STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
Petitioner,	)	
vs.	)	Case No. 07-1082
ST MICHAEL'S ACADEMY, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on June 6, 2007, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Kimberly D. Coward, Esquire
Department of Children and Family Services
401 Northwest Second Avenue, N-1014
Miami, Florida 33128

For Respondent: James H. Greason, Esquire
801 Brickell Avenue, Suite 900
Miami, Florida 33131

STATEMENT OF THE ISSUES

1. Whether Respondent, in November 2006, violated child care facility licensing standards relating to supervision set

forth in Florida Administrative Code Rule 65C-22.001(5), as alleged by the Department of Children and Family Services (Department) in its December 15, 2006, letter to Respondent.

2. If so, whether Respondent should be fined $1,000.00 for this violation, as proposed by the Department in the aforesaid December 15, 2006, letter.

PRELIMINARY STATEMENT

By letter dated December 15, 2006, the Department provided Respondent with the following information:

> You are hereby notified that the Department of Children and Families, pursuant to section 402.310 of the Florida Statutes has imposed a civil penalty on St. Michael's Academy in the amount of $1000.00. The grounds for the imposition of this fine are as follows:
>
> GENERAL INFORMATION 65C-22.001
>
> 1. Supervision 65C-22.001(5)(a-d)
>
> In 11/06 Child Care Licensing office received a complaint that a child cared for at St. Michael's Academy was severely bitten. A written note was brought to our office from the pediatrician stating "injuries on cheek and back are consistent with a human bite." Licensing staff held investigation at day care where staff confirmed child obtained marks at day care at time of incident. Supervision was found to be inadequate at center.
>
> This was the second finding of inadequate supervision leading to a Class I violation in a 4 month period.[1]

The letter then went on to advise that Respondent had the opportunity to "request an administrative hearing to contest the decision." Respondent subsequently requested such a hearing. On March 6, 2007, the matter was referred to DOAH for the assignment of a DOAH administrative law judge to conduct the hearing Respondent had requested and to "submit a Recommended Order."

On May 31, 2007, the parties filed a Pre-Hearing Stipulation, which read, in pertinent part, as follows:

> (a) Concise statement of controversy. Respondent St. Michael's Academy, a licensed child day-care facility, requested an administrative hearing of a $1,000 fine imposed by Petitioner DCF predicated on alleged inadequate supervision which caused injury to a child in day care on November 16, 2006.
>
> (b) Parties' respective positions. St. Michael's contests the factual predicate for the penalty imposed in the latter incident. St. Michael's acknowledges that the subject child (an infant girl aged 16 months at the time) was in day care when a mark was discovered by staff on the child's face, which was sustained after the child was observed falling against the play equipment in the facility. Staff immediately called the mother, who arrived and examined the child, as did staff, and no other injury was received. Staff at no time observed another child inflict the bite or in any way interact with the child in such a way as to cause the mark. The child was at all times supervised by the required number of staff.
>
> DCF relies on Florida Administrative Code 65C-22.001(5)(a), which notes that child

> care personnel are accountable for the children in their care at all times. The Child Care Licensing Department received a complaint alleging that a child was severely bitten at St. Michael's Academy on or about November 16, 2006. Upon independent investigations, both the licensing staff and the protective investigator verified the child's injuries and found the cause to be a direct result of inadequate supervision on behalf of the child care personnel at St. Michael's Academy.
>
> * * *
>
> (e) Admitted facts. St Michael's is a day care facility subject to license and regulation by DCF. The subject children were in St. Michael's day care facility.
>
> (f) Agreed issues of law. Regulations applicable to day-care facilities such as St. Michael's are set forth in §§ 402.301, et seq., and Fla. Admin. Code Chapter 65C-22.
>
> (g) Issues of fact to be litigated. The factual predicate for the fine, (1) the cause of the injury seen on the child at Noon on November 16, 2006, and (2) whether there was inadequate supervision at the time the child sustained that injury.
>
> (h) Issues of law to be determined. Propriety and amount of fines.

As noted above, the final hearing was held on June 6, 2007.[2] Six witnesses testified at the hearing: Linda Reiling, J. F., Meloni Fincher, Ian Fleary, Cheryl Smith, and Dawnise Mobley. In addition, nine exhibits (Petitioner's Exhibits A, B, C, and E, and Respondent's Exhibits 1, 2, 3, 4, and 5) were offered and

received into evidence. Two exhibits, Petitioner's Exhibits F and G, were rejected.[3]

At the close of the taking of evidence, the undersigned established a deadline (20 days from the date of the filing with DOAH of the hearing transcript) for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on September 10, 2007.

