

COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

*Community Care and Assisted Living Act,
SBC 2002, c.75*

APPELLANT: KR, Licensee
(operating Happy Hearts Daycare)

RESPONDENT: Suzanne Sellin, Manager, Community Care Facilities
Licensing, Fraser Health Authority

PANEL: Marcia McNeil, Vice-Chair
Joan Gignac, Member
Dianne Ledingham, Member

DECISION

Introduction

- [1] This appeal concerns a license to operate a family child care facility.
- [2] Until October 19, 2007, the Appellant operated a licensed daycare called Happy Hearts Daycare (the "Daycare") in Langley, British Columbia.
- [3] On June 22, 2007 Denise Carr, Licensing Officer, Community Care Facilities Licensing ("Licensing"), Fraser Health Authority ("FHA"), rendered a decision cancelling the license of the Daycare effective August 10, 2007.
- [4] On August 8, 2007, Suzanne Sellin, the Manager of Licensing rendered a reconsideration decision which confirmed the earlier decision of Denise Carr to cancel the license of Happy Hearts Daycare, but changed the closure date to midnight, Friday September 14, 2007. Ms. Carr and Ms. Sellin acted as delegates of the Medical Health Officer, who is the official responsible for investigating complaints and taking licensing action against community care facilities.
- [5] The Appellant appealed the reconsideration decision to this Board and it is that appeal which is the subject of this decision. The Appellant also sought a stay of the decision to cancel her daycare license pending her appeal. That stay was initially granted by Board Chair, Susan Ross on September 14, 2007 but was later rescinded by Ms. Ross in a decision dated October 5, 2007, which determined that the license cancellation would be effective Friday, October 19, 2007.

[6] A subsequent further request by the Appellant for an order staying the decision under appeal was also denied by Ms. Ross on October 12, 2007.

Background

[7] The Appellant has operated a licensed daycare facility in her home since 1991.

[8] As noted above, on June 22, 2007 a Licensing Officer with FHA decided to cancel the Appellant's licence to operate a daycare. This decision was made following an investigation by the Licensing Officer into a complaint received by FHA on June 12, 2006. That complaint alleged that the Appellant had left children unattended in her vehicle while shopping in an IGA grocery store and also that the Appellant had approached a parent who was unknown to her and asked that the parent escort a child in her care to a pre-school classroom.

[9] The Appellant was advised of the complaint on June 13, 2006 and provided a written response to FHA on June 14, 2006.

[10] The Licensing Officer's investigation continued over the next several months and included a detailed review of the Appellant's file as well as a review of inspection reports prepared pursuant to the *Community Care and Assisted Living Act* and the *Child Care Licensing Regulation* (the "Act" and the "Regulations").

[11] The inspection reports demonstrate that since 1991 the Appellant's facility has been inspected approximately twenty times and that a variety of hazards or areas of non-compliance with the *Regulations* were noted. During the course of the hearing before the Panel, Licensing indicated that the number of inspections were higher than the norm and that the number of infractions were also higher than the norm, however, no specific evidence was provided regarding their experience typically with investigations of licensed family daycare facilities. In any event, Licensing also took the position that the cancellation of the Appellant's license did not relate to the issues identified in the various inspections or to the quality of the facility operated by the Appellant, rather the decision to cancel the Appellant's license was based entirely on the record of the Appellant's lapses in supervision of the children in her care or other lapses in judgment. For the purpose of this decision therefore, we will address only the judgment and supervision issues.

[12] A summary table of the investigations regarding the Appellant's supervision of the children in her care is set out at page 20 of the report prepared by the Licensing Officer. The summary table demonstrates that since 1993 a total of 14 complaints have been filed against the Appellant's facility. In addition the Appellant self-reported three incidents. Each time a complaint was filed it was investigated by Licensing. A number of those investigations could not substantiate the complaint filed. For the purpose of this decision we will set out only the circumstances in which a complaint was substantiated.

a) November 1993

[13] On November 17, 1993 Licensing received a complaint about two issues of which only one was substantiated, that being that in response to a child's inappropriate language, the Appellant had placed soap in a child's mouth. The Appellant advised Licensing at the time that her action was consistent with the action taken by the child's guardian. She acknowledged that it was inappropriate discipline and there was no indication before the Panel that the incident was repeated. This incident may be described as a lapse in judgment, however, we place little weight on it.

b) October 1994

[14] On October 24, 1994 Licensing received a complaint that addressed a total of ten issues. Of those ten issues, four were substantiated.

- a. the Appellant took children in her care on field trips without parental consent;
- b. children were sometimes "double seat-belted" in her van while she was transporting them;
- c. the Appellant would leave children in her car while she used the bank machine; and
- d. a child was left behind at a grocery store.

[15] Following the complaint appropriate parental consent forms were obtained by the Appellant. The issue of taking the children on field trips without parental consent does not appear to have been repeated. The Appellant was advised that the children at all times were to be placed in an appropriate and approved restraint device while in a car and that at no time were two children ever to share a seatbelt.

