STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
Petitioner,	)	
vs.	)	Case No. 03-1228PL
RASHIDA ALLI,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 9, 2003, by video teleconference between sites in Orlando and Tallahassee, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Richard Cato, Esquire
Department of Children
and Family Services
400 West Robinson Street
Suite S-1106
Orlando, Florida 32801-1782

For Respondent: L. Todd Budgen, Esquire
Budgen Law Firm, P.L.
1800 Pembrook Drive, Suite 300
Orlando, Florida 32810

STATEMENT OF THE ISSUE

The issue is whether Respondent's license to operate a family day care home should be revoked.

PRELIMINARY STATEMENT

By certified letter dated February 28, 2003, the Department of Children and Family Services (Department) informed Respondent that her license to operate a family day care home was being revoked. The proposed revocation was based upon the results of the Department's inspection of Respondent's home on February 27, 2003, as well as Respondent's prior history of noncompliance with the applicable licensing statutes and rules.

Respondent disputed the facts underlying Department's decision, and on March 20, 2003, she timely requested a formal administrative hearing. On April 3, 2003, the Department referred the matter to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct the hearing requested by Respondent.[1]

The final hearing was scheduled for and held on May 9, 2003. At the hearing, the Department presented the testimony of Brandi Blanchard, a family service counselor in the Department's day care licensing division, and Patricia Richardson, a supervisor in the Department's day care licensing division. The Department's Exhibits A, C, D, and E were received into evidence. Exhibit B was offered but not received.[2]

Respondent testified in her own behalf at the hearing and also presented the testimony of her neighbor, Annette Rodgers. Respondent proffered the testimony of Wesley McDonald, a construction worker who had done work at Ms. Rodgers' home and would have testified as to the fencing in Ms. Rodgers' backyard. Mr. McDonald was not permitted to testify because he had not been disclosed by Respondent as a potential witness in advance of the hearing and because his testimony would have been repetitious of that of Respondent's other witnesses. See Binger v. King Pest Control, 401 So. 2d 1310, 1313-14 (Fla. 1981); Section 120.569(2)(g), Florida Statutes. Respondent's Exhibits 1-A through 1-F and 2 were received into evidence.[3]

No Transcript of the hearing was filed with the Division. The original exhibits introduced by Respondent at the hearing were filed with the Division on May 22, 2003. The original exhibits introduced by the Department were filed with the Division on May 29, 2003.

The parties were initially given ten days from the date of the hearing to file their proposed recommended orders (PROs). However, the parties subsequently requested and were granted an extension of time through May 23, 2003, to file their PROs. As a result, the parties waived the deadline for entry of this Recommended Order. See Rule 28-106.216(2), Florida Administrative Code. The parties' PROs were timely filed and

were given due consideration by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

A. Parties

1. The Department is the state agency responsible for licensing and regulating child care facilities, including family day care homes.

2. The Department routinely conducts inspections of licensed family day care homes to determine whether the home is in compliance with the applicable statutes and rules. Any problems found during the inspection are noted on a report which is provided to the home's operator immediately following the inspection. When appropriate, the inspection report provides a time frame within which the problems must be corrected.

3. Regular inspections are conducted approximately twice a year. More frequent inspections -- monthly or every six weeks -- are conducted on family day care homes which have a provisional license rather than a standard license.

4. The Department also conducts inspections in response to complaints it receives, and it has the authority to inspect family day care homes at any time with or without notice.

5. Respondent is the owner and operator of a licensed family day care home located at 1218 Jordan Avenue in Orlando, Florida (hereafter "Respondent's facility" or "the facility"). Respondent and her husband reside at that address as well.

6. Respondent has operated day care homes in Florida since 1992, and she has been involved in child care for approximately 21 years. As a result, she is or should be familiar with the rules regulating family day care homes.

7. Respondent keeps children in the back portion of her home. The children also play in Respondent's backyard, which is enclosed by an approximately six-foot high wooden fence.

