

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)	
FAMILY SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 03-3152
)	
S & S ACHIEVERS LEARNING)	
CENTER,)	
)	
Respondent.)	
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S & S ACHIEVERS LEARNING)	
CENTER,)	
)	
Petitioner,)	
)	
vs.)	Case No. 03-4240
)	
DEPARTMENT OF CHILDREN AND)	
FAMILY SERVICES,)	
)	
Respondent.)	
)	
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RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding and hearing before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on January 29, 2004, via teleconference from locations in Orlando and Tallahassee, Florida; on February 27, 2004, in Orlando, Florida; and on March 5, 2004, via teleconference from locations in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Larry H. Colleton, Esquire
2300 East Concord Street
Orlando, Florida 32803

For Respondent: Richard Cato, Esquire
Department of Children and
Family Services
400 West Robinson Street, Suite S-1106
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STATEMENT OF THE ISSUES

At issue in DOAH Case No. 03-3152 is whether the Department of Children and Family Services ("Department") established sufficient grounds for suspending the provisional child care license of S & S Achievers Learning Center ("S & S Achievers") for 30 days due to noncompliance with minimum licensing standards.

At issue in DOAH Case No. 03-4240 is whether S & S Achievers' license to operate a child care facility should be renewed.

PRELIMINARY STATEMENT

By letter dated June 25, 2003, the Department informed S & S Achievers that its provisional license to operate a child care facility was being suspended for a period of 30 days. As grounds for the suspension, the Department's letter cited the following alleged violations of the minimum child care standards found in Section 402.305, Florida Statutes (2003), and Florida Administrative Code Chapter 65C-22:

(1) Since your initial licensure in April 2001, three of nine inspections reveal violations of staff-to-child ratios and/or direct supervision of children.

(2) In four of nine inspections, the facility has been cited for violations of children's records, either being incomplete or unavailable for review.

(3) Your facility has been cited in six of nine inspections for deficiencies in personnel files, either in background screening requirements or having staff trained in required childcare courses.

(4) Your facility had been cited twice for not having documented fire drills or staff certified in First Aid and CPR.

(5) Your facility has been cited twice for exceeding the licensed capacity.

(6) A consumer complaint received June 5, 2003, involving a special needs child reveals ongoing violations of staff-to-child ratios and supervision. The complaint revealed that a child was observed in clothing and a crib soiled with vomit and nine other toddlers in the room with only one staff present. Although an effort was made by staff to clean the child, the child was returned to the same soiled crib.

When another agent of the department visited the facility to investigate the complaint, she reported to the licensing unit that upon her arrival, she found two staff members mopping the floors while some of the children napped. She counted seven children, ages three to five in one room, three children, ages three to five in a second room, and one infant in a crib along with thirteen other children in the third room.

Lavaine Shuler, the owner of S & S Achievers, signed an acknowledgement of receipt of the suspension letter on July 8, 2003, when it was apparently hand-delivered by a Department representative. By letter dated July 29, 2003, counsel for S & S Achievers requested a formal administrative proceeding to challenge the suspension. On September 3, 2003, the matter was forwarded to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge and the conduct of a formal administrative proceeding. This matter was given DOAH Case No. 03-3152. The hearing was initially scheduled for October 29, 2003, and continued four times before being held on the dates set forth above.

On October 14, 2003, S & S Achievers filed an application to renew its license. By letter dated October 17, 2003, the Department denied the application, stating the following grounds for its action:

(1) Your facility was inspected September 18, 2003 for the purpose of renewal. During the inspection the facility was cited for violations in transportation requirements; clean and good repair; toxic/hazardous materials; lighting; outdoor play area; fencing; bedding and linens; sanitary diapering area; indoor equipment; outdoor equipment; employee training; first aid supplies; personnel records; and background screening of employees.

(2) With your application you submitted a copy of the inspection report from September 18 with hand written statements on

it to indicate corrective actions had been made. However, in several instances, these corrections were not reflected in what the licensing representatives found at a reinspection on October 16, 2003.

(3) At the reinspection, the facility was cited again for transportation requirements; clean and good repair; toxic/hazardous materials; lighting; fencing; bedding; sanitary diapering area; indoor equipment; outdoor equipment; staff training; first aid supplies; and screening of employees.

