

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN )  
AND FAMILIES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-4508  
 )  
LIL' STARS LEARNING CENTER, )  
INC., d/b/a LIL' STARS )  
LEARNING CENTER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on November 8, 2011, in New Port Richey, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert C. Burnette, Esquire  
Law Offices of Robert C. Burnette, P.A.  
5522 Gall Boulevard  
Zephyrhills, Florida 33542

For Respondent: Alicia Victoria Gonzalez, Esquire  
Department of Children and Families  
9393 North Florida Avenue, Suite 902  
Tampa, Florida 33612

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent violated provisions of Florida Statutes and Florida Administrative Code

relating to the operation of a child care facility, and, if so, whether sanctions should be imposed.

PRELIMINARY STATEMENT

Respondent, Department of Children and Families (hereinafter the "Department"), filed an Administrative Complaint against Petitioner, Lil' Stars Learning Center, Inc., d/b/a Lil' Stars Learning Center (the "Center"), dated July 22, 2011. The Administrative Complaint alleged violations of regulations governing the operation of a child care facility. There were four alleged incidents contained in the Administrative Complaint. The Department found that the cumulative violations warranted imposition of an administrative fine and conversion of the Center's license to a probationary status. The Center filed a response to the Administrative Complaint which was accepted by the Department as a Petition for Formal Administrative Hearing. The Administrative Complaint and response were forwarded to the Division of Administrative Hearings and assigned to the undersigned Administrative Law Judge.

At the final hearing, the Department offered the testimony of six witnesses: Toni Dye; Rebecca Conner; Donna Richey, counselor for the Department; Judy Doyle, licensing supervisor for the Department; Rhonda Gollhardt, principal owner of the Center; and Tracy Clemmer, teacher at the Center. The

Department's Exhibits 1 through 9 were admitted into evidence. The Center called one additional witness: Robin Kirk, co-owner of the Center along with her mother, Rhonda Gollhardt. The Center did not offer any additional exhibits into evidence.

The undersigned was advised that a transcript of the final hearing would be ordered. Because of scheduling issues concerning the upcoming holidays, the parties agreed to file their proposed findings of fact and conclusions of law by December 12, 2011. However, the Transcript of the proceeding was not filed at DOAH until December 8, 2011, so the parties requested and received ten additional days to file their proposed recommended orders. The Department and the Center each timely filed Proposed Recommended Orders. Each was duly considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Department is the government agency responsible for licensing, inspecting, and monitoring child care facilities in Florida. At all times subject hereto, the Department was operating according to its statutory mandates.

2. The Center is a child care facility located at 5034 18th Street, Zephyrhills, Florida. It operates under License No. C06PA0156 and is licensed for a maximum capacity of 67 students. The Center has been operating for approximately

five years.<sup>1/</sup> It is owned by Ms. Gollhardt and her daughter, Ms. Kirk.

3. On July 22, 2011, the Department issued an Administrative Complaint against the Center. The Administrative Complaint contained allegations concerning four separate incidents over a four-month period, from September 2010 to January 2011. The incidents, as set forth in pertinent part from the Administrative Complaint, are as follows:

- a. On August 5, 2010, G.H., a staff member, was observed by another staff member to have slapped K.L., a three (3) year old child, across the face. Another staff member heard the incident and the child crying subsequent to the slapping.
- b. On October 6, 2010, a four (4) year old child, B.G., had been spitting on other children and had previously been disciplined for his inappropriate behavior. The child continued to spit and R.G., the owner/director, sprayed the child in the face with the liquid from a bottle that was being used to sanitize the tables. The liquid in the bottle was diluted bleach and water. R.G. stated the

solution was 3 table spoons [sic] bleach to 5 gallons water.

- c. After conducting an investigation of an incident on November 29, 2010, it was determined that a staff member, T.C., used her hands to press down on a two (2) year old child's forearms to keep the child from getting up from the time out chair.
- d. On January 24, 2011, D.L., a five (5) year old child, had an accident and the owner/director needed to change his underwear. The child threw a fit because he wanted [sic] boxers and the facility did not have boxers to put on him. After conducting an investigation[,] it was determined that struggle [sic] the owner/director, R.G., had been observed dragging the child by the arms across the floor.

4. A complaint form was drafted for each of the four incidents after the Department finished its investigation for each incident. The complaints were provided to the Center for review, and the Center signed an acknowledgement that it had received each of the complaints.