8. A wooden gate in the fence connects Respondent's backyard to the backyard of the house immediately behind Respondent's home. That house has been rented by Annette Rodgers since November 2002.

9. Respondent does not have a pool in her yard. Ms. Rodgers' yard does have a pool, which at the time of the Department's February 27, 2003 inspection (discussed below), was only partially filled with water. Ms. Rodgers' pool is not visible from Respondent's back yard because of the wooden fence and gate.

10. The photographs and videotape received into evidence show that Ms. Rodgers' pool is now completely enclosed by a series of fences.[4] The evidence does not clearly and

convincingly establish that the fences were not in place on February 27, 2003. Indeed, the weeds and high grass which can be seen along the base of and around the posts of the chain-link fence and the discoloration on some of the fence posts indicate that at least that fence has been in place for quite some time.[5]

B. Previous Inspections of Respondent's Facility and Actions Taken by the Department

11. Respondent's facility was inspected on May 28, June 14, and September 30, 2002. Several areas of noncompliance were identified during each of those inspections, including inadequate supervision of children, unsafe storage of chemicals, evidence of roaches in the home, and incomplete enrollment and health records for the children at the home. On each occasion, Respondent was given a period of time within which to correct the areas of noncompliance.

12. The inadequate supervision for which Respondent was cited in June 14, 2002, involved several children playing unsupervised in Respondent's carport area, which has access to the street; several children playing in the backyard under the "supervision" of Respondent's mother, who was not an authorized caregiver; and several children playing unsupervised on the porch area in the vicinity of tools and small screws.

13. The Department issued Respondent a provisional license on October 28, 2002, presumably as part of the license renewal

process. The provisional license was based upon Respondent's history of noncompliance with the Department's minimum standards, and it was valid through April 2, 2003, unless Respondent applied for an received a change in license status (which she apparently did not) or "if the license is suspended or revoked by the Department."

14. A provisional license is issued where the Department has continued concerns regarding the day care home's compliance with the applicable statutes and rules. A provisional license is issued in lieu of denying a license renewal or suspending or revoking the home's license. A provisional license gives the licensee an opportunity to correct the areas of noncompliance, and because such homes are inspected more frequently, the Department has an opportunity to monitor the licensee's progress.

15. On October 29, 2002, Respondent was assessed an administrative fine of $100.00 based upon deficiencies identified during the May 28 and June 14, 2002, inspections. The fine was based primarily upon the incident described above involving inadequate supervision of the children at the home.

16. Respondent apparently did not contest the administrative fine or the issuance of the provisional license rather than a standard license.

17. Despite the provisional license and the administrative fine, the Department's inspections continued to identify areas of noncompliance at Respondent's facility.

18. For example, the November 14, 2002, inspection identified "evidence of rodents/vermin in the home" as well as incomplete enrollment and immunization records for the children in the home. The December 18, 2002, inspection identified these same deficiencies, including "live roaches in the children's area and the kitchen," as well as the storage of plastic shopping bags and chemicals which can pose dangers to children in an unlocked cabinet accessible to the children.

19. These violations were the same as or similar to those for which Respondent had been previously cited and which led to the imposition of the administrative fine and issuance of the provisional license.

20. The Department did not take immediate action to suspend or revoke Respondent's license based upon the results of the November 14 and December 18, 2002, inspections. Instead, the Department continued to give Respondent an opportunity to bring her home into compliance with the minimum standards in the Department's licensing rules and statutes.

C. Inspection of Respondent's Facility on February 27, 2003

21. The Department next inspected Respondent's facility on February 27, 2003. That inspection was conducted by Department employee Brandi Blanchard.

22. Ms. Blanchard had been responsible for inspecting Respondent's facility since at least September 2002, so she was familiar with the layout of the facility and its history of noncompliance. Respondent testified that Ms. Blanchard, unlike the prior inspector, had been "very good to her."

23. Ms. Blanchard arrived at Respondent's facility by car between 8:30 a.m. and 8:45 a.m. As she arrived, Respondent was pulling her car into the driveway/carport at the facility. Ms. Blanchard parked her car directly behind Respondent's car.