(4) In addition to the violations cited in paragraph #3 as repeat violations, the childcare center was cited for being over the licensed capacity; bathroom supplies unavailable; enrollment information missing, as well as children's health records being incomplete.

(5) Additionally, you submitted an application with a sworn statement that all known childcare personnel have submitted background screening which is not reflected in your employee files.

Your facility was issued a provisional license April 14, 2003, for noncompliance with minimum standards. You were informed that should inspections show insufficient progress toward compliance, the department would seek suspension of the license. You were further advised that failure to achieve and maintain compliance with licensing standards could jeopardize future licensing of [S & S Achievers].

While the licensing representative reports some cosmetic changes at the center, the continuing violations are repetitive, serious, and pose potential risk to children in your care. The ongoing violations represent a lack of understanding of the rules and regulations pertaining to

childcare facilities or a disregard for the safety of children

By letter dated October 28, 2003, counsel for S & S Achievers challenged the denial and requested a formal administrative hearing on the question of S & S Achievers' continued licensure. On November 12, 2003, the matter was forwarded to DOAH for assignment of an Administrative Law Judge and the conduct of a formal administrative proceeding. This matter was given DOAH Case No. 03-4240. On November 21, 2003, an Order was entered granting S & S Achievers' Motion to Consolidate DOAH Case Nos. 03-3152 and 03-4240. The consolidated cases were heard on the dates set forth above.

At the final hearing, the Department presented the testimony of: Milhem Ashy and Janice Nilles, family services licensing counselors for the Department who conducted inspections of S & S Achievers; Donna Boatwright, an occupational therapist; Gwendolyn Butler, a child protective services investigator for the Department; Linda Sue Shaul, a Department licensing representative; and Patricia Richardson, a supervisor in the Department's child care licensing office. The Department's Exhibits A through KK were admitted into evidence.

S & S Achievers presented the testimony of Angela Dorn and Blanca Trejo, teachers at the facility, and of Lavaine Shuler, the owner of S & S Achievers. S & S Achievers' Exhibits 1

through 13 were admitted into evidence. Exhibit 13, a videotaped tour of the facility, was viewed at the hearing but was not filed at DOAH.

The final volume of the Transcript of the hearing was filed at DOAH on May 24, 2004. By stipulation, the parties agreed that their proposed recommended orders would be filed within 30 days of the filing of the transcript. Neither party timely filed a proposed recommended order. The undersigned contacted the parties and orally granted their request for additional time in which to submit their proposed recommended orders. The Department submitted a Proposed Recommended Order on September 17, 2004. S & S Achievers did not submit a proposed recommended order.

FINDINGS OF FACT

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

1. The Department is the state agency responsible for licensing and regulating child care facilities.
2. S & S Achievers, owned by Lavaine Shuler, was initially licensed in April 2001 to operate a child care facility in Apopka. The licensed capacity for the facility was 30 children. The Department routinely inspected the facility.
3. On October 5, 2001, Milhem Ashy, a licensing counselor for the Department, conducted a routine inspection of the

facility. Mr. Ashy's inspection checklist reported S & S Achievers for multiple violations of minimum licensing standards: failure to post a list of planned daily activities in a place accessible to parents; old, unsafe toys and long sticks on the outdoor playground; no adult at the facility with first aid or CPR training; failure to have physical examination and immunization records in children's files; and failure to complete and document the background screening of facility staff. Mr. Ashy discussed the deficiencies with Ms. Shuler, who also received a copy of the inspection checklist.

4. On February 18, 2002, Mr. Ashy conducted another routine inspection of the S & S Achievers facility. Mr. Ashy's inspection checklist again reported S & S Achievers for multiple violations of minimum licensing standards. The most critical violation regarded the staff-to-children ratio. Among the children at S & S Achievers were some under one year of age. Florida Administrative Code Rule 65C-22.001(4)(b) provides that in groups of mixed ages where children under one year of age are included, the minimum ratio is one staff member for any four children. Mr. Ashy observed a ratio of one staff member for five children. After discussing the matter with Ms. Shuler, Mr. Ashy decided not to recommend a fine for this violation.

