WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

YMCA OF PARKERSBURG,

Appellant,

v. **Action Nos.: 22-BOR-1508**
22-BOR-1509

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for YMCA of Parkersburg. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on June 30, 2022, on an appeal filed April 11, 2022.

The matter before the Hearing Officer arises from actions by the Respondent against different child care locations operated by the Appellant. The first was a March 25, 2022 decision by the Respondent to implement a first offense, or 'strike one' against the Appellant's Child Care Provider status at its Parkersburg child care center location. The second action was an April 5, 2022 decision by the Respondent to implement a separate, first offense, or 'strike one' against the Appellant's Child Care Provider status at its Williamstown after school program location. These initial, 'strike one' decisions by one division of the Respondent were the basis for secondary decisions to terminate stabilization grant payments to the same child care centers.

At the hearing, the Respondent was represented by Chaelyn Casteel, Esq., Assistant Attorney General. Appearing as witnesses for the Respondent were Kristall Chambers, Denise Richmond, and Theresa Wascom. The Appellant was represented by Robert Bays, Esq. Appearing as witnesses for the Appellant were Jeff Olson and Katie Flinn. All witnesses were sworn and the following documents were admitted into evidence.

EXHIBITS

Department's Exhibits:

D-1	Child Care Provider Services Agreement YMCA – Parkersburg Child Care Center Date signed: September 22, 2020

Child Care Provider Services Agreement
YMCA of Parkersburg Williamstown After School Program
Date signed: September 22, 2020

D-2 Child Care Provider Services Agreement
YMCA Center
Date signed: March 29, 2021

Child Care Provider Services Agreement
YMCA Williamstown
Date signed: March 29, 2021

D-3 Email chain between parent of Child L.W. and Kristall Chambers, dated April 22, 2022

D-4 Email from Jennifer Negie to Kristall Chambers, dated April 22, 2022

D-5 Email chain and additional communications between Respondent employees, dated March 25, 2022, and April 27, 2022

D-6 Notification of Provider Regulatory Status, YMCA – Parkersburg Child Care Center, dated March 25, 2022

D-7 Email chain between Respondent employees, dated April 5, 2022

D-8 Notification of Provider Approval Status, YMCA of Parkersburg Williamstown After School Program, dated April 5, 2022

D-9 Form ECE-CC-10A, Request for Payment Child Care Services
YMCA of Parkersburg, WV
Site: YMCA
Billing month: March 2022

YMCA form regarding Child L.W., signed without date

D-10 Form ECE-CC-10A, Request for Payment Child Care Services
YMCA of Parkersburg, WV
Site: Williamstown Elementary
Billing month: January 2022

YMCA form regarding Child L.G., unsigned

Appellant's Exhibits:

Grouped for Action Number 22-BOR-1508*

A-1 Behavioral Report regarding Child L.W., dated March 2, 2022

A-2 Behavioral Report regarding Child L.W., dated March 8, 2022

A-3 YMCA forms regarding Child L.W.

Early Learning Registration
Early Learning Social Resume, signed December 2, 2021
Fee and Payment Guide (form or excerpt), signed December 2, 2021

A-4 Email chain between Katie Flinn and Jennifer Negie, dated March 1, 2022, through March 22, 2022

A-5 OpTime Program Rosters – Attendance Format A
YMCA of Parkersburg WV

A-6 Email chain between Jennifer Lewis and Katie Flinn, dated April 1, 2022, through April 8, 2022

Email chain and additional communications between Respondent employees, dated March 25, 2022, and April 27, 2022

Email from Katie Flinn to Meagann Morris, dated March 1, 2022

Email from Jennifer Negie to Kristall Chambers, dated April 22, 2022

Email from parent of Child L.W. to Kristall Chambers, dated April 22, 2022

Grouped for Action Number 22-BOR-1509*

A-1 Behavioral Report regarding Child L.G., dated February 14, 2022

A-2 YMCA form (or form excerpt) regarding Child L.G.
Elementary After-School Registration

A-3 OpTime Program Rosters – Attendance Format A
YMCA of Parkersburg WV

A-4 Email chain between Respondent employees, dated April 5, 2022

*All exhibits were reviewed for both matters. Exhibits were labeled as pertaining to the respective children under care, rather than by the Action number. The exhibits will retain the labeling used by the Appellant but will be identified respective to their Action number to protect the confidentiality of the children addressed.