[16] More significant for the purpose of this appeal is the issue of children being left unattended in a vehicle while the Appellant undertook tasks such as stopping at the bank machine. A letter dated November 9, 1994 from a Licensing Officer with the then Langley Health Unit, notes:

In regards to supervision, specific concerns were as follows:

1. Children were observed being left unattended in your car.

[17] On November 30, 1994 the Appellant provided a written response to the Licensing Officer and noted the following:

Children in my daycare are always under my supervision at all times. When I do my banking at the

main branch of the CIBC on Fraser, the children have come in with me, except when I have had my mother, mother-in-law or a responsible adult with me. As far as the Willowbrook Branch goes, when I have to withdraw cash from cash machine I park my truck right in front of the window, lock all the doors, take my keys with me, withdraw cash which is right by the window so I can see them and walk back to my truck. This seemed to me was a safer procedure than taking them all out of the truck, having them jump about or for sake of a bank robbery. The kids are safe and where I can see them. [emphasis in original]

No response to the Appellant's letter was provided in the materials given to this Panel.

[18] The Panel has placed more weight on the other substantiated incident included in the same complaint. Specifically, a complaint was received that on one occasion a child was left behind at a grocery store and the Appellant had returned home before she had noticed that the child was missing.

[19] From the information provided to the Panel, the Appellant had taken the children shopping with her. On returning to the car she became aware that a child had taken candy from the store that had not been paid for. She locked the children in the car and returned the item to the store. Unbeknownst to the Appellant, a child followed her into the store but did not return to the car with her. She then left the store parking area and discovered on her return that the child had been left behind.

[20] While the Appellant immediately advised the parent of the incident she did not complete an incident report and submit it to Licensing.

c) October 1994

[21] On October 27, 1994 a complaint was received that the Appellant was advertising in a local newspaper that she was ECE qualified when she was not. This complaint was also found to be substantiated. This incident has no significant relation to the other matters addressed by Licensing and we place little weight on it for the purpose of this Appeal.

d) March 1995

[22] On March 27, 1995 the record demonstrates that the Appellant left a child in her car while she went into a Stationary store. This incident was reported to Licensing by the Appellant.

[23] Specifically, the note to file presented to us by Licensing provides:

TC (telephone call) from [the Appellant] – stating that she had run into the Stationary store and left the children in the car out front. She met Ms. _____ (name obscured) who stated, see, you do leave the children unattended, that she was going to complain. Informed [the Appellant] children must be supervised at all times and discussed the potential for injury/etc., liability and the appropriateness of errands if she cannot supervise the children. [The Appellant] stated, it will not happen again.

[24] A follow-up note dated April 11th includes the following:

Again discussed – supervision is required at all times.

e) May 1996

[25] On May 1, 1996 a complaint was received that children under the Appellant's supervision were again being transported while sharing seatbelts. The record demonstrates that an inspection was conducted on May 17, 1996 and notes that a substitute was engaged to assist the Appellant while she attended a practicum. On at least one occasion the substitute transported six children as well as her own two children and her own children shared a seatbelt while all daycare children were provided their own seatbelts. The note indicates that the Appellant clarified with the substitute that all children must wear seatbelts. While the failure to use appropriate child restraints when transporting children is a significant issue, it appears from the record that when this matter was brought to the attention of the Appellant she addressed it appropriately and we place little weight on this incident.

f) September 1997

[26] On September 25, 1997 a complaint was received by Licensing indicating that two children in the Appellant's care had engaged in inappropriate touching. The record demonstrates that this incident occurred while the Appellant was reading a story to the children. At the time, the two children involved in the incident were playing on the bottom bunk of a bunkbed and were obscured from view by a blanket hanging down over the bunk. After an unspecified period of time the Appellant pulled the blanket back and witnessed the incident. The parent was advised.

[27] Following this incident, at the request of Licensing the Appellant prepared a plan of supervision to ensure the health and safety of children in her care.

[28] During the course of investigation into the incident the children disclosed that similar incidents had occurred previously at the daycare and in circumstances where the children were together outside of the daycare. A report

dated October 10, 1997 prepared by a Licensing Officer with the Boundary Health Unit, includes the following notations:

[The Appellant] stated that she was unable to observe child one and child two for periods of time up to five minutes when the incident occurred on September 17, 1997.

- On the balance of probabilities it appears other incidents of sexual activity occurred at the daycare and were not known to [the Appellant]
- [The Appellant] cooperated fully and responded with a plan to closely supervise all the children to ensure their health and safety during the course of the investigation

...Licensing has concerns regarding the supervision of the children at Happy Hearts Daycare. It is imperative that the Licensee address this issue and submit a plan by November 7, 1997, as to how she plans to address the above-noted contravention and ensure that all the children are supervised all the time.

[29] A response to the report prepared by the Appellant on November 10, 1997 includes the following comments:

I would like to say for starters that the children in my care are at all times and to the best of my capabilities, at any given time being supervised.

. . .

With respect to Section Number 16, Supervision of children, once again I strongly deny this allegation for the reasons I mentioned at the time of being interviewed phone conversations with [representatives of Licensing], and as stated in this letter of response.

. . .

These children have picked their times and places so as not to get caught over this past summer...to be curious.

In conclusion to your letter of October 24, 1997, which I received I believe the 30th or 31st of October and having one week to reply, is my following response:

Although abuse was not a factor due to both girls' participation and willingness.

