STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES, Petitioner, vs. DAVIS FAMILY DAY CARE HOME, Respondent.	)	Case No. 11-0916
DAVIS FAMILY DAY CARE HOME, Petitioner, vs. DEPARTMENT OF CHILDREN AND FAMILIES, Respondent.	)	Case No. 11-2242

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted by video teleconference in these cases on July 28, 2011, in Lakeland and Tallahassee, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

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For Davis Family Day Care Home:

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STATEMENT OF THE ISSUES

The issues in these cases are: whether the Davis Family Day Care Home violated provisions of chapter 402, Florida Statutes,[1/] and Florida Administrative Code Chapter 65C-20,[2/] and, if so, what penalty should be imposed; whether the Davis Family Day Care Home's renewal application for a license to operate a regular family day care center should be approved or denied; and whether the Davis Family Day Care Home's initial application for a license to operate as a large family child care home should be approved or denied.

PRELIMINARY STATEMENT

The Department of Children and Families (hereinafter the "Department" or "DCF") issued a "Proposed Fine of Family Day Care Home License No. F10PO0720" (hereinafter "AC 1") on October 29, 2010, to the Davis Family Day Care Home (hereinafter the "Davis Day Care" or the "facility"). AC 1 alleged a single violation (August 3, 2010) of the regulations governing the operation of a family day care home and imposed an administrative fine of $500.00. The Davis Day Care filed a response to AC 1, which was accepted by the Department as a

petition for a formal administrative hearing. On February 21, 2011, AC 1 and the facility's response were forwarded to the Division, assigned Case No. 11-0916, and assigned to Administrative Law Judge J. D. Parrish.

On March 23, 2011, the Department issued a "Proposed Denial Application to Operate a Family Day Care Home" (hereinafter "AC 2") to the Davis Day Care. AC 2 alleged five violations of the regulations governing the operation of a family day care home and denied the facility's renewal application.

On April 11, 2011, the Department issued a "Proposed Denial Application to Operate a Large Family Day Care Home" (hereinafter "AC 3") to the Davis Day Care. AC 3 also alleged the same five allegations as set forth in AC 2 for the renewal denial. On April 19, 2011, the Davis Day Care filed a "Petition for Administrative Hearing" (hereinafter the "Petition"), disputing all the allegations in the Department's AC 2 and AC 3. On May 4, 2011, the Department forwarded the facility's request for a hearing to the Division.[3/] Administrative Law Judge William F. Quattlebaum was assigned to hear the Petition under one Division case number, Case No. 11-2242. On May 11, 2011, the Davis Day Care filed a "Motion for Consolidation of Related Cases" involving AC 1, AC 2 and AC 3. By Order dated May 18, 2011, the Division consolidated both Division cases involving the Davis Day Care. Pursuant to notice, the

consolidated cases were noticed for video teleconference hearing for July 28, 2011. The consolidated cases were transferred to Administrative Law Judge Lynne A. Quimby-Pennock for the final hearing.

At the beginning of the hearing, the Department announced that with respect to AC 2 and AC 3, it was not presenting evidence on either of the alleged abuse investigations that occurred in 2007 and 2008 as outlined in each administrative complaint.

At the final hearing, the Department called seven witnesses: Marva Brooks, program manager for a child care food program; Natalie Barton (mother of E.B.); Connie Fleming, nurse practitioner with the child protection team; Deanna McCain, child protection investigator; Vicki Richmond, children and family counselor; Sheila Nobles, child care licensing administrator; and Donald M. Giorgano, child care licensing counselor, who was called as a rebuttal witness. The Department offered 14 exhibits into evidence, and all were admitted.[4/]

The Davis Day Care called five witnesses including: LaShandra Davis; Sarah Stafford; Suzanne Williams; Alexis Webb; and LaToya Wilson. The facility offered 19 exhibits into evidence. As the exhibits had been pre-numbered, the following facility exhibits were admitted: 1 through 16, 18, 19 and 21.

At the conclusion of the hearing, the parties requested and were granted leave to file their proposed recommended orders (PROs) by the close of business on the 30th day after the transcript was filed. The two-volume Transcript of the hearing was filed on August 15, 2011. The parties filed a "Joint Request for Extension of Time to File Proposed Recommended Orders" before the filing deadline. The request was granted, and the parties were directed to file their PROs no later than the close of business on September 30, 2011. Both parties timely filed their PROs, and each has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. The Department is responsible for inspecting, licensing and monitoring child care facilities such as the one operated by the Davis Day Care. It is also the Department's responsibility to ensure that all such facilities are safe and secure for the protection of the children utilizing those facilities.

