

Care Standards

The Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

Heard on 18, 19, 20 and 21 April 2017 at First-tier Tribunals at Civil and Family Centre Liverpool L2 2BX

BEFORE
Tribunal Judge Melanie Lewis
Mr Michael Cann – Specialist Member
Ms Denise Forshaw – Specialist Member

BETWEEN

New Street Playgroup Committee

Appellant

v

Ofsted

Respondent

[2016] 2797.EY

DECISION

Representation

The Appellant was represented by Kohanzad Counsel.
The Respondent was represented by Mr Toole Solicitor Ofsted Legal Services.

Witnesses

We heard oral evidence from the following witnesses:

Appellant

1. Ms Sara Donlan (Manager)

And read the evidence of:

2. Ms Mackay (Nominated Individual. Unsigned)
3. Ms Tunstall (Parent. Unsigned)

Respondent

1. Ms Lisa Bolton, Prospects Inspection Services
2. Ms Ann Flynn, Ofsted Early Years Regulatory Inspector

3. Ms Elaine White, Ofsted Senior Officer

And read the evidence of:

4. Ms Hilary Boyd, Prospects Inspection Services
5. Ms Julie Firth, Prospects Inspection Services
6. Ms Alison Tranby, Early Years Regulatory Inspector

Reporting order

1. There shall be a Restricted Reporting Order under Rule 14(1)(b) of the Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008 ('the 2008 Rules') prohibiting the publication (Including by electronic means) in a written publication available to the public, or the inclusion in a relevant programme for reception in England and Wales, of any matter likely to lead members of the public to identify any child or its family mentioned in the appeal.

The appeal

2. This is the appeal of New Street Playgroup Committee ('the Appellant'). The Appellant appeals against a decision of Ofsted dated 2 August 2016, to cancel the Appellant's registration. Since the setting was registered in 2003, they had consistently failed to meet the EYFS requirements. Despite Welfare Requirement Notices being issued, no sustained improvements were made. They relied on the history which we have recorded below and more recent concerns which led to the cancellation.

3. Ofsted did not consider that the setting had the capacity to improve especially given the significant amount of help that the Committee had received from the Local Authority Early Years team in St Helens and the lack of sustained improvement. Despite repeated opportunities to demonstrate that they could make the required improvements they failed to meet the minimum requirements. Accordingly, they concluded that this setting had not demonstrated that they had a secure vision of how to improve the setting. In particular the manager did not have the capacity to drive forward the necessary improvements.

Procedural Issues:

4. At the commencement of the hearing Mr Kohanzad confirmed that there was no issue that the New Street Playgroup Committee were the correct Appellant. The committee members listed on the registration certificate were Ms Mackay and her daughter Ms. Donlan. It had been anticipated by the Respondent in their Skeleton Argument that there would be an issue of the 'registered provider'. In more recent months it had been asserted by Ms Donlan that it was her mother Ms Suzanne Mackay, who had started the playgroup and that she, was not a committee member. Ms MacKay is the 'nominated individual' but has not had an active role in recent years.

5. Mr Kohanzad was only instructed on 13 April 2017. Ms Donlan had some prior legal assistance but not consistently. We thought it appropriate and in accordance with the overriding objectives to be flexible about late evidence. We accepted the following documents :-

- 1) Childcare Investigation Toolkit dated 4 April 2017
- 2) Statement of Sara Donlan undated, confirmed to be prepared with the assistance of a solicitor (who attended with her) for Objections Hearing with handwritten annotations by her.
- 3) Daily Risk assessment sheets: children's rooms and children's toilets.

6. We were assisted by the parties continuing to work on a Scott Schedule, clarifying which of the historic issues were accepted. They mostly were. We guided that we were going to focus on events from December 2015 onwards.

Background/ Chronology:

7. The decision and chronology set out that over the years a number of issues had arisen in relation to the setting.

8. The setting was inspected in June 2011 at which a judgement of satisfactory, which is now known as 'requires improvement' was made. One action and four recommendations were raised regarding, written parental permission for seeking any necessary medical advice or treatment, planning, opportunities for parents to contribute to their children's learning and development, effective use of space and the use of self-evaluation to effectively monitor and evaluate the service and outcomes for children.

