

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)	
FAMILY SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 07-5100
)	
GOD'S LITTLE ANGELS and VICKIE)	
OLOPADE,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on April 14, 2008, by video teleconference with sites in Jacksonville and in Tallahassee, Florida.

APPEARANCES

For Petitioner:	Robin Whipple-Hunter, Esquire Department of Children and Family Services Post Office Box 2417 Jacksonville, Florida 32231-0083
For Respondents:	Randall A. Schmidt, Esquire 620 West 37th Street Savannah, Georgia 31415

STATEMENT OF THE ISSUE

The issue presented is whether Respondents' license to operate a child care facility should be revoked.

PRELIMINARY STATEMENT

In response to the Department's undated Intent to Revoke License alleging that Respondents had violated certain statutes and rules regulating the operation of a child care facility, Respondents requested an administrative hearing regarding the Department's allegations by correspondence dated October 22, 2007. On November 6, 2007, the Department transmitted its undated Intent to Revoke License and Respondents' request for a hearing to the Division of Administrative Hearings to conduct the evidentiary proceeding.

By Order of Pre-hearing Instructions entered November 26, 2007, the parties were ordered to file a pre-hearing stipulation no later than 20 days before the final hearing in this cause. The Department never complied with that Order.

On April 14, 2008, the day of the final hearing in this cause, Respondents filed a unilateral statement, erroneously entitled "Pre-hearing Stipulation." In that document, Respondents admitted that the Department's Intent to Revoke License had been amended. Although an amended intent to revoke license would replace the intent to revoke license it was amending and would become the charging document/administrative complaint, no amended intent to revoke license was ever filed with the Division. Further, the Department never requested leave to amend the charges in this cause. Accordingly, it

cannot be determined which, if any, allegations contained in the Department's original Intent to Revoke License survived in the amended intent to revoke license.

Also on April 14, 2008, the day of the final hearing in this cause, the Department filed its Addendum to Amended Intent to Revoke License dated January 16, 2008, neglecting still to file the document to which the Addendum referred. Since the Intent to Revoke License was apparently replaced by an amended document not filed in this proceeding, the only charging document at issue in this proceeding is the Addendum to the Amended Intent to Revoke License filed on April 14, 2008.

At the final hearing the Department presented the testimony of Pauline Miller, Pamela Buckham, and Pamela Jett. Respondent Vickie Olopade testified on behalf of the Respondents and presented the testimony of Amanda Woodridge, Keisha McGriff, Antoinette Jones, Dorothy Daniels, Nichol Rogers, and Lynette Blair.

The Department's Exhibits numbered 5, 6, 8-14, the third page of 15, 16-19, and 36-68 and Respondents' Exhibits numbered 1-6 were admitted in evidence without objection. Ruling was reserved on the admissibility of the Department's Exhibits numbered 1-4, 7, and the first two pages of 15, subject to the parties filing post-hearing memorandum on the issue of whether the Department could take disciplinary action for violations

remote in time and for which disciplinary action had already been imposed and resolved and which pre-date the issuance of subsequent annual licenses. Since the Department's Proposed Recommended Order contained no legal argument on this issue but merely asserted that it could do so, the Department's Exhibits numbered 1-4, 7, and the first two pages of 15 are rejected.

The Transcript of the final hearing was filed on May 12, 2008. By agreed motion, the parties requested that their deadline for filing proposed recommended orders be extended to June 12, 2008, and that request was granted. Although both parties were afforded leave to file proposed recommended orders, only the Department did so.

FINDINGS OF FACT

1. The Department first issued a child care facility license to Respondent God's Little Angels in 1999.

2. On October 30, 2007, the Department's inspector went to Respondent God's Little Angels to conduct a routine inspection. Several items on the Department's form checklist are marked as being in "noncompliance." Those items are either given a date by which they must be corrected or are marked "complete." Although the Department presented no evidence as to the meaning of the notation "complete," a review of the types of items marked "complete" suggests that the item was corrected immediately and/or before the inspection was finished.

