

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN)
AND FAMILY SERVICES,)
)
Petitioner,)
)
vs.) Case No. 99-0264
)
PLAY CORNER DAY CARE, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and on June 28, 1999, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes. The hearing location was the Yates Building, City Hall Annex, Room 431, 231 East Forsyth Street, Jacksonville, Florida. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Roger L. D. Williams, Esquire
Department of Children
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Post Office Box 2417
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For Respondent: Joseph B. Stokes, III, Esquire
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STATEMENT OF THE ISSUE

Should Department of Children and Family Services, Petitioner (the Department), impose an administrative fine of \$1,000 against Play Corner Day Care, Inc., Respondent (Play Corner), for violating provisions within Rule 65C-22.002, Florida Administrative Code?

PRELIMINARY STATEMENT

On December 10, 1998, the Department issued an administrative complaint against Play Corner in the person of Shirley Ann Dugger, facility operator. In pertinent part the administrative complaint sought to impose a \$1,000 administrative fine in that:

3. Respondent committed a violation, FAC Rule [sic] 65C-22.002(9)(b)(1), 65C-22.002(4)(c)(2), and 65C-22.004(3)(d)(2), in that: During a complaint investigation on 11-24-98, it was confirmed that on 11-19-98, a child aged two (2) years, sustained serious injury to her spleen as a result of a fall from an elevated playdeck. The playdeck was not suitable for the child's age and development. During that time, lack of direct supervision appropriate to the child's age and area of play resulted in an injury to the child. Further, the staff failed to immediately notify the parents of this serious accident.

On January 7, 1999, Play Corner filed a written response to the administrative complaint, essentially denying the allegations in that complaint. Consequently, the case was forwarded to the Division of Administrative Hearings for an assignment of an

administrative law judge to conduct a hearing to resolve material disputes of fact, and the hearing ensued.

The Department presented Janet McMahan and Gloria Crosby as its witnesses. Department's Exhibits numbered 1 and 2 were admitted as Petitioner's exhibits. Play Corner presented Shirley Ann Dugger, D.R., Heather Lynn Prescott, and Maurice Murray, Jr., as its witnesses. Play Corner Exhibits numbered 1 and 2 were admitted as Respondent's exhibits.

Official recognition was made of Chapter 65C-22, Florida Administrative Code.

On July 14, 1999, a hearing transcript was filed. This meant that proposed recommended orders were due on July 26, 1999. Play Corner, with the Department's agreement, asked that the time for filing proposed recommended orders be extended until August 2, 1999. Counsel for the parties were orally informed that the motion to extend the time for filing the proposed recommended orders was granted. Both parties submitted proposed recommended orders. The proposed recommended orders have been considered in preparing the recommended order.

FINDINGS OF FACT

1. In accordance with Chapter 402, Florida Statutes, and rules adopted pursuant to that statute, the Department licenses child care facilities and has the authority to impose discipline against the license holders.

2. Play Corner is a licensed child care facility owned and operated by Ms. Shirley Ann Dugger. Ms. Dugger purchased Play Corner on April 1, 1994, from the previous owners. The facility is located in Macclenny, Florida.

3. The outside playground at the facility is divided into several areas. One area is for school-age kids above the age of five. Another area is for children under two years old. That area has small plastic portable play equipment. The third area is for two-year-olds through five-year-olds. The equipment in that latter area has two swing sets, a merry-go-round, and an elevated playdeck with a slide. The slide attached to the playdeck comes off the front. The playdeck has a ladder that allows the children to climb up to the platform. The first level on that playdeck is approximately three feet from the ground. It is the playdeck provided for the two- to five-year-olds that is at issue.

4. The playground equipment for the two- to five-year-olds with the elevated platform and attached slide was purchased sometime in 1996. Before purchasing that equipment Ms. Dugger consulted an inspector with the day care licensing agency. Specifically, Ms. Dugger asked Ms. Deborah Jones about any existing guidelines from the regulatory agency concerning appropriateness of playground equipment for various ages of children who would utilize the equipment. Ms. Jones reported that there were no set guidelines for determining age

appropriateness of playground equipment. Ms. Jones referred Ms. Dugger to Mr. Maurice Murray, Jr., who at that time was a safety inspector for the licensing agency. Ms. Murray reiterated the comments made by Ms. Jones to the effect that there were no guidelines for determining the age appropriateness of playground equipment.