- These children in question were being supervised, that is why they were caught and not gone unnoticed...
- Their age. This age brings curiosity over one's and another's bodies as stated by both the children's doctors, paediatrician, school nurse and SASS counsellor.
- These children have also carefully picked their times and places so as not to get caught.

[30] As a result of the correspondence received from the Appellant, Licensing modified the report to note that the incidents occurred during brief lapses in supervision, and to note that while the children are generally well supervised, on occasion lapses in supervision have occurred.

g) December 1997

[31] Another incident of inappropriate touching between the same two children was reported by the Appellant on December 31, 1997. This incident occurred when the Appellant had left the children, including a two and a half year old child, in the daycare area of her home, which is in the basement, to go upstairs to get a cup of tea.

[32] The notes on the Licensing file dated January 7, 1998 include the following:

Discussed [the Appellant's] responsibility for supervision – that she must provide supervision at all times and prevent these incidents from happening. [The Appellant] stated that she has made some adjustments to the environment to increase supervision such as – purchased a portable phone so she doesn't have to leave the room to answer the phone, moved the divider from behind the bunkbeds for increased supervision.

[33] In a letter dated December 31, 1997 the Appellant wrote to the Licensing Officer and made the following comment:

I wish to comply to [Licensing's] request in assuring Social Services these children will not under no circumstances be left unattended for any brief moment while at the daycare.

[34] The Chief Licensing Officer of the Boundary Health Unit responded to the Appellant's letter on January 28, 1998 and included the following note:

On the basis of your response to address the concerns noted regarding supervision, I have concluded that no action concerning your license should be taken at this time.

h) April 1999

[35] A complaint was filed with Licensing on April 23, 1999. On this occasion the Appellant had children in her care in her car while she was waiting at her daughter's school to pick her up. Her daughter made a request to have a friend come over to the home and the Appellant left the children unattended in the car to go speak to her friend's mother. As she did so, the car rolled across the adjacent street and stopped upon hitting a fence. At the time there were three children in the car all in car seats or seatbelts. None were injured. The Appellant completed an incident report about this incident on April 26, 1999.

[36] In her incident report the Appellant included the following comments:

In any case, this did take place and a very important lesson was learned that for whatever circumstance I will not allow myself ever again to leave my vehicle running and that my keys are in my hand to ensure one hundred per cent safety.

[37] The file notes prepared by Licensing at the time of the incident include the following notations:

[The Appellant] appeared quite defensive when I explained my concern regarding this serious incident. She stated "it was not a serious incident, no one was hurt".

. . .

I explained SIR is required to be filed along with detailed account of the incident and written plan how she could ensure that constant supervision of children is maintained at all times and how an incident of this nature does not reoccur. [The Appellant] explained that she did not submit an SIR because nobody was hurt.

[38] A letter from the Appellant to the Licensing Officer includes the following notes:

I knew when getting out of my truck that the children were in the back and all in their seatbelts and that I was only going to be in front of my vehicle for a brief moment to let the mother know I lived just up the street.

. . .

Getting out of my vehicle at the school is not something I ever do as my children just come to me, but the fact that this did take place has put some fear in me.

. . .

So, in knowing this and with all honestly and you have my word to ensure one hundred per cent safety to the children in my care as well as my own, this absolutely will never be an issue again. A person can't take anything for granted these days, not even for a moment and not even if they feel they are the safest person around as I did in this circumstance. But please believe me when I say, that my truck will never be left running again and that *if I do have to get out for any given reason these children in my truck will be by my side to ensure one hundred per cent supervision.* [emphasis added]

[39] The Licensing Officer wrote to the Appellant on May 5, 1999 regarding this incident and included the following comments:

As outlined in the Booklet *Preventing Injury in Childcare Settings*, the vast majority of injuries are preventable. A care-giver must realize the potential for injury and take the necessary steps to ensure children are not placed at any risk. *Children can never be left unattended in a vehicle.* [emphasis added]

[40] Her letter then sets out a history of allegations and complaints received noting whether the allegation was substantiated, and concludes:

Licensing has concerns regarding the supervision of the children at Happy Hearts Family Daycare. Supervision concerns were addressed by [the Appellant] after discussion with Licensing. However it does appear that there have been occasions when lapses in supervision have occurred. The temporary lapses have the potential for placing the children in care at risk.

A meeting will be held with Licensing and yourself on May 18, 1999 at 9:30 a.m. to discuss licensing concerns...

[41] Both the notes of the meeting of May 18th and subsequent correspondence from the Licensing Officer to the Appellant reiterated Licensing's concerns with respect to the Appellant's history regarding appropriate supervision of the children. The letter for example again notes:

It is of concern however, that temporary lapses in supervision have placed the children in your care at risk.

[42] Both in the meeting of May 18th and the letter of June 1st, the Appellant was put on notice that if concerns regarding supervision of the children continued, Licensing would recommend to the Medical Health Officer that action be taken on the license.

i) December 2001

[43] The Appellant further reported an incident which had occurred on December 7, 2001. On this occasion, the Appellant had taken two children in her care to a Christmas breakfast with Santa. She then directed a 13 year old who she knew and trusted, to walk the two young children into the school while she unloaded items from the car. The children in question were ages 18 months and 3 years. She lost sight of the children and gathered up items from the car. It was only when she sat down at the table that she became aware that the youngest child was not with the teenager. They immediately began to search for the child and found her standing outside beside the car. She had been alone outside for approximately ten to fifteen minutes.