5. After the first incident (the slapping of a child), the Department issued an Administrative Warning Notification dated September 22, 2010. The warning advised the Center that the incident was the first Class II violation against the Center within a two-year period. The Center was warned that another Class II violation within two years would result in a fine in the amount of \$50.00. The warning did not include a process for the Center to appeal or contest the Department's findings.

6. After the second incident (the spray bottle), the Department issued a Notice of Administrative Action dated October 13, 2010. The Notice advised the Center that the incident constituted the second Class II violation within a two-year period and of the Department's "intent to impose an administrative fine as a result of this repeat Class II violation." The Notice advised the Center that it would receive a formal administrative complaint imposing the fine and that upon receipt of the administrative complaint, the Center would have 21 days to either pay or appeal the fine. According to the Department's witness, the action taken by the staff member constituted a "physical form of discipline that could have caused the child to be harmed."

7. Following the third incident (teacher holding child in a chair), the Department issued another Notice of Administrative Action, this one dated November 30, 2010. This Notice advised

the Center that the Department intended to issue an Administrative Complaint imposing a fine commensurate with a third Class II violation within a two-year period. The Notice had the same language as the prior Notice concerning appeal rights.

8. Finally, after the fourth incident (the soiled boy), the Department issued yet another Notice of Administrative Action dated January 25, 2011. This final Notice advised the Center that the Department intended to impose a fine and to change the Center's license to probationary status. The Notice also advised that another Class II violation "within [two] years from the date of this report" would result in the Center's license being suspended, denied, or revoked.<sup>2/</sup> The Notice again stated that an Administrative Complaint would be issued from which an appeal could be taken within 21 days.

9. On July 22, 2011, the Department issued its promised Administrative Complaint setting forth allegations as to each of the four incidents. The Administrative Complaint provided the Center its first opportunity to contest or challenge the allegations set forth in the four previous notices or warnings. The Center timely filed a request for formal administrative hearing to contest the Department's findings.

10. The four incidents will be discussed more fully below, including the Department's basis for its findings and the Center's explanation, mitigation or other response.

Incident No. 1--Slapping a child

11. This incident occurred on Thursday, August 5, 2010, while Ms. Gollhardt and Ms. Kirk were both out of town on family matters. A teacher, Gayla, was observed by another teacher slapping a child's face. The second teacher immediately contacted the owners via cell phone to report what had happened. Ms. Gollhardt had the observing employee do a written statement and place it in Ms. Gollhardt's lock box for safe keeping. Then Ms. Gollhardt verified that Gayla had left the Center for the day. Ms. Gollhardt returned to the Center and looked into the matter. She directed Gayla not to report back to work and then called the Department's abuse hotline to self-report the incident. Ms. Gollhardt then contacted Ms. Richey, the Department's counselor assigned to the Center. Ms. Richey came to the Center on the following Tuesday and conducted her own investigation of the matter.

12. When it became clear that the incident had indeed occurred as reported, Ms. Gollhardt terminated Gayla's employment at the Center. From the day of the incident until she was terminated, Gayla had not been allowed back into the Center.



13. The Department found out about this incident in two ways: First, a Child Protection Investigator ("CPI") notified Ms. Richey after the initial hotline call made by Ms. Gollhardt, i.e., after the Center self-reported the incident. Second, when Ms. Gollhardt contacted Ms. Richey directly to report the incident.

14. There was no testimony from the parents of the child or from the terminated employee.

Incident No. 2--The Spray Bottle

15. As set forth in the Administrative Complaint, the child at issue, B.G., had been disciplined previously for spitting on other students. Ms. Gollhardt had written reports about B.G.'s behavior and sent the reports home with B.G. However, B.G.'s parents never responded to the reports or made any effort to discuss his behavior with the Center.

16. On October 6, 2010, B.G. was again spitting on other children. Ms. Gollhardt tried to prevent B.G. from doing this by holding him in her lap as she sat and read a story to a group of students. This worked until the story was over and the students got up from the carpeted reading area. At that time, B.G. spat on another child. Ms. Gollhardt, who was standing nearby and holding a bottle in her hand, sprayed a mist towards B.G., who was three or four feet away, i.e., on the other side of a toy shelf from Ms. Gollhardt. Her intent was to get his

attention and to show him that it was uncomfortable to have liquid of any kind involuntarily foisted upon you.