2. The Department routinely conducts inspections of licensed family day care homes to determine whether the home is in compliance with the applicable statutes and rules. Following such inspections, a report is provided to the operator which provides a time frame to correct any outstanding deficiencies.

3. The Department also conducts inspections or investigations of child care facilities in response to complaints it receives.

4. LaShandra Davis (Ms. Davis) owns and operates the Davis Day Care, a family day care facility licensed by the Department. The Davis Day Care was initially licensed in April 2007 and was in continuous operation at all times material to these issues. No testimony was offered that the facility had prior disciplinary actions against it.

5. Ms. Davis is a nurse, has an associate of science (A.S.) degree in nursing from Polk Community College, and is attending college to obtain an A.S. degree in early childhood education. Additionally, Ms. Davis has five sons and one daughter. Their names include (from youngest to oldest): Layla Davis, Steven Davis, Devondrae Davis, Deshawn Williams, Daniel Williams, and Rafael Davis. No testimony was received regarding Ms. Davis using any other name or names from August 3, 2010, through December 2, 2010.[5/]

6. On February 23, 2011, Ms. Davis submitted an application to obtain a license to operate a large family day care home at her current location.

7. On March 15, 2011, Ms. Davis submitted her renewal application to retain her license to operate a family day care home at her current location.

B. October 29, 2010, AC 1 (August 3, 2010, Inspection)

8. On August 3, 2010, the Davis Day Care was subjected to an inspection based on a complaint that it was "over-ratio." This over-ratio issue involves the number of children in the care of a family day care operation to the number of adults providing that care. The Department received a complaint that the facility was seeking meal reimbursements for more children than were allowed for the type of child care license it held. Vicki Richmond (Ms. Richmond) testified that she conducted the inspection on August 3, 2010, and cited the facility for being over the licensed capacity ratio by more than two children. Because the facility was over ratio by more than two children, it was a Class I violation.

9. At that August inspection, Ms. Davis explained to Ms. Richmond that she (Ms. Davis) had a license to provide child care for ten children, and she had ten children in her care. Ms. Richmond explained the ratio requirement to Ms. Davis. Based on the age of the children, Ms. Davis was authorized to have a maximum of ten children provided no more than five were preschool age, and, of those five, no more than two were under 12 months of age. At this August inspection, Ms. Davis was over-ratio by two children. Ms. Davis executed and received a copy of the complaint report prepared on August 3, 2010, that discussed the over-ratio limitations. Three other technical

violations were brought to Ms. Davis's attention during that inspection, and two of those violations were corrected immediately. Ms. Davis was given a two-week extension to correct the third violation involving an expired fire extinguisher.[6/]

10. Additionally, Ms. Richmond testified that Ms. Davis's mother ("Ms. Jones")[7/] was visiting the facility while Ms. Richmond was conducting this August inspection. According to Ms. Richmond, Ms. Jones had been previously screened, but did not meet the Department's standards to be in a child care facility. Ms. Jones should not have been present either for a visit or to be preparing lunches as the testimony revealed. Ms. Richmond recommended to Ms. Davis that it was important to check into getting an exemption for Ms. Jones to be at the facility. Ms. Davis later testified that Ms. Jones had cleared up the screening issue, and both had been told Ms. Jones was allowed to be present at the facility.

11. At hearing, Ms. Davis admitted that she was over-ratio on August 3, 2010. Further, she stated that she "just flat out misunderstood" the adult-child ratio requirement issue until Ms. Richmond explained it to her in August 2010.

12. Ms. Brooks and Mr. Giordano testified that they had each individually explained the ratio requirement to Ms. Davis during prior inspections or discussions at the facility.

Although there is some discrepancy between Ms. Davis's recollection and the two witnesses on this point, Ms. Davis admitted this violation and was quite candid about her lack of knowledge with respect to it.

13. Credible testimony from both Ms. Richmond and Shelia Nobles (Ms. Nobles) established that having two or more children over-ratio was a Class I violation, which would subject any child care facility to discipline by the Department.