The Department and Respondent filed their Proposed Recommended Orders on September 28, 2007, and October 1,2007, respectively.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. At all times material to the instant case, including Thursday, November 16, 2006, Respondent operated a child care facility located at 780 Fisherman Street in Opa Locka, Florida (Facility) pursuant to a license issued by the Department, which was effective June 10, 2006, through June 9, 2007.

2. On November 16, 2006, J. D. was one of nine children between the ages of 12 and 23 months in the Facility's Wobbler/Toddler class. Two properly credentialed Facility staff members, Charnette Muldrow and Barry Thompson, were assigned to oversee the children in the class that day.

3. Cheryl Smith is now, and was at all times material to the instant case, including November 16, 2006, the Facility's office manager. Among her various responsibilities is to make sure that state-mandated staff-to-child ratios are maintained in each of the Facility's classrooms. To this end, she has placed posters in the classrooms indicating what these "appropriate ratios" are and that they "must be maintained at all times." In addition, she "do[es] counts [of staff and children in each classroom] every hour on the hour." She did these "counts" in J. D.'s Wobbler/Toddler classroom on November 16, 2006, and each time found the staff-to-child ratio to be "correct" (one staff member for every six children).

4. Sometime around noon on November 16, 2006, a Facility staff member brought J. D. to Ms. Smith's office. J. D. was not crying, although she had a roundish red mark on her right cheek that she had not had when her mother had dropped her off at the Facility earlier that day. "It looked like ringworm to [Ms. Smith] at first." There were no discernible "puncture wounds," nor was there any blood. The staff member who had brought J. D. to the office explained to Ms Smith that J. D. had "bumped her face" on the "corner cabinet in the classroom."

5. After administering first-aid to J. D., Ms. Smith attempted to contact J. D.'s mother, J. F., by telephone. She

was unable to reach J. F., but left a message at J. F.'s workplace.

6. J. F. returned Ms. Smith's call at 12:54 p.m. and was told by Ms. Smith that J. D. had "bumped her head on a cabinet while playing, and she ha[d] a little bruise," but was "doing fine."

7. J. F. left work at 4:30 p.m. and went directly to the Facility to pick up J. D.

8. Upon arriving at the Facility, J. F. first went "upstairs" to see Ms. Smith, who told her "about the incident and what [had] happened."

9. J. F. then went to retrieve J. D. (who was "downstairs"). It did not appear to J. F., when she examined the mark on J. D.'s cheek, that the mark was "from the cabinet." In her opinion, it looked like J. D. had been bitten by "somebody,"[4] a view that she expressed upon returning to Ms. Smith's office. Ms. Smith replied, "There's no biters in here.[5] Nobody bit J."

10. Before leaving the Facility with J. D., J. F. signed an Accident/Incident Report that Ms. Smith had filled out. According to the completed report, on "11/16/06 at 12:00 noon," J. D. "was playing with . . . toys and bumped her face on the corner cabinet," leaving a "red mark on the right side of her face"; Mr. Thompson was a "[w]itness[] to [the]

[a]ccident/[i]ncident"; the injured area was treated with "antiseptic spray[,] triple antibiotic ointment and a cold compress"; and a message was left with J. F. "to call school."

11. J. F. took J. D. directly from the Facility to the Skylake office of Pediatric Associates, a pediatric group practice to which J. D.'s regular pediatrician belonged. J. D.'s regular pediatrician was unavailable that evening, so J. D. saw someone else,[6] who gave her a signed and dated handwritten note, which read as follows:

> To whom it may concern
>
> The injuries on [J. D.'s] cheek and back are consistent with a human bite. Please investigate.[7]
>
> Thank you.

12. J. F. reported to the local police department, as well as to the Department, that J. D. had been injured at the Facility.

13. J. F. provided this information to Ian Fleary, the Department's childcare licensing supervisor for the north area of the southeast zone, during a visit that she made to Mr. Fleary's office late in the afternoon on Friday, November 17, 2006. J. F. brought J. D. with her to Mr. Fleary's office and showed Mr. Fleary the red mark on J. F.'s cheek, as well as three other, less visible marks on J. F. (one on her cheek,

beneath the red mark; one on her lower back; and one on her right forearm).[8] Mr. Fleary took photographs of all four marks.[9]

14. Mr. Fleary asked one of his subordinates, Linda Reiling, to "address [J. F.'s] complaint as soon as possible."

15. Ms. Reiling, accompanied by Mr. Fleary, went to the Facility on Monday, November 20, 2006, to investigate J. F.'s complaint. Ms. Reiling and Mr. Fleary interviewed Facility staff members, including Ms. Muldrow and Mr. Thompson.[10] Ms. Muldrow stated that she had gone to the restroom, having asked another staff member "to watch the children" in her absence, and first "saw the mark on [J. D.'s] cheek" upon her return to the classroom. Mr. Thompson advised that he was "on lunch break at the time the incident occurred."[11] No one to whom Ms. Reiling and Mr. Fleary spoke at the Facility "admitted seeing [J. D.] being bitten."