[44] On January 30, 2002, Licensing wrote to the Appellant and again outlined the history of issues concerning the Appellant's daycare. That letter includes the following paragraph:

Based on a historical review of the facility, Licensing has serious concerns regarding the supervision of children at Happy Hearts Daycare. You explained that you are currently experiencing some personal challenges as your mother is very ill. While Licensing sympathizes with your current situation, Licensing must still address the concerns regarding the supervision you are providing to the children in your care. The facility's history shows previous incidents in which there have been concerns with regards to the supervision of children. The most recent incident is deemed to be very serious as the child was outside without supervision. The child could have been injured

by traffic, wandered off and been lost or abducted by a stranger. Any future lapse in supervision may lead to Licensing recommending to the Medical Health Officer one of the following actions be taken on your license:

1. Attach terms or conditions to a license.
2. Suspend the license.
3. Cancel the license.

[45] The Appellant's response includes a notation that she was seeking to employ someone to assist her with her facility but that she had been unsuccessful to date.

j) August 2005

[46] A complaint was also filed on August 12, 2005. On this occasion a parent who was looking for a daycare placement for her daughter attended at the Happy Hearts facility to speak with the Appellant. She spoke to the Appellant outside the home while children were playing in a sprinkler and small wading pool. At some point during their discussions the phone rang and the Appellant left the area to answer the phone while children remained in the pool. Although an adult visitor was present at the time, the Appellant did not make any specific request that she watch over the children while the Appellant went inside.

[47] The facility inspection report prepared by Licensing includes the following notes:

Licensing informed [the Appellant] that leaving the children with a parent while she went inside is in contravention of the *Childcare Regulation* which requires supervision of children at all times. The FHA Pool guidelines required that an adult be within arms reach at all times of children in a wading pool. It is important that you very clearly explain this requirement to anyone who is supervising children even if just for a few minutes. It is also important that you clearly confirm with another adult if you require that they supervise children.

[48] The Appellant indicated to Licensing that she would ensure that there is always a clear communication regarding supervisor responsibility and that FHA Pool guidelines requirements are always met.

k) June 2006

[49] On June 12, 2006, Licensing received a complaint that raised two issues:

1. That the Appellant asked a parent of another child to take a child in her care into the pre-school for her. The parent responded that she would not do so as she did not know the child and thought this would be an unsafe practice as she was a stranger to the child. The Appellant did take the child to the pre-school herself.
2. That the complainant also had seen the Appellant in the IGA on more than one occasion while there were up to five children in her vehicle. She said that she had witnessed this previously but had not known that the Appellant was a daycare provider. She also indicated that three weeks previously, now knowing that the Appellant was a daycare provider, she saw the Appellant in the IGA while four children under the age of two years were left in the Appellant's truck unattended.

[50] Licensing contacted the complainant to obtain additional details. The complainant advised that the Appellant was in the store shopping, that she was using a shopping cart and that she had more than a few items. The complainant believed that there were three or four children in the car and that the back seat was full, and also raised concerns about the Appellant's driving habits.

[51] The Appellant was advised of the complaint on June 13, 2006. She confirmed that there were one or two mothers of other children who routinely escorted a child in her care into the pre-school class. She admitted that on one occasion she asked a mother who was going into the school with her son to assist her. The mother said no and explained that she wasn't comfortable. The Appellant then took the child herself.

[52] When Licensing questioned the Appellant regarding the names of the other parents that regularly took the child into the class the Appellant was unable to provide their names and said that she knew them to see them but didn't know their names.

[53] When the issue of her shopping in the IGA while children were unattended in her car was discussed with the Appellant, she denied it had occurred. She then responded by asking if there was something wrong with popping your head in a store to see if they have popsicles. When the Appellant was initially questioned about the IGA allegation, Licensing does not appear to have informed the Appellant when the incident was alleged to have occurred or which store was involved.

[54] The Appellant acknowledged in the hearing that, on at least one occasion, she left the children in her car while she, with the vehicle keys in her hands,

spoke to the owner of a store near her home to ask if they had popsicles in stock that day. She explained that on a previous outing with the children the store did not have popsicles in stock. She also confirmed that the children remained in her line of vision at all times. We will refer to this admission by the Appellant as "the popsicle incident" hereafter. No evidence was lead to confirm when this incident occurred but, the Panel accepts that it only came to the attention of the Licensing Officer as a result of the Officer asking the Appellant about the IGA allegation.

[55] An onsite inspection was made of the Appellant's facility on June 14, 2006.

[56] On this occasion the Appellant again admitted that she had asked a parent to take a child in her care into the pre-school and that she did not know the name of the parent she had asked.