5. On the February 18, 2002, inspection, Mr. Ashy found that the facility continued not to post a list of planned daily

activities in a place accessible to parents. He found insufficient lighting in the infant room. On the outdoor playground, Mr. Ashy found that the frame of the swing set was not securely anchored. S & S Achievers continued its failure to have immunization records in children's files and to have documentation of staff's background screening.

6. In April 2002, S & S Achievers' license was scheduled for renewal. On April 15, 2002, Mr. Ashy conducted a renewal inspection of the facility. In this inspection, Mr. Ashy found that the kitchen needed cleaning. He noted that the files still did not indicate sufficient credentialed staff at the facility, did not document employees' background screening, and did not contain students' immunization and health examination records.

7. After discussing the noted deficiencies with Ms. Shuler, Mr. Ashy concluded that S & S Achievers was making progress toward full compliance. In light of the good working relationship between the Department and S & S Achievers, he recommended that the deficiencies cited in his report should not affect the facility's license renewal. On April 15, 2002, the Department issued an annual license to S & S Achievers.

8. On June 26, 2002, Mr. Ashy conducted a routine inspection of the facility. He found the following elements of noncompliance with minimum standards: the infant teacher was observed caring for three infants, one six-year-old child and

one four-year-old child, where the ratio requirements stated that she should have been caring for no more than four children; the second teacher was observed caring for 16 children, including one child under one year of age, three one-year-olds, four two-year-olds, one three-year-old, one four-year-old, and six children who were at least five years old; two children were observed in the rest room without any adult supervision; the facility's plan of scheduled activities was not posted in a place accessible to parents; the floors were stained and cluttered, tiles were peeling off the floors, and walls were peeling in the infant room; plastic and paper trash were observed on the playground; the swing set frame was not anchored; the facility could not document that it had conducted the monthly fire drills required by Department rules; the facility had no documentation that any staff member was trained in first aid or infant and child CPR.

9. The facility continued to lack documentation regarding background screening and student health records. On his inspection checklist, Mr. Ashy noted that Ms. Shuler would be required to bring in the required documents for review at the Department's offices.

10. By letter dated June 27, 2002, Patricia Richardson, supervisor of the Department's child care licensing office, notified S & S Achievers that the repeat violation of ratio and

supervision requirements were being referred to the Department's legal counsel with a recommendation that a fine be imposed on S & S Achievers. Ms. Richardson further requested that S & S Achievers provide a "full and complete corrective action plan" addressing all the violations cited in the June 26, 2002, inspection checklist and that the plan be submitted no later than July 10, 2002.

11. Ms. Shuler scheduled a meeting with Mr. Ashy for July 5, 2002. At that meeting, she provided some files regarding staff and children at the facility. On July 6, 2002, Ms. Shuler filed a plan of corrective action responsive to Ms. Richardson's letter of June 27, 2002.

12. Nonetheless, on July 12, 2002, the Department filed an Administrative Complaint against S & S Achievers seeking a civil penalty, totaling \$200.00 for the violations of staff-to-child ratio requirements and for the failure to supervise the children in the bathroom. S & S Achievers did not contest the imposition of the penalty.

13. On July 16, 2002, Mr. Ashy conducted a follow-up inspection of S & S Achievers. He found that S & S Achievers was within the required staff-to-child ratios, but was in excess of its licensed capacity of 30 children.

14. On August 30, 2002, Mr. Ashy visited the S & S Achievers facility and observed that there were 40 children at

the facility. He also noted that the facility was again out of compliance with staff-to-child ratios and instructed S & S Achievers that it was required to comply with the Department's minimum standards for child care facilities.

15. On October 10, 2002, Mr. Ashy conducted a routine inspection of the S & S Achievers facility. He found the following elements of noncompliance with minimum standards: the kitchen needed to be cleaned; the outdoor playground contained debris and rusted toys; the facility still had no documentation of monthly fire drills; the frame of the swing set remained unanchored; and staff training was still not documented. A follow-up inspection on October 31, 2002, indicated that the facility had corrected the items cited in the October 10, 2002, inspection.

16. On December 30, 2002, Mr. Ashy conducted a surprise inspection. In this inspection, he looked only at the facility's staff-to-child ratios and supervision of children. The inspection found no violation of staff-to-child ratios and found that adult supervision of children was adequate.

