the “[f]actors which have a significant bearing on the suitability and responsibility of an applicant”:

The applicant or licensee has obtained or attempted to obtain a license by fraud or misrepresentation or by submitting false information.

In his application for 100 Temple Street, Somerville, Mr. Desjardins, when asked whether he had ever had Medicaid certification revoked, left the answer blank. (Resp. Ex. 20, p. 8) He certified under the pains and penalties of perjury that the information was accurate and

correct, and acknowledged that his failure to file a complete and accurate application may constitute grounds for denial or revocation of a license. (Resp. Ex. 20, pp. 11-12)

Later, in the same application, Mr. Desjardins was again asked whether he had ever had Medicaid certification revoked. (Resp. Ex. 20, p. 18) This time he answered “no.” (Resp. Ex. 20, p. 19) He again certified under the pains and penalties of perjury that the information was accurate and correct, and acknowledged that his failure to file a complete and accurate application may constitute grounds for denial or revocation of a license. (Resp. Ex. 20, pp. 21-22)

Because Medicaid is part of MassHealth, and MassHealth canceled Mr. Desjardins’s provider number (Resp. Ex. 14), he should have answered “yes” to this question. (Crocker-Wilson testimony) Mr. Desjardins, having had a MassHealth provider number, should have known the connection between MassHealth and Medicaid. His apology to DPH in 2016 for having answered “no” indicates that he knew the connection. If he did not know the connection, he should have investigated what constitutes Medicaid in Massachusetts before signing two statements under the pains and penalties of perjury. Thus, Mr. Desjardins “attempted to obtain a license...by submitting false information.” 105 CMR 158.015(B)(6). The regulation does not require that the application that an applicant seeks with false information (for 100 Temple Street, Somerville) be the same application that DPH denies (for 23 Warren Avenue, Woburn). DPH’s denial of the application for 23 Warren Avenue, Woburn, is affirmed on this ground.

4th ground for amended notice

The fourth ground on which DPH found Mr. Desjardins not to be suitable and responsible was under 105 CMR 158.015(B)(1), which appears among the “[f]actors which have a significant bearing on the suitability and responsibility of an applicant”:

The applicant or licensee has failed to demonstrate that he or she has competence and experience in operating a Program.

As evidence of Mr. Desjardins's failure to demonstrate competence and experience in operating an adult day health program, DPH cites Mr. Desjardins's unsuccessful applications for many other locations (including 42 Charles Street, Dorchester; 67 Norwood Street, Everett; 50 Church Street, Everett; 100 Temple Street, Somerville[]), between 2015 and 2018.

This ground has a few problems. One, an application for 50 Church Street, Everett, is not in the record and I decline to find that Mr. Desjardins failed to demonstrate competence and experience in operating an adult day health program partly on the basis of an application that DPH has presented no evidence about. Two, the word "including" makes me wary. I decline to find that Mr. Desjardins failed to demonstrate competence and experience in operating an adult day health program on the basis of an application or applications that DPH has not specified. I'm wary that DPH is relying on an application or applications that, like 50 Church Street, Everett, is or are not in the record.

In its amended notice, DPH continued:

Evidence adduced at hearing demonstrated that all of those applications contained deficiencies, were incomplete, contained fraudulent responses, or the proposed plans that were, on their face, in violation of space, physical plant, or other regulatory violations.

(Resp. Ex. 40) This raises other problems with this ground. For an applicant to submit deficient, incomplete, and even fraudulent applications, which on their face violate regulations, does not constitute failure to demonstrate competence and experience in operating an adult day health program. The applications may demonstrate inability to follow DPH's regulations, as I state above, and incompetence and inexperience in filling out extensive forms. The applications may

presage incompetence in running an adult day care program, but 105 CMR 158.015(B)(1) is not concerned with those things.

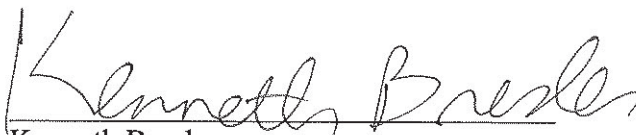
DPH concluded this fourth ground by stating that “the 2022 Woburn ADH application... also contains deficiencies.” (Resp. Ex. 40) This argument has two problems. For Mr. Desjardins to submit an application that contains deficiencies is not the same as his failing to demonstrate that he has competence and experience in operating an adult day health program. And, as I discuss above, Mr. Desjardins’s application in 2022 for 23 Warren Avenue, Woburn, was not as deficient as DPH posits.

DPH’s regulations grant it huge discretion. It does not need to rely on regulations that don’t apply to the situations it tries to apply them to.

Conclusion and Order

DPH’s denial of Mr. Desjardins’s application for 23 Warren Avenue, Woburn, is affirmed because he (1) did not prove that he is suitable and responsible for operating an adult day health program; and (2) attempted to obtain a license by submitting false information on his application for 100 Temple Street, Somerville, thus violating 105 CMR 158.015(B)(6).

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in black ink, appearing to read "Kenneth Bresler", is written over a horizontal line.

Kenneth Bresler
Administrative Magistrate

Dated: FEB 27 2024