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

1) The Appellant is a child care provider offering its services at two locations: the YMCA Parkersburg Child Care Center (hereinafter referred to as "Parkersburg location"), and the Williamstown After School Program (hereinafter referred to as "Williamstown location").

2) A representative for the Appellant signed Child Care Provider Services Agreements for the Appellant's Parkersburg location and Williamstown location on September 22, 2020 (Exhibit D-1), and again on March 29, 2021 (Exhibit D-2).

3) The Provider Service Agreement (PSA) reads, in each instance (Exhibits D-1 and D-2), "Unless an emergency occurs, provider agrees to give two-week termination notices to parents of children in care."

4) Child L.W. was a child in the care of the Appellant, at its Parkersburg location.

5) The mother of Child L.W. emailed the Respondent to describe the disciplinary actions taken by the Appellant with regard to her child. (Exhibits D-3 and A-6)

6) The mother of Child L.W. reported, "...the Director had called and notified me that 'They tried and they cannot do it anymore'..." and "...they cannot handle it anymore as he is requiring too much and they don't have the staffing for it." (Exhibits D-3 and A-6)

7) The mother of Child L.W. described her understanding of the Appellant's suspension policy as progressive disciplinary steps, which she reported as, "...a 1-day suspension, then three, five concluding in expulsion..." (Exhibits D-3 and A-6)

8) Katie Flinn has been the Appellant's Child Care Director since 2018.

9) Ms. Flinn testified the Appellant's suspension policy is a one-day suspension for the first disciplinary step, followed by a three-day suspension at the second step, and finally, a one-week suspension.

10) Ms. Flinn testified that she had not terminated child care services to a child in the care of the Appellant prior to the week preceding the hearing.

11) The Appellant did not provide a two-week notification letter to the mother of Child L.W., advising her that child care services were terminated.

12) The mother of Child L.W. signed behavioral reports regarding Child L.W., dated March 2, 2022 (Exhibit A-1, Action Number 22-BOR-1508), and March 8, 2022 (Exhibit A-2, Action Number 22-BOR-1508).

13) The report dated March 2, 2022, (Exhibit A-1, Action Number 22-BOR-1508), is marked as a 'second' offense, in the section marked 'Offense Notice.'

14) The report dated March 2, 2022, (Exhibit A-1, Action Number 22-BOR-1508) reads, in pertinent part, "...Third write up would normally lead to expulsion but we will work with Choices so we can help [Child L.W.] stay in care..."

15) The report dated March 8, 2022, (Exhibit A-2, Action Number 22-BOR-1508) reads, in pertinent part, "...can return on the 17th when behavior specialist returns..."

16) The report dated March 8, 2022, (Exhibit A-2, Action Number 22-BOR-1508) is blank in the section marked 'Offense Notice.'

17) The Respondent issued notice to the Appellant on March 25, 2022, which reads, in pertinent part, "It is our understanding that YMCA-Parkersburg Child Care Center did not give a child a 2-week notification before expelling a child. I am issuing a strike for this because it is a violation of your Provider Service Agreement." (Exhibit D-6)

18) The Respondent did not provide evidence of a notice to the Appellant informing them that the secondary effect of the primary action is ineligibility for stabilization grant payments.

19) Child L.G. was a child in the care of the Appellant at its Williamstown location.