16. Based on her investigation, Ms. Reiling was unable to determine, one way or another, whether the staff-to-child ratio in J. D.'s classroom was "correct" on "[t]he day of the incident," but she did find that there was a "lack of supervision." Ms. Reiling prepared a written complaint documenting this finding and provided it to Ms. Smith.

17. Meloni Fincher, a child protective investigator with the Department, also investigated the matter. She was assigned

the case on November 17, 2006, after the incident had been reported to the Florida Abuse Hotline.

18. Ms. Fincher began her investigation by visiting J. F. and J. D. at their home that same day (November 17, 2006), some time after 4:00 p.m. During her visit, Ms. Fincher observed that J. D. had "bruises to her cheek, her back, and [also] her arm."

19. Ms. Fincher was unable to determine the nature or cause of these injuries, so she made arrangements for J. D. to be seen on November 21, 2006, by a University of Miami Child Protection Team physician.

20. Ms. Fincher went to the Facility on November 21, 2006, but was unable to speak to any staff members about the incident at that time.

21. She returned to the Facility on December 7, 2006. This time, she interviewed Ms. Muldrow, Mr. Thompson, Ms. Smith, and Dawnise Mobley.[12] None of the interviewees claimed to be an eyewitness to the incident, having personal knowledge of what happened to J. D.

22. After receiving a copy of the Child Protection Team's "medical report," which contained the team's determination that J. D. had "bite marks at different stages [of] healing [which were] consistent with another child [having] bit[ten] [her],"

Ms. Fincher, on December 12, 2006, "closed the case" finding "[v]erified indicators of inadequate supervision."[13]

23. The evidence received at the final hearing does not allow the undersigned, applying a clear and convincing competent evidence standard, to reach the same conclusion that Ms. Fincher and Ms. Reiling did regarding the adequacy of the supervision J. D. received at the Facility on November 16, 2006. While the evidence is sufficient to support a finding that J. D. suffered a single (red) mark on her right cheek while at the Facility that day, it does not clearly and convincingly establish that she was being inadequately supervised at the time. Inferring that Respondent failed to provide J. D. with adequate supervision based on the mere fact that she received this mark while in Respondent's care is unwarranted, absent a clear and convincing showing (enabling the undersigned to conclude, with a firm belief and conviction and without hesitancy) that a toddler would not receive such a mark while at a child care facility in a classroom setting like J. D. was in unless there was a lack of adequate supervision.

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

25. Section 402.305, Florida Statutes, requires the Department to establish, by rule, licensing standards for child care facilities in Florida, including standards "designed to address . . . [t]he . . . safety . . . for all children in child care."

26. Pursuant to this mandate, the Department has adopted Florida Administrative Code Rule 65C-22.001, which provides as follows with respect to "[r]atios" and "[s]upervision":

> (4) Ratios.
>
> (a) The staff-to-child ratio, as established in Section 402.305(4), F.S.,[14] is based on primary responsibility for the direct supervision of children and applies at all times while children are in care.
>
> (b) Mixed Age Groups.
>
> 1. In groups of mixed age ranges, where children under one (1) year of age are included, one (1) staff member shall be responsible for no more than four (4) children of any age group, at all times.
>
> 2. In groups of mixed age ranges, where children one (1) year of age but under two (2) years of age are included, one (1) staff member shall be responsible for no more than six (6) children of any age group, at all times.
>
> (c) For every 20 children, a child care facility must have one (1) credentialed staff member pursuant to Section 402.305(3), F.S.

(5) Supervision.

(a) Direct supervision means watching and directing children's activities within the same room or designated outdoor play area and responding to the needs of each child. Child care personnel at a facility must be assigned to provide direct supervision to a specific group of children and be present with that group of children at all times. When caring for school-age children, child care personnel shall remain responsible for the supervision of the children in care, capable of responding to emergencies and are accountable for children at all times, including when children are separated from their groups.

(b) During nap time, supervision means sufficient staff are in close proximity, within sight and hearing, of all the children. All other staff required to meet the staff-to-child ratio shall be within the same building on the same floor and be readily accessible and available to be summoned to ensure the safety of the children. Nap time supervision, as described in this section, does not include supervision of children up to 24 months of age, who must be directly supervised at all times.