17. The bottle was apparently set on a "mist" mode and there is insufficient evidence as to whether the liquid actually touched B.G. or not. The liquid was contained in a bottle that had been used to sanitize tables at the Center. The bottle contained water and bleach, but there is no competent evidence as to the ratio of the mixture. The Administrative Complaint alleges that Ms. Gollhardt said that the mixture was three tablespoons of bleach to five gallons of water, but that is the only evidence concerning the mixture. Nor was there any testimony provided as to the potential harm to a person that such a mixture might cause. If the mixture was as reported, there would seem to be a very minimal amount of bleach in the misted spray.

18. Ms. Gollhardt prepared an incident report to show to B.G.'s parents, but she was not at the Center when they picked him up on the day of the incident. The next morning, when B.G.'s father dropped him off at school, Ms. Gollhardt told him what had happened and showed him the incident report. The father examined the contents of the spray bottle and indicated that no further action would be necessary. Later that day, Ms. Gollhardt advised the parents that if B.G. did not stop this behavior, they would have to find another place for him to go.

The mother took great exception to this admonition, so she reported the incident to the Department. B.G.'s mother thereafter withdrew B.G. from the Center, and he has never returned.

19. While spraying a water and bleach mixture at a child is never a good idea and is not condoned, it does not rise to the level of a punishment or discipline of the child.

Incident No. 3--The Crying Chair

20. The Center utilizes two different methods of dealing with children who are disruptive or act inappropriately. The Center uses the "time out" method, wherein they place a child in a designated place for a specified period of time so the child has an opportunity to think about their behavior. The Center also employ a "crying chair," which is a chair to which a crying child is directed to sit until they stop crying. The children apparently understand that they can get up from the chair as soon as they stop crying. The Center says the crying chair is a very effective tool.

21. On November 29, 2010, a small, just-turned-two-year-old child (referred to as "Lisa"--not her real name) came to the Center late. She had been at a doctor's appointment with her grandmother and arrived at the Center at the time her class was playing on the playground. "Lisa" was upset that she could not stay with her grandmother and was crying and unruly when her

grandmother left. After failing in her efforts to calm "Lisa" down, her teacher, Ms. Clemmer, placed "Lisa" in a crying chair on the covered porch adjacent to the playground. "Lisa" got up from the chair three or four times and continued to cry and act out.

22. Ms. Clemmer placed "Lisa" back in the chair each time she got out and remembers that she "may have" placed her hands on "Lisa" when she directed her back to the chair. Ms. Clemmer does not remember any one return to the chair to be different from the others. Ultimately, "Lisa" calmed down, hugged Ms. Clemmer and went off to play with her classmates.

23. Meanwhile, Ms. Dye was parked across the street from the Center waiting for her daughter's school bus to arrive. Ms. Dye said that children were not usually out on the playground when she picked up her daughter, but they were on this day. She was parked approximately 25 yards (75 feet) from the playground area. Ms. Dye does not remember any posts or other items obstructing her view. She does not remember a porch or covered area next to the playground. Upon hearing shouts or other noises, Ms. Dye turned to watch what was happening on the playground. Ms. Dye observed a little girl sitting in a chair and interacting with a teacher. The little girl got up from the chair three or four times, but each time a teacher would direct her back to the chair. The little girl seemed to be trying to

go over to a plastic playhouse where other children were playing. This interaction went on for ten or 15 minutes.

24. Ms. Dye remembers that the last time the teacher brought the girl back to the chair, she "may have" yelled at the girl. Then, the teacher grabbed the child's upper arm, pulled her across the playground, and placed her roughly into the chair. She could not tell exactly, but it looked to Ms. Dye like the teacher may have pulled the student's ponytail, jerking her head backwards. Ms. Dye does not believe that what she observed was a teacher attempting to keep an unruly child from hurting herself.

25. Ms. Dye reported the incident to the Department. Ms. Richey, a CPI, and a police officer were dispatched to the Center to investigate the allegations. When they came to the Center, they identified the victim as a black child with a ponytail. Ms. Gollhardt said she had no children with ponytails and only one black child in the two-year-old age group. She offered to wake the child from her nap, but the investigators said not to do so. The investigators eventually talked with Ms. Clemmer and with the child's mother. Ms. Richey remembers Ms. Clemmer being very nervous and saying that she placed a child in time out for not behaving properly.

26. Ms. Clemmer remembers the incident a little differently than reported by Ms. Dye. She says that when "Lisa"

was dropped off by her grandmother, the child was having extreme separation anxiety. Ms. Clemmer tried to calm "Lisa" by holding her and walking out to the fence so "Lisa" could wave goodbye to her grandmother. That didn't work. After "Lisa" continued screaming and crying, Ms. Clemmer took her to the crying chair, with which "Lisa" was familiar. The chair was located on a covered patio adjacent to the playground area.