14. When Ms. Davis received the Department's three-page October 29, 2010, AC 1 advising her of the Class I violation (over-ratio by two or more children) and assessing a $500 fine, she was "shocked." Ms. Davis testified that, at the time of the inspection (August 3, 2010), Ms. Richmond had stated the fine might be $50 or maybe more, leading Ms. Davis to believe the fine would not be that high.

15. AC 1 advised Ms. Davis that the over-ratio issue was a Class I violation of section 402.302(7). AC 1 provided one Department address for two reasons, to pay the $500 fine or to request an administrative hearing. There is no language within AC 1 that advised Ms. Davis of an optional payment plan. Ms. Davis testified she was unaware of a payment plan option, and her only option was to appeal the decision, which she did.

16. Ms. Richmond confirmed that the Department would accept payments as long as the total fine amount was paid in

full prior to the next renewal. However, that information was not shared with Ms. Davis until the hearing.

C. Department's March 23, 2011, Proposed Denial Application to Operate a Family Day Care Home (AC 2) and Department's April 11, 2011, Proposed Denial Application to Operate a Large Family Day Care Home (AC 3).

17. Both AC 2 and AC 3 set forth five allegations in support of the Department's denial of the renewal application and the large family child care home application. Two alleged abuse allegations from 2007 and 2008 were included in these administrative complaints; however, as previously stated, no testimony or evidence was offered, presented or substantiated at hearing. Thus, any attempt to reference either the 2007 or 2008 allegations as fact is disregarded as unfounded and not supported by credible testimony or evidence. AC 2 and AC 3 rest on three allegations: the alleged abuse of child E.B., the alleged lying during the investigation of the alleged child (E.B.) abuse, and the inspection conducted on August 3, 2010, regarding the facility being over ratio.[8/]

18. Natalie Barton (Ms. Barton), E.B.'s mother, testified that she saw marks on E.B.'s bottom at the end of November 2010 (November 30, 2010) that "could only have occurred at the day care." Ms. Barton testified she picked E.B. up from the facility prior to 5:30 p.m. and discovered the marks on E.B.'s bottom during bath time that evening.

19. Both Ms. Barton and Ms. Davis testified that E.B.'s mother sent a picture of the injury to Ms. Davis via her cell phone the evening the injury was first seen. At that point, Ms. Davis told E.B.'s mother that she (Ms. Davis) didn't know what or how the injury occurred and recommended taking the child to E.B.'s doctor. Ms. Davis had no hesitation in making this recommendation to Ms. Barton.

20. Ms. Barton took E.B. to her (E.B.'s) pediatrician the morning after she discovered the injury (December 1, 2010). However, E.B.'s physician indicated he wanted to see the child in two days, as he could not make a determination what, if anything, had caused the injury as there was no bruising. Ms. Barton also testified that she took E.B. back to the Davis Day Care after she was seen by her pediatrician so she could see how E.B. reacted. While at the facility, E.B. was "in her routine," that she (E.B.) walked in and sat on the couch like she did every day. Ms. Barton did not return E.B. to her own pediatrician for further evaluation. Ms. Barton testified E.B. was seen by the child protective team the day after she was seen by the pediatrician (December 2, 2010).

21. On December 2, 2010, after receiving information about the possible physical abuse of a child (E.B.) (documented as being received at 11:08 p.m. on December 1, 2010), Deanna McCain (Investigator McCain) contacted Ms. Barton to obtain additional

information. Investigator McCain also spoke with E.B., who said she had been hit by "Ms. Shawna." After observing E.B.'s injuries and obtaining a photograph of E.B.'s buttocks, an appointment was made for E.B. to be seen by a member of the child protection team, i.e., the nurse practitioner.

22. During the afternoon of December 2, 2010, Nurse Practitioner Connie Fleming (Nurse Fleming) performed a medical evaluation of E.B., a then two-year, nine-month old child. During E.B.'s evaluation, Nurse Fleming noticed bruising on E.B.'s buttocks. When Nurse Fleming asked E.B. what happened, E.B. responded "Ms. Shawn spanked me." Nurse Fleming stated the bruising appeared to be consistent with an outline of a hand. Pictures taken during the medical evaluation reflect red areas on E.B.'s buttocks.

23. Based on her nine-plus years of training and experience as a nurse practitioner, Nurse Fleming determined that E.B. had suffered physical abuse; however, she never stated who caused the injury. Nurse Fleming contended that the injuries were indicative of a rapid-force compression injury, typical of a slap with a hand.