(c) No person shall be an operator, owner, or employee of a child care facility while using or under the influence of narcotics, alcohol, or other drugs that impair an individual's ability to provide supervision and safe child care.

(d) Additional Supervision Requirements.

1. In addition to the number of staff required to meet the staff-to-child ratio, for the purpose of safety, one (1) additional adult must be present on all field trips away from the child care

> facility to assist in providing direct supervision.
>
> 2. If a child care facility uses a swimming pool that exceeds three (3) feet in depth or uses beach or lake areas for water activities, the child care facility must provide one (1) person with a certified lifeguard certificate or equivalent unless a certified lifeguard is on duty and present when any children are in the swimming area. In situations where the child care facility provides a person with a certified lifeguard certificate or equivalent, that person can also serve as the additional adult to meet the requirement in subparagraph (d)1., above.
>
> 3. A telephone or other means of instant communication shall be available to staff responsible for children during all field trips. Cellular phones, two-way radio devices, citizen band radios, and other means of instant communication are acceptable.

27. While operators of child care facilities, acting through their staff, "at all times" are "responsible" and "accountable" for the supervision of the children in their care, they "are not insurers of the [children's] safety, nor are they strictly liable for injuries to [the children]." La Petite Academy v. Nassef by and through Knippel, 674 So. 2d 181, 183 (Fla. 2d DCA 1996); see also Harrison v. Escambia County School Board, 434 So. 2d 316, 319 (Fla. 1983)("School boards, however, are not insurers of students' safety."); Concepcion by and through Concepcion v. Archdiocese of Miami by and through McCarthy, 693 So. 2d 1103, 1105 (Fla. 3d DCA 1997)("[S]chool

officials and/or teachers are neither insurers of their students' safety, nor are they strictly liable for any injuries which may be sustained by the students."); Ankers v. District School Board of Pasco County, 406 So. 2d 72, 73 (Fla. 2d DCA 1981)("A school board is not an insurer against a student being injured."); and Benton v. School Board of Broward County, 386 So. 2d 831, 834 (Fla. 4th DCA 1980)("[T]eachers and school boards are neither insurers of the students' safety, nor are they strictly liable for any injuries which may occur to them."). "[S]ome accidents occur without the attachment of liability on others." Rodriguez v. Discovery Years, Inc., 745 So. 2d 1148, 1149 (Fla. 3d DCA 1999).

28. Section 402.310, Florida Statutes, which provides, in pertinent part, as follows, authorizes the Department to impose penalties, including administrative fines, upon operators of licensed child care facilities who violate the foregoing "licensing standards":

> (1)(a) The department . . . may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder:
>
> 1. Impose an administrative fine not to exceed $100 per violation, per day. However, if the violation could or does cause death or serious harm, the department . . . may impose an administrative fine, not to exceed $500 per violation per day in addition to or in lieu

of any other disciplinary action imposed under this section.

2. Convert a license . . . to probation status and require the licensee . . . to comply with the terms of probation. . . .

3. Deny, suspend, or revoke a license . . . .

(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 or registrant.

(c) The department shall adopt rules to:

1. Establish the grounds under which the department may deny, suspend, or revoke a license . . . or place a licensee . . . on probation status for violations of ss. 402.301-402.319.

2. Establish a uniform system of procedures to impose disciplinary sanctions for violations of ss. 402.301-402.319.[15] The uniform system of procedures must provide for the consistent application of disciplinary actions across districts and a progressively increasing level of penalties from predisciplinary actions, such as efforts to assist licensees . . . to correct

> the statutory or regulatory violations, and to severe disciplinary sanctions for actions that jeopardize the health and safety of children, such as for the deliberate misuse of medications. The department shall implement this subparagraph on January 1, 2007, and the implementation is not contingent upon a specific appropriation.[16]
>
> (d) The disciplinary sanctions set forth in this section apply to licensed child care facilities . . . .
>
> (2) When the department has reasonable cause to believe that grounds exist for the denial, suspension, or revocation of a license or registration; the conversion of a license or registration to probation status; or the imposition of an administrative fine, it shall determine the matter in accordance with procedures prescribed in chapter 120. . . .
>
> * * *