[57] She was advised that the allegation about her leaving children unattended while shopping occurred at the IGA, approximately three weeks earlier. The notes of the report include the comment:

During our conversation you requested clarification regarding what is acceptable practice. You described a situation where you parked your vehicle outside a nearby corner store, taking the keys with you as children were inside the vehicle. You included that you could see the children. *It was discussed that there is no acceptable situation that allows for children to be left inside a vehicle when you are not in fact inside the vehicle.*

There is concern that [the Appellant] may not fully understand the degree of risk involved with this above described situation. [emphasis added]

[58] A meeting was held on July 6, 2006 between the Appellant, a Licensing Officer and Ms. Sellin. A transcript of that meeting is contained in the materials and confirms that discussions occurred between the Appellant and representatives of Licensing about how the Appellant could ensure appropriate supervision of the children in her care. In part, the discussions centred around the Appellant seeking clarity regarding appropriate and inappropriate supervision practices. Some feedback was provided by Licensing but the Appellant was advised that it was important for her to determine policies and procedures that would ensure appropriate supervision. The Appellant was also advised that while Licensing would be looking at the specific complaints that had been made in June of 2006 they would also be conducting a file review to determine if there was an overall concern regarding her ability to care for the children in her care.

[59] The Appellant was again advised of the types of actions that could be taken on her file and acknowledged that she had been made aware of these options previously.

[60] Licensing continued its investigation by speaking to parents of children in the daycare and by speaking further to the Appellant. On August 17, 2006 Licensing issued a report confirming that both allegations had been substantiated. The first allegation, that being that the Appellant had asked a parent to escort a child in her care into a pre-school had been admitted by the Appellant.

[61] The second incident, alleging that the Appellant had been shopping while children were left alone in her car, was also found to be substantiated. The report on this finding notes:

Licensing had determined that there had been past practices where [the Appellant] by her own admission, has left the children unattended in her vehicle. During the July 5, 2006 meeting with [representatives of Licensing], [The Appellant] indicated her practice of leaving children in her vehicle while she goes to buzz the door at an apartment where she picks up a child attending her family childcare program.

On a balance of probability, as [the Appellant] had previously left children in her vehicle unattended and the other half of the allegation has been substantiated, it is probable that the second half of the allegation, which is based on eye witness testimony, did in fact occur, therefore Section 18 of the *Childcare Licensing Regulation* has been contravened. Through her actions, [the Appellant] did not ensure the health and safety of the children in her care, therefore Section 7 (1) (b) of the *Community Care and Assisted Living Act* has also been contravened.

[62] In the conclusions of the report it is noted that the Appellant had difficulty with what she referred to as "gray areas" of supervision and her view of what made "common sense" and that she sought clarification regarding several scenarios. The Licensing Officer noted:

Past history of this facility indicates that [the Appellant] had already stretched the concept of common sense and has in fact made decisions that have put children at risk.

[63] The officer determined that a full file review would be completed in the near future to ensure that the Appellant put into place and maintained policies

and procedures relating to supervision and transportation of children in her care to maintain compliance with the *Act*. A written response was requested by September 8, 2006 addressing the concerns raised in the investigation report.

[64] The Appellant's response dated September 5, 2006 acknowledged that seeking to release a child in her care into the custody of another adult was not the best practice. Her response indicates that in order to address this she had acquired an emergency supervisor and that proper procedures would be put in place prior to requiring her services.

[65] With respect to the second allegation, that of leaving the children unattended while shopping, the Appellant again denied the allegation. She noted that she recognized that the *Act* and *Regulations* are paramount to providing professional quality daycare but that:

Sometimes my best practice is based on the confidence of my parents and how they view me as a person.

[66] Additional information was sought by Licensing on September 20, 2006 and was provided by the Appellant on October 2, 2006. In particular her response included a detailed description of the time and circumstances in which she would drive the children in her care to various schools and extra-curricular activities. This was presented to address Licensing's concern that the children the Appellant's care were required to spend too much time in a vehicle.

[67] Licensing responded on December 6, 2006 indicating that the information provided was insufficient as it did not provide a plan to clarify how the Appellant would ensure compliance with the *Regulations*, and how the health and safety of the children in her care would be maintained. Sections 19 (2) (b) and 18 of the *Regulations* as well as section 7 (1) (b) of the *Act* were highlighted.

[68] The Appellant was reminded that Licensing would conduct a complete file investigation at the conclusion of which a decision regarding the status of her license would be made. She was reminded that this could include no action, attaching terms and conditions to her license or suspending or cancelling her license.

[69] The Appellant was reminded that the *Act* and *Regulations* set the minimum standards that must be met by all licensed facilities to ensure the health and safety of vulnerable individuals in care. She was reminded that the onus rested with her to provide for the health and safety needs of all the individuals in her care at all times.

[70] A facility inspection was made on December 13, 2006 during which the Licensing Officer noted that a two year old child was sleeping on a bed in a bedroom and another child was sleeping in the livingroom, on a couch. There was no baby monitor in use. While the Licensing Officers conducted their inspection, at one point the Appellant left the children unattended on the main floor of her home to speak with them in the basement of the home where her

childcare facilities are located. While she spoke to the Licensing Officers, the children were both out of her line of vision and out of her hearing.

[71] The Appellant confirmed in her testimony that on this occasion she left the children unattended while she went downstairs to speak to the Licensing Officers, but questioned why they did not raise an objection with her if they felt this was unsafe.