24. Later on December 2, 2010, Investigator McCain went to the facility to investigate the alleged abuse report. Upon her arrival at the location, Investigator McCain had to wait for a

local law enforcement officer (LEO) before she could enter the facility.

25. While Investigator McCain waited for the LEO to arrive (between 3:30 p.m. and 4:45 p.m.), she spoke with parents who were picking up their children from the facility. Each parent she spoke with had supportive comments about the facility ("great day care provider," their child had "no injuries," had never seen "inappropriate behavior," "no concerns"). Whether all these comments came from one parent or multiple parents is unclear. Investigator McCain did not observe any injuries to any of the children leaving the facility.

26. Ms. Richmond also went to the facility at approximately the same time as Investigator McCain; however, Ms. Richmond could enter the home without a LEO, and she did so. Ms. Richmond made contact with Ms. Davis and explained there was a complaint. Ms. Richmond's task at the time was to obtain information about the number of children Ms. Davis had in the facility. According to the sign in sheet, there were seven children present, plus Ms. Davis's four-year-old son. Ms. Richmond testified that Ms. Davis initially stated there were four children present, but later a sleeping child was found in a crib, and her (then) four-year-old son ran through the home.[9/] Although Ms. Richmond asked for the attendance sheets for the previous month (November 2010), Ms. Davis was only able

to provide the attendance sheets for December 1 and 2, 2010.[10/] According to Ms. Richmond, those two attendance sheets documented that Ms. Davis's facility was again over-ratio for those two days.

27. When Investigator McCain entered the facility with the LEO, she explained the reason for her presence to Ms. Davis. Investigator McCain testified Ms. Davis was asked how many children were present and together they conducted a "walk-through" of the facility. Investigator McCain testified that, at the time of the walk-through, she was told there were four children present, three toddlers and a small child in Ms. Davis's arms. Investigator McCain also testified that, during the walk-through, they found an additional child sleeping in a crib. She further testified that, at some later point, another young child ran through the facility, and Ms. Davis identified him as her son.

28. On December 2, 2010, Investigator McCain questioned Ms. Davis about the alleged physical abuse of E.B. During the investigation discussion, Ms. Davis reported to Investigator McCain that "she [Ms. Davis] had no idea how they [E.B.'s injuries] occurred." Ms. Davis further reported E.B. was "fully potty trained." Ms. Davis reported that the child had a toileting accident the day before and had cleaned herself. Still, later in the investigation discussion, Ms. Davis told

Investigator McCain that she (Ms. Davis) had helped clean E.B. after the toileting accident, but only from the front, and she had not observed E.B.'s buttocks. Ms. Davis also shared with the investigator that when Ms. Davis questioned E.B. about the injury, E.B. said her mother (Ms. Barton) did it (the abuse).

29. At hearing, Investigator McCain testified that Ms. Davis was "very far along in" a pregnancy and that Ms. Davis was upset, shocked, and surprised by the presence of the investigators. Investigator McCain also confirmed that DCF's presence tends to raise anxiety levels and that people feel like they are being attacked. Further, Ms. Davis confirmed that she was two weeks from her delivery due date when this investigation started. Thus, under the circumstances, forgetfulness may be perceived by some as lying, when in reality it is simply being overwhelmed by the situation.

30. As part of the investigation, it was Investigator McCain's responsibility to also check for any hazards in the facility and to ensure adequate supervision of the children. Although Ms. Davis initially reported there were no other adults to supervise the children, she later reported that her mother, Ms. Jones, came each day around 10:15 a.m. to make lunch for the children. Ms. Barton confirmed that Ms. Jones was sometimes present in the mornings when Ms. Barton brought E.B. to the facility.

31. Several technical violations were noted during the December 2010 investigation; however, they are not the subject of this hearing.

32. Ms. Davis testified she did not spank E.B. Ms. Davis testified that she did not know how the injury occurred, and the child's hearsay statement that her mother had spanked her is not supported by other testimony.

33. However, the time lapses between when the injury was alleged to have occurred (the "end of November," or November 30, 2010, according to the mother), when the injury was "discovered" (the night of November 30, 2010, according to the mother), when the alleged abuse was reported (December 1, 2010, at 11:08 p.m.), when the pediatrician's examination occurred on December 1, 2010, and when the child protective team became involved (December 2, 2010), create confusion and doubt as to when the injury actually occurred and by whom. Even taking the thought process to try to find that the events happened a day later does not relieve the doubt or confusion, nor is that supported by the Department's documentation.

