STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
14DHR04338

Mount Zion Daycare And Kimberly Brandon Petitioner v. NC Department of Health and Human Services Respondent	**FINAL DECISION**

THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on October 30, 2014 in Raleigh. Following preparation of a transcript, and submission of proposed findings and conclusions by both parties, this Final Decision was prepared.

APPEARANCES

For Petitioners: Michelle M. Walker
Law Office of James C. White, P.C.
4819 Emperor Blvd., Suite 400
Durham, NC 27703

For Respondent: Letitia Echols
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent deprived Petitioners of property; otherwise substantially prejudiced Petitioners' rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law in finding fraudulent misrepresentation and upholding Durham County Department of Social Services' ("DSS's") imposition of a sanction against receipt of benefits for new enrollees for a period of 12 months.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. **§** 110-94
N.C. Gen. Stat. § 110-107

N.C. Gen. Stat. §150B-23
10A NCAC 10. 0308
10A NCAC 10 .0312(l)
Subsidized Childcare Services Manual

EXHIBITS

Petitioners' Exhibits 1-15 were admitted into evidence.

Respondents' Exhibits 1-10 were admitted into evidence.

WITNESSES

For Petitioners: Ms. Kimberly Brandon, Director, Mt. Zion Daycare

For Respondent: Ms. Kim Miller, Acting Subsidy Services Section Chief

UPON DUE CONSIDERATION of the arguments and submissions of counsel, the exhibits admitted, and the sworn testimony of each of the witnesses, considering their opportunity to see, hear, know, and recall the relevant facts and occurrences, any interests they might have, and whether their testimony is reasonable and consistent with other credible evidence, assessing the greater weight of the evidence from the record as a whole, in light of the applicable law, and based upon the preponderance of the credible evidence, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. For 14 years, and at all times relevant to this matter, Kimberly Brandon (hereinafter, "Ms. Brandon") has served as the Director of Mt. Zion Daycare ("Mt. Zion"), a child care facility in Durham, North Carolina. She also oversees preschool, afterschool and summer programs at Mt. Zion serving children ages zero through 12. These programs are parts of an education complex than includes a kindergarten through 12th grade school, a beauty school, and a Bible college. She supervises a staff of 32 teachers, serving approximately 180 students. Mt. Zion enrolls preschool children from 11 counties receiving subsidized child care benefits administered through their county's Department of Social Services ("DSS"), and Ms. Brandon is also responsible for the accounting and compliance documentation for these programs, and the food subsidies for the school and summer programs. More than half of the students at Mt. Zion are subsidized for some or all their fees, based on family income.

2. An infant, "D.A.," was enrolled in the daycare at Mt. Zion in June 2013. D.A.'s mother, Shuzette Rhodes ("Ms. Rhodes"), sent a letter dated August 16, 2013 to Ms. Brandon indicating that D.A.'s last day at Mt. Zion would be August 23, 2013. On August 20th, Ms. Brandon sent a memo to Ms. Rhodes explaining, per DSS policies, that termination of care by Mt.

Zion required a two-week notice period, and that D.A.'s voucher could not be transferred to another daycare until a balance of $368.00 owed to Mt. Zion had been paid.

3. Also on August 20, 2013, Ms. Brandon left a voicemail message for D.A.'s social services case worker relating the above facts. This was Ms. Brandon's final communication with the Durham Department of Social Services ("Durham DSS"), before it issued a "Redetermination" that D.A. would attend Mt. Zion, and actual payments to Petitioner for D.A. in the Fall of 2013.

4. On or about August 23, 2013, Ms. Brandon met with Ms. Rhodes, who told her that she had been very satisfied with Mt. Zion's summer program by attending by D.A. and siblings, would consider enrolling D.A. and her five children at Mt. Zion for the remainder of the year. Ms. Brandon gave Ms. Rhodes additional information regarding enrollment in Mt. Zion Academy for her elementary and middle school age children.

5. Approximately one week after meeting with Ms. Rhodes, Ms. Brandon received a "Child Care Action Notice" dated August 30, 2013 for each of Ms. Rhodes' six (6) children from Durham Department of Social Services. The "action" for each of Ms. Rhodes' five older children was "TERMINATION," with the notation that the, "PAYMENT TO CURRENT PROVIDER WILL END ON 8/23/2013 -- Referred to Another Provider." Ms. Brandon was not very surprised by this, because subsidies are not accepted for students attending the elementary and middle school grades, although some students are offered partial scholarships.