9. In August 2011 Ofsted received concerns regarding the nappy changing arrangements. The concern was investigated and the setting was found not to be meeting the Early Years Foundation Stage requirements (EYFS). Actions were raised regarding the safeguarding children policy and the qualification of the manager at the setting.

10. The setting was again inspected in March 2013 at which a judgement of satisfactory was again received. Two actions and one recommendation was raised in relation to adult interventions, planning, staff supervision and teaching.

11. The setting was inspected in December 2015 at which a judgement of 'inadequate' was received. The actions related to the settings recruitment procedures, staff supervision, staff inductions, staff with paediatric first-aid training, a suitable first aid box, the quality of teaching and learning, observations and assessment of children's progress in developing the use of self-evaluation to identify strengths and weaknesses, in order to inform accurate priorities for improvement.

12. The setting was again inspected in March 2016 at which a judgement of 'inadequate with enforcement' was received. Three welfare requirement notices and two actions were raised regarding an appropriately trained and capable deputy manager, staff supervision, meeting the emotional needs of all children, observations assessment and the quality of teaching.

13. On 3 May 2016 monitoring visit was undertaken to see if the welfare requirement notices actions were being followed up. At this visit it was found that the setting was not meeting the EYFS requirements because there was no named deputy to take charge in the absence of the manager Ms Donlan. Ms Donlan said she had not received the WNR or the previous report which had been sent to the site where the playgroup is based, rather than to Ms Mackay, whose address was to be used for post correspondence.

14. A number of concerns were noted: Staff supervisions were not taking place, children's emotional needs were not being met because there was no effective key person system and no accurate observations and assessments were being performed. The quality of teaching had not been improved. A number of hazards were identified and there were issues about the security and safety of the premises.

15. Another visit was made on 17 May 2016 which the Appellant felt was too soon. The setting was not meeting three WRNs, which was an offence. They were also not meeting three of the four actions raised at the premises. The inspector was concerned about there being no clean bedding available, minimal interaction between staff and children especially at snack time, the setting was cold and staff members were not aware of the setting safeguarding procedures or policies. There was no activity planning in place.

16. A Notice of Intention to cancel registration was sent on 3 June 2016.

17. An objection meeting was held on 5 July 2016 and a decision was made not to uphold the objection.

18. A monitoring visit took place on 21 June 2016 when it was again concluded that the setting was not meeting children's needs and only one room was suitable for use by children

19. A further monitoring visit was undertaken on 21 July 2016 which again identified that the minimum EYFS requirements were not being met. Ms Donlan was the only qualified member of staff present.

20. On 29 July 2016 the Local Authority Early Years team in St Helens which had had a very active involvement with the setting informed Ofsted there had been a burglary at the setting. There was a concern raised that the children's outdoor play area was contaminated. On 29 July 2016 Ofsted telephoned Ms Donlan. They were very concerned by her presentation. A suspension letter was sent.

21. Ms Flynn undertook a monitoring visit on 18 August 2016 and found the setting locked and operating in accordance with the terms of the suspension. However, the outdoor area contained rubble, wood and stacked crates. There was also rubble in the pathway leading up to the entrance.

22. Following an oral hearing on 13 September 2016, the Tribunal confirmed the suspension: see the decision of Judge Khan dated 16 September 2016 [2016] 2781.EY-SUS. Their conclusions, paragraph 29 in particular stated that they were satisfied that the test for suspension was met as Ms Donlan accepted that the setting was not suitable to take children as it stood. Because of the way that the manager had presented in the phone conversation with Ofsted on 29 July 2016, they also went on to consider the issue of the manager's health. The letter from her GP did not address her suitability to work with children.

23. Ms Flynn attempted a monitoring visit on 23 September 2016 but the setting was locked and therefore compliant with the suspension. The outdoor area had not been improved.

24. Ms Flynn visited on 16 November 2016. Again the setting was locked, so compliant with the suspension. The outdoor area had not been improved.

25. The Health Declaration Booklet (HDB) was received on 23 November 2016 but one page was missing. In the event, Health Management requested Ms Donlan to attend an interview with the occupational health physician to review suitability.