24. Ms. Blanchard got out of her car as Respondent was getting out of hers, and she said, "Hello, Ms. Alli," to Respondent. Upon seeing Ms. Blanchard, Respondent quickly went into the house through the carport door. Ms. Blanchard followed Respondent into the facility.

25. Ms. Blanchard lost sight of Respondent as she went down a hallway towards the back of the house where the children were located. The backdoor of the house was open, and by the time that Ms. Blanchard caught up with Respondent, Respondent was directing the children through the facility's backyard

towards the back gate connecting Respondent's yard to Ms. Rodgers' yard. Several of the children, led by Ms. Rodgers' 14-year-old son carrying an infant in a car seat and Ms. Rodgers' 13-year-old son carrying a toddler had already reached Ms. Rodgers' yard.

26. Ms. Blanchard told Respondent to stop and return to the facility with the children, which she did. Ms. Blanchard went through the open gate onto Ms. Rodgers' property and directed Ms. Rodgers' sons to return to Respondent's facility with the children, which they did.

27. While on Ms. Rodgers' property, Ms. Blanchard saw a partially-filled swimming pool and other ongoing construction. Ms. Blanchard did not notice any fencing around the pool and saw one of the children, which she estimated to be three or four years old, walking in the construction area close to the edge of the pool.

28. After the children had been returned, Ms. Blanchard assessed the situation and commenced her inspection of the remainder of Respondent's facility.

29. Ms. Blanchard found roach droppings in the bathtub and in other locations in the facility. Respondent acknowledged a roach problem, but claimed that she had an exterminator working on the problem and that he was due to come out and treat the facility. Respondent did not present any documentation to

Ms. Blanchard to corroborate her claims regarding the exterminator, nor did she introduce such documentation at the hearing.

30. Ms. Blanchard found plastic bags in an unlocked cabinet accessible to the children. Respondent acknowledged at the hearing that the bags were in the cabinet and further acknowledged the suffocation danger that they posed to young children.

31. Ms. Blanchard's review of the facility's records identified missing enrollment and immunization records for the children in the home. However, Ms. Blanchard did not document the children whose records were missing and she did not determine whether, as Respondent claimed at the time and in her testimony at the hearing, any of the missing records were for students who had enrolled in Respondent's facility within the prior two weeks.

32. Ms. Blanchard documented the results of her inspection, including the events surrounding the movement of the children to Ms. Rodgers' yard on her inspection report. The inspection report identified each of the violations that she observed, including inadequate supervision based upon Respondent's absence from the facility, unsafe storage of materials dangerous to children (i.e., plastic bags) in a location accessible to the children, evidence of roaches,

incomplete enrollment and immunization records, and more than the allowed number of children in the home. Ms. Blanchard also cited Respondent's facility for the dangers posed by Ms. Rodgers' pool since the children were being taken onto Ms. Rodgers' property.

33. With respect to the citation for having too many children, Ms. Blanchard's inspection report did not include any detailed information about the children such as their names (or initials), ages, or descriptions. The report simply stated that Ms. Blanchard counted seven children at the facility -- i.e., "3 infants, 3 preschool and 1 school age child."

34. Ms. Blanchard's testimony at the hearing referred to only two infants, which was consistent with Respondent's testimony on that issue. As a result, the evidence is not clear and convincing that there were seven children in Respondent's care at the facility rather than the authorized six children.

35. During the course of her inspection, Ms. Blanchard did not see any adults (other than Respondent, who arrived as Ms. Blanchard was arriving) at the facility. It is undisputed that Respondent's husband, who is the designated substitute caregiver, was not at the facility that morning.

36. There is no credible evidence that Respondent's 22-year-old son, Abdel, was at the facility that morning. He did not testify at the hearing, and, if as Respondent claims, Abdel

was at the facility that morning, Ms. Blanchard would have seen him at some point during the commotion surrounding Respondent's rushing the children out the back door or during her subsequent inspection of the facility.