20) On April 5, 2022, Sarah James, an employee of the Respondent, emailed Theresa Wascom, another Respondent employee, to share the details of a phone conversation Ms. James had with the foster parent of Child L.G. (Exhibit A-4, Action Number 22-BOR-1509)

21) In this email, Ms. James stated the foster parent of Child L.G. reported Child L.G. was "expelled from the site," and that her other, younger child, "...still attends the after school program..." (Exhibit A-4, Action Number 22-BOR-1509)

22) The foster parent of Child L.G. reported to Ms. Wascom, in an April 5, 2022 phone conversation, that she was changing child care providers because she received an 'expulsion' from the Appellant in the form of a phone call on February 14, 2022.

23) The foster parent of Child L.G. signed a behavioral report regarding Child L.G., dated February 14, 2022 (Exhibit A-1, Action Number 22-BOR-1509).

24) This report (Exhibit A-1, Action Number 22-BOR-1509) is marked 'first' in the section marked 'Offense Notice,' and reads, in pertinent part, "...called mom, principal had to remove him from cafeteria..."

25) The Appellant did not provide a two-week notification letter to the foster parent of Child L.G., advising her that child care services were terminated.

26) Ms. Flinn called the foster parent of Child L.G. on February 14, 2022, to advise the foster parent that Child L.G. could return to care on February 28, 2022.

27) The Respondent issued notice to the Appellant on April 5, 2022, which reads, in pertinent part, "It was reported to our office that a child, [Child L.G.], was expelled from your program without providing a two week notice of termination to the parent. This is a violation of the Provider Service Agreement...This agreement indicates that provider is required to give two weeks' notice to parents if you intend to stop caring for their children. As a result of this violation, you are receiving a Strike 1." (Exhibit D-8)

28) The Respondent did not provide evidence of a notice to the Appellant informing them that the secondary effect of the primary action is ineligibility for stabilization grant payments.

APPLICABLE POLICY

The policy governing eligibility for Child Care Providers and recipients is located in the Child Care Subsidy Policy and Procedures Manual.

At §8.8.2, this policy reads, in pertinent part, "When child care providers participating in the subsidy program violate the terms and conditions of the provider service contract and/or billing requirements, it may be necessary to place the provider on a Corrective Action Plan."

At §8.8.2.1.B, this policy reads, in pertinent part, "The first time a provider violates the service agreement, the case manager should notify the provider of the breach and remind the provider of the terms of the service agreement. A Corrective Action Plan is not done for the first occurrence."

The policy governing eligibility for receipt of Child Care stabilization payments is located in the West Virginia Child Care Stabilization Payment Policy & Procedure Manual.

At §2.2, this policy lists conditions for eligibility for stabilization payments, and, at §2.2.4, notes that a provider must "...have a Provider Services Agreement in good standing."

At §2.3, the policy reads, in pertinent part, "Providers are not eligible if any of the following apply...(t)he provider is in violation of any section of the Provider Services Agreement..."

DISCUSSION

The Respondent made a determination that the Appellant, a child care provider, violated the terms of its Provider Service Agreement (PSA), and implemented first offense, or 'strike one' corrective action steps in response to that violation. The secondary effect of this action is the ineligibility for Child Care stabilization payments issued by another part of the Respondent's Child Care division. The Appellant requested a fair hearing to appeal the Respondent's termination of Child Care stabilization payments and the determination of the service agreement violation upon which it is based. The Respondent must show by a preponderance of the evidence that the Appellant violated the terms of its PSA, and that the Respondent correctly implemented this action.

The Appellant is a child care provider, operating a location in Parkersburg and another location in Williamstown. The Appellant provided care to two children – Child L.G. and Child L.W. – and the actions of the Respondent are based on its contention that the Appellant terminated care to those children without adequate notice. The Appellant signed PSAs requiring it "...to give two-week termination notices to parents of children in care," and the Respondent contended that this requirement was not met and their corrective actions were necessary in instances of PSA violations. The Appellant contended that the Respondent's actions were incorrect because the Appellant did not 'terminate' care to the children in question. The Appellant did not argue that the actions constituted an 'emergency' or deny the non-provision of termination notices. The

Appellant contended that its actions were not terminations, but rather suspensions. The question to be answered is: were the actions of the Appellant regarding Child L.W. and Child L.G. terminations which constituted PSA violations without adequate notice, or merely suspensions?