29. Under no circumstances may the Department impose (as it is seeking to do in the instant case) a fine for a single day violation that is in excess of $500.00, regardless of the severity of the violation or the operator's disciplinary record. See Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991)("An administrative agency has only the authority that the legislature has conferred it by statute."); Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806-807 (Fla. 1st DCA 1990)("We agree that the $60,000 payment is a penalty. As a penalty, it can only be

upheld if the legislative authority relied upon by the agency is sufficiently specific to indicate a clear legislative intent that the agency have authority to exact the penalty prescribed."); and McFarlin v. Department of Business Regulation, Division of Pari-Mutuel Wagering, 405 So. 2d 255, 256 (Fla. 3d DCA 1981)("McFarlin was fined an aggregate of $400 for two separate violations, ostensibly pursuant to Florida Administrative Code Rule 7E-4.09(3), which purports to authorize the levy of a fine of $200 for each separate violation. The authority for adopting the rule appears to be Section 550.02, Florida Statutes (1979). However, a simple reading of the statute fails to disclose the specific authority for the Division to levy such a fine. Moreover, the argument of the Division expressly ignores Article I, Section 18 of the Declaration of Rights of the Florida Constitution which provides: 'No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.' It is apparent that insofar as Rule 7E-4.09(3) sought to levy a fine, it was beyond the purview of the agency to adopt or enforce it without specific legislative authority. Consequently, that portion of the order which sought to impose a $400 fine against McFarlin is vacated.").

30. Nor may the Department punish a licensee twice for the same offense. See Department of Transportation v. Career

Service Commission, 366 So. 2d 473, 474 (Fla. 1st DCA 1979)("Although the Commission may have inartfully used the term 'double jeopardy,' its reversal was based on sound reasoning. D.O.T. not only lacked authority to discipline Woodard twice for the same offense but its action was fundamentally unfair. The same offense may be a proper ground for either a suspension or a dismissal but the statute and rules contemplate that these are mutually exclusive disciplinary alternatives. Otherwise, an agency could repeatedly punish an employee and the employee would never be secure in his employment. . . . [H]aving concluded its investigation and reached its decision as to the disciplinary action it will administer to an employee, the disciplinary action administered may not be increased at a later date nor may an agency discipline an employee twice for the same offense."). The Department, however, is authorized, pursuant to Subsection (1)(b)3. of Section 402.310, to take into consideration "[a]ny previous violations of the licensee" in determining what disciplinary action (within statutory limits) it should take against the licensee for having committed a previously unpunished offense. Cf. Tillman v. State, 609 So. 2d 1295, 1298 (Fla. 1992)(habitual offender statute which "allow[ed] enhanced penalties for those defendants who me[t] objective guidelines indicating recidivism" not violative of constitutional protection against double jeopardy); Castaldi v.

United States, 783 F.2d 119, 123 n.3 (8th Cir. 1986)("Petitioner also contends that the District Court's consideration of his prior criminal record in sentencing him violated several of his constitutional rights (e.g., Fifth Amendment double jeopardy and Fourteenth Amendment equal protection and due process) since Petitioner has fully completed the sentences imposed on those prior convictions. We dismiss this contention as totally without merit. In sentencing, the district court may conduct a broad inquiry into the defendant's background and generally is unlimited as to the kind and source of information it may consider."); and Ross v. State, 413 N.E.2d 252, 258 (Ind. 1980)("It is clear that the appellant was not given double punishment for two specific felonies, but that his history of criminal activity, which dated from 1968, was but one factor the trial court considered in sentencing, as is proper under the statute. The habitual criminal proceeding and sentencing does not violate the prohibition against double jeopardy.").

31. If the Department makes a preliminary determination to impose "disciplinary sanctions" against the operator of a child care facility, it must advise the operator of its intent to take such action and of the operator's opportunity to request an administrative hearing pursuant to Chapter 120, Florida Statutes, at which the operator will be able to make a presentation in an attempt to change the Department's mind. See

Florida League of Cities v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991)("Until proceedings are had satisfying [S]ection 120.57, or an opportunity for them is clearly offered and waived, there can be no agency action affecting the substantial interests of a person."); Capeletti Brothers, Inc. v. Department of General Services, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983)("Capeletti misconceives the purpose of the [Section] 120.57 hearing. The rejection of bids never became final agency action. As we have previously held, APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind."); Capeletti Brothers, Inc. v. Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978)("[A]n agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57."); and Couch Construction Company, Inc. v. Department of Transportation, 361 So. 2d 172, 176 (Fla. 1st DCA 1978)("APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind.").

32. Where "there is a disputed issue of material fact which formed the basis for the proposed final action," the operator is entitled, upon request, to an evidentiary hearing held in accordance with Section 120.569, Florida Statutes, and

Section 120.57(1), Florida Statutes. See Florida Sugar Cane League v. South Florida Water Management District, 617 So. 2d 1065, 1066 (Fla. 4th DCA 1993)("Under section 120.57, a party may petition for an administrative evidentiary hearing to contest any proposed final state agency action where the proposed final agency action would affect that party's substantial interest and where there is a disputed issue of material fact which formed a basis for the proposed final agency action.").

