COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Docket No: OC-16-485

Department of Early Education and Care,

 Petitioner

 v.

Sterlin Sanchez,

 Respondent

**Appearance for the Petitioner:**

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Department of Early Education and Care

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**Appearance for the Respondent:**

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**Administrative Magistrate**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**SUMMARY OF RECOMMENDED DECISION**

The Department of Early Education and Care established sufficient grounds under 102 C.M.R. § 1.07(5)(B) to suspend the family child care license issued to the Respondent and, therefore, I recommend that the Commissioner affirm the decision to suspend the license.

**RECOMMENDED DECISION**

 On October 12, 2016, the Department of Early Education and Care (“Department”) issued an Order to Protect Children, Notice of Emergency Suspension, Notice of Revocation, and Notice of Intent to Fine pertaining to the family child care program licensed and operated by the Respondent, Sterlin Sanchez. Sanchez filed a timely Notice of Claim – Emergency Suspension on October 18, 2016.[[1]](#footnote-1)

 A hearing was scheduled for November 9, 2016, but by agreement of the parties the hearing was continued, and the parties’ representatives appeared for a pre-hearing conference on November 9. On November 16, 2016, the Petitioner filed a pre-hearing memorandum which was marked “A” for identification. On November 22, 2016, the Respondent filed her pre-hearing memorandum, and I marked it “B” for identification.

 I began the evidentiary hearing on November 28, 2016 and concluded it on December 16, 2016. The hearing was held at the Division of Administrative Law Appeals, 1 Congress Street, Boston, Massachusetts. The hearing was recorded by digital means.

 The Department called Alessandra DePass, a Family Child Care Licensor, and Tricia Halpin, a Family Child Care Supervisor, as witnesses. In addition, the Department called Kelly Hart Meehan, EEC Regional Director, to testify. Sanchez testified at the hearing, as did Dulce Santana. Ms. Santana is an Approved Assistant and Sanchez’s mother. Sanchez provided an interpreter, Juan Bernal, at the second day of hearing to translate the testimony of Santana. I admitted 11 exhibits into evidence. [[2]](#footnote-2)

 Following the presentation of the evidence, the parties’ representatives made oral closing arguments. On December 16, 2016, following the hearing, I closed the administrative record.

**FINDINGS OF FACT**

 Based on the testimony and other evidence in the record, the reasonable inferences from the evidence and my assessment of witness credibility, I make the following findings of fact:

1. The Department issued a Regular License to Provide Family Child Care Services to Sanchez on October 27, 2011. At the time material to this matter, Sanchez was licensed to care for a maximum of ten children. (EEC Ex. 1, Sanchez Test.)
2. Alessandra DePass is a Family Child Care Supervisor employed by the Department. DePass has worked at the Department for one year. She has been a licensed family care provider for 15 years. She worked two years coaching other family child care educators. (DePass Test.)
3. DePass’s duties at the Department include: inspecting child care programs making sure children are safe, checking for non-compliance and conducting site visits. She is responsible for assuring that curriculum is followed and for correcting non-compliance. (DePass Test.)
4. The purpose of site visits is to check for non-compliance. (DePass Test.)
5. DePass first visited child care programs in March 2016 as part of her training. (DePass Test.)
6. On June 28, 2016, DePass made an unannounced visit to Sanchez’s family child care program. (DePass Test., EEC Ex. 2)
7. DePass was assisting the licensor assigned to Sanchez’s program. (DePass Test.)
8. DePass had to wait a little while after she knocked for the door to be opened. (DePass Test.)
9. Sanchez and an assistant were present. (DePass Test.)
10. During this visit, DePass observed that there was an infant sleeping in a bouncy seat located in the kitchen. The kitchen was hot. The infant was covered by two blankets and was sweaty. The infant had a bottle. (DePass Test.)
11. DePass told Sanchez that the conditions did not comply with the Department’s Safe Sleep requirements and that the infant should be sleeping on a flat, firm surface with no blankets or other items. In addition, it was not appropriate to let the infant have a bottle while not being held. (DePass Test.)
12. These requirements are to reduce the risk of Sudden Infant Death Syndrome and choking. (DePass Test.)
13. During this visit, DePass observed peeling paint on the porch and in the kitchen. She observed an unsecured shelf and hazardous household items that were not secured. There was a non-working smoke detector and no carbon monoxide detector. (DePass Test.)
14. DePass learned that Sanchez was not keeping the attendance records of her assistants. (DePass Test.)
15. Sanchez admitted that she was not aware of all the policies and practices around Safe Sleep. Sanchez admitted that she did not have a port-a-crib available. (DePass Test., EEC Ex. 2)
16. Sanchez promised to get a port-a-crib that day. (DePass Test., EEC Ex. 2)
17. DePass pointed out to Sanchez that, if all the enrolled students were present or if two children under two years of age were present, then one educator would be insufficient. (DePass Test.)
18. DePass believed Sanchez was trying hard. Sanchez was attending school and was working at another facility. (DePass Test.)
19. DePass sent Sanchez attendance templates and a letter concerning the visit. (DePass Test., EEC Ex. 2)
20. On July 14, 2016, DePass conducted another visit to follow up on the Safe Sleep concerns. She was accompanied by Sanchez’s Home Monitor. (DePass Test., Sanchez Ex. 1)
21. A Home Monitor is attached to a family child care system that places children with family child care providers. The child care system uses vouchers from the Department to pay the family child care providers. The family child care system also provides technical assistance to the family child care provider. (DePass Test.)
22. The family child care provider may use the child care system, but the Department does not require it. (DePass Test.)
23. Sanchez’s child care system was Child Development. (DePass test.)
24. DePass knocked at the front and back door. She had to wait 5-6 minutes before she was admitted. While she was knocking, she could see Sanchez. (DePass Test.)
25. Four children were in attendance, two had already left. Based upon a review of the records, it appeared that the day care was over enrolled. Sanchez said that two children listed on the records had been terminated from the day care and she listed them to get paid for the two weeks notice period. (DePass Test., Sanchez Ex. 1)
26. The kitchen and porch had been painted. Sanchez had obtained a port-a-crib and it appeared that Sanchez had disposed of the bouncy seat. (DePass Test.)
27. DePass complimented Sanchez on what she had corrected. (DePass Test.)
28. On August 18, 2016, the Home Monitor’s director telephoned DePass, because the Home Monitor had been waiting at Sanchez’s program for 45 minutes, but could not get in. (DePass Test., Ex. 5)
29. The Home Monitor could not reach Sanchez. (DePass Test.)
30. DePass called Sanchez’s assistant and told her to admit the Home Monitor. (DePass Test.)
31. DePass could hear children over the phone. (DePass Test.)
32. On August 18, 2016, following the visit, a Quality Assurance Home Visit Report was written. It described the physical facility as “very nice and clean.” It also stated that: “She is doing a good job but needs to record CDE attendant every day.” (Sanchez Ex. 1)
33. The Home Monitor reported that she heard children, but all the children she saw were asleep. (DePassTest., Ex. 5)
34. The Home Monitor was concerned that children were being hidden. (DePass Test.)
35. The delays opening the door and hearing children when the children seen were sleeping, caused DePass to be almost certain that children were being hidden at Sanchez’s program. (DePass Test.)
36. DePass and the Home Monitor, Maritza Ruiz, planned to do a home visit together. They planned to go to the front and back doors at the same time and see how long it took to get in. (DePass Test.)
37. DePass used this strategy once before. DePass thought going to the front and back door at the same time was the only way to get in quickly. (DePass Test.)
38. On September 26, 2016, DePass and Ruiz conducted an unannounced Home Visit at Sanchez’s program. (DePass Test.)
39. The purpose of the visit was to find children being hidden. (DePass Test.)
40. Ruiz went to the back door which was open. She went in and DePass was let in the front door. There were two assistants present. Seven children were sleeping. (DePass Test.)
41. One of the assistants was Dulce Santana, Sanchez’s mother. (DePass Test., Santana Test.)
42. The other assistant was Claudia Toribio. (EEC Ex. 4)
43. A 14-month-old was sleeping in the bouncy seat that had been there on an earlier visit. The baby had a bottle. Santana told DePass the baby was nine months old. (DePassTest., EEC Ex. 3)
44. DePass told Santana that was a violation of the Safe Sleep requirements. (EEC Ex. 3)
45. Santana told DePass the child in the bouncy seat was Santana’s nephew. (EEC Ex. 3)
46. DePass found two locked doors. (DePass Test.)
47. Ruiz expressed concern that one of the interior doors was always locked. (DePass Test.)
48. DePass asked Santana to open that door, but she would not open the door saying it was Sanchez’s private space. (DePass Test.)
49. Santana refused to open the door to the unlicensed space because there was a baby in the unlicensed room. (Santana Test.)
50. Santana did not tell DePass that there was another entrance to the room, because of DePass’s and Ruiz’s attitude. (Santana Test.)
51. Santana thought DePass and Ruiz were aggressive and acted uneducated. (Santana Test.)
52. Santana telephoned Sanchez, while Sanchez was at her daughter’s school, and told her to return. Sanchez was told that her Licensor was at her house. (Santana Test., Sanchez Test.)
53. Ruiz stood near the door to the unlicensed space and watched it. (DePass Test.)
54. DePass reviewed the attendance sheets and Santana and Toribio were confused about the names of the children. (DePass Test.)
55. After about 30 minutes, Sanchez arrived. (DePass Test.)
56. DePass asked Sanchez to open the 2 locked doors. Sanchez said she did not have a key to the basement and the other room was a private, unlicensed space. DePass insisted and Sanchez opened the door to the unlicensed space. (DePass Test.)
57. DePass heard the television, it had its volume turned up. DePass heard faint whining noises that sounded like a kitty cat. (DePass Test.)
58. The noises were coming from behind two beds. DePass moved some clutter and 2 car seats and found a baby in a bouncy seat. (DePass Test.)
59. The infant in the unlicensed space was not listed on the program’s attendance sheet. (EEC Ex. 4)
60. Before entering the unlicensed space, Ruiz had specifically asked for the child, because the child had been there during an earlier visit, but neither Santana nor Toribio disclosed that the child was unsupervised in the unlicensed space. (EEC Ex. 4)
61. DePass called her supervisor. Because it appeared that children were being neglected or abused, DePass’s supervisor instructed DePass to have Ruiz file a 51A report on all the care givers present and instruct Sanchez to stop care.