17. On March 17, 2003, Mr. Ashy conducted the annual license renewal inspection of S & S Achievers. He counted a total of 32 children under the supervision of S & S Achievers, either at the facility itself or on a field trip. Mr. Ashy found that the facility did not maintain a log for all children

that it transported in its van, did not have documentation of an annual vehicle inspection, and did not have verification of insurance coverage for its van. The swing set frame was still not anchored. The facility did not have documentation showing that its staff persons had enrolled in or completed the required introductory course in child care or that staff had completed the required eight hours of annual in-service training. The facility still lacked documentation of criminal background screening for all staff.

18. By letter dated March 20, 2003, Ms. Shuler clarified that S & S Achievers did not provide transportation to and from the facility for any of its students. Therefore, the deficiencies cited by Mr. Ashy related to transportation did not require correction. A follow-up inspection by Mr. Ashy on April 9, 2003, found that S & S Achievers had corrected the remaining items found deficient in the March 17, 2003, inspection.

19. By letter dated April 10, 2003, Ms. Richardson informed Ms. Shuler that S & S Achievers would be issued a provisional license, pending completion of a corrective action plan to increase compliance with minimum standards. This provisional license was to be valid for a period of six months. S & S Achievers did not contest the issuance of the provisional license.

20. By letter to Ms. Shuler dated May 19, 2003, Ms. Richardson noted the repeated violations of S & S Achievers regarding ratios and supervision, as well as the maintenance of records. She stated that these continuing violations were "repetitive, serious, and reflect a lack of organization in management and oversight of the facility." Ms. Richardson "strongly recommended" that Ms. Shuler enroll in a training course for child care facility owners. Ms. Richardson notified Ms. Shuler that her facility "will be inspected more frequently during this provisional period for increased compliance," and cautioned that insufficient progress toward compliance could lead to suspension of the license and could jeopardize future licensing for S & S Achievers.

21. Donna Boatwright was a pediatric occupational therapist. From roughly April until June 2003, Ms. Boatwright visited S & S Achievers from one to three times per week to provide therapy to a one-year-old child with spina bifida. On June 4, 2004, Ms. Boatwright arrived at S & S Achievers to find her patient in a crib. The child was covered in vomit, "from his head to his butt, feet, on both sides, back and front," as if he had rolled around in it. Ms. Boatwright picked up the child and called for the staff person in the room to help her clean him.

22. Ms. Boatwright noted that there was one adult in the room caring for ten small children, all of whom she described as "toddlers." She had seen similar ratios on previous visits. The staff person took the baby from Ms. Boatwright and left the room. For about five minutes, Ms. Boatwright was the only adult in the room with nine children.

23. The staff person returned with the child after cleaning him. Ms. Boatwright took the child to another room and treated him. She saw that his clothes had been changed, but he still smelled strongly of vomit. After Ms. Boatwright was finished, a staff person returned the child to his crib. Ms. Boatwright did not believe the crib had been cleaned, because it still smelled of vomit.

24. On June 4 or 5, 2003, Ms. Boatwright wrote a letter to Ms. Richardson to report this incident. In her letter, Ms. Boatwright added that in her visits to S & S Achievers, she had observed two toddlers playing in a toilet, dirty and broken toys within reach of small children, staff persons constantly yelling at children, and a general atmosphere of chaos.

25. On or about June 5, 2003, Gwendolyn Butler, a child protective services investigator for the Department, went to S & S Achievers to investigate Ms. Boatwright's allegations. Ms. Butler counted 24 children in the facility. She stated that the youngest child was about three months old and the oldest was

four or five years old. Ms. Butler noted that there were only two adults to supervise the 24 children spread among four or five rooms of the facility, meaning that some of the children were unsupervised. She was never able to see Ms. Boatwright's patient or to contact the child's parents because Ms. Shuler was unable to give her a correct phone number or address for the family. Ms. Butler closed the investigation with a finding of "some indicators" of physical injury and threatened harm to children and a "verified" finding of inadequate supervision.

26. By letter dated June 25, 2003, Ms. Richardson notified Ms. Shuler of the Department's decision to suspend the license of S & S Achievers for a period of 30 days. On July 22, 2003, Ms. Shuler met with Mr. Ashy and initially informed him that she intended to comply with the suspension and make use of the 30-day period to bring her facility into compliance with the Department's minimum standards. However, later on the same day, Ms. Shuler wrote Mr. Ashy a note stating that she wished to confer with her attorney before making any decision. S & S Achievers challenged the suspension decision, and the facility remained open pending the results of its challenge.