34. Investigator McCain testified that this investigation was closed with a verified finding of physical injury to E.B. However, simply finding a "verified finding of physical injury to E.B." does not establish who perpetrated that physical injury. No testimony was provided that any other possible

explanation for the injury was explained. Further, other than indicating that E.B. had red marks on her bottom, no testimony was provided that indicated the degree of harm to the child. That being said, this not to say that logic has left the building with respect to some harm being caused to the child. There were marks on E.B.'s buttocks.

35. Several current and former parents of children who attend or attended the Davis Day Care testified on Ms. Davis's behalf. Each testified that they did not have any concerns with their child attending Ms. Davis's facility.

36. On March 11, 2011, after receipt of the facility's application for the large family day care home license,[11/] the Department conducted an inspection of the facility and found it to be in compliance with all the licensing standard requirements (including those previously cited during the December 2010 inspection that were corrected).

37. Upon completion of its investigation, the Department determined to deny Ms. Davis's renewal application and to deny her application for a large family day care license, based on "numerous complaints to our office alleging physical abuse of children in your care and Class I violations of licensing standards." There was one verified complaint of abuse, not "numerous complaints" as alleged. There was a Class I violation regarding the over-ratio issue; however, that could have been

resolved with better communication skills. The misrepresentation could have been avoided. Neither notification includes any indication that the March 11, 2011, inspection was taken into consideration prior to making the denial decision.

38. The Department presented testimony indicating that there had been past complaints regarding Ms. Davis and/or the facility. However, no documented prior complaints or final orders were submitted with respect to any prior actions.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).

D. AC 1 October 29, 2010 (August 3, 2010, Inspection)

40. Where the Department makes allegations that the applicant engaged in wrongdoing, the burden is on the Department to prove wrongdoing. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). Factual findings based on record evidence must be made indicating how the conduct alleged violates the statutes or rules or otherwise justifies the proposed sanctions. Mayes v. Dep't of Child. & Fam. Servs., 801 So. 2d 980, 982 (Fla. 1st DCA 2001).

41. The standard of proof with respect to the alleged wrongdoing issue (over-ratio) is clear and convincing evidence

because the Department is seeking to discipline the license of Respondent. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

42. The "clear and convincing standard" is well settled in the law. Evidence has been described as follows:

> [T]he 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 Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

43. Ms. Davis admitted the allegation of being over-ratio on August 3, 2010. The Department met its burden of proof with respect to the over-ratio allegation.

E. Department's March 23, 2011, Proposed Denial Application to Operate a Family Day Care Home (AC 2) and Department's April 11, 2011, Proposed Denial Application to Operate a Large Family Day Care Home (AC 3).

44. The standard of proof with respect to a contested denial of the family day care renewal application and the denial of the large family day care application is by clear and convincing evidence. See Dorothy Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998). Generally, a license applicant has the burden to prove that he or she is

entitled to the license. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d at 934. However, where the licensing agency proposed to deny the renewal of a license based on specific statutory and rule violations, it has the burden to prove those violations.

45. Section 402.302(8) provides the definition for a "family day care home" as:

> [a]n occupied residence in which child care is regularly provided for children from at least two unrelated families and which receives a payment, fee, or grant for any of the children receiving care, whether or not operated for profit. A family day care home shall be allowed to provide care for one of the following groups of children, which shall include those children under 13 years of age who are related to the caregiver:
>
> (a) A maximum of four children from birth to 12 months of age.
>
> (b) A maximum of three children from birth to 12 months of age, and other children, for a maximum total of six children.
>
> (c) A maximum of six preschool children if all are older than 12 months of age.
>
> (d) A maximum of 10 children if no more than 5 are preschool age and, of those 5, no more than 2 are under 12 months of age.