33. At any such hearing, the Department bears the burden of proving the accused child care facility operator's guilt of the violation(s) alleged. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the operator's guilt 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."); and § 120.57(1)(j), Fla. Stat. ("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 . . . .").

34. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . 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, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

35. In determining whether the Department has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits an

agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Trevisani v. Department of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999; and Ghani v. Department of Health, 714 So. 2d 1113, 1115 (Fla. 1st DCA 1998).

36. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed [in the charging instrument] to have been violated" was in fact violated, as alleged by the Department, if there is any reasonable doubt, that doubt must be resolved in favor of the operator. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

37. If the violation alleged is proven by clear and convincing evidence, the Department may then, in accordance with the provisions of Section 402.310(1)(b), Florida Statutes, take final agency action penalizing the operator for its wrongdoing; however, the "disciplinary sanction" imposed may be no more severe than the "disciplinary sanction" the Department, in its notice of proposed agency action, had indicated it intended to impose. See Williams v. Turlington, 498 So. 2d 468 (Fla. 3d DCA 1986)("Since Williams was not given notice by either the complaint or any later proceedings that he was at risk of having his license permanently revoked, the Commission's imposition of the non-prayed-for relief of permanent revocation, even if justified by the evidence, was error."); Department of Children and Family Services v. Robinson, No. 97-1669, 1998 Fla. Div. Adm. Hear. LEXIS 5471 *11-12 (Fla. DOAH February 5, 1998)(Recommended Order)("In its Proposed Recommended Order, the Department has recommended that Mr. Robinson's certification to provide services under the Waiver Program be discontinued. This proposed penalty is rejected because it was not the penalty identified in the letter of February 5, 1997."); and Department of Business and Professional Regulation, Construction Industry Licensing Board v. Hufeld, No. 94-6781, 1995 Fla. Div. Adm. Hear. LEXIS 4518 *8 (Fla. DOAH May 3, 1995)(Recommended Order)("[R]espondents in license discipline cases are entitled

to notice of the penalty sought by the agency, and the penalty imposed cannot be more severe than the most severe potential penalty of which a respondent had notice.")(Recommended Order).

38. The charging instrument in the instant case (the Department's December 15, 2006, letter to Respondent) alleges that sometime "in 11/06," Respondent violated Florida Administrative Code Rule 65C-22.001(5) by providing "inadequate supervision" to a child (J. D.) who was injured at the Facility when she was "severely bitten" on her cheek and back by another (unnamed) person. The allegation is not that Respondent had an insufficient number of staff supervising the children in J. D.'s classroom at the time of the alleged biting incident (as counsel for the Department made clear at hearing[17]). Rather, the Department is alleging that the staff who were in the classroom did not properly discharge their supervisory responsibilities in accordance with the requirements of Florida Administrative Code Rule 65C-22.001(5).

39. The evidentiary record does not contain the clear and convincing competent evidence necessary to support this allegation.

40. Although there was clear and convincing competent evidence adduced at hearing that J. D. left the Facility on November 16, 2006, with a mark on her body that she had not had when she had arrived at the Facility earlier that day

(specifically, the red mark on her right cheek depicted in three of the photographs comprising Petitioner's Exhibit E),[18] the evidentiary record lacks sufficient evidence to enable the undersigned to determine, with a firm belief and conviction and without hesitancy, either what happened to J. D. to cause this mark to appear on her cheek or, more importantly, whether she was receiving adequate supervision at the time.

41. The Department and Respondent have each offered different theories as to how J. D. got this mark on her cheek: the Department contending that she was bitten by another child at the Facility, with Respondent taking the position that she fell against a piece of furniture in her classroom. Neither the Department nor Respondent, though, presented any substantiating eyewitness or expert medical testimony at hearing, and their respective theories both remain unproven.