[72] The Appellant later wrote a letter of complaint to Licensing raising her concerns that the December 13th inspection was conducted in a disrespectful manner. In her response she again admitted that she left the children alone upstairs while she went downstairs to speak to the Licensing Officers. She indicated that she did not normally leave the children unattended to go downstairs and that they are normally all together either upstairs or downstairs. The balance of her letter took issue with hazards that were noted on the report that the Appellant felt were overly picky or inappropriate, and further noted that those areas that were noted on the report had been remedied. Her letter concluded that she would continue to comply with the *Regulations* "as they are brought to my attention".

[73] Licensing's report dated June 22, 2007 noted that on March 5, 2007 the Appellant was contacted to ask that she attend at a meeting to present the decision regarding her license. The date of the meeting was set mutually as May 28, 2007 but was later delayed at the Appellant's request to June 18, 2007.

[74] The Appellant was provided with a copy of the decision report prepared by the Licensing Officer on June 22, 2007. That report drew a variety of conclusions from the incidents noted above as well as the inspection reports, and concluded that the number of recurring contraventions where children were unsupervised or placed in high risk situations reflected a lack of judgment and sound decision-making on the Appellant's part. The report determined that while compliance was obtained for periods of time it was not maintained as required.

Discussion and Analysis

[75] The *Act* provides that when the Appeal Board hears an appeal from the decision of the Medical Health Officer, the hearing is to proceed as if the proceeding before the Appeal Board were a decision of first instance. However, the appellant bears the burden of proving the decision under appeal was not justified. This means that this Panel is entitled to hear all of the evidence considered by the Medical Health Officer as well as further relevant evidence from the parties, and on that basis the Appellant must convince the Panel that the Medical Health Officer's decision was not justified.

[76] The Appellant brought a number of parents to testify in these proceedings. Each of these parents confirmed their support of the Appellant's daycare and expressed that they were happy with the care that was being provided by the Appellant to their children. They also confirmed that they were aware of the

Appellant's policy in picking up and dropping off children at school and at recreational programs as well as taking the children with her when she attended to her personal errands and that they did not object to these practices. The parents further confirmed that they were aware of past serious incidents involving the Appellant but that they felt this did not diminish her ability to care for their children.

[77] The Appellant also testified and asserted that she feels passionately about the services that she provides and that she is confident that she provides quality daycare to the children in her care. Her pride in the quality of her facility and the special relationship she has with the children was evidenced from her testimony, the materials she submitted to Licensing and the photographs that she provided to the Panel of her facilities and of the children interacting at the facility. Indeed, in their submissions, Licensing did not take issue with the quality of the facilities provided by the Appellant or with her genuine care and concern for the children.

[78] Primarily, Licensing relied on the substantiated incidents we set out in this decision to demonstrate that there is a pattern of inappropriate supervision or other lapses in judgment by the Appellant, which have placed the children in her care at risk. With the exception of the allegation that the Appellant left children unattended in her vehicle while she shopped at the IGA in June 2006, the Panel finds that the incidents we have set out in this decision at paragraphs a – j did occur. In all cases the Appellant admitted that the events occurred.

[79] The Appellant's response effectively was that the past incidents were momentary lapses of judgment, but they do not reflect her overall record as a caregiver and that everyone makes mistakes from time to time. She also indicated that she regularly remedied infractions when they were brought to her attention.

[80] In being questioned by counsel for Licensing regarding her knowledge and familiarity with the *Regulations*, the Appellant responded that she was not familiar with the *Regulations* and while she had read them in the past, she did not have a working knowledge of them.

[81] It is of course a licensee's responsibility to be familiar with the *Regulations* and to be proactive to ensure compliance with the *Regulations*. One of the issues raised by Licensing was that while the Appellant would routinely correct infractions of the *Regulations* that were brought to her attention, she did not demonstrate a sufficient awareness of the *Regulations*, or of her responsibilities as a caregiver, to address these issues proactively. The Panel agrees that the evidence demonstrated that the Appellant does not have sufficient awareness of her obligations as a licensee.

[82] The Panel also finds that the Appellant's supervision practices were inadequate, as demonstrated by the totality of the substantiated incidents in her licensing record. It was not apparent to the Panel that the Appellant fully understood that a lapse in judgment was no less serious simply because there

were no injuries to the children in her care. The record demonstrates that on three occasions, lapses in judgment or gaps in supervision by the Appellant had potentially devastating consequences:

1. On one occasion her truck rolled across a street and hit a fence with three children inside.
2. On one occasion a child was left behind in a parking lot of a grocery store when the Appellant was unaware the child was no longer with her in the vehicle.
3. On another occasion a child was left for approximately 15 minutes in the parking lot of a school when the Appellant did not realize that the child was not supervised. The child in question was 18 months old.

[83] We recognize that the Appellant understood the seriousness of these incidents. However, she did not accept that other incidents demonstrating a lapse in judgment on her part could potentially have had equally serious consequences. Of course everyone involved is grateful that no injuries did occur, however, the incidents are no less serious as a result.

[84] The Panel accepts that the Appellant struggles with issues regarding the level of supervision she is required to provide. This was demonstrated by her evidence that she believed it was a safe practice to leave children in her vehicle as long as they were within her line of sight. What the Appellant did not demonstrate to the Panel's satisfaction was an understanding that her responsibility as a licensed caregiver exceeds what may be considered "common sense" by a parent. The Appellant must exhibit a standard of care of the children in her care that ensures their safety. This can only be achieved if she has the children in her supervision (by which we mean line of sight or hearing) and that they are not left in situations that are potentially unsafe.