46. Section 402.302(9) provides the definition for a "large family child care home" as:

> [a]n occupied residence in which child care is regularly provided for children from at least two unrelated families, which receives a payment, fee, or grant for any of the

children receiving care, whether or not operated for profit, and which has at least two full-time child care personnel on the premises during the hours of operation. One of the two full-time child care personnel must be the owner or occupant of the residence. A large family child care home must first have operated as a licensed family day care home for 2 years, with an operator who has had a child development associate credential or its equivalent for 1 year, before seeking licensure as a large family child care home. A large family child care home shall be allowed to provide care for one of the following groups of children, which shall include those children under 13 years of age who are related to the caregiver:

(a) A maximum of 8 children from birth to 24 months of age.

(b) A maximum of 12 children, with no more than 4 children under 24 months of age.

47. Section 402.305(4) provides for the staff to children ratio that may be used at child care locations as:

(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.

3. For children 2 years of age or older, but under 3 years of age, there must be one child care personnel for every 11 children.

> 4. For children 3 years of age or older, but under 4 years of age, there must be one child care personnel for every 15 children.
>
> 5. For children 4 years of age or older, but under 5 years of age, there must be one child care personnel for every 20 children.
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> 6. For children 5 years of age or older, there must be one child care personnel for every 25 children.
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> 7. When children 2 years of age and older are in care, the staff-to-children ratio shall be based on the age group with the largest number of children within the group.

48. Section 402.309 provides for provisional licenses or registration as follows:

> (1) The . . . department, whichever is authorized to license child care facilities in a county, may issue a provisional license for . . . or large family child care homes, . . . to applicants for an initial license or registration or to licensees or registrants seeking a renewal who are unable to meet all the standards provided for in ss. 402.301-402.319.
>
> (2) A provisional license . . . may not be issued unless the operator or owner makes adequate provisions for the health and safety of the child. A provisional license may be issued for a child care facility if all of the screening materials have been timely submitted. A provisional license or registration may not be issued unless the child care facility, family day care home, or large family child care home is in compliance with the requirements for screening of child care personnel in ss. 402.305, 402.3055, 402.313, and 402.3131, respectively.
>
> (3) The provisional license . . . may not be issued for a period that exceeds 6 months; however, it may be renewed one time for a period

that may not exceed 6 months under unusual circumstances beyond the control of the applicant.

(4) The provisional license or registration may be suspended or revoked if periodic inspection or review by the local licensing agency or the department indicates that insufficient progress has been made toward compliance.

(5) The department shall adopt rules specifying the conditions and procedures under which a provisional license or registration may be issued, suspended, or revoked.

49. Section 402.310 addresses discipline for failure to conform with licensing requirements and states, in pertinent part:

(1)(a) The department or local licensing agency 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 or local licensing agency 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 or registration to probation status and require the licensee or registrant to comply with the terms of probation. A probation-status license or registration may not be issued for a period that exceeds 6 months and the probation-status license or registration may not be renewed. A probation-status license or registration may be suspended or revoked if periodic inspection by the department or

local licensing agency finds that the probation-status licensee or registrant is not in compliance with the terms of probation or that the probation-status licensee or registrant is not making sufficient progress toward compliance with ss. 402.301-402.319.

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

(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 or registrant 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 registration or place a licensee or registrant 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. 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 or registrants 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.

(d) The disciplinary sanctions set forth in this section apply to licensed child care facilities, licensed large family child care homes, and licensed or registered family day care homes.

(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. . . .

50. Section 402.305(12)(a) provides for the child discipline that may be used at child care locations as:

(a) Minimum standards for child discipline practices shall ensure that age-appropriate, constructive disciplinary practices are used for children in care. Such standards shall include at least the following requirements:

1. Children shall not be subjected to discipline which is severe, humiliating, or frightening.

2. Discipline shall not be associated with food, rest, or toileting.

3. Spanking or any other form of physical punishment is prohibited.

51. Florida Administrative Code Rule 65C-20.010(6) and (7) state, in pertinent part:

> (6) Child Discipline.
>
> (a) Family day care homes shall adopt a discipline policy consistent with Section 402.305(12), F.S., including standards that prohibit children from being subjected to discipline which is severe, humiliating, frightening, or associated with food, rest, or toileting. Spanking or any other form of physical punishment is prohibited.
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> (b) All family day care home operators, employees, substitutes, and volunteers must comply with the family day care home's written discipline policy.
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> (c) A copy of the written discipline policy must be available for review by the parents or legal guardian and the licensing authority.
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> (7) Child Abuse or Neglect.
>
> (a) Acts or omissions that meet the definition of child abuse or neglect provided in Chapter 39, F.S., constitute a violation of the standards in Sections 402.301-.319, F.S.
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> (b) Failure to perform the duties of a mandatory reporter pursuant to Section 39.201, F.S., constitutes a violation of the standards in Sections 402.301-.319, F.S.