5. In addition to consulting with employees of the licensing agency, Ms. Dugger spoke with persons at two day care centers in Jacksonville, Florida, concerning the type of playground equipment those facilities had for two- to five-year-olds. Upon that inquiry Ms. Dugger was told that wooden swings and slides were "the best thing," because of durability.

6. Following the contacts with licensing agency employees and day care center personnel, the equipment at issue was purchased.

7. On September 15, 1998, and again on October 29, 1998, the Department performed an inspection at Play Corner. An inspection checklist was completed on each visit. Among the entries on the checklist was the outdoor play area. On both occasions the block was checked, indicating compliance with the expectations in Rule 65C-22.002(4)(c), Florida Administrative Code. Those inspections did not include observing children at play on the equipment in the outdoor play area. Ms. Janet McMahan performed the inspections. Ms. McMahan is a family

services counselor for the child day care licensure unit within the Department. In conversation she asked the director for Play Corner about the use of the various playground areas. The discussion did not extend to whether two-year-olds would be allowed to use the area in which the playdeck and slide were found.

8. On November 19, 1998, H.S. was a child receiving care at Play Corner. On November 19, 1998, she was two years old. On that date, she arrived at the facility shortly after 6:00 a.m. It was typical for the child to be left at the day care center around that time.

9. H.S. was familiar with the playground equipment for two- to five-year-olds, to include the playdeck and slide. Her teacher D.R. had never observed H.S. experiencing problems utilizing that piece of playground equipment. H.S. and other two-year-olds routinely used the equipment.

10. Around 9:40 a.m., on November 19, 1998, D.R. was observing the two-year-olds in the outside play area designated for that age group. Ten children were in her care at that time, within the limits of appropriate ratios of teachers to children. The children were at various places in the play area. H.S. had been observed standing on the playdeck at the three-foot elevation above the ground. D.R. briefly turned away from H.S. to remove another child to a picnic table to be placed in "time-out" for misconduct. After seating that child at the

picnic table, D.R. heard H.S. crying. When D.R. reached H.S., the child was on the ground in front of the playdeck in the area of the ladder. D.R. had not seen the child fall. The time that transpired from the moment at which H.S. had been seen standing on the playdeck to finding her on the ground was a brief interval.

11. On the date in question D.R. moved about so that she could observe the children at play and provide direct supervision. Not unexpectedly, D.R. could not observe all children and provide supervision to them when directing her attention to the disorderly child who had to be placed in "time-out."

12. When D.R. reached H.S., she picked the child up and examined her for any bruises or other marks and found no evidence. The child cried for a couple of minutes. D.R. took her over to the picnic table where the child became sleepy and laid down. H.S. then fell asleep. It was not uncommon for H.S. to fall asleep in the morning, even while she was eating in her high-chair. However, those instances of falling asleep in the high-chair were not in association with an accidental fall. D.R. was not concerned about H.S.'s sleepy condition following the fall in that D.R. perceived that H.S. normally fell asleep around that time.

13. Following the fall, when H.S. was taken inside the facility, she did not eat lunch because she was still sleepy.

About an hour after lunch, H.S. began to whine in her sleep and D.R. thought something was wrong. D.R. woke H.S. up and H.S. said she was hungry. D.R. gave H.S. a little snack to eat. H.S. stopped complaining after she had her snack.

14. In the afternoon on that day, D.R. took the two-year-olds outside again following the nap period for the two-year-olds, but H.S. remained inside to allow the child to be monitored in her demeanor. The child was kept inside "to just keep an eye on her." H.S. was then taken to the nursery area and examined for marks and bruises and her temperature was checked. H.S. played with the children in the nursery after being left in that area.

15. The child was checked a third time before being picked up by her mother. This check was made around 2:30 p.m., by Ms. Heather Lynn Prescott, an employee at Play Corner. Ms. Prescott did not see any marks on H.S.

16. Around 4:30 p.m. in the afternoon when H.S.'s mother picked the child up, D.R. told the mother about the child's fall.