(DePass Test.)

1. Sanchez asked for another chance. Ruiz responded that a 51A was filed. (DePass Test.)
2. DePass thought leaving the infant alone posed Safe Sleep risks and choking risks. (DePassTest.)
3. DePass did not call the police, because she did not want to escalate the situation and she understood Sanchez was returning. (DePass Test.)
4. DePass and Ruiz collected the children’s files and found two extra files. (DePass Test.)
5. The children corresponding to the two extra files were listed on Ex. 6. (DePass Test.)
6. The names of children provided by Santana on Ex. 6 were not accurate. (DePass Test., Santana Test.)
7. Santana did not know the children’s names so, when DePass demanded the names, she just wrote something down. (Santana Test.)
8. Tricia Halpin is employed by the Department as a Family Child Care Supervisor. She is DePass’s supervisor and has worked for the Department for 35 years. (Halpin Test.)
9. Halpin assigned DePass to support Licensors with annual visits, because of vacancy in caseloads. (Halpin Test.)
10. Halpin reviewed the visits with DePass in June and contacted Child Development to assess the attendance and determine how many private children were enrolled. (Halpin Test.)
11. Halpin spoke to Sanchez after the visit on September 26, 2016. Halpin explained the 51A Report. Sanchez apologized for what she did and expressed concern about her job at Sunny Bear Academy. (Halpin Test.)
12. Kelly Meehan is a Regional Director for the Department. She oversees two Family Child Care Supervisors and is responsible for 12 Licensors. (Meehan Test.)
13. Meehan spoke to DePass on September 26, 2016. She told DePass to have Ruiz file a 51A Report and work with Child Development to stop care. (Meehan Test.)
14. A 51A Report was filed alleging that Sanchez, Santana and Toribio abused or neglected a child on September 26, 2016. (Meehan Test.)
15. Meehan was concerned about the safety of the child left in the unlicensed room, because something could have fallen on her and she could have choked while unattended. (Meehan Test.)
16. Meehan was concerned because there was a lack of cooperation by the assistants. They refused to give access and they gave false information about the children. In addition, there were previous Safe Sleep issues. (Meehan Test.)
17. Meehan determined that this was not just a question of one bad decision being made. The television was on in the unlicensed space to cover the child’s noise and the child was hidden in a locked room. (Meehan Test.)
18. Meehan believed the situation posed an immediate risk to the health and safety of children enrolled in Sanchez’s program. (Meehan Test.)
19. Sanchez also works at Sunny Bear Academy. (Sanchez Test.)
20. Sanchez’s mother, Dulce Santana, is an approved assistant and has worked for Sanchez for five years. (Sanchez Test., Santana Test.)
21. During those five years, Sanchez’s mother has always been properly licensed. (Sanchez Test.)
22. Sanchez and her mother called parents to come pick up the children. (Sanchez Test.)
23. Sanchez waited with the children until parents picked them up. (Sanchez Test.)
24. The files pertaining to the children placed by Child Development were removed by Child Development on September 27, 2016. (Sanchez Test.)
25. The allegations of abuse or neglect in the 51A Report against Sanchez were not supported, because Sanchez was not there and she did not know the baby was unsupervised in the unlicensed room. (Sanchez Test.)
26. The allegations of neglect in the 51A Report against Santana and Toribio were supported. (EEC Ex. 4, Sanchez Test., Santana Test.)
27. Santana is appealing the finding against her. (Santana Test.)
28. Sanchez is the licensee and is responsible for her program. (Sanchez Test.)