37. In any event, Abdel was not the substitute caregiver designated by Respondent. He was not even authorized to watch the children because, although he had been background screened by the Department, he had not taken the Department's mandatory child care training program and was not certified in cardiopulmonary resuscitation (CPR).

38. It is more likely than not that Ms. Rodgers' teenage sons were actually left to supervise the children at Respondent's facility during the time that Respondent was gone on the morning of February 27, 2003. Indeed, that is the most likely explanation of their presence at the facility and their involvement in the movement of the children to Ms. Rodgers' yard. However, the evidence on this issue is not clear and convincing.

39. Respondent's explanation of her actions on the morning of the inspection -- i.e., that she hurried into the house upon her arrival and directed all of the children to Ms. Rodgers' yard so she could convey an important message to Ms. Rodgers -- is not credible. Her explanation of the roach droppings that Ms. Blanchard found in the bathtub -- i.e., that it was actually

dirt from washing one of the children's feet -- is also not credible.

40. By contrast, Respondent's explanation of the incomplete records -- i.e., that the missing records were for those children who had enrolled in the facility within the prior two weeks -- is reasonable. Because Ms. Blanchard's inspection report did not identify the children whose records were missing and did not document the date of their enrollment, the evidence is insufficient to prove this violation.

41. Respondent admitted at the hearing that she "was taking a chance" by leaving the children at the facility without her husband, the designated substitute caregiver, being present. Respondent testified that she was gone only 15 minutes to drop one of her children off at school, and that she follows that same routine every day although her husband is usually at the facility while she is gone.

42. After Ms. Blanchard completed her inspection, she discussed the results with Respondent and provided Respondent a copy of the inspection report. Ms. Blanchard then went back to her office and discussed the results of the inspection with her supervisor, Patricia Richardson.

43. Based upon the results of the February 27, 2003, inspection and the history of noncompliance at Respondent's facility (both before and after the provisional license),

Ms. Richardson determined that Respondent's license should be revoked.

44. Thereafter, on February 28, 2003, Ms. Richardson sent a letter to Respondent informing her that her license was being revoked and advising Respondent of her right to "appeal" that decision through the administrative process.

CONCLUSIONS OF LAW

A. Jurisdiction and Burden of Proof

45. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), 120.60(5), and 402.310(2), Florida Statutes. (All references to Sections are to the 2002 version of the Florida Statutes. All references to Rules are to the current version of the Florida Administrative Code.)

46. The Department has the burden to prove by clear and convincing evidence the grounds for revocation of Respondent's family day care home license. See Coke v. Dept. of Children & Family Servs., 704 So. 2d 726 (Fla. 5th DCA 1998); Dept. of Banking & Finance v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996). Accord Marcia Edwards Family Day Care Home vs. Dept. of Children & Family Servs., DOAH Case No. 02-3784, Recommended Order, at 20 (Feb. 5, 2003), adopted in toto, Order No. DCF-03-086-FO (Mar. 4, 2003); Dept. of Children & Family

Servs. vs. Dorothy Dempsy Family Day Care Home, DOAH Case No. 02-1435, Recommended Order, at 7 (Aug. 7, 2002), adopted in toto, Order No. DCF-02-305-FO (Nov. 27, 2002).

47. The clear and convincing evidence standard has been described as follows:

> Clear 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 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.

Inquiry Concerning Judge Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)) (internal brackets omitted). Accord Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous."), rev. denied, 599 So. 2d 1279 (Fla. 1992).

B. Violations of the Licensing Statutes and Rules at Respondent's Facility

48. Section 402.310(1)(a) provides that the Department may "deny, suspend, or revoke a license . . . for the violation of any provision of ss. 402.301-402.319 or rules adopted thereunder."

49. The rules adopted by the Department to implement Sections 402.301 through 402.319 are codified in Rule Chapter 65C-20.