27. "Lisa" kept "flopping out of the chair" and running across the playground. Each time, Ms. Clemmer would redirect her back to the chair and try to calm her down. She does not remember any one of the interactions with "Lisa" to be more forceful or different from any other. The last time she sat "Lisa" down, however, Ms. Clemmer remembers placing her hand in the chair between Lisa's legs to prevent "Lisa" from flopping out of the chair.

28. Eventually, "Lisa" had had enough crying and stopped being upset. She went over and hugged Ms. Clemmer, then ran off to play with the other children. That was the end of the matter. "Lisa" is still a student at the Center. Incidentally, "Lisa" is a child of mixed races (African-American and Caucasian); she has very short hair and does not have a ponytail.

29. Ms. Clemmer holds an early childhood associate certificate, obtained after a six-month course of study. Her

testimony was credible, and she appears to have the interests of her students as a priority.

30. Based on the foregoing facts, there is no evidence that Ms. Clemmer "used her hands to press down on a two (2) year old child's forearms to keep the child from getting up from the time out chair" as alleged in the Administrative Complaint.

Incident No. 4--The Boy with Soiled Pants

31. On January 24, 2011, D.L., a five-year-old boy, was playing on the playground when he announced an immediate need to go to the bathroom. His teacher, Susan, took him inside to use the toilet. However, before getting to the bathroom, D.L. had a small bowel movement and soiled his pants.

32. Susan and D.L. remained in the bathroom for a while and then Susan came out to report that D.L. was "having issues." Ms. Gollhardt then went in to see if she could help. She found the little boy screaming and fussing, upset, and refusing to cooperate. Ms. Gollhardt began to try to calm the boy down. D.L. was upset because he had been wearing boxer shorts and wanted a new pair to replace the ones he had soiled. Unfortunately, his cubicle did not contain any clean boxers. Instead, Ms. Gollhardt offered D.L. a pair of his brother's underwear, but they were briefs, and D.L. wanted no part of them. She also offered D.L. his own soiled underwear, because they were only slightly soiled and gave him the option of

wearing a pair of his sister's pull-ups. He wanted none of those.

33. As Ms. Gollhardt continued to try to reason with D.L., he became more agitated and upset. He tried to crawl behind the toilet and began kicking and hitting at Ms. Gollhardt. Ms. Gollhardt was eventually able to dress D.L. (although it is unclear which pair of underwear was placed on him). Then Ms. Gollhardt picked up D.L., wrapping her arms around him as he faced away from her and carried him out of the bathroom. As they left the bathroom, D.L. reached up and knocked Ms. Gollhardt's glasses off her face. When she bent down to retrieve her glasses, D.L. began to kick her.

34. At that point, D.L. dropped to the ground in a sitting posture and refused to move. Ms. Gollhardt gathered her glasses and reached down, grabbing D.L.'s arm. When D.L. refused to get up, Ms. Gollhardt slid him across the floor as she held him by his arm. They went into a classroom where D.L. could be watched by another teacher and closed the door. Then Ms. Gollhardt came out of the room and left the door open as she placed a call to D.L.'s parents.

35. While this was going on, Ms. Conner, another child's parent, arrived at the Center to retrieve her infant child. She saw D.L. in the bathroom kicking and screaming as Ms. Gollhardt attempted to dress him. She saw Ms. Gollhardt dragging D.L.



three or four feet across the floor by his arm as D.L. whimpered. She remembers them going into a classroom and Ms. Gollhardt closing the door. She does not remember the door being re-opened as Ms. Gollhardt made the phone call.

36. After placing D.L. in the classroom, Ms. Gollhardt called his mother to come and get him at the Center. D.L.'s mother arrived shortly and discussed the situation with Ms. Gollhardt. She then talked calmly with D.L. and had him apologize to Ms. Gollhardt for his bad behavior. D.L. apologized and then hugged Ms. Gollhardt. D.L. and his four siblings are still students at the Center.

37. Ms. Conner's testimony is somewhat suspect. She had been admonished by Ms. Gollhardt just prior to this incident for being behind on her child's tuition payments. Despite the alleged incident, Ms. Conner kept her infant and one other child at the Center until August of this year (2011). Further, Ms. Conner appears to have initially told the Department's investigator a different story, i.e., that Ms. Gollhardt dragged D.L. across the floor all the way from the bathroom into another classroom.