27. On August 28, 2003, Janice Nilles, a licensing counselor for the Department, conducted an inspection of the S & S Achievers facility. Ms. Nilles found the facility once more in violation of staff-to-child ratios. She found no daily

plans posted. She noted several aspects of disrepair in the facility: exposed metal on a doorframe; a metal bracket holding some carpeting in place had come loose, exposing a cutting edge and causing a tripping hazard; three electrical outlets were uncovered; a nail protruded from the wood frame of the girls' bathroom door; detergents and bleach were within the reach of children in the boys' bathroom; the general storage of cleaning products did not prevent children's access to them; soap and paper towels or air dryers were not provided in the bathrooms; old wooden chairs created a splinter hazard; and lighting was insufficient.

28. As to the outdoor playground, Ms. Nilles found debris and broken play equipment. The wooden gate to the playground was unaligned, with an exposed nail between the slats. The ground cover within the landing zones of swings and slides was not properly maintained. Wooden play blocks littered the playground, creating landing and tripping hazards. A protruding screw on the slide created a hazard.

29. Ms. Nilles found that the facility did not provide developmentally appropriate toys for the ages of children in care and did not provide enough play equipment for the number of children under care at the facility. She found that linens, pillows, and blankets were not provided for napping children, and some of the bedding that was provided was dirty. The

facility's first aid kit was incomplete. The facility still did not have on file the required background screenings for staff or the immunization information for children.

30. On September 18, 2003, Ms. Nilles conducted an inspection for the renewal of S & S Achievers' provisional license. She found that the facility had "repaired" the loose carpet bracket by placing a rug over it. The splintered wooden chairs had not been replaced. Ms. Nilles observed cans of paint inside a storage cabinet in the infant room, with no secure lock for the cabinet. The first aid kit remained incomplete. The diapering changing area was not on an impermeable surface. The wooden blocks remained on the playground, and the broken play equipment had not been repaired or replaced. A nail protruded on the slide. The ground cover for the landing zones of the slides and swings remained insufficient. The facility did not have documentation showing that staff had enrolled in the introductory course in child care or had completed the required eight hours of in-service training. The facility had no documentation of criminal background screening for its employees.

31. On October 14, 2003, one day before the scheduled expiration of the provisional license, Ms. Shuler applied to renew the license of S & S Achievers. Ms. Shuler hand-delivered the application to Ms. Richardson and told Ms. Richardson that

every violation noted in the September 18, 2003, inspection had been corrected.

32. Because of the number and frequency of S & S Achievers' violations, Ms. Richardson sent a team of licensing counselors to inspect the facility on October 16, 2003, in order to verify Ms. Shuler's claim to have corrected all of the noted deficiencies. The inspection revealed that some of the violations had been corrected, but that many others continued: the failure to document criminal background screening of employees; dangerous conditions on the playground; toxic cleaning supplies accessible to children; no soap or paper towels in the bathrooms; diaper changing area not on an impermeable surface; the protruding nail on the slide; incomplete first aid kit; and operating in excess of licensed capacity.

33. By letter dated October 17, 2003, the Department notified Ms. Shuler that her license would not be renewed based upon continuing violations that were "repetitive, serious, and pose potential risk to children" under the care of S & S Achievers.

34. At the hearing, Ms. Shuler testified at length on the various violations found by the Department's inspectors. She admitted to most of them, attempted to minimize others, and sought to leave the impression that Mr. Ashy and Ms. Richardson

were of little assistance and seemed intent on closing her facility. In fact, the evidence establishes that the Department bent over backward to help Ms. Shuler bring her facility close enough to the minimum standards to justify keeping it open. The evidence leads to a finding that Ms. Shuler did not take the Department's authority seriously and that the Department was, if anything, too lenient in allowing her to avoid the consequences of repeated, serious violations of its minimum standards.

35. Several parents testified at the hearing to the effect that even if all the alleged violations were true, they would nonetheless continue to place their children at S & S Achievers. This testimony is credited as honest, but it is irrelevant. To keep its license, S & S Achievers was bound to comply with the requirements of Florida Administrative Code Chapter 65C-22, even if parents were willing to waive those requirements.

