STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner, vs. NORWOOD ELEMENTARY AFTER SCHOOL PROGRAM, Respondent.	)	Case No. 02-1664

CORRECTED RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on June 28, 2002, by means of a video teleconference link between Miami and Tallahassee, Florida. The hearing was held before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES:

For Petitioner: Rosmarie Rinaldi, Esquire
Department of Children and Family Services
401 Northwest Second Avenue
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Miami, Florida 33128

For Respondent: Teresa Ragatz, Esquire
Isicoff, Ragatz & Koenigsberg, P.A.
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STATEMENT OF THE ISSUE

The issue in this case concerns whether the Respondent,[1] Norwood Elementary After School Program, should be fined $200.00 for violation of licensing standards applicable to childcare facilities as alleged in the Charging Document dated December 20, 2001.

PRELIMINARY STATEMENT

By letter dated December 20, 2001, the Petitioner, Department of Children and Family Services, notified the YWCA of Greater Miami, the operator of the Norwood Elementary After School Program, of its intention to impose a civil penalty in the amount of $200.00 for alleged violation of the minimum standards, rules, and regulations for the operation of a child care facility. The Respondent, Norwood Elementary After School Program, timely requested a hearing pursuant to Sections 120.569 and 120.57, Florida Statutes, on the Department's proposed action. On April 25, 2002, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct the hearing.

The hearing was held on June 28, 2002. The Petitioner presented the testimony of Linda Reiling, a licensing counselor employed by the Petitioner, and the Petitioner also offered two exhibits, both of which were received in evidence. The Respondent presented the testimony of Eileen Maloney-Simon,

Executive Director of the YWCA of Greater Miami, Patricia Williams, Director of the YWCA's after school programs and Rosalind Dunwoody, on-site Director of the Norwood Elementary After School Program. The Respondent also offered two exhibits, both of which were received in evidence.

The transcript of the final hearing was filed on August 8, 2002. At the hearing, the parties agreed that proposed recommended orders would be submitted within twenty-one days of the filing of the transcript. Proposed recommended orders were timely submitted by both parties. Those documents have been carefully considered during the preparation of this Recommended Order.[2]

FINDINGS OF FACT

1. Norwood Elementary School is a public elementary school located in Miami-Dade County, Florida. The Norwood Elementary After School Program is a childcare facility licensed by the Petitioner.

2. The Norwood Elementary After School Program is operated by the YWCA of Greater Miami. The YWCA of Greater Miami has a long history in child care in the Miami-Dade County community. The YWCA of Greater Miami operates seven early childhood centers, three of which are nationally accredited, and 18 after school sites, caring for over 2,500 children every day.

3. The Norwood Elementary After School Program is a center for children with special needs. The Norwood Elementary After School Program provides services to children who have various disabilities, including children who are profoundly handicapped, trainable handicapped, and severely mentally retarded. Eighty percent of the staff of the Norwood Elementary After School Program is employed by Miami-Dade County Public Schools and are individuals who work with the special needs children during the day as well as after school. These are individuals who are specially trained to work with special needs children. These staff members know the children as well as their parents, and the children know them. Rosalind Dunwoody, the on-site director of the Norwood Elementary After School Program is an employee of Dade County Public Schools. She works as a paraprofessional at Norwood Elementary during the school day and for the Norwood Elementary After School Program in the afternoons.

4. D.D. is a four-year-old boy who is in the special needs program at Norwood Elementary during the day and also is in the Norwood Elementary After School Program. D.D. is in the profoundly retarded classroom at Norwood Elementary and his behavior is impulsive. For his own safety, when he is being fed or when he is sitting to play or color or do some other task, D.D. is secured in his chair by a seat belt. It is a regular wooden child's chair with a seatbelt, similar to the seatbelts

used on airplanes, that fastens around the child's hips, waist, or lower abdomen. Neither the child's arms nor legs are restrained. D.D. uses a similar chair during the daytime program at Norwood Elementary and he is able to buckle and unbuckle the seatbelt himself, usually buckling himself in when he sits in the chair to be fed. Such chairs are utilized for similarly disabled children when they are sitting to eat or to perform some task. The purpose of the chair is to ensure the safety of the child. D.D.'s parents have provided Norwood with written permission to buckle D.D. into the chair for his safety. D.D. never has been buckled in his chair for disciplinary purposes or for the purpose of protecting other children in the program.