**DISCUSSION**

*Statutory and regulatory framework*

The Department has the authority to license Family Child Care facilities. G.L. c. 15D, § 6(a). The Legislature has also given the Department the authority to regulate them, providing:

Subject to the requirements of chapter 30A, the department may suspend, revoke, make probationary, refuse to issue or renew the license of any person, assess a civil fine within the limits prescribed by this section, or impose any other sanctions it considers appropriate, in accordance with rules and regulations promulgated by the board. This action may be taken if the person: fails to comply with applicable rules and regulations, furnishes or makes any misleading or false statements relative to any submission required under the rules and regulations, refuses to submit any reports or make available any records required by the rules and regulations or refuses to admit representatives of the department at any reasonable time for purposes of investigation or inspection. The department may temporarily suspend a license in an emergency situation without a prior hearing….

G.L. c. 15D, § 10.

The Department’s regulations set out the grounds for suspension of a license in an emergency:

Suspension in An Emergency.

(a) 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. If a 51B report indicates that any abuse or neglect occurred in a family day care program or during participation in a family day care program related activity, it shall be *prima facie* evidence that an emergency exists.

102 C.M.R. § 1.07(5).

*The Department was warranted in suspending Sanchez’s license, because of the allegations of neglect supported in a 51B report*

 The Department has established that there were allegations of neglect that “occurred in [Sanchez’s] family day care program that were supported in a 51B Report.” (EEC Ex. 4, Sanchez Test., Santana Test.). Pursuant to 102 C.M.R. § 1.07(5)(a), such evidence was prima facie evidence that there was an emergency endangering the life health or safety of children present in Sanchez’s program. The Department, therefore, had reasonable cause to suspend Sanchez’s license. *See Todino v. Arbella Mut. Ins. Co.*, 415 Mass. 298, 301-302 (1993) *citing Anderson’s Case*, 373 Mass. 813, 817 (1977) (even if contradicted, prima facie evidence is sufficient by itself to require submission of a case to jury); *see also* 102 C.M.R. § 1.02 (supported 51B report means that there is reasonable cause to believe child has been abused or neglected by a caretaker).