42. Respondent's failure to have substantiated its theory and affirmatively established the adequacy of the supervision it provided J. D. is not fatal to its prevailing in this proceeding (notwithstanding the Department's suggestion to the contrary in its Proposed Recommended Order). That is because it was the Department, not Respondent, that had the burden of proof at hearing. It was the Department's burden to prove, by clear and convincing competent evidence, that on the day of the incident described in the charging instrument, Respondent failed to

provide J. D. with the supervision required by Florida Administrative Code Rule 65C-22.001(5), as the charging instrument alleges. The Department's evidentiary presentation at hearing fell short of meeting this burden. The mere fact that J. D. received a single mark of unknown cause on her cheek while at the Facility on November 16, 2006, is not clear and convincing proof that Respondent was derelict in its responsibility to adequately supervise her that day.[19] See La Petite Academy, 674 So. 2d at 183 ("The fact that an injury occurs in the presence of a teacher, without some evidence of wrongdoing, does not establish negligent supervision. Teachers and schools are not insurers of their students' safety.").

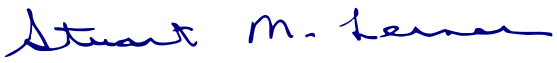
43. In view of the foregoing, the charge of "inadequate supervision" made in the Department's December 15, 2006, letter to Respondent should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Department issue a final order dismissing the "inadequate supervision" charge made in its December 15, 2006, letter to Respondent.

DONE AND ENTERED this 11th day of October, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of October, 2007.

ENDNOTES

[1]/ In another, subsequent letter, the Department informed Respondent it would be imposing a separate $200.00 fine for the first alleged instance of "inadequate supervision," which the Department claimed occurred in August 2006. As of the date of the final hearing in this case, no final agency action had yet been taken with respect to this other matter. (In its Proposed Recommended Order, however, Respondent asserts that "[t]he fine for that [first] incident . . . . [subsequently] was dismissed by [the Department].")

[2]/ The hearing was originally scheduled for May 7, 2007, but was continued twice at the Department's request.

[3]/ Petitioner's Exhibit F, which was offered into evidence for the stated purpose of showing that the Department could impose a fine in excess of $500.00 for the alleged November 2006 violation described in the Department's December 15, 2006, letter to Respondent, was rejected because, as a matter of law, the Department has no such authority. Under Section 402.310, Florida Statutes, $500.00 is the maximum "per violation per day" fine the Department may impose. Petitioner's Exhibit G was rejected because it was not timely disclosed and its admission

would have unfairly prejudiced Respondent. See Gonzalez v. Department of Insurance, 814 So. 2d 1226, 1227 (Fla. 3d DCA 2002)(administrative law judge erred in receiving into evidence exhibit offered by agency that had not been disclosed to accused until the "eve of the administrative hearing," where admission of exhibit was prejudicial to accused).

[4]/ There is no record evidence that J. F. has any experience or expertise in bite mark identification.

[5]/ No showing was made at hearing that there were any known biters in J. D.'s class that day.

[6]/ The evidentiary record reveals neither the name nor the credentials of the person J. D. saw. The person did not testify at the final hearing.

[7]/ This note was offered and received into evidence at the final hearing (as Petitioner's Exhibit B). To the extent offered to prove what caused the "injuries" described therein, the note constitutes hearsay evidence that would not admissible over objection in a civil proceeding in Florida. See Visconti v. Hollywood Rental Service, 580 So. 2d 197, 198 (Fla. 4th DCA 1991); Saul v. John D. and Catherine T. MacArthur Foundation, 499 So. 2d 917, 919-20 (Fla. 4th DCA 1986); and Department of Financial Services v. Ripa, No. 06-3421PL, 2007 Fla. Div. Adm. Hear. LEXIS 292 n.8 *43-44 (Fla. DOAH May 16, 2007)(Recommended Order). As such, it is insufficient, standing alone, to support a finding of fact in this administrative proceeding as to the cause of these "injuries." See Scott v. Department of Professional Regulation, 603 So. 2d 519 (Fla. 1st DCA 1992)("The only evidence which the appellee presented at the hearing was a hearsay report which would not have been admissible over objection in a civil action. . . . [T]his evidence was not sufficient in itself to support the Board's findings."); Doran v. Department of Health and Rehabilitative Services, 558 So. 2d 87, 88 (Fla. 1st DCA 1990)("The documents presented before the hearing officer were hearsay and did not come within any recognized exception which would have made them admissible in a civil action. . . . Because the only evidence presented by the department to show that Doran held assets in excess of the eligibility requirements for receiving ICP benefits consisted of uncorroborated hearsay evidence, we must reverse the hearing officer's final order."); and Section 120.57(1)(c), Florida Statutes ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be

sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

[8]/ The evidence is insufficient to establish that any of these three other marks were the result of anything that happened at the Facility on November 16, 2006.

[9]/ These photographs were offered and received into evidence at the final hearing (as Petitioner's Exhibit E). The undersigned is unable to discern from an examination of these photographs the presence of any obvious bite marks (with visible teeth impressions, that even a lay person would be able to identify as such).