17. As a result of the injuries H.S. sustained in the fall, she had to be hospitalized.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over this subject matter and the parties in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

19. The Department has licensed Play Corner as a child care facility. See Section 402.308, Florida Statutes.

20. Section 402.310, Florida Statutes, allows the Department to impose discipline against a day care license to include the imposition of an administrative fine for violation of rules adopted in accordance with provisions within Chapter 402, Florida Statutes. The limits upon the imposition of fines is \$100 per violation per day, unless the violation could or does cause death or serious harm, in which case the fine may not exceed \$500 per violation per day. The appropriate disciplinary action to be taken for a violation is pursuant to factors set forth in Section 402.310, Florida Statutes.

21. To prevail in its disciplinary action the Department must prove the alleged violations in the administrative complaint by clear and convincing evidence.

22. Rule 65C-22.002(9)(b)1, Florida Administrative Code, states:

A child care facility shall provide equipment and play activity suitable to each child's age and development.

The Department has provided no further explanation concerning the determination of equipment suitable to a child's age and development. It is a matter of conjecture on the part of the Department and licensed day care facilities to determine compliance. Ms. Dugger, as owner/operator for Play Corner, made reasonable attempts at determining the suitability of the

playdeck in question for use by two-year-olds, among other age groups. Until the incident there is no indication in the record that H.S. or other two-year-olds had any difficulty in using the equipment. H.S.'s accident does not per se prove the unsuitability of the equipment for use by a child of her age and development. In summary, the Department has not presented clear and convincing evidence that Rule 65C-22.002(9)(b)1, Florida Administrative Code, has been violated.

23. Rule 65C-22.002(4)(c)2, Florida Administrative Code, states:

During outdoor play, personnel must situate themselves in the outdoor play area so that all children can be observed and direct supervision provided.

The specific expectations of the rule concerning the ability to observe all children and to directly supervise those children are not further explained by the Department, by statute, rule, or policy statement.

24. On the date the accident occurred D.R. was in a position to observe and directly supervise the children in her charge. It would not be a reasonable construction to read the rule to require observation and direct supervision of every child every instant. The expectation that the children can be observed denotes an ability to observe. It does not entail constant observation. The concept of providing direct supervision does not call for supervision directed at all times. The time it took D.R. to attend the discipline of one child by diverting her

attention from H.S. is not found to be a failure by D.R. to observe and directly supervise H.S. in violation of the expectations in the rule. In summary, the Department has failed to present clear and convincing evidence that Play Corner violated Rule 65C-22.002(4)(c)2, Florida Administrative Code.

25. Rule 65C-22.004(3)(d)2, Florida Administrative Code, states:

Custodial parents or legal guardian shall be notified immediately in the event of any serious illness, accident, injury, or emergency to their child and their specific instructions regarding action be taken under such circumstances shall be obtained and followed. . . .

26. No more specific explanation is made by statute, rule, or policy statement concerning the definition of a serious accident or injury as that explanation would pertain to this case. Nonetheless, H.S.'s reaction following her fall in which she cried, was sleepy, was restless in her sleep, coupled with the response by personnel at Play Corner in caring for the child in a manner that was not routine demonstrates that the accident was serious, even in the absence of outward signs of injury to the child. Consequently, immediate notification should have been made to the parents or legal guardians and was not made. Clear and convincing evidence was provided that Play Corner violated Rule 65C-22.004(3)(d)2, Florida Administrative Code.

27. The actual harm to H.S. was serious.

28. In accordance with Section 402.310(1), Florida Statutes, a \$250 administration fine is appropriate.

RECOMMENDATION

Upon consideration of the facts found and the conclusions reached, it is

RECOMMENDED:

That a final order be entered which dismisses the alleged violations of Rule 65C-22.002(9)(b)1, Florida Administrative Code, and Rule 65C-22.002(4)(c)2, Florida Administrative Code, and finds a violation of Rule 65C-22.004(3)(d)2, Florida Administrative Code, and for such violation imposes a \$250 fine in accordance with Section 402.310(1), Florida Statutes.

DONE AND ENTERED this 10th day of September, 1999, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of September, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.