There was no evidence that Sanchez knew that the infant had been left in the unlicensed space. And, while the allegation of neglect against Sanchez was unsupported, 102 C.M.R. § 1.07(5)(b) is applicable when: “a 51B report indicates that any abuse or neglect occurred *in a family day care program or during participation in a family day care program related activity.”* The regulation also provides that a “[51B Report] shall be *prima facie* evidence that an emergency exists.” (emphasis added). The Department did not have to prove Santana knew about the situation or that the allegations of neglect were supported against her. It had to prove that the neglect occurred in the family day care program and it met its burden. *See* 606 C.M.R. § 7.11 (4) (c) (“Educators are responsible for abuse and neglect if: … the Department of Early Education and Care determines…that there is reasonable cause to believe that the educator *or any other person* caused the abuse or neglect while children were in care”).

*The Department was warranted in suspending Sanchez’s license, because Sanchez failed to comply with applicable regulations* *resulting in an emergency situation which endangered the life, health, or safety of children or staff present in the program or facility*

 The Department proved that Sanchez failed to comply with applicable regulations resulting in an emergency situation endangering the lives of children present in the program and, therefore, the Department was warranted in suspending her license. *See* 102 C.M.R. § 1.07 (4)(a)(1). The Department proved that Sanchez failed to “operate the program in ways that protect[ed] children from abuse or neglect” and thereby violated 606 C.M.R. § 7.11 (4)(b). The Department also proved that Sanchez failed to provide “a separate mat, cot, sofa, portacrib, playpen, bassinet or bed, and blanket for each child present at any time during the day.” 606 C.M.R. § 7.11 (13)(d)(3)(b).

 The Department proved that Sanchez and her assistants provided false and conflicting information concerning the children enrolled in the program and thereby violated 102 C.M.R. § 1.07(4)(a)(3). That regulation prohibits “the applicant or licensee from submit[ting] any misleading or false statement or report required under 102 CMR 1.00 through 8.00 *et seq.*” Santana admitted at hearing that she was confused about children’s names so she provided the Licensor with false names. She admitted that she did not tell the licensor about another access to the unlicensed space and the child she left in there, because she did not like Ruiz’s and DePass’s uneducated and aggressive behavior. In addition, the documentation kept by Sanchez on September 26, 2006 was not accurate and it had been inaccurate during prior visits.

I find that the failure to comply with these regulations on September 26, 2016, resulted in in an emergency situation endangering the life, health, and safety of children enrolled in Sanchez’s program. These violations were especially egregious because, despite repeated findings of violations, the situations were not corrected. *See* 102 C.M.R. § 1.02 (2)(d) (failure to correct non-compliance is factor to consider).

 While the Department alleged that on June 28, 2016 there were violations concerning an unsecured shelf, blocked exits, uncovered electric outlets, peeling paint, the lack of a carbon monoxide detector and working smoke detectors, I was not convinced that these violations posed a risk to the life and safety of children. Prior to September 26, 2016, the Department was satisfied by telling Sanchez to correct these violations. The Home Visit Report dated August 18, 2016 (Sanchez Ex. 1) and the testimony concerning corrections made by Sanchez before September 26, 2016 indicate those problems were corrected and undercut the Department’s case on these points. In addition, the Department did not prove that Sanchez operated her program over the licensed capacity. While there was evidence 12 children were enrolled in the program, I was not convinced that at any time Sanchez’s program admitted, supervised or provided care for more than the maximum number of children indicated on the license.  *See* 606 C.M.R. § 7.03 (2).

**CONCLUSION**

 By a preponderance of the evidence, the Department has established sufficient grounds under 102 C.M.R. § 1.07(5)(A), to Suspend the Regular License to Provide Family Child Care Services issued to the Respondent. I recommend that the decision be **AFFIRMED**.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Edward B. McGrath, Esq.

 Chief Administrative Magistrate

DATED: January 6, 2017

1. There is no indication in the administrative file that Sanchez appealed the Notice of Revocation and, in any event, no motion to join that issue was filed. This decision only addresses the suspension. [↑](#footnote-ref-1)
2. *Sua sponte* I impounded EEC Ex. 7. The Report of Child(ren) Alleged to be Suffering from Serious Physical or Emotional Injury by Abuse or Neglect, because it contains the child’s name and address. *See* G.L. c. 119, § 51E. In future appeals, parties should redact children’s identifying information as appropriate. [↑](#footnote-ref-2)