5. On April 25, 2001, Ms. Reiling, the Petitioner's licensing counselor responsible for the Norwood Elementary After School Program, received a complaint from the mother of another special needs child to the effect that her daughter had been bitten at the Norwood After School Program by D.D. On April 26, 2001, the day after she received the complaint, Ms. Reiling visited the site and she observed D.D. in his chair with the seatbelt buckled. Ms. Reiling suggested to Ms. Dunwoody, the Director of Norwood, that ambulatory children should be separated from non-ambulatory children and that D.D. should not be strapped to a chair. That same day, Ms. Reiling prepared an

inspection report in which she noted: “Children must not be strapped to chair for discipline.” The report prepared by Ms. Reiling also noted that, in response to Ms. Reiling’s suggestions, Ms. Dunwoody explained that the chair was not being used for disciplinary purposes. Ms. Reiling’s report states: “Ms. Dunwoody states child not put in chair for discipline.”

6. Subsequent to her April 26, 2001 inspection, Ms. Reiling returned to Norwood on May 16, 2001, and on May 30, 2001. On both of these visits, Ms. Reiling noted that, while the ambulatory children were separated from the non-ambulatory children as she had suggested, D.D. was buckled in his chair. When she again mentioned that she did not believe it was good practice to buckle D.D. into his chair, the staff explained that D.D. was buckled in his chair because they were about to feed him.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.569 and 120,57(1), Florida Statutes.

8. Sections 402.301-402.319, Florida Statutes, establish statewide minimum standards for the protection of children in child care facilities, the legislative intent being “to protect the health, safety and well-being of the children of the state. . . .” Section 402.301. In addition, Section

402.301(7), Florida Statutes, provides that it is "the policy of the state to encourage child care providers to serve children with disabilities." Norwood Elementary After School Program, a child care facility that serves children with disabilities, is licensed by the Department. Norwood After School Program has a responsibility to take the reasonable steps necessary to ensure the health and safety of the children it serves.

9. Section 402.310(1)(a), Florida Statutes, pursuant to which the Department seeks to impose a fine in this case, provides that the Department may impose "an administrative fine not to exceed $100 per day, for the violation of any provision of ss. 402.301-402.319." In this case, the Department contends that Norwood violated Section 402.305(12)1., Florida Statutes, which states that "[c]hildren shall not be subjected to discipline which is severe, humiliating, or frightening." The Department contends that the buckling of D.D. into his chair constituted discipline and that such discipline was severe, humiliating, and/or frightening.

10. In seeking to impose an administrative fine upon a child care facility for violating licensing standards, the Department has the burden of establishing the accused child care facility's guilt of the alleged violation. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence is required. See Department of Banking and

Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996) ("[A]n administrative fine deprives the person fined of substantial rights in property. Administrative fines . . . are generally punitive in nature . . . Because the imposition of administrative fines . . . are penal in nature and implicate significant property rights, the extension of the clear and convincing evidence standard to justify the imposition of such a fine is warranted"); Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute"). "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting with approval, Slomowitz v. Walker, 429 So. 2d 797. 800 (Fla. 4th DCA 1983).

11. The Department has not met its burden of proving, by clear and convincing evidence, that the Norwood Elementary After

School Program subjected D.D. to discipline, in the first instance, and certainly has not met its burden of proving that the Norwood Elementary After School Program subjected D.D. to discipline that was severe, humiliating, or frightening. Rather, the greater weight of the evidence is to the effect that the buckling of D.D. into his chair was never done for any disciplinary purpose, but was solely for D.D.'s own safety -- a safety measure that was taken with the written permission of D.D.'s parents. A violation of Section 402.305(12)1., Florida Statutes, has not been established.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department issue a final order dismissing the charges against the Respondent.

DONE AND ENTERED this 4th day of October, 2002, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of October, 2002.

ENDNOTES

1/ The Department of Children and Family Services initiated this proceeding by notifying the YWCA of Greater Miami that it intended to impose a fine on the Norwood Elementary After School Program. Under these circumstances, the Department bears the burden of proof and should be designated as the Petitioner. The style of this matter has been corrected to reflect the correct status of the parties. Throughout this Recommended Order, the Department of Children and Family Services is sometimes referred to as "the Petitioner" or "the Department," and the Norwood Elementary After School Program is sometimes referred to as "the Respondent."

2/ The proposed recommended order submitted by the Respondent is, for the most part, consistent with the findings and conclusions reached by the administrative law judge. Substantial portions of the Respondent's proposed recommended order have been incorporated into this Recommended Order.

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.