26. Following suspension case reviews which were held on diverse dates, a decision was made to extend the provider suspension while Ofsted awaited the submission of the HDB form and to confirm the premises were now safe. The suspension was finally lifted on 14 April 2017.

Documentary evidence

27. In advance of the hearing we carefully considered a bundle of written evidence and read all the witness statements.

Evidence: **Respondent:**

28. We summarise only such evidence as is necessary to explain our decision and in the light of the concessions made. It highlights what the themes of the concerns were and the history and the points of concern that the Playgroup Committee had failed to address.

29. Ms Bolton confirmed a witness statement dated 7 November 2016. She carried out the priority inspection 29 March 2016. She is employed by Prospects, an early years inspection service. It was clarified that she reported to her own line manager and issues of enforcement were made by Ofsted. This was a priority inspection due to information being received that the

setting may not be meeting the action set. She confirmed that she would have had a broad picture of the concerns found in December 2015, but that she did not get a full copy of the previous inspectors toolkit.

30. In about September 2015, Ms Donlan decided to step back from the setting, where she had been a deputy manager. She stepped up again to be the manager after the December 2015 inspection. She was not present when Ms Bolton attended but came in later in her visit. She told us in oral evidence that she had been focussing on policy issues and often worked at home. Ms Bolton had concerns about the deputy manager, who despite being in post for about eight months was not capable enough and reported that she didn't feel confident in her role. She knew about her safeguarding responsibilities but did not have a good knowledge about the statutory requirements. Teaching and learning was not improved

31. As with all the witnesses, she stressed that what they were looking for was compliance with minimum standards. She had been concerned about a child who was left to cry for 15 minutes which Ms Donlan agreed could never be acceptable. There was a concern that that the key worker system was not embedded.

32. Her note recorded that at 5:55 pm as she was leaving she gave her feedback. She was pressed on whether she had told Mr Donlan that a new WRN would be issued, which is what transpired. She stated that she would have had no authority to say that would happen, but in accordance with guidance she did make clear that Ofsted might take enforcement action. Ms Donlan who had become the Manager on 8 December 2015, told her she had been in to model and observe good practice but acknowledged that it had not yet had a good impact on learning and 'there was a way to go'. She felt it was achievable given more time. .

33. Ann Flynn works for Ofsted as an EY Inspector and went in having read the full notes. She was a key witness because she'd undertaken inspections on 3 May 2016, 17 May 2016 and 21 July 2016. 18 August and 23 September and 16 November 2016 and 14 December 2016

34. The monitoring visit on 3 May 2017 was effectively cut short because Ms. Donlan said she hadn't received the earlier report or WRNs. Ms Flynn did not feel it was fair to proceed with a full monitoring visit in those circumstances. However, what she saw concerned her. The glass contained within the fire door had been broken. The store room was untidy and disorganised, which in her evidence Ms Donlan accepted she had no real explanation for. The kitchen was messy, because children had been doing a planting activity. The explanation of the untidy boxes was that they contained junk modelling equipment. Ms Flynn noted a toilet roll holder, with the bar out, so that the prongs stood out. Whilst the explanation was that children were always accompanied to the toilet, Ms Donlan accepted that the staff should have picked up on this. Ms Donlan was recorded as saying 'she hadn't had much luck recruiting a deputy'. We were shown an advertisement which sought an experienced deputy who 'liked a challenge', so it was suggested

that Ms Donlan recognised the profile needed for the position which she was actively pursuing.

35. The thrust of the cross examination, was that 17 May 2016 was too early to go back. The WRNs were reissued with a deadline of 16 May 2017. The note records that she was told if this was not complied with, Ofsted might move to enforcement. A new deputy had started on 12 May 2017, so that WRN was met. The actions relating to the quality of teaching and assessments and the action relating to effective risk assessments, were still not met. It was suggested that it would be unrealistic to expect change in so short a time.

36. Mr Donlan had said that it was 'no wonder a child went home dirty' but this was in relation to them being in the muddy play area rather than the coat having been dragged along the ground as observed by Ms. Flynn. She noted a knife in the kitchen, in a drawer at child height. Ms. Flynn accepted that Ms. Donlan was trying to make changes but that she just simply was not 'meeting the mark.'