[85] The Panel accepts that it is unsafe for a licensee to leave children under the age of five alone in a vehicle, even if they are within the line of sight of the caregiver. The Panel also accepts that it is unsafe to leave children under the age of five out of both earshot and line of vision, especially when the children are not in a crib or other environment where there is a greater assurance of their safety. Having had the potential consequences of these actions demonstrated to her in the past, the Appellant should have grasped the potential risk to which the children in her care were exposed when she:

- a. Left the children in the car while she checked with the corner grocery store to see if they had Popsicles.
- b. Left the children in her care on the main floor of her house while she went downstairs to speak with Licensing Officers.

- c. Asked a parent who was unknown to her to escort a child into pre-school.

[86] Each of these incidents were admitted by the Appellant during the proceedings.

[87] The Panel however does not find that the Appellant left children unattended in a car while she shopped at the IGA in approximately May of 2006. Licensing did not call the complainant regarding this incident as a witness and did not provide an explanation why she did not testify. The Panel was therefore unable to assess her evidence. Further, the report of the initial complaint registered with Licensing, and the notes of the subsequent interview with the Complainant do not appear consistent with a likelihood that this incident occurred.

[88] First, the complainant suggested that the children in the car were all under the age of two. The Appellant was not caring for four children under the age of two at the material time. Further, although the complainant professed to be profoundly concerned about the incident when she discovered that the caregiver was a daycare provider, she did not make any effort to speak to the Appellant about the incident at the time, and did not report it for approximately three weeks to Licensing.

[89] Licensing urged us to find that this incident occurred because the other issue raised by the complainant, that the Appellant had asked a parent to escort a child into pre-school, had been substantiated, thereby suggesting it was likely that the IGA incident also occurred. By the same measure however, as the Appellant admitted that the first incident occurred, it may be more likely that the second incident, which she denied, did not.

[90] Ultimately, in all of these circumstances, the Panel is unable to find that this incident was substantiated.

[91] The record demonstrates that Licensing has repeated to the Appellant on a number of occasions that it is her responsibility under the *Act* and *Regulations* to ensure that the children in her care are supervised at all times. However, the Appellant's evidence in this case demonstrated that she did not share Licensing's understanding of what this responsibility entailed. For example, while Licensing's witnesses testified that it was not appropriate to leave children without adult supervision in a vehicle, the Appellant's evidence was that she believes there are circumstances where it is appropriate to leave children in a vehicle as long as visual contact with the children is maintained and that this would comply with her obligation to provide supervision at all times.

[92] With respect to the incident where children were left playing in a wading pool with a parent while the Appellant answered the phone, following from her conversation with the Licensing Officer, the Appellant understood that it was

expected that she more plainly communicate with a parent if she was leaving children under their supervision for a period of time.

[93] The Appellant testified that when she approached the individual to ask that the individual escort a child in her care into the pre-school, based on her previous discussion with the Licensing Officers, she ensured that she clearly communicated her request with the individual. When the individual indicated that she was uncomfortable doing so, the Appellant did not press the matter.

[94] The issue raised by this incident however, was not strictly an issue of communication, but rather, one of safe practices. When the Appellant asked an individual whose face she recognized, but whose name she did not know, to escort a child in her care, she was unable to assess the level of risk posed by the individual in question. Any level of risk would have been inappropriate in the circumstances.

[95] While this case may remind Licensing Officers who read it that it is a good practice to ensure that licensees have clearly understood their intended message, the Panel is not able to find that the Appellant's responsibilities under the *Act* and *Regulations* are diminished if she did not fully comprehend the message Licensing Officers intended to convey to her. The responsibility lies with the Appellant, and indeed any licensee, to demonstrate that she accepts, and is willing and able to deliver, a level of care and attention and supervision that ensures children in her care are not inappropriately at risk. The Appellant has not satisfied us of this.

[96] The Panel has found that there is a lengthy history of the Appellant exposing the children in her care to serious risk of harm as a result of significant lapses in supervision by the Appellant. The most recent incidents which the Panel has relied on in making its decision, namely, the popsicle incident, asking a parent to escort a child into a pre-school and leaving the children on the main floor of her home while speaking to the Licensing Officers in the basement of her home may not appear to the Appellant, or indeed the parents of children in the daycare, to be as serious as the incidents that had occurred previously. However, these incidents are of a sufficiently similar nature to incidents which have occurred in the past that this Panel finds that the Appellant has not fully grappled with her role and responsibility as a caregiver. If the Appellant was prepared to leave the children in her care unsupervised while she spoke to Licensing Officers during a facility inspection, it is more likely that the Appellant will also do so when her actions are not supervised.

[97] It is the very nature of a licensed family daycare that caregivers are not regularly supervised. As a result, the Health Authorities of the province and the Appeal Board must be satisfied that individuals operating in those circumstances are providing a level of care to the children to whom they are entrusted, that ensures their ultimate safety.