36. At the hearing, Ms. Shuler introduced considerable evidence that after receiving the October 17, 2003, denial letter, she finally corrected many of the deficiencies in the structure of her facility and in the playground. This evidence is irrelevant to the instant cases, though it should assist Ms. Shuler should she apply for a child care facility license in the future.

CONCLUSIONS OF LAW

37. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 402.310(2), Florida Statutes (2003).

38. The Department is the state agency responsible for licensing, inspecting, and regulating child care facilities. See §§ 402.301-402.319, Fla. Stat. (2003).

39. S & S Achievers, as a licensed child care facility, is required to comply with the standards established in Sections 402.301 through 402.319, Florida Statutes (2003), and the rules implementing those provisions.

40. Subsection 402.310(1)(a), Florida Statutes (2003), provides that the Department may deny, suspend, revoke a license, or impose an administrative fine "for the violation of any provision of ss. 402.301-402.319 or rules adopted thereunder." Florida Administrative Code Chapter 65C-22, setting forth standards for child care facilities, implements Sections 402.301 through 402.319, Florida Statutes (2003).

41. The Department has the burden to prove the allegations against S & S Achievers by clear and convincing evidence in order to suspend or deny renewal of S & S Achievers' license to operate a child care facility. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

42. 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 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.

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 Electric Corporation, Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.")

43. The relevant text of the June 25, 2003, Department letter suspending the license of S & S Achievers is set forth in the above Preliminary Statement. The letter alleges repeated violations of: the staff-to-child ratios set forth in Subsection 402.305(4)(a), Florida Statutes (2003); the direct supervision requirements of Florida Administrative Code Rule 65C-22.001(5)(a)^{1/}; the record keeping requirements of Florida

Administrative Code Rule 65C-22.006(2), relating to children's health requirements; the record keeping requirements of Florida Administrative Code Rule 65C-22.006(5), relating to personnel records; the staff training requirements of Florida Administrative Code Rule 65C-22.003(2) and (6)^{2/}; the fire safety requirements of Florida Administrative Code Rule 65C-22.002(7); the first aid and CPR training requirements of Florida Administrative Code Rule 65C-22.004(2); requirements that a facility not exceed its licensed capacity, derived from Subsections 403.305(5) and (6), Florida Statutes (2003), and Florida Administrative Code Rule 65C-22.002(3) and (4), setting forth square footage-per-child requirements. The letter further alleges the elements of Ms. Boatwright's complaint regarding the child covered in vomit, as investigated by Ms. Butler of the Department.

44. The Findings of Fact set forth above establish by clear and convincing evidence that S & S Achievers repeatedly violated each of the cited rules. The inspection reports and the testimony of the inspectors, Mr. Ashy and Ms. Nilles, demonstrated that the inspections were conducted in a fair manner and that the cited violations, in fact, occurred. The testimony of Ms. Boatwright as to the child covered in vomit was completely credible, as was the testimony of Ms. Butler regarding her investigation of the incident. Ms. Shuler offered

virtually no evidence to dispute that the alleged violations occurred as described by the Department's witnesses.

45. The relevant portion of the October 17, 2003, Department letter denying S & S Achievers' license renewal application is set forth in the above Preliminary Statement. The letter alleges that the September 18, 2003, renewal inspection revealed violations of: the transportation requirements of Florida Administrative Code Rule 65C-22.001(6); the requirement that a facility be clean and in good repair found at Florida Administrative Code Rule 65C-22.002(1)(b)^{3/}; the requirement that areas accessible to children be free of toxic substances and hazardous materials found at Florida Administrative Code Rule 65C-22.002(1)(c)^{4/}; the requirement that outdoor play areas be securely fenced and be clean and free of hazards found at Florida Administrative Code Rule 65C-22.002(4)(c); the requirement that bedding and linens be safe and sanitary found at Florida Administrative Code Rule 65C-22.002(5)(c); the requirement of a sanitary diapering area found at Florida Administrative Code Rule 65C-22.002(8)(b); the requirement that indoor toys be safe and suitable to each child's age and development found at Florida Administrative Code Rule 65C-22.002(9)(a); the requirement that outdoor play equipment be suitable, safe, and properly maintained found at Florida Administrative Code Rule 65C-22.001(9)(b); the employee

training requirements of Florida Administrative Code Rule 65C-22.003(2), and the in-service training requirements of Florida Administrative Code Rule 65C-22.003(5)^{5/}; the first aid training and supply requirements of Florida Administrative Code Rule 65C-22.004(2); the record keeping requirements of Florida Administrative Code Rule 65C-22.006(2), relating to children's health requirements; and the record keeping requirements of Florida Administrative Code Rule 65C-22.006(5), relating to personnel records, including criminal background screening.