3. Those items marked "complete" were four staff members in a room instead of five; no soap in one of the bathrooms; one child did not wash his or her hands after using the bathroom; a toy in the outdoor play area was broken; water was standing in toys and equipment outside; and one bottle was not labeled with the child's first and last name. As to the standing water in the outdoor toys, no information is provided as to whether it was raining or whether the sprinklers were operating at the time or whether any children were outside.

4. A number of items on the October 30, 2007, form checklist are marked as being in "noncompliance" and have a deadline by which they must be corrected. They are: the facility's storage of linens was not sanitary, due date October 31, 2007; and outdoor toys need to be cleaned, due date November 5, 2007. There are also several recordkeeping items noted: 3 children out of 45 did not have a current physical examination record, due date November 9, 2007; 5 children did not have a current immunization record, one child's record did not have an expiration date, and 2 records had expired, due date November 10, 2007; and 19 children had incomplete enrollment information on file, due date November 3, 2007.

5. The Department's inspector returned to the facility on November 30, 2007. The form checklist carries a notation that the owner's spouse indicated that the Department and the

facility could only deal with each other through their attorneys. When the inspector asked her supervisor for advice, her supervisor told her to leave the facility. November 30, 2007, is subsequent to the Department's referral of this case to the Division of Administrative Hearings.

6. On December 28, 2007, the Department conducted a routine inspection of God's Little Angels. The form checklist has attached to it a hand-written explanation of the visit of November 30, 2007, by the inspector who went to the facility on that date. Her explanation is more detailed and states that the owner's spouse denied her access because the facility was "in the process of revocation" and that his lawyer had told him that everything now had to go through the facility's lawyer and the Department's lawyer. The explanation also states that the owner's spouse tried to contact his lawyer but was unable to. The owner's spouse then called the inspector's supervisors and talked to them; they then told the inspector not to do the inspection that day.

7. The items marked to be in "noncompliance" and "complete" on the December 28, 2007, form checklist are as follows: the back door did not have a screen and was open; some outdoor toys were splashed with mud, some had standing water in them, and two were cracked; the posted menu did not have the date on it; and an evacuation plan was missing from "the back

room." The Inspection Checklist contains a notation that the inspector came to the facility on December 28, 2007, but was denied access by the owner's spouse. When the inspector returned later that day, the owner's spouse and the Department's program administrator had conferred, and the owner's spouse advised the inspector that the inspection could take place.

8. The items marked to be in "noncompliance" and which have a deadline for correction are as follows: side fence is not secure, due date January 7, 2008; the facility did not have documentation to show completion of a five-hour literacy training course for one staff member, due date January 7, 2008; the facility did not have an Attestation of Good Moral Character for that same staff member, due date January 4, 2008.

9. The only item on the December 28, 2007, inspection checklist that also appeared on the October 30, 2007, inspection checklist is the standing water in the outdoor playground equipment or toys. On both checklists that notation is marked "complete" so it is assumed that the water was removed before either of those inspections was completed.

10. No item on the October checklist was found to remain in non-compliance in December. Checklists for three inspections after the December inspection were admitted in evidence but no testimony explaining the entries or the actual inspections was offered. The January 29, 2008, inspection checklist has an

entry related to the fence, but the description is different than on the December inspection form. It cannot be assumed, therefore, that the deficiency was the same. The February 28, 2008, and the March 28, 2008, checklists indicate that Respondents were in compliance with all statutory and rule requirements.

11. Respondents have obtained assistance from the grandmother of one of the children attending God's Little Angels. That lady has assisted Respondents to organize the required paperwork, has given Respondents computer programs to track the required paperwork, and has created spreadsheets to handle Respondents' finances. Since she is also a state-certified firefighter, she has inspected the facility regarding safety issues and made suggestions for improvements. Those suggestions have been implemented.

12. Respondents have also hired a woman to be the operations manager at God's Little Angels. She will computerize God's Little Angels' records and ensure that all of the Department's rules and regulations are being met by Respondents and by the parents of children attending the facility. Her background is as a medical office supervisor, overseeing 12 facilities, and, according to her testimony at the final hearing, has never failed an inspection by the State regarding those facilities.