6. By contrast, in the "Child Care Action Notice" the infant for D.A., the "action" was "REDETERMINATION/CO-PAY/TRANSPORTATION/HOURS OF CARE/ TERMINATION," followed by the "REDETERMINATION OF ELIGIBILITY FROM 8/26/2013 THROUGH 36/09/**2014**," and the "TERMINATION" space left blank. This document specifically shows as "PROVIDER: MT. ZION DAY CARE." The form includes authorization for care from 7 AM to 6 PM, Monday through Friday, and the parent's portion of the costs, presumably based on the specific charges of Zion Day Care and the parent(s) income.

7. Based on receipt of the "Child Care Action Notice" concerning D.A. from the Durham Department of Social Services, and the fact that Ms. Rhodes had not paid the $368.00 owing for D.A.'s care as she knew was required by Social Services, Ms. Brandon reasonably formed the expectation that D.A. would remain at Mt. Zion Day Care from August 26, 2013 through June 9, 2014.

8. Ms. Brandon and Mount Zion Daycare did not receive a "Child Care Action Notice" concerning termination of D.A.'s attendance from the Durham Department of Social Services until November 2013.

9. Mount Zion Daycare, and Ms. Brandon on its behalf, was responsible for reporting the attendance of children for whom the Petitioner received subsidy payments, and that information was used in calculating the amount due to the Petitioner. Each month, the Departments of Social Services ("DSS") would send Ms. Brandon a pre-printed form listing each of the children, and by their names, each day of the month, with the weekends and holidays "X-ed" out. It was Ms. Brandon's task to go through this 12- or 13-page form and make an entry in

each of the empty blocks representing the school days in the month, for each child. The most common entries she made were "F" for "Full-Day care," or "A" for "Excused Absence." See, Plaintiff's Exhibit 6.

10. Ms. Brandon creditably testified that she used the following method of filling out these 18,000+ blocks per year during the 14 years she had done this prior to hearing. She obtained Attendance Reports from the caregivers or teachers in each of the 19 classrooms on forms that used the same general format and code letters as the DSS's forms. See, Plaintiff's Exhibit 5. She would first locate the "A's" and other relatively uncommon code letters, and record them and the DSS forms. Once that was done, she would go back through the forms and fill in all the other boxes with "F's".

11. Ms. Brandon instructed and relied on her teachers to tell her if a child designated for their classroom was not coming to school, presumably so that she would know about this more quickly, even if both the parents their social worker failed to notify both her office and DSS. To her recollection, no teacher during her tenure at Mt. Zion had ever failed to notify her before the incident with D.A. After that incident, she added to the school's Attendance Report forms, in Spanish and English, written instructions and blanks that inquire whether, why and when a child has stopped attending the teacher's class.

12. "Ms. Luzmina," an elderly Spanish teacher, was also the "lead teacher" for D.A.'s "class," and responsible for preparing the Attendance Reports for that group. When D.A. failed to attend at the beginning of the school year, she dropped him from her attendance roll. She did not notify Ms. Brandon that D.A. was not attending, or that she had deleted him from her Attendance Report. For health reasons, Ms. Lucina ceased teaching at Mt. Zion later in the school year.

13. Consistent with their submission to Mt. Zion of the "Child Care Action Notice" bearing the "redetermination of eligibility from 8/26/2013 through 36/09/2014" for D.A., with Mt. Zion as the designated "provider," Durham Department of Social Services sent Ms. Brandon their preprinted forms for reporting attendance with D.A.'s name on in September, October and November of 2013.

14. When Ms. Brandon scanned the lists of students on the 19 teachers' Attendance Reports in September and October, she did not find any "A's" or other code indicating non-attendance on a line beside D.A.'s name, because the teacher who prepared the form had omitted his name. Consequently, Ms. Brandon did not transfer any absence notation to the DSS form by his preprinted name. Thus, when she completed noting all the absences, and went back through the form filling in the remaining blank day boxes with "F's", all of the blocks by D.A.'s name were marked as if he had attended.