52. Rule 65C-20.012 identifies the Department's treatment of Class I violations of its licensing rules for child care facilities. The rule states in pertinent part:

(1) Definitions.

* * *

(b) "Probation" is a licensing status indicating the license is in jeopardy of being revoked or not renewed due to violations within the control of the provider. Probation may require the licensee to comply with specific conditions intended to ensure that the licensee comes into and maintains compliance with licensing standards. Examples of such conditions are: a deadline to remedy an existing violation, a specified period during which compliance with licensing standards must be strictly maintained; and, specified conditions under which the home must operate during the probationary period.

(c) "Standards" are requirements for the operation of a licensed family day care home or large family child care home provided in statute or in rule.

(d) "Violation" means a finding of noncompliance by the department or local licensing authority of a licensing standard.

1. "Class I Violation" is an incident of noncompliance with a Class I standard as described on CF-FSP Form 5318 March 2009 Family Day Care Home Standards Classifications Summary and CF-FSP Form 5317, March 2009 Large Family Child Care Home Standards Classification Summary, which is incorporated. A copy of CF-FSP Form 5318 and 5317 may be obtained from the department's website www.myflorida.com/childcare. Class I violations are the most serious in nature, pose an imminent threat to a child including abuse or neglect and which could or do result in death or serious harm to the health, safety or well-being of a child.

* * *

4. "Technical Support Violations" are the first or second occurrence of noncompliance of an individual Class III standard or the first occurrence of noncompliance of an individual Class II standard.

* * *

(3) Disciplinary Sanctions.

(a) Enforcement of disciplinary sanctions shall be applied progressively for each standard violation. In addition, providers will be offered technical assistance in conjunction with any disciplinary sanction. The department shall take into consideration the actions taken by the home to correct the violation when determining the appropriate disciplinary sanction.

(b) Each standard violation has an assigned classification based on the nature or severity of the violation(s) as identified within CF-FSP Form 5318 and CF-FSP Form 5317.

* * *

(d) Failure to submit a completed CF-FSP Form 5133, Application for a License to Operate a Family Day Care Home, which is incorporated by reference in subsection 65C-20.008(1), F.A.C. or CF-FSP Form 5238, Application for a License to Operate a Large Family Child Care Home, which is incorporated by reference in paragraph 65C-20.013(3)(a), F.A.C., for renewal of an annual license at least 45 days prior to the expiration date of the current license constitutes a licensing violation. The department shall issue an administrative complaint imposing a fine of $50.00 for the first occurrence, $100.00 for the second occurrence, and $200.00 for each subsequent occurrence within a five year period.

(e) Disciplinary sanctions for licensing violations that occur within a two year period shall be progressively enforced as follows:

1. Class I Violations.

a. For the first and second violation of a Class I standard, the department shall, upon applying the factors in Section 402.310(1), F.S., issue an administrative complaint imposing a fine not less than $100 nor more than $500 per day for each violation, and may impose other disciplinary sanctions in addition to the fine.

b. For the third and subsequent violation of a Class I standard, the department shall issue an administrative complaint to suspend, deny or revoke the license. The department, upon applying the factors in Section 402.310(1), F.S., may also levy a fine not less than $100 nor more than $500 per day for each violation in addition to any other disciplinary sanction.

* * *

(4) Access. The family day care operator must allow access to the entire premises of the family day care home to inspect for compliance with family day care home minimum standards. Access to the family day care home also includes access by the parent, legal guardian, and/or custodian, to their child(ren) while in care. (emphasis added).

53. The Department did not sustain its burden with respect to the denial notification letters. The Department failed to provide the facility with the option to pay the October 29, 2010, proposed fine in a manner that clearly the Department has utilized in the past. Further, its own witnesses stated that

Ms. Davis was shocked, overwhelmed, or stunned that the investigation was on-going and that they pushed her with respect to answering questions in a stressful situation. That's not to say that the investigation was conducted inappropriately. However, under the circumstances once, it was determined that no children were in immediate danger (which was determined by Investigator McCain's inquiries on December 2, 2010), a more methodical approach to seek the requisite answers to the inquiry could have been undertaken. That systematic methodology may have ensured that the documentation of the events was accurately recorded as opposed to various discrepancies in the Department's exhibits.