37. Ms Flynn was concerned about the temperature of the building recorded as 15 degrees. The setting is based in portacabins with electric heaters and it was acknowledged that when the doors were left open, which they often were when the children went outside, then this brought the temperature down. It was suggested that the staff were wearing cardigans not coats. Ms. Donlan said the deputy had told her she never complained about the temperature as alleged. The toolkit note records that the deputy also complained that she had needed to clean all weekend and that there were issues over appropriate staff supervision.

38. Ms Flynn visited again on 23 September 2016, when there were no children in the setting. She remained concerned about the outside area. We were taken to correspondence between Ofsted and Ms Flynn, which she said was intended to be an invitation to come and see what she had achieved and not that the outside was now tidy and safe. Ms Flynn went on 16 November 2016 and 14 December 2016 when the work was still not done.

39. Ms Hilary Boyd highlighted that the levels of support from the local authority amounted to approximately fortnightly visits.

40. Ms. Elaine White was the decision-maker. She cautioned herself that cancellation was a serious step but was concerned about the settings history of compliance that they had not reached a good judgement, changes of management and staff that the quality had gone down not up and negative communication with Ofsted. The lengths of suspension was unusual. We confirmed that she had visited herself and was not just making a decision based on the papers. She had attended with Ms. Flynn on 4 February 2017. . At that point there were no children in this setting.

41. Ms White informed that the Local Authority will not fund places in the setting which has a judgement of 'inadequate'. There are currently no children in the setting.

42. When cross-examined she confirmed that she may be inaccurate to say that the setting had never had a 'good' judgement, as they had in 2005 and 2007. She was taken to the Policy Guidelines, which she interpreted as Ofsted may cancel after one adverse inspection however they must cancel after three. She would not be drawn on precise timescales. The setting could become compliant very quickly but longer term change might take 12 to 18 months to embed.

43. Ms Donlan adopted her witness statement dated 30 December 2016. She set out that she had a professional background in accountancy. Her initial role in the setting was related to payroll and accountancy support. She set out a number of steps she had taken, following the 'inadequate' judgement on 4 December 2015, after which she stepped up to be Manager.

44. The key points of the case, been put in cross examination. Whilst her written evidence challenged a number of the judgements made, particularly around the visits on 3 May and 17 May 2016, in oral evidence Ms Donlan was more willing to acknowledge some of the concerns. The Tribunal gave her the opportunity to explain how she would see conditions working, how she would fund them and the length of time she thought it would take to bring about change.

The Law

45. Schedule 2, Part 1, paragraph 1 of the Childcare (Early Years Register) Regulations 2008 requires that applicants for registration be suitable to provide early years provision, that the applicant will secure that the proposed early years provision meets the Early Years Foundation Stage (EYFS) learning and development requirements, will comply with the EYFS welfare requirements and has carried out an assessment to identify any risks to the health and safety of children for whom provision is to be provided and has appointed an individual to manage the provision which is suitable to care for young children.

46. Where the applicant is a partnership, body corporate or unincorporated association, the applicant must nominate an individual who is a member of the governing body of the applicant to be responsible for dealing with matters relating to the applicant's application for registration and subsequent registration and oversee the management of the early years provision. The individual is referred to as "the nominated individual".

47. Pursuant to section 68(2)(a) Childcare Act 2006 the Respondent asserts that the requirement for the applicant to be an individual who is suitable as a provider of childcare is not met. Further in accordance with section 68(2)(c) CA 2006 the Appellant had failed to meet the learning and development requirements and comply with the welfare requirements.

48. Section 74(1) of the 2006 Act provides a right to appeal to this Tribunal. The legal burden remains vested in Ofsted, which must establish the facts upon which it relies to support cancellation. It must also demonstrate that the decision to cancel the Appellant's registration is proportionate and necessary. The standard of proof to be applied is the balance of probabilities. We must make our decision on the basis of all the evidence available to us at the date of the hearing and we are not restricted to the matters available to Ofsted when the cancellation decision was taken.