15. There is no credible suggestion this record that Ms. Brandon's actions in completing the September and October attendance forms for Durham Department of Social Services were anything other than an honest mistake, induced by an extraordinary series of erroneously created authoritative documents, as well as direct personal contact with the child's mother, who had the prerogative to choose his daycare provider.

16. At some point between submission of the October and November DSS attendance forms, Ms. Brandon was contacted by Ms. Roane at the Durham Department of Social Services, and told that they had been paying two providers for D.A.'s care. Ms. Roane asked her when D.A. had stopped coming to Mt. Zion. Ms. Brandon's response during that conversation was she was not aware he had stopped attending, but would check and report back. When she did, the DSS supervisor instructed Ms. Brandon to show D.A. as enrolled through the first 10 days of November, and said that Durham DSS would recoup the overpayment for D.A. in the subsequent month's payment. Ms. Brandon cooperated by filling in all the days of November beside D.A.'s preprinted name with "A's" for "absent." The Durham DSS recouped the funds paid to Mt. Zion for D.A. in September, October and November attendance, a grand total of $1,521.00, out of the December 2013 payment. (See, Plaintiff's Exhibit 9.)

17. The Petitioner's records have been audited on three occasions during Ms. Brandon's tenure. In 2003, they were found to be in compliance and "excellent order." In 2005, there were three findings (one of them erroneous) that one document was missing from the individual files for the 141 subsidized children attending. In 2010, Mt. Zion was again found in compliance, although Petitioner was asked to keep copies of the children's vouchers in one place, rather than in the children's individual files, to make access to them easier for the auditor, and Ms. Brandon has accommodated that request.

18. Ms. Brandon testified that she had never had an overpayment problem other than the episode involving D.A., until the week before the hearing, when she received "ironically, … over $52,000 from the Department of Social Services for children that I had already been paid for."

19. The monthly fee paid for D.A. would be about 1% of the amount Ms. Brandon's program was receiving from Durham DSS at the time of the hearing, after that amount had been suppressed somewhat by the sanctions imposed due to the allegations under review in this case.

20. On December 3, 2013, Ms. Dorsett, program integrity supervisor for the Durham County DSS, send a letter to Ms. Brandon stating that she was undertaking a "review" of "your Subsidized Child Care benefits" as a "result of possible benefits paid for a child that was attending another facility." Without first contacting Ms. Brandon, Ms. Dorsett set an appointment for the following week. The letter was mishandled at the Mt. Zion campus, and Ms. Brandon did not receive it until it was too late to attend that appointment. The appointment was reset, but canceled because Ms. Dorsett's was ill. Ms. Dorsett did not attempt to reset the appointment when she was well.

21. Ms. Dorsett did not meet with Ms. Brandon or anyone from Mt. Zion, prior to issuing a Notification of Sanctions against Petitioner on February 4, 2014. It appears that Durham DSS attempted to send this by certified mail (7007 0220 0004 2892 4234), but it was never delivered, presumably because it was improperly addressed. Ms. Dorsett subsequently contacted Ms. Brandon by telephone to notify her of the sanctions, and Ms. Brandon received copy of the Notification of Sanctions when she later met with Ms. Dorsett.

22. The sanctions Noticed prohibit Mt. Zion from enrolling students receiving subsidy benefits through Durham DSS for a period of 12 months, based on allegations of an "Intentional Program Violation." The stated reason for the sanctions was, "You received said benefits ["$1,521"] from September 2013 to November 2013 and were not eligible because D.A. did not attend your facility during this period, yet you reported that he did." It appears that Ms. Dorsett did not discuss with Ms. Roane the discovery of the double payment problem, and the arrangement she made for recoupment with Ms. Brandon, nor review the documents issued by Durham DSS during the pertinent period. The "Findings of Fact" appended to the February 4th Notice do not mention Ms. Brandon's meeting with Ms. Rhodes when she was told D.A. would be attending Mt. Zion, or Durham DSS issuance of a "Redetermination," presumably based on the same information from Ms. Rhodes. The "Findings" incorrectly suggest that Ms. Brandon "terminated" D.A. before preparing the DSS attendance reports, and concludes by saying that the $1,521.00, which was recouped in December 2013, "is due as of the date of this summary [February 4, 2014] will be deducted from the next monthly payment to Mt. Zion."