54. Any final order denying renewal of the applicant's license must be based solely on the grounds asserted in the notice of intent to deny given the applicant. See M. H. v. Dep't of Child. & Fam. Servs., Case No. 2D07-1006, 2008 Fla. App. LEXIS 4391 *6 (Fla. 2d DCA March 28, 2008)("[T]he notice's exclusive focus on 'significant pulling force' as causing a nonaccidental injury precluded DCF from urging negligence as an alternative ground for denying the renewal of the license at the administrative proceeding.")[12/]

55. There was a verified abuse finding; however, the perpetrator of the abuse is unknown to the undersigned. No

testimony was provided as to what a verified abuse finding entailed.

RECOMMENDATION

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

a. With respect to the October 29, 2010, administrative complaint, that a final order be entered by the Department of Children and Families finding that the facility was over-ratio on August 3, 2010, and imposing an administrative fine of $500 with no less than ten months to pay the fine. It is further RECOMMENDED that Ms. Davis be ordered to attend remedial classes on the financial operations and management of a child care facility;

b. With respect to the March 23, 2011, administrative complaint, that a final order be entered by the Department of Children and Families renewing the family day care home license on probation status for six months with periodic inspections to ensure the continued safe operation of the facility; and

c. With respect to the April 11, 2011, administrative complaint, that a final order be entered by the Department of Children and Families finding that the large family child care home application be issued a provisional license for a minimum of six months with periodic inspections to ensure the continued safe operation of the facility, with the ability for an

additional six-month provisional period. In the event the large family child care home provisional license is not activated within two months of the issuance of the final order in this matter, a new application shall be required, subject to all the applicable statutory requirements.

DONE AND ENTERED this 25th day of October, 2011, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of October, 2011.

ENDNOTES

[1/] References to Florida Statutes are to Florida Statutes (2010), unless otherwise indicated.

[2/] References to Florida Administrative Code rules are to the current version, unless otherwise indicated.

[3/] Although electronically filed on May 4, 2011, the Department's notice to the Division references the "DCF Case Action (Administrative Complaint imposing $500 fine)" and is executed on February 17, 2011, before the facility was notified of these two administrative complaints.

[4/] The Department's Exhibit 1, the October 29, 2010, letter to "Davis Family Day Care Home, Attention: LaShandra Davis" contained three pages; however, page two and page three were identical. The Davis Day Care's Exhibit 9 contained the same October 29, 2010, letter with three distinct separate pages.

[5/] In both the Department's Exhibit 5 and the Davis Day Care's Exhibit 10, the reference to the day care owner and provider (Ms. Davis) as "Ms. Shawn" is hearsay and was not corroborated with any testimony at hearing.

[6/] These three technical violations and the expired fire extinguisher are not the subject of this case.

[7/] Ms. Davis's mother's name was never provided during the hearing. However, in both the Department's Exhibit 5 and the Davis Day Care's Exhibit 10, the mother's name is given as Velma Jones. However this name is hearsay and was not corroborated with any testimony at hearing. This name is being used simply for ease of reference.

[8/] Ms. Davis admitted she was over-ratio on August 3, 2010, and there will be no further discussion of that allegation in this section.

[9/] In both the Department's Exhibit 6 and the Davis Day Care's Exhibit 13, the number "6" is beside the phrase "Children Present:," yet on page 3 of 5 of both exhibits, it's reported "The number of children observed in this age group was 8 per the sign in sheets and the operator statement." The Department's Exhibit 6 (Bate-stamped page 22) lists six children "[p]resent at time of inspection."

[10/] In the Department's Exhibit 6 (Bate-stamped page 22) and the Davis Day Care's Exhibit 11 (page 1 of 2), the dates for the "sign in sheets" listed are Thursday, December 2, 2011, and Wednesday, December 2, 2011. This is inaccurate reporting/recording.

[11/] The Davis Day Care submitted its renewal application on March 15, 2011, four days after this inspection. Thus, this inspection had to be in response to the Davis Day Care's large family child care home application that was submitted on February 23, 2011.

[12/] The Department did not allege a lack of timeliness in the filing of the facility's renewal application and should not be allowed to allege that as a grounds for further sanctions.

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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 these cases.