49. The powers of the Tribunal can be found in section 74(4) of the 2006 Act. Essentially the Tribunal may either confirm Ofsted's decision to cancel or direct that it shall not have effect. If the Tribunal decides that cancellation should not have effect, it may impose conditions on the appellant's registration, or vary or remove any of the current conditions.

Submissions

50. Mr Toole placed emphasis on the history that this setting had required improvement since 2011. He reminded us to look at the impact on young children and the significance of concerns around planning, observation and improving children's learning. It was clear that the setting had for the last two years been driven by Ms Donlan and had got worse. She had not attended to issues of the premises and her HDB in a timely manner. Whilst such cases often turned on managers being reactive not proactive but then putting it right, this case was unusual in that despite time, including an adjournment of the final hearing from February 2017, she had not done so. He reminded us to look at the suitability of the registered provider which was the committee.

51. Mr Kohnanzad did not shy away from the fact that this had been an underperforming setting. He invited us to look at the failings on a spectrum and to how long it would take the setting to improve. His key points were that inspections of May 2016 were unnecessarily negative. Ofsted had not applied its own policy and allowed for three inadequate inspections. The issue was the suitability of the manager and not a requirement of a 'superstar'. The draft report of May 2017 was accepted and the setting knew what it had to work on. The focus of Ms Donlan then became the Tribunal proceedings, which was understandable even if focusing on getting the setting into order might have been a more sensible choice.

52. He invited us to attach conditions: that the setting should only remain registered providing it employed a manager or deputy manager who had previous experience of assisting or managing an outstanding setting. He further suggested that an ex Local Authority or Ofsted inspector should be present for the first week and thereafter weekly. This would be funded by Ms Donlan and her family.

Conclusion and Reasons

Approach to evidence generally

53. Before turning to our findings we set out our broad assessment of the witnesses who appeared before us. We find that the professional witnesses called by Ofsted provided honest evidence, supported by notes written at the relevant time or soon thereafter. Where they did not know an answer or were unsure they were candid in making that clear. They were all prepared to acknowledge improvements made by the setting, and to make concessions where appropriate. They gave time for change to take place. We consider that they all provided balanced, reliable evidence.

54. Ms Donlan spoke with sensitivity and concern about the children in her care and we noted had some support from parents. Mr Kohanzad probed every point he reasonably could in the case but this did not ultimately lead us to conclude that with more time and conditions, the setting could be complaint and move forward. We kept in mind that some concerns of themselves were minor, others major but overall it added up to a consistent pattern of failing to consistently drive forward sustainable change.

55. Overall, Ms Donlan's evidence was inconsistent with no sense of urgency to make the necessary changes to bring the setting into compliance. At many points in the proceedings she tried to shift the focus, for example querying why she had to produce an HDB. She did not sufficiently acknowledge that she was the person driving the change. The committee could have been changed. Professional support could have been brought in. In closing submissions, it inevitably had to be recognised on her behalf that she had not focused on the right things. She allowed herself to be diverted. We note that she had a long involvement with the setting since 2007, so should have known about the minimum standards required. At no point did we see clear evidence that she was on top of bringing the setting into compliance. It was submitted that it was likely the setting had been compliant between the end of 2015 till shortly before the December 2016 inspection. We find no clear evidence overall, taking account of the history and the lack of any effective committee, that would allow us to make that inference.

56. The Appellants are a committee. Apart from an unsigned statement which in general terms was critical of Ofsted, there appeared to have been no active involvement by Mrs Mackay in the setting or in these proceedings. That is concerning given her important position as the 'nominated individual'. Over a year ago Ms Donlan spoke of recruiting new committee members but that has not happened.

57. In our experience an exceptional amount of Local Authority support was given to the setting. Ms Donlan fairly acknowledged that not all Local Authorities could offer this and that she had not had to pay for it. We further note that she had had support from the Pre-School Learning Service.

Findings on key concerns identified in Scott schedule:

58. We remind ourselves that the Scott Schedule is an aid. It is not a list of charges or allegations. We focused on events December 2015 but the history,

we find is relevant. It gives the context and allowed us to examine themes in the evidence overall. The history since 2011 is of a setting that was not compliant.