Child Care policy does not set a duration at which the refusal to provide services stops being a 'suspension' and starts to become a 'termination.' Although this apparently leaves the question to the provider to determine for themselves, it must be bound by reasonable limits. If a provider could characterize any time frame as a simple suspension, the provider could circumvent the noticing requirement for any termination. In this case, the provider has stated policy of their own which appears reasonable for determining how their actions should be described.

Testimony from Katie Flinn, Child Care Director for the Appellant, described the Appellant's suspension policy. In response to behavioral incidents, or 'write-ups', the Appellant will interrupt care to the child for one day for the first instance, three days for the second, and one week for the third. The mother of Child L.W. reported identical progressive disciplinary steps for behavioral incidents in her email to the Respondent (Exhibits D-3 and A-6). The mother of Child L.W. signed a behavioral report (Exhibit A-2, Action Number 22-BOR-1508) on March 8, 2022, informing her Child L.W. could "...return on the 17th...", or nine (9) days later. This report includes a section marked "Offense Notice" to show the action as a first, second, or third offense; the section is left blank. A March 2, 2022, behavioral report (Exhibit A-1, Action Number 22-BOR-1508) shows a prior action by Child L.W. as a 'second offense.' But the nine (9) day interruption in services to Child L.W. does not correspond with Appellant's stated policy for third offense suspensions. On February 14, 2022, the foster parent of Child L.G. signed a similar behavioral report (Exhibit A-1, Action Number 22-BOR-1509) at the onset of the Appellant's interruption in service provision, which was marked as a first offense, and did not provide any date of return for the child. The Appellant contended that the behavioral report to Child L.W. served as notice of suspension, but it neither matched the Appellant's internal policy on suspensions nor clearly communicated that the interruption in services was a suspension. Child L.G.'s March 2 report (Exhibit A-1, Action Number 22-BOR-1508) appears to communicate contrary intentions, noting in pertinent part, "Third write up would normally lead to expulsion..." This was followed by the March 8 report (Exhibit A-2, Action Number 22-BOR-1508) which omitted the offense number and provided a nine (9) day interruption in care incongruent with, and in excess of any of the Appellant's suspension policy options (one-day, three-day, one week). The behavioral reports also fail to serve as any kind of suspension notification because the parent of Child L.W. received one without any language describing the action as a suspension or any mention of the return date for the child. Testimony at hearing established the date Child L.W. was allowed to return for care as February 28, or a fourteen-day interruption in care. This duration also exceeds the suspension duration options established by the Appellant's internal suspension policy. Neither the parent of Child L.W. nor the foster parent of Child L.G. were refused care for a period of time that corresponded with the Appellant's stated suspension policy for all other children, and both were refused care for a period of time longer than any suspension option.

The Appellant presented two rosters of children, one for its Parkersburg location (Exhibit A-5, Action Number 22-BOR-1508) and one for its Williamstown location (Exhibit A-3, Action Number 22-BOR-1509). On their own, these rosters do not clearly show anything. The testimony offered to support the exhibits did not convincingly establish what the Appellant intended – that a name on these rosters show that individuals have not been 'terminated' from care. Jeff Olson

testified as the Chief Executive Officer of the YMCA of Parkersburg and stated that he did not know about the active roster and would have to ask Ms. Flinn if his testimony was correct. He also testified he did not have the document in front of him to review as he testified. Mr. Olson was unable to answer if a child would remain on the roster if terminated from care. The testimony of Mr. Olson in this area was given no weight. When Ms. Flinn testified regarding the roster, she also provided testimony that failed to clarify what the rosters show. During one set of questions, Ms. Flinn testified that she had not terminated a child from care until a few days before the date of the hearing. Her testimony regarding what these rosters would show after a termination is therefore unconvincing. Even with clear testimony supported by employees who appear capable of understanding and interpreting these documents, these rosters could only show what the Appellant intended to communicate about its interruptions in care for the children in question, and not the impression they created with the parents.