23. Mt. Zion timely appealed the imposition of sanctions, and received a "Local Hearing." The "Local Hearing Summary" prepared by Ms. Dorsett on March 19, 2014 reflects the same pattern of omissions, both in text and the list of documents reviewed as "evidence."

24. Mt. Zion again appealed, and on short, verbal notice, appeared before a "Local Appeal" panel. On this occasion, Petitioner was represented by counsel, and her Motion to Continue was denied. Apparently, the hearing focused on Ms. Brandon's preparation of the attendance documents. The prior decision was upheld.

25. The Petitioner timely appealed to the Respondent's "Subsidy Appeal Panel," which reviewed the records and decisions generated at the county level. Petitioner's counsel prepared and submitted a 13 page Statement of Appeal, with 32 pages of exhibits, in what appears to be the first comprehensive presentation of the Petitioner's case in the record. However, this was not given to the Subsidy Appeal Panel. (See, Plaintiff's Exhibit 10, and Transcript pages 85 and 94.) According to the "Notice of Subsidy Appeals Panel Action" -- being the document constituting agency action -- this panel concluded that "the attendance records … were falsified since they did not match the classroom attendance records for the child." Chapter 23 of the Subsidized Child Care Services Manual offers illustrations of the distinction between a fraudulent misrepresentation, and an inadvertent error for which no sanction may be imposed. Among them is when "a provider submitted information, such as an attendance report, that has unintentional errors." See, Chapter 23, Section III(A)(2).

26. The Subsidy Appeal Panel also found that Mt. Zion violated the "Child Care Provider Agreement [paragraph] #11 regarding collection of fees." This section requires that "if a parent does not pay his/her parent fee that I must notify the local purchasing agency," i.e., Durham DSS. Ms. Brandon notified Durham DSS on August 20, 2013 of Ms. Rhodes outstanding fees. Petitioners did not violate paragraph 11 of the Child Care Provider Agreement.

27. The Durham Department of Social Services' mistaken issuance of the Child Care Action Notice reauthorizing D.A.'s attendance at Mt. Zion in the 2013-14 school year, and the payment of subsidies to Mt. Zion, while knowing that D.A. attending another school, and paying

that school accordingly, was a primary cause of Ms. Brandon's erroneous entries on Mt. Zion's attendance reports to Durham DSS.

28. The Petitioners have shown by the greater weight of the evidence that there was no intentional misrepresentation of fact caused the overpayment.

29. Petitioners filed their Petition in the Office of Hearings and Appeals on June 13, 2014, within 30 days of Respondent's mailing its final agency decision dated May 15, 2014 with notice of Petitioner's right to seek a contested case hearing. However, testimony at the hearing of this matter indicated that Durham DSS has enforced the sanctions since the spring of 2014.

30. To the extent that portions of the following Conclusions of Law include Findings of Fact, such are incorporated by reference into these Findings of Fact.

Upon the foregoing Findings of Fact, the undersigned makes the following

CONCLUSIONS OF LAW

1. To the extent that portions of the foregoing Findings of Fact include conclusions of law, such are incorporated by reference into these Conclusions of Law.

2. The Office of Administrative Hearings has jurisdiction of the parties and the subject matter upon Petitioner's timely request for a contested case hearing. N.C. Gen. Stat. **§§** 110-94 and 150B-23; 10A NCAC 10 .0312(l).

3. The Respondent shall impose sanctions for fraudulent misrepresentation if, and only if, a recipient of child care subsidies makes a false statement "with the intent to deceive," which results in receipt of child care subsidy funds to which the recipient is not lawfully entitled. N.C. Gen. Stat. **§§** 110-107(a); 10A NCAC 10 .0308(a).

4. The Petitioners Mt. Zion Daycare and Kimberly Brandon did not make any statement with intent to deceive to obtain child care subsidy funds.

5. Respondent acted erroneously in finding that Petitioners made fraudulent misrepresentations, and depriving Petitioners of property by upholding the imposition of a sanctions barring Mt. Zion Daycare's receipt of subsidy benefits for new enrollees for a period of 12 months.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

Consequently, the imposition of the sanction barring Petitioners' receipt of benefits for new enrollees for a period of 12 months must be **REVERSED**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 16th day of February, 2015.

_____

J. Randolph Ward
Administrative Law Judge