59. On an investigation visit on 10 August 2011, the setting was not managed by a suitably qualified person. Mrs Mackay could not manage the setting since a Level 3 qualification was the minimum requirement. It was partly accepted that the safeguarding policy was not up to date. Management and safeguarding are recurring themes

60. On 19 March 2013 there was a full inspection. The inspector identified concerns around the programme of activities and that there were no suitable arrangements to ensure each child was covering all areas of learning and development. We note that was prior to the change in the EYFS 2014 which placed greater emphasis on development. Ms Donlan sought to rely on those changes as an explanation for non-compliance, but the setting was not compliant even before they came into force.

61. What appeared to be happening in 2015 was that Ms Mackay had stepped back for personal reasons and they relied on the manager. This led to a failed inspection in December 2015. Ms Donlan accepted that safeguarding was inadequate, that leaders had not followed appropriate recruitment and vetting procedures and the programme for professional supervision didn't focus sufficiently on improving effectiveness, again all themes. We conclude that the concerns raised all came down to management. Ms Donlan admitted the weaknesses in the self-evaluation process which meant that they had not identified accurate priorities for improvement.

62. The concern that there was no first-aid box accessible at all times, could have been easily remedied. That might be an example of what we were invited to see as the lower end of the spectrum. What was more concerning was the lack of planning to train up the required number of paediatric first aiders, rather than just the manager being qualified in this area. The failure to plan as to what would happen in a medical emergency is just one example of a failure to anticipate problems or think things through.

63. During the course of the hearing, the findings of the inspection on 29 March 2016 were largely accepted. There was no capable and knowledgeable deputy manager in place. It was accepted that supervision arrangements were not accurate and staff didn't always ensure, that children were appropriately supported when they became upset or distracted, although Ms Donlan narrowed this to transition time such as home time. Ultimately Ms Donlan accepted the concern around the quality of teaching and learning, providing the concern was modified to that it had not been 'sufficiently improved to a desired standard. A particular concern was around a child who had identified Special Needs. A picture starts to build up of a committee who were not taking sufficient steps to bring the setting into minimum compliance.

64. We remind ourselves that issues of premises are usually the easiest thing to remedy. Ms Flynn inspected on 3 May 2016. We take the point that 10.10am was very early to tell Ms Donlan that she had not met the requirements, were satisfied that she was merely drawing attention at that point to an untidy disorganised and not very clean premises. Ms Donlan could give us no real explanation of why bleach should be left under the kitchen sink, why the office was in such a mess other than a staff member who was in the middle of cleaning it had gone home and that the member of staff who accompanied the child to the toilet should have seen or heard that the toilet roll holder had fallen. They should have noted that the toilet roll was at a child's height and dangerous with two prongs sticking out.

65. Mr Kohanzad suggested whilst Ms Flynn was telling the truth of what she saw, in the light of the history, she had gone in, in effect, looking for evidence that was negative. That is a possibility we reject. For example, the concern about the temperature, was again noted as a concern on the next visit on 17 May 2016 .

66. On our analysis Ms Donlan had had a clear warning on 3 May 2016. It is therefore particularly concerning that when Ms Flynn returned on 17 May 2017 she was still finding very basic issues. There was we accept not sufficient clean bedding. A large knife had been left in the kitchen drawer. Our concern is that this was not a sudden turn of events and that the Committee appeared to have taken no active steps to remedy this. The new Deputy Manager who told Ms Flynn that she had spent the weekend cleaning and that the setting was cold, clearly had concerns about supervisions and risk assessments. Ms Donlan praised her efficiency and knowledge said they got on well. We see no reason that she would voice these concerns, if they were not what she'd seen and observed.

67. This fits with the points accepted by Ms Donlan, namely that the resources were not laid out properly. It was partially accepted that there was a lack of planning although it was done day-to-day. The overall picture is of a changing staff group, against a lack of management.

68. Clearly Ms Donlan was looking to recruit an experienced deputy on 3 May 2016, even if she did not make this clear to Ms Flynn. That point is not material as the deputy did not stay, citing a 'bad back' as a reason for not returning at any point. Some improvements were made for example transferring to an online tracking and assessment program, conducting staff supervisions and the new deputy acknowledged there was clearly more to do on safeguarding. The student had read a safeguarding policy on 3 May 2016 but when questioned didn't appear to fully understand it.