#### The Center's Discipline Policy

38. The Center has a policy concerning how it will administer discipline to its students. Each teacher is expected to comply with the policy. Each student's parent(s) must

acknowledge receipt and review of the policy. It is the intent of the Center that its discipline policy be consistent with the Department's Basic Guidance and Discipline protocols.

39. The Department's protocols distinguish between discipline and punishment. Discipline includes tools and actions used to teach a child a lesson or to redirect their behavior. Punishment is "more of a consequence" of a child's behavior and is used to control a child. Or, as stated by the Department's licensing supervisor, "punishment is an action that is taken by a caregiver in response to a bad choice. And it's a consequence of some kind of bad inappropriate behavior that a child is engaged in." There is no published definition of the distinction between discipline and punishment in the Department's rules, and its witnesses acknowledged there is a fine line between the two.

40. According to the Center's policies, discipline is not to be associated with food, rest, or toileting. Nor should discipline be severe, humiliating, or frightening. Spanking or other forms of physical punishment are not to be used by a teacher.

#### Enforcement of the Law

41. The Department utilizes progressive enforcement when citing child care facilities for violations of statutes and rules. When looking at violations, there are three classes of

violations to be considered: Class I violations are those which may endanger a child's life; they are the most severe. Class II violations address disciplinary actions, teacher-to-student ratios, and other practical aspects of operating a child care facility. Class III violations are those relating to paperwork or other less harmful matters.

42. When looking at Class II violations, the Department will assign a progressively more serious sanction when multiple violations occur within a two-year period. For example, a single Class II violation may warrant only a warning; a second Class II within a two-year period will result in a fine. Four Class II violations within a two-year period will result in a license being placed under probationary status. Five violations during a two-year period can result in denial or suspension of the license.

43. The effect of a probationary license is serious. A facility with a probationary license is required to post its violation citations on the wall of its facility. A facility is not allowed to advertise while it is on probation. Facilities under probation forfeit their connection to the Early Learning Coalition (the "Coalition"), the entity that provides payment or subsidies for low-income families to place their children in a licensed day care facility.

44. Ms. Kirk cooperated with the Department concerning its investigation into the four alleged incidents. She provided names of witnesses and even offered written statements from eyewitnesses. The Department did not accept the written statements, saying their investigation was complete. No further explanation was provided by the Department as to why they would not review additional information that may have led them to a more informed conclusion.

45. Instead, the Department warned Ms. Kirk that the Center had better "straighten up" or they would be facing more severe sanctions. Ms. Kirk says that a Department representative told her the Department had talked with the Coalition. According to the representative, the Coalition said it had received numerous complaints about the Center and that the Center was not cooperating with the Coalition.

46. Ms. Kirk was concerned about those comments. About one half of the Center's students are receiving subsidies through the Coalition. Loss of connection to the Coalition would be an extreme hardship for the Center. Ms. Kirk contacted the Coalition to find out if there was indeed a problem of some kind. Neither Ms. Kay Williams, the voluntary pre-kindergarten representative at the Coalition, nor her supervisor, Kim Bergeau (phonetically spelled), could verify that any complaints had

been received concerning the Center. The Center has not been contacted directly by the Coalition about any complaints.

47. Each of the four incidents discussed above was investigated by the Department, by CPI, and by local law enforcement. No evidence as to the findings or conclusions by CPI or law enforcement was entered into evidence as support for the Department's position, so there is no independent corroboration that the incidents occurred as alleged.

#### CONCLUSIONS OF LAW

48. 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). Unless specifically stated otherwise herein, all references to Florida Statutes will be to the 2011 version.

49. The Department is mandated to protect the health, safety, and well-being of the children of the State of Florida and to promote the safe physical, intellectual, motor and social development of children in the care of others. § 402.26, Fla. Stat. Section 402.305 requires the Department to establish, by rule, licensing standards for child care facilities, including standards "designed to address the . . . safety . . . for all children in child care." § 402.310(1). That section also charges the Department with the responsibility of administering the child care/day care licensing program. Id.

50. In cases where a state agency makes allegations that an applicant or licensee engaged in wrongdoing, the burden is on the Department to prove the wrongdoing. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996).

Factual findings based on record evidence must be made indicating how the alleged conduct violates the statutes, or rules, or otherwise justifies the proposed sanctions. Mayes v. Dep't of Child. & Fam. Serv., 801 So. 2d 980, 982 (Fla. 1st DCA 2001).

