

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN)
AND FAMILIES,)
)
Petitioner,)
)
vs.) Case No. 12-0750
)
REDLANDS CHRISTIAN MIGRANT)
ASSOCIATION, INC., d/b/a RCMA)
SMITH BROWN CHILD DEVELOPMENT)
CENTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on July 12, 2012, in Ft. Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Redlands Christian Migrant Association, Inc., d/b/a RCMA Smith Brown Child Development Center ("RCMA" or the "Center"), violated Florida Administrative Code Rule 65C-22.001(5)(a) and section 402.281(4)(a), Florida Statutes (2011),^{1/} and, if so, what licensure discipline should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Children and Families (the "Department"), issued an Administrative Complaint against RCMA dated December 29, 2011. RCMA asked for a formal administrative hearing and filed a Petition for Hearing dated January 23, 2012. The Administrative Complaint and Petition for Hearing were forwarded to the Division of Administrative Hearings on February 23, 2012, and assigned to the undersigned Administrative Law Judge.

At the final hearing, the Department called seven witnesses: A.P., mother of the child at issue in this proceeding; C.P., aunt of the child; Eddie Gibbs, bus driver; Mihaela Bobcia-Pessmer, director of RCMA; Jeanette Witmer, licensing counselor; Lisa

Voigt, abuse investigation supervisor; and Sherrie Quevedo, licensing supervisor. The Department offered 15 exhibits into evidence, all of which were admitted. RCMA called four witnesses: Jasmine Lee, aide and substitute teacher; Barbara Clark, driver; Tiara Holloman, RCMA employee; and Leslie Moguil, associate director. RCMA did not offer any additional exhibits into evidence.

At the conclusion of the final hearing, the parties were not certain if a transcript of the proceeding would be ordered. The parties were given ten days from the date of hearing to submit proposed recommended orders (PROs) or to advise if a transcript would be ordered. The transcript of the proceeding was not ordered. The Department and RCMA each timely filed a PRO and each was duly considered in the preparation of this Recommended Order.

Subsequent to the filing of the parties' PROs, RCMA moved to strike portions of the Department's PRO as being unsupported by the record. The Department filed a response. The motion is moot in that the undersigned Administrative Law Judge will not consider any proposed findings of fact that are not supported by the evidence in this case, whether or not the opposing party files a motion.

FINDINGS OF FACT

1. RCMA is a child care facility owned by a large not-for-profit entity, Redlands Christian Migrant Association, Inc. (the "Association"). The Association has been in existence since 1965 and currently operates approximately 80 facilities, serving in excess of 8,000 children statewide. Over half of the Association's facilities, including RCMA, are accredited. The Association serves about 300 children in the greater Arcadia area, most of whom are low income, at risk children. Many of the children have disabilities. A majority of the children served by RCMA come from migrant worker families.

2. RCMA has received a Gold Seal certification from the State, which is in effect until March 31, 2013. As a Gold Seal facility, the Center receives approximately \$36,000 per year in funding from the State. That money is used to hire staff to provide care for indigent children.

3. RCMA is located in Arcadia. It uses an application for enrollment which sets forth the duties and responsibilities of both the parents and RCMA for the children being served. The application, which also serves as the admission agreement, does not mention transportation.

4. Prior to the fall of 2010, children at RCMA, who were also going to public school, would be transported to the Center at the end of the school day by way of the regular school bus.

The school bus would drop the children off right in front of the Center. Due to budget constraints and other issues, the DeSoto County School Board decided to make changes to the bus service. Instead of being dropped off at