50. Ms. Blanchard's February 27, 2003, inspection report which served as a basis of the Department's February 28, 2003, revocation letter cited the following rules/statutes which Respondent was allegedly in violation of: Rule 65C-20.009(3)(a) (relating to supervision of the children); Rule 65C-20.010(1)(b) and (1)(e) (relating to elimination of potential hazards); Rule 65C-20.010(1)(f) and (1)(g) (relating to fencing around swimming pools); Rule 65C-20.010(1)(n) (relating to vermin and pest control); Rule 65C-20.011(1), (2)(a), and (4) (relating to maintenance of health and enrollment records); and Section 402.302(7) (relating to the maximum number of children allowed at the facility). Each alleged violation will be addressed in turn.

51. Rule 65C-20.009(3)(a) provides:

> At all times, which includes when the children are sleeping, the operator shall remain responsible for the supervision of the children in care and capable of responding to the emergencies and needs of the children. During the daytime hours of operation, children shall have adult supervision which means watching and directing children's activities, both indoors and outdoors, and responding to each child's needs.

52. The evidence clearly and convincingly establishes that Respondent was in violation of Rule 65C-20.009(3)(a). It is undisputed that Respondent was not at the facility when Ms. Blanchard arrived on the morning of February 27, 2003, and that her husband, the only authorized substitute caregiver, was also not at the facility that morning. Respondent's unsubstantiated testimony that her son, Abdel, was left in charge of the facility and the children that morning is not credible and, even if Abdel was there, he was not authorized to supervise the children. As a result, even under Respondent's version of the facts, the children were effectively left unsupervised when Respondent left the facility that morning.

53. Respondent acknowledged at the hearing that she was "taking a chance" by leaving the children at the facility without her husband being present. Nevertheless, she did so. Respondent had previously been cited and fined for noncompliance in the area of supervision of children, albeit prior to the issuance of the provisional license, so her actions on February 27, 2003, represent a repeat violation.

54. Rule 65C-20.010(1)(b) and (1)(e) provides:

> (b) All areas and surfaces accessible to children shall be free of toxic substances and hazardous materials. All potentially harmful items including cleaning supplies, flammable products, poisonous and toxic materials must be labeled. These items as well as knives, and sharp tools and other

potentially dangerous hazards shall be stored in locations inaccessible to the children in care.

* * *

(e) Play areas shall be clean, free of litter, nails, glass and other hazards.

55. The evidence clearly and convincingly establishes that Respondent violated Rule 65C-20.010(1)(b) and (1)(e) by not storing the plastic grocery bags, which Respondent conceded posed a suffocation hazard to small children, in a location that is inaccessible to children at the facility. Respondent had previously been cited for this violation as well.

56. Rule 65C-20.010(1)(f) and (1)(g) provides:

(f) The outdoor space shall be fenced, a minimum of 4 feet in height, if the family day care home property borders any of the following:

* * *

5. lake, ditch, pond, brook, canal or other water hazard.

Swimming pools shall be fenced, a minimum of 4 feet in height, and locked to keep the water hazard inaccessible to children, except during the time water related activities are being conducted as a program function.

(g) If a family day care home uses a swimming pool, it shall be maintained by using chlorine or other suitable chemicals. If the family day care home uses a swimming pool, which exceeds three (3) feet in depth at the family day care home site, one person who has completed a basic water safety

> course such as one offered by the American Red Cross, YMCA or other organization, must be present when children have access to the swimming area. If the family day care home uses swimming pools not at the site of the family day care home, or takes the children to beach or lake areas for swimming activities, the family day care home operator must provide one person with a certified lifeguard certificate or equivalent, who must be present when children are in the swimming area, unless a certified lifeguard is on duty.

57. The evidence fails to establish a violation of Rule 65C-20.010(1)(f) and (1)(g). It is undisputed that the backyard of Respondent's facility is adequately fenced to keep the children from accessing the pool in Ms. Rodgers' yard, and the evidence does not clearly and convincingly establish that the gate on the back fence is routinely kept open or unlocked. Moreover, while the evidence establishes that the children were being taken into Ms. Rodgers' yard on the day of Ms. Blanchard's inspection, they were not being taken there to swim and they were generally under Respondent's supervision at the time. Finally, the evidence does not clearly and convincingly establish that the fencing shown in the photographs of Ms. Rogers' yard was not in place at the time of Ms. Blanchard's inspection.