[10]/ The statements given during the investigative process by Ms. Muldrow and Mr. Thompson (neither of whom testified at the final hearing), which the Department offered into evidence through the testimony of its witnesses, constitute party admissions (within the meaning of Section 90.803(18)(d), Florida Statutes) that would be admissible over a hearsay objection in a civil proceeding in Florida. See Castaneda v. Redlands Christian Migrant Association, 884 So. 2d 1087, 1091 (Fla. 4th DCA 2004)("[T]he statements of the Redlands employees are admissions within the meaning of section 90.803(18)(d) as the statements concerned matters regarding this specific accident arising from their employment and were made while the deponents were still employees of Redlands.").

[11]/ Who, if anyone, took Mr. Thompson's place in the classroom during his lunch break, the evidentiary record does not reveal.

[12]/ Ms. Mobley, who testified at the final hearing, described herself in her testimony as the "representative" of Respondent's board of directors.

[13]/ Ms. Fincher testified at the final hearing concerning her reliance upon the Child Protection Team's "medical report," the contents of which she described in her testimony. To the extent that her testimony was offered for the purpose of proving the truth of the matters asserted in the report, it amounts to hearsay evidence that would not admissible over objection in a civil proceeding in Florida and that therefore cannot, by itself, in this administrative proceeding, be the basis for any factual finding as to the correctness of the assertions made by the Child Protection Team in its report. See cases cited in endnote 7, above.

[14]/ Section 402.25(4), Florida Statutes, provides, in pertinent part, as follows:

> STAFF-TO-CHILDREN RATIO.
>
> (a) Minimum standards for the care of children in a licensed child care facility as established by rule of the department must include:
>
> 1. For children from birth through 1 year of age, there must be one child care personnel for every four children.
>
> 2. For children 1 year of age or older, but under 2 years of age, there must be one child care personnel for every six children.
>
> * * *

[15]/ In its Proposed Recommended Order, the Department claims that its "CF Pamphlet 175-2 (Desk Reference)" (a document that is not part of the record in this case) contains such a "uniform system of procedures." Section 402.310(1)(c)2, Florida Statutes, however, requires that the "uniform system of procedures" referred to therein be "adopt[ed] [as] rules" in accordance with the rulemaking procedures of Chapter 120, Florida Statutes, not merely set forth in a "pamphlet." See Department of Children and Family Services v. Children's Christian School House, Inc., No. 06-4777, 2007 Fla. Div. Adm. Hear. LEXIS 213 *5 (Fla. DOAH April 16, 2007)(Recommended Order)("In its proposed recommended order, Petitioner cites a 'CF Pamphlet 175-2 Enforcement Section' ('Desk Reference'), which the Administrative Law Judge has not found in the Florida Administrative Code, to support its contention that Class II violations shall be penalized by fines of $50-100.").

[16]/ It appears from an examination of the Florida Administrative Code that the Department has not yet complied with this statutory rulemaking mandate. There is case law suggesting that such non-compliance has the consequence of rendering the Department powerless to impose any "disciplinary sanctions." See Arias v. Department of Business and Professional Regulation, Division of Real Estate, 710 So. 2d 655, 661 (Fla. 3d DCA 1998)("Absent the penalty guidelines required by law, in

accordance with section 120.68, we can only conclude that the order under review must be reversed. This real estate licensee who was subject to disciplinary proceedings was entitled to notice of all matters that the Commission would consider, including the likely range of the penalty to be imposed. Furthermore, because any future creation and application of penalty guidelines and application of those guidelines to this litigant would constitute an ex post facto application of law, remand for further agency action is not a viable option.").

[17]/ See pages 27 and 28 of the hearing transcript.

[18]/ The evidence adduced at hearing does not clearly and convincingly establish that any of the other marks on J. D's body depicted in the photographs that comprise Petitioner's Exhibit E first appeared while she was at the Facility on November 16, 2006.

[19]/ Even if the Department had established that the mark was a bite mark resulting from J. D.'s having been bitten by one of her classmates at the Facility that day, the Department's proof would still be insufficient to clearly and convincingly establish "inadequate supervision" on Respondent's part. As Administrative Law Judge Ella Jane P. Davis observed in Johnson v. Department of Children and Family Services, 04-0271, 2004 Fla. Div. Adm. Hear. LEXIS 1851 *13 (Fla. DOAH June 7, 2004), "[c]hildren biting one another is not necessarily a preventable occurrence." Such an incident can occur in the classroom of a child care facility even though the victim and biter are being watched as required by Florida Administrative Code Rule 65C-22.001(5).

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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.