[98] With respect to the popsicle incident, the Panel recognizes that some parents who read this decision may have also made a choice on some occasion to leave their child in their line of vision in a vehicle, rather than wake the child while attending a brief chore. However, the Panel finds that the Appellant's choice was inappropriate for three reasons:

- a) a similar decision in the past had lead to a very serious situation where the Appellant's car rolled across a street with children inside the vehicle;
- b) the Appellant had previously made definitive statements to Licensing Officers that she would never leave the children unattended in the car for any reason; and
- c) the decision to check to see if a local store had popsicles is evidence of poor planning on the part of the Appellant.

[99] With respect to the issue of planning, this Panel accepts Licensing's concern that a licensed daycare operator should not be placing children in unsafe situations in order to attend to personal errands. In this circumstance, the Appellant could have called the store to determine if they had popsicles, or could have gone to the store, which was very close to her house, after the children had left the previous day. Simply put, there was no good reason why the Appellant needed to leave the children unattended in the vehicle while she asked if the store had popsicles. While the Appellant felt that she was not exposing the children to significant risk, there was no need for them to have been placed in that circumstance at all.

[100] The other two incidents, (asking a parent to escort a child into a Pre-School, and leaving the children unattended on the main floor of her house during Licensing's inspection), also raise issues with the Appellant's choices. The Appellant did not provide the Panel with any explanation for why there was a pressing need for her to make either of these decisions. The choices the Appellant makes do not demonstrate that similar decisions in the past, which lead to serious risks to the children in her care, have caused her to change her behaviour. We see no real difference between asking a stranger to take responsibility for a child in her care and asking a teenager to take responsibility for a child in her care, a decision which lead to a child being placed at serious risk. Similarly, we do not see a difference between leaving children without supervision while making tea, or leaving children out of hearing or visual range to speak to Licensing Officers during the course of a home inspection.

[101] The Appellant did not demonstrate to the Panel's satisfaction that she is able to consistently make choices that ensure that the children in her care are free from unnecessary risk of harm.

[102] In making this finding, the Panel did consider two arguments raised by the Appellant in the course of the hearing. The first was that the passage of time

between the original complaint and the completion of Licensing's report was excessive and demonstrated that Licensing did not seriously believe her daycare was unsafe. Further, the Appellant argued that the fact that her facility continued to operate between the original complaint in June of 2006 and October 2007 without incident, demonstrated that she operated a safe facility.

[103] With respect to alleged delay in issuing the report, the Panel notes that between June 12, 2006 when the complaint was received and October 2, 2006 Licensing was actively investigating the matter including meeting with and continuing discussions with the Appellant.

[104] A request was made of the Appellant on March 5, 2007 to attend a meeting to present the decision regarding her license. Approximately five months passed between the conclusion of gathering information to prepare a report and its actual compilation and analysis for the report. The passage of time between then and the presentation of the report in June 2007 appears to have occurred at the Appellant's request.

[105] The Panel accepts that the passage of time between the original complaint and the decision to cancel her license caused the Appellant some anxiety, however, the Panel is unable to draw negative conclusions from the fact that it took five months to prepare a report of the breadth and scope of the June 22, 2007 report prepared by the Licensing Officer. We are satisfied that Licensing conducted a thorough investigation and ensured that the Appellant was treated fairly. In this context, the fact that the Appellant was allowed to continue to operate her daycare while the review proceeded supports the conclusion that she was given the benefit of a fair and unbiased assessment by the Officer. We are also satisfied that the Appellant suffered no prejudice in presenting her case to this Panel from any perceived delay in receiving the report.

[106] Surveying the totality of the evidence of substantiated incidents as well as her perspective on those incidents in her testimony in the hearing, the Panel is not satisfied that the absence of incidents between June 2006 and October 2007 establishes that the Appellant is able to provide a safe environment for the children in her care. In that regard, this Panel has also placed some weight on the fact that during an inspection report conducted in December 2006, the Appellant left the children unattended on the main floor of her home while she went to the basement to speak to the Licensing Officers. While no "incident" occurred, this lapse in supervision could have had serious consequences.

[107] Ultimately, the Appellant did not adequately demonstrate to the Panel during the course of the hearing that she had fully understood the seriousness of the evidence brought to the Panel's attention and that she would sufficiently change her practices in the future to ensure that similar incidents did not arise.

[108] The Panel acknowledges the demonstrated enthusiasm that the Appellant brings to her role as caregiver and believes that in a supervised environment the Appellant would be able to continue the nurturing environment that the parents

of children she has previously cared for spoke of so eloquently. The Panel is aware that many parents have difficulty finding daycare that they are comfortable with and where they can ensure that their children are being cared for as they would be at home. The Panel would like to encourage the Appellant to continue her career in childcare in a supervised setting. However, the Panel concludes the decision under appeal was justified even without substantiation of the IGA incident, and confirms the cancellation of the license issued to the Appellant to operate Happy Hearts Daycare.

Conclusion

[109] In making this decision the Panel has considered all the evidence, materials and arguments submitted to us by the parties, whether or not they were specifically referred to by the parties or in this decision.

[110] For the reasons stated above, the Panel finds that the Appellant has failed to establish that cancellation of her licence was not justified in all the circumstances.

[111] The appeal is dismissed.

March 6, 2008

Marcia McNeil, Vice-Chair

Joan Gignac, Member

Dianne Ledingham, Member