58. In light of the foregoing determinations, it is unnecessary to address Respondent's contention that Ms. Blanchard violated Section 402.311 by going onto

Ms. Rodgers' property without permission or a warrant.[6] Nor is it necessary to address whether a day care may be cited for deficiencies existing on property which is not part of the licensed facility.

59. Rule 65C-20.010(1)(n) provides:

> Rodents and vermin shall be exterminated. Pest control shall not take place while rooms are occupied by children.

60. The evidence clearly and convincingly establishes that Respondent violated Rule 65C-20.010(1)(n), because Ms. Blanchard found roach droppings at Respondent's facility on February 27, 2003. Respondent has been cited for this violation on prior occasions, both before and after the provisional license, and her unsubstantiated testimony at hearing that she has been through several exterminators in an effort to eliminate the roaches was not credible.

61. Rule 65C-20.011(1), (2)(a), and (4) provides:

> (1) Immunizations. Within 30 days of enrollment, each child must have on file and keep current a completed DH Form 680, Florida Certification of Immunization, Part A-1, B, or C (Aug. 1998 or Aug. 2000), or DH Form 681, Religious Exemption from Immunization (May 1999), which is incorporated by reference in Rule 64D-3.011(5), F.A.C. . . . . The DH Form 680, Florida Certification of Immunization Parts A-1, Certification of Immunization for K-12 Excluding 7th Grade Requirements or Part B, Temporary Medical Exemption, shall be signed by a physician or authorized personnel licensed under the provisions of Chapter

458, 459, or 460, Florida Statutes, and shall document vaccination for the prevention of diphtheria, pertussis, tetanus, poliomyelitis, rubeola, rubella, mumps, Haemophilus influenzae type B (HIB), and effective July 1, 2001, completion of the varicella vaccination. The DH Form 680, Florida Certification of Immunization Part C, Permanent Medical Exemptions, shall be dated and signed by a physician licensed under the provisions of Chapter 458 or 459, Florida Statutes.

(2) Children's Student Health Examination.

(a) Within 30 days of enrollment, each child must have on file a completed DH Form 3040 (Oct. 96), Student Health Examination, which is incorporated by reference, and copies of which are available from the local county health department or the child's pediatrician. The student health examination shall be completed by a person given statutory authority to perform health examinations.

* * *

(4) Enrollment and Medical Authorization.

(a) The operator shall obtain enrollment information from the child's custodial parent or legal guardian, prior to accepting the child in care. This information shall be documented on CF-FSP Form 5219, Dec 97, Child Care Application for Enrollment, which can be obtained from the local Department of Children and Families district service center or the local licensing agency, and is incorporated by reference, or an equivalent that contains all the information required by the department's form.

(b) Enrollment information shall be kept current and on file for each child in care.

62. The Department failed to prove a violation of Rule 65C-20.011(1) or (2)(a) because Ms. Blanchard's inspection report and her testimony did not clearly and convincingly demonstrate which children's records were missing or that those children were enrolled in the facility for more than 30 days, which is the timeframe allowed by the rule to obtain that information. Similarly, the Department failed to establish a violation of Rule 65C-20.011(4) because Ms. Blanchard's inspection report and her testimony did not clearly and convincingly demonstrate which children's records were missing.

63. Section 402.302(7) provides in relevant part that:

> A family day care home shall be allowed to provide care for one of the following groups of children, which shall include those children under 13 years of age who are related to the caregiver:
>
> (a) A maximum of four children from birth to 12 months of age.
>
> (b) A maximum of three children from birth to 12 months of age, and other children, for a maximum total of six children.
>
> (c) A maximum of six preschool children if all are older than 12 months of age.
>
> (d) A maximum of 10 children if no more than 5 are preschool age and, of those 5, no more than 2 are under 12 months of age.