13. Respondents have made a number of physical changes to the facility and organizational changes to the required recordkeeping in their attempt to avoid revocation of their license.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

15. The Department seeks to take disciplinary action against Respondents in this proceeding. The burden of proof, therefore, is on the Department, and the Department must prove the allegations in its Administrative Complaint by clear and convincing evidence. Dept. of Banking & Finance, Division of Securities & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

16. Since the Department's Intent to Revoke License has been replaced by an amended notice of intent to revoke license which was never filed in this case, the only charging document remaining in this proceeding is the Addendum to the Amended Intent to Revoke License which was filed the day of the final hearing in this cause.

17. The Addendum alleges that Respondents have violated Chapter 402, Florida Statutes, and Chapter 65C-22, Florida Administrative Code. The Addendum recites the violations found

during the October 30, 2007, inspection and the December 28, 2007, inspection. It also curiously alleges that the Department received a complaint from a parent on December 18, 2007, investigated the complaint, and found that Respondents were in compliance. It also alleges that on November 30, 2007, the Department was prevented from making a routine inspection by the owner's spouse. It fails to explain, as the Department's November 30 notes attached to the December checklist explained, that the owner's spouse said his attorney had told him that contact with the Department should only go through the attorneys, that the owner's spouse spoke with the inspector's supervisor's supervisor, and that that Department employee told the inspector not to inspect the facility that day.

18. The parent complaint that the Department found to be without merit and the inspection that was not performed upon orders of the inspector's superior are not alleged in the Addendum to be statutory or rule violations and warrant no further discussion in this Recommended Order.

19. As to the violations found during the October and December inspections, many were corrected while the inspector was still on-site. Of those not immediately corrected but which were given a deadline for correction, there is no evidence that those were not corrected by the deadline.

20. Section 402.310, Florida Statutes, authorizes the Department to take disciplinary action for violations of the Department's statutes and rules. There are no specific statutes alleged in the Addendum to have been violated by Respondents. As to rule violations, the Department offered no testimony regarding the inspections conducted in October and December but simply relied on the inspection checklists themselves. The checklists indicate that the violations noted were either corrected during the inspection or were to be corrected by a date certain, and there is no evidence that any violation was not corrected.

21. Since the Department presented no testimony regarding the two inspections covered by the sole charging document in this cause and simply relied upon the inspection checklists, it is not possible to understand the severity of the violation or even what the violation was. For example, the October 30, 2007, checklist and the Addendum to the Amended Intent to Revoke License both allege that: "The facility's storage of linens was not sanitary." Although these words quote Florida Administrative Code Rule 65C-22.002(5)(c), standing alone, they do not describe what Respondents were doing wrong or how serious or minor the infraction was.

22. After listing all items from both inspections, whether corrected during the inspection or the subject of a deadline for

correction, the Addendum simply concludes that there is an immediate and serious danger to the health, safety, and welfare of the children served by God's Little Angels and that revocation is appropriate. Since the only charging document in this cause is the Addendum and the inspection checklists constitute the entirety of the Department's evidence regarding the inspections, the Department has failed to prove any of its allegations by even a preponderance of the evidence let alone the clear and convincing evidence standard the Department is required to meet. Moreover, the Department has failed to show that any item listed on the checklists presented an immediate or serious danger to anyone.

23. Lastly, most of the Department's exhibits are well outside the time period covered in the Addendum to the Amended Intent to Revoke License and cannot be used as a basis for disciplinary action in this proceeding even though testimony was offered regarding some of those exhibits. Only Exhibits numbered 63-65 relate to the time period covered by the Addendum to the Amended Intent to Revoke License, and Exhibits 66-68 are the checklists for subsequent inspections, outside the time period covered in the Addendum.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that the Department failed to prove the allegations in its Addendum to the Amended Intent to Revoke License and dismissing the Addendum filed against Respondents in this cause.

DONE AND ENTERED this 2nd day of July, 2008, in
Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
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Filed with the Clerk of the
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this 2nd day of July, 2008.

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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.