69. Ms Flynn returned on 21 July 2016. For reasons that have not really been explained only Ms Donlan was in place with two children. We can accept that strictly the setting was 'ratioed' but when documentation was requested Ms Donlan could not leave the children. This was another example of where when pressed she readily accepted that the key document should have been easily accessible. Issues of trailing wires, empty drink cans in bins with no lid

on, sensory fibre-optic lights on the floor were examined in some detail. Whilst individually they may not be the most serious issues, taken cumulatively they all add up to a picture of disorganisation.

70. The issue that led to the suspension was a further visit by Ms Flynn on 18 August 2016. The photographs make clear why there was concern with clear hazards such as rubble and loose pieces of wood containing nails. We were entirely unpersuaded by Ms Donlan's answers that the weather or some other reason such as getting a 'man and van' prevented her sorting this out.

71. The decision of Judge Khan dated 16 September 2016 sets out the concerns and the reasons for upholding the suspension. We drew attention in particular to paragraph 29, which again should have been another warning to Ms Donlan to sort out the state of the outside of the premises to produce an HDB. We note she took a very defensive stance in relation to her health, stating that it was discriminatory to ask about her health

72. Additional visits were made by Ms Flynn on 16 November 2016 and 14 December 2016. We accept they were made in part to monitor the setting which remained suspended but also because Ms Donlan had contacted Ofsted. We accept that it was reasonable for Ofsted to have expected the premises to have been made safe by this stage. A range of reasons were offered relating to the weather, family holidays and family commitments. Overall we concluded this points to a lack of strategic thinking as to how problems were going to be sorted out and the setting to be brought into compliance. Miss Donlan knew or should have known that time was running against her by this stage.

Early Years minimum requirements:

73. We have reminded ourselves at all times we are dealing with the EYFS which are a minimum requirement. The setting took in a number of vulnerable children who were supported by local government funding. Some parents spoke positively to the Inspectors but they may not have fully appreciated what the minimum requirements were. Ofsted acknowledged that certain individuals working at the setting tried to give a good standard of care and this was no doubt appreciated by parents.

74. This is not a case about physical harm but the potential harm caused by a fundamental failure over a period of time to consistently meet children's welfare, learning and development needs. Without an effectively embedded key person system, children would struggle to form dependable and secure attachments to staff. Staffing was one of the key themes.

Suitability of Committee to be registered

75. We find that none of the Committee are suitable to be registered. They failed to adequately supervise, monitor and ensure the setting met the EYFS welfare and learning and development requirements. They demonstrated a lack of strategic analysis and drive to bring the setting into

compliance. We accept the analysis ultimately offered by Ofsted that they have a role to point out issues but that even that did not trigger any sufficient action from the committee.

Proportionality

76. In considering whether the sanction imposed by Ofsted was proportionate we have had regard to the duration and breadth of the concerns and the fact that many have been ongoing over time. The failings are persistent and systemic, and go to the ability of the Appellants to provide a consistently safe and secure setting for children, which facilitates their learning and development. We have also taken into account the assistance provided by the LA over a sustained period to support, advise and provide training to the setting. Whilst the Appellant has sought to address some weaknesses and make improvements, the approach has been reactive and not proactive. The improvements have not translated into sustainable good practice.

77. We do not consider that conditions are appropriate or practicable when the Appellant has already been provided with numerous opportunities and help to comply with actions in order to evidence sustainable good childcare practice, and they have demonstrated their unsuitability. In response to our questions, Ms Donlan referred to hiring an ex Ofsted Inspector and a new manager which she then changed to deputy manager. For the first time she mentioned a large sum of money that her father would make available, without any explanation as to why this is not been done before.

78. When all these matters are considered cumulatively we conclude that the sanction imposed was and is appropriate and proportionate.

Decision

The appeal is dismissed.

The decision of Ofsted dated 2 August 2016 to cancel the Appellant's registration is confirmed.

**Judge Melanie Lewis
Care Standards
First-tier Tribunal (Health Education and Social Care)**

Date Issued: 4 May 2017