The parent of Child L.W. reported her understanding of the Appellant's suspension policy in her email describing actions taken prior to the ultimate action, conveyed by phone call, that "...they cannot do it anymore" or "...they cannot handle it anymore." The foster parent of Child L.G. continued to receive care for her other foster children – showing she still needed child care services, but did not believe Child L.G. could return. The foster parent of Child L.G. ultimately found a new child care provider. The notion the foster parent simply chose to not have Child L.G. return to care with the Appellant is unconvincing because she continued to use their services for her other foster children. The parents of both of the children in question were under the impression the action by the Appellant constituted a termination rather than a suspension. The Appellant could have clarified this by implementing a policy of its own to use written notices for all interruptions in child care service; barring this, they could have consistently applied their own suspension policy for Child L.W. and Child L.G. Because the Appellant did neither, their actions were not suspensions but unnoticed terminations. These terminations clearly violate PSAs signed by representatives of the Appellant and in effect at the time of the Respondent's action. The Respondent was correct to implement a first offense, 'strike one' corrective action step due to the Appellant's PSA violation. Because the Respondent correctly established a PSA violation, the Appellant does not have a PSA 'in good standing' and is therefore not eligible for stabilization grant payments. The Respondent provided evidence of its notification regarding the primary actions (Exhibits D-6 and D-8). The Respondent did not provide evidence that its secondary actions to terminate stabilization grant payments were properly notified, so it is more likely than not that these notices were not sent.

The Respondent failed to provide the Appellant adequate 13-day notice of an adverse action. However, the penalty implemented by the Respondent creates a twelve-month period of ineligibility for stabilization payments that would only be effectively extended by any remedy to address the noticing issue. The Appellant violated the terms of its PSAs by terminating child care services to two parents of children in its care without two-week notice. The Respondent was correct to implement two separate first offense, 'strike one' corrective action steps (one corresponding with the Parkersburg location, and the other corresponding with the Williamstown location) on this basis.

CONCLUSIONS OF LAW

1) Because the parents of Child L.W and Child L.G. were refused child care for a period of time, these interruptions in care must either be a suspension or a termination.

2) Because the Appellant implemented interruptions in care to the parents of Child L.G. and Child L.W. which do not match the Appellant's stated suspension policy, the actions cannot be suspensions from the perspective of the Appellant.

3) Because the Appellant implemented interruptions in care to the parents of Child L.G. and Child L.W. which exceeded the greatest penalty option available in the Appellant's stated suspension policy, these actions were unnoticed terminations by the Appellant.

4) Because the Appellant terminated care to the parents of Child L.W. without a two-week notice, the Respondent was correct to implement a first offense, 'strike one' corrective action against the Appellant at its Parkersburg location.

5) Because the Appellant terminated care to the parents of Child L.G. without a two-week notice, the Respondent was correct to implement a first offense, 'strike one' corrective action against the Appellant at its Williamstown location.

6) Because the Appellant's actions against the parents of Child L.W. violate the Appellant's Provider Services Agreement with the Respondent, the Respondent was correct to terminate stabilization payments to the Appellant at its Parkersburg location on this basis.

7) Because the Appellant's actions against the parents of Child L.G. violate the Appellant's Provider Services Agreement with the Respondent, the Respondent was correct to terminate stabilization payments to the Appellant at its Williamstown location on this basis.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the decision of the Respondent to implement two separate first offense, or 'strike one' corrective action steps against the Appellant's child care provider status, and to terminate stabilization payments on this basis.

ENTERED this 3rd Day of August 2022.

Todd Thornton
State Hearing Officer