64. The Department failed to prove a violation of Section 402.302(7). Indeed, the preponderance of the evidence

establishes that, as allowed by Section 402.302(7)(b), Respondent had a total of six children at the facility on February 27, 2003, consisting of two infants (12 months or younger) and four other children under the age of five.

C. Appropriate Penalty

65. Section 402.310(1)(b) directs the Department to consider the following factors in determining the appropriate disciplinary action for a violation of Section 402.310(1)(a):

> 1. The severity of the violation, including the probability that death or serious harm to the health or safety of any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of ss. 402.301-402.319 have been violated.
>
> 2. Actions taken by the licensee to correct the violation or to remedy complaints.
>
> 3. Any previous violations of the licensee.

66. Because Petitioner held a provisional license at the time of the February 27, 2003, inspection, Section 402.309 is also implicated. Subsection (4) of that statute provides that:

> The provisional license may be suspended if periodic inspection made by . . . the department indicates that insufficient progress has been made toward compliance.

67. Respondent argues that the Department should not and/or could not revoke her license under Section 402.310(1)(a) without giving her a chance to bring her facility in compliance

pursuant to Section 402.309(4). Alternatively, Respondent argues that revocation is not appropriate under the circumstances of this case, and that less severe sanctions (such as suspension) were available to the Department.

68. Section 402.309(4) authorizes the Department to suspend a provisional license if the licensee is making insufficient progress towards compliance with the licensing statutes and rules. However, that statute does not preclude the Department from taking other disciplinary action against the licensee, including revocation under Section 402.310(1) if the circumstances warrant. Indeed, the provisional license issued to Respondent on October 28, 2003, stated that the license would be valid though April 3, 2003, unless it is "suspended or revoked by the Department" (emphasis supplied).

69. The circumstances of this case involve more than just "insufficient progress . . . towards compliance" by Respondent; they involve Respondent's blatant disregard for the safety of the children in her care. Not only did Respondent leave six children under the age of five at her facility without adult supervision, but she actively attempted to conceal that deficiency from the Department's inspector by moving the children to Ms. Rodgers' yard.

70. Supervision is a cornerstone of child care. See Section 402.302(1) (defining "child care" to mean "the care,

protection, and supervision of a child . . ."). Respondent's failure to supervise the children in her care by leaving the facility to take her own child to school is inexcusable and is a serious violation of the licensing statutes and rules. The violation created a real possibility of death or serious harm for the children at the facility in light of their young age, the roach droppings in the facility, and the plastic bags which were accessible to the children.

71. While there is no evidence that any of the children suffered actual harm, such evidence is not required under Section 402.310(1)(b)1. Indeed, it is not necessary for the Department to wait until a child is seriously injured or dies before it revokes a license for statutory or rule violations.

72. Respondent has a long history of violations, both before and after she received a provisional license, and she has been previously cited for inadequate supervision. The Department has given Respondent ample opportunity to bring her facility into compliance, but she has failed to do so. Indeed, even though Respondent has made some efforts towards compliance over time, she continues to be cited for the same deficiencies, including roaches and the storage of dangerous materials.

73. Respondent acknowledged at the hearing that she was "taking a chance" when she left the facility and the children

unsupervised on the morning of February 27, 2003. Not only was she taking a chance with her license, but she was taking a chance with the lives of the children in her care. Respondent is fortunate that her actions that morning did not result in harm to the children, but she is not so fortunate with respect to her license.

74. Indeed, even under Respondent's version of events, her decision to leave the facility and the children in her care under the supervision of a person without CPR training and the necessary Department certification is sufficient grounds for revocation of Respondent's license. In light of the undersigned's rejection of Respondent's version of events, it is even more evident that revocation is the appropriate penalty in this case.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Children and Family Services issue a final order revoking Respondent's license to operate a family day care home.

DONE AND ENTERED this 12th day of June, 2003, in Tallahassee, Leon County, Florida.

S

T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2003.

ENDNOTES

1/ The "notice" by which this case was referred to the Division designated Rashada Alli as the Petitioner and the Department as the Respondent. Those designations were changed by the Clerk of the Division as reflected in the case style above. That change was presumably based upon the fact that this is a license revocation proceeding in which the Department is the party seeking the affirmative relief.