46. The letter goes on to state that when she submitted her application, Ms. Shuler attested that corrective action had been taken on the listed violations. However, at the October 16, 2003, reinspection, the facility was again found in violation of the following requirements: transportation; "clean and good repair"; toxic/hazardous materials; fencing; sanitary diapering area; indoor and outdoor play equipment; training and background screening of employees; and first aid supplies.

47. The Findings of Fact set forth above establish by clear and convincing evidence that S & S Achievers repeatedly violated each of the cited rules, except for the transportation requirements of Florida Administrative Code Rule 65C-22.001(6). The Department did not establish that Ms. Shuler provided transportation to and from her facility during any time period covered by the inspections.

48. Subsection 402.310(1)(b), Florida Statutes (2003), directs the Department to consider the following factors in determining the appropriate disciplinary action for the violation of any provision of Sections 402.301 through 402.319, Florida Statutes (2003), or rules adopted pursuant thereto:

(b) In determining the appropriate disciplinary action to be taken for a violation as provided in paragraph (a), the following factors shall be considered:

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.

49. The many and continuing violations more than justified the Department's decision to suspend the license of S & S Achievers and later to deny renewal of the license to operate a child care facility. Some of the continuing violations posed direct and severe hazards to the health and safety of the children in the care of S & S Achievers: toxic cleaning materials within reach of children; lack of proper first aid or CPR training for staff coupled with inadequate first aid supplies; persistent violations of staff-to-child ratio

requirements; inadequate direct supervision of the children. Some of the other continuing violations posed real, though less severe, dangers to the health and safety of the children: inadequately trained staff; worn out and splintered furniture; lack of soap and toweling in bathrooms; the presence of wooden blocks and other debris on the outdoor playground, as well as inadequate landing areas for swings and slides. Of particular concern was the persistent failure of S & S Achievers to document the criminal background screening of its employees or to document the health and immunization records of the children in its care.

50. Compounding the violations was Ms. Shuler's casual attitude toward bringing her facility into compliance with the Department's minimum standards. Despite the Department's almost excessive forbearance, Ms. Shuler appears never to have taken the Department's enforcement authority seriously until it denied S & S Achievers' application for license renewal. At that time, Ms. Shuler appears to have undertaken some efforts to bring her facility into compliance. Ms. Shuler's after-the-fact corrections do not alter the fact that the Department had more than ample cause to deny her license application, given her lengthy history of noncompliance and persistent failure to correct violations of the minimum standards for child care facilities found in Florida Administrative Code Chapter 65C-22.

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:

1. Sustaining its initial decision to suspend the license of S & S Achievers for the reasons set forth in the Department's letter dated June 25, 2003; and

2. Sustaining its initial decision to deny the application of S & S Achievers for a license to operate a child care facility for the reasons set forth in the Department's letter dated October 14, 2003, with the exception that S & S Achievers be found not to have violated the provisions of Florida Administrative Code Rule 65C-22.001(6), related to the transportation of children.

DONE AND ENTERED this 9th day of February, 2005, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of February, 2005.

ENDNOTES

^{1/} Florida Administrative Code Rule Chapter 65C-22 was amended on July 13, 2003, and again on September 12, 2004. The references in the text are to the rules as they were at the time of the alleged violations. Where the current text or numeration of the rules varies from the contemporaneous version, the current version is identified by footnote.

^{2/} Currently Florida Administrative Code Rule 65C-22.003(2) and (7).

^{3/} Currently Florida Administrative Code Rule 65C-22.002(1)(a).

^{4/} Currently Florida Administrative Code Rule 65C-22.001(1)(b).

^{5/} Currently Florida Administrative Code Rule 65C-22.003(6).

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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.