51. The standard of proof in this case is clear and convincing evidence, because the Department is seeking to discipline the Center and take action detrimental to the Center's license, thus, making it penal in nature. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

52. The clear and convincing evidence standard is greater than the preponderance of the evidence standard used in most administrative proceedings. The clear and convincing standard is quite stringent. It has been described as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the

truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

53. Accordingly, the Department must have proven that each of the allegations is true by the presentation of distinctly remembered, precise, explicit, and clear testimony. The only violation proven by the Department by clear and convincing evidence in this case is the one addressing a teacher slapping a student. It is clear that that incident, reported by the Center itself, did occur.

54. Facts as to the other incidents were not proven by clear and convincing evidence. The eyewitness accounts were not distinctly remembered or free of confusion. Neither Ms. Dye, nor Ms. Conner, provided testimony which produced in the mind of this finder of fact a firm belief or conviction as to the truth of the allegations. Neither Ms. Dye's across-the-yard observations, nor Ms. Conner's potentially retaliatory testimony, was totally credible. Further, each of them had memories of the situations they viewed which were inconsistent with other witnesses' first-hand accounts.

55. Other than the allegations themselves as set forth in the Administrative Complaint, the Department did not provide any persuasive evidence as to the facts surrounding each allegation. For example, there was no confirmation of wrongdoing by any

other agency which investigated the incidents. There was no testimony by the parents of the children involved in the alleged incidents. The Department did not satisfy the clear and convincing evidence standard.

56. Section 402.310 addresses discipline which may be imposed against a child care facility 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.

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

(1) Definitions.

\* \* \*

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

\* \* \*

2. "Class II Violation" is the second or subsequent incident of noncompliance with an individual Class II standard as described on CF-FSP Form 5318 and CF-FSP Form 5317. Class II violations are less serious in nature than Class I violations and could be anticipated to pose a threat to the health,

safety or well-being of a child, although the threat is not imminent.

\* \* \*

(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 facility 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.

(c) A violation of a Class II standard that results in death or serious harm to a child shall escalate to a Class I violation.

\* \* \*

(e) Disciplinary sanctions for licensing violations that occur within a two (2) year period shall be progressively enforced as follows:

\* \* \*

2. Class II Violations.

a. For the first violation of a Class II standard, the department shall issue a formal warning letter stating the department's intent to take an administrative action if further violations of the standard occur. The violation will be classified as "Technical Support."

b. For the second violation of the same Class II standard, the department shall issue an administrative complaint imposing a fine for \$50 for each violation. This violation, and subsequent violations, of the same standard within a two year period will be classified as "Class II."

c. For the third violation of the same Class II standard, the department shall issue an administrative complaint imposing a fine of \$60 per day for each violation.

d. For the fourth violation of the same Class II standard, the department shall issue an administrative complaint placing the provider's license on probation status for a period not to exceed six months, and the department shall also issue an administrative complaint imposing an additional fine of \$75 per day for each violation. . . .

58. The Department has not proven any violations of standards by clear and convincing evidence beyond the first incident, the slapping of a child. Inasmuch as the other violations were not proven, the progressive discipline standards are not operative in this matter.

59. It is then only necessary to determine the appropriate fine for the one violation which was proven. The Center's response to the incident is a clear indication that it acted appropriately and quickly to prevent any recurrence of such an event. It is also evident that the teacher who slapped the child acted outside the policies established by the Center. That is, her behavior was that of a rogue employee and is not

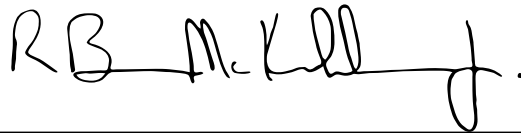
evidence of wrongdoing by the Center. The letter of warning imposed by the Department is the correct sanction for that violation. No further monetary sanction is warranted.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Petitioner, Department of Children and Families, upholding the issuance of the letter of warning against Respondent, Lil' Stars Learning Center, Inc., d/b/a Lil' Stars Learning Center, but dismissing the other allegations in their entirety.

DONE AND ENTERED this 30th day of December, 2011, in Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of December, 2011.

ENDNOTES

<sup>1/</sup> Ms. Richey, however, testified that she had been the Center's licensing coordinator for ten years. Apparently, the Center operated under previous management. Ms. Kirk testified that she and her mother bought the Center in December 2007.

<sup>2/</sup> The Department conceded at final hearing that the Notice was in error. It should not have said that any subsequent Class II violation within two years of the report would result in the further sanctions, but that a fifth violation within two years of the first violation could result in sanctions.

COPIES FURNISHED:

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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.