2/ Exhibit B summarizes a complaint from an anonymous caller to a Department "hot line" regarding the operation of Respondent's family day care home. The exhibit was offered to show the reason that Ms. Blanchard went to Respondent's home on February 27, 2003. The exhibit was rejected because the undersigned concluded that the Department had not established the necessary foundation for admission of the document as a business record or a public record pursuant to Sections 90.803(6) or (8), Florida Statutes, and because the reason that Ms. Blanchard went to Respondent's home was irrelevant. Upon reflection, the Department did establish the necessary foundation under Section 90.803(6), Florida Statutes, although the statements of the anonymous complainant within the exhibit are still hearsay to the extent they were offered for their

truth. See Reichenberg v. Davis, 2003 WL 21297232, at *1 (Fla. 5th DCA June 6, 2003); Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986). Nevertheless, Exhibit B is still inadmissible because what it was offered to show is not relevant and/or because any probative value of the exhibit is outweighed by its prejudicial effect. See Section 402.311 (Department may inspect family day care homes at any time with or without notice; it does not need a reason to conduct an inspection); Keen v. State, 775 So. 2d 263, 274-76 (Fla. 2000) (discussing the immateriality and irrelevance of the substantive aspects of "tips" received by the police which lead to an investigation or arrest); State v. Baird, 572 So. 2d 904, 908 (Fla. 1990) ("[W]hen the only purpose for admitting testimony relating accusatory information received from an informant is to show a logical sequence of events leading up to an arrest, . . . the better practice is to allow the officer to state that he acted upon a 'tip' or 'information received,' without going into the details of the accusatory information."). Exhibit B is also inadmissible because it is unduly repetitious of Ms. Blanchard's unobjected-to testimony that she went to Respondent's family day care home in response to a complaint that the Department received. See Section 120.569(2)(g), Florida Statutes.

3/ Respondent's Exhibit 2 is a videotape which was played at the hearing on a hand-held camcorder. Because the hearing was conducted by video teleconference, the undersigned was not able to view the videotape during the hearing. As directed at the conclusion of the hearing, Respondent converted the camcorder videotape to a normal, VCR-size videotape for filing with the Division. The undersigned viewed the videotape in camera in advance of the preparation of this Recommended Order.

4/ The fences include the wooden fence which runs between Respondent's yard and Ms. Rodgers' yard, an approximately eight-foot high chain-link fence, and a three- to four-foot high metal mesh fence. The mesh fence is attached to the studs of an addition that is being constructed on the back of Ms. Rodgers' house. The chain-link fence runs from the wooden fence along the back of Respondent's yard to the addition. There is a gate in the chain-link fence which must be used to access the pool area. That gate is located at the intersection of the chain-link fence and the wooden fence, near where the gate in the wooden fence is located.

5/ Respondent testified that the photographs and videotape were both taken on February 28, 2003, the day after the Department's

inspection. However, a close examination of the photographs and videotape conclusively shows that they were not taken on the same day. Specifically, the level of the pool in the videotape is considerably higher than it was in the photographs, and several of the trees which can be seen in the background of the photographs without leaves or with brownish-yellow leaves (as would be expected in late February) can be seen in the videotape with green leaves (as would be expected later in the year). These discrepancies undermine Respondent's credibility and also affected the weight given by the undersigned to the photographs and the videotape.

6/ Section 402.311 provides in relevant part:

> A licensed child care facility shall accord to the department . . ., the privilege of inspection, including access to facilities and personnel and to those records required in s. 402.305, at reasonable times during regular business hours, to ensure compliance with the provisions of ss. 402.301-402.319. The right of entry and inspection shall also extend to any premises which the department . . . has reason to believe are being operated or maintained as a child care facility without a license, but no such entry or inspection of any premises shall be made without the permission of the person in charge thereof unless a warrant is first obtained from the circuit court authorizing same. . . . .

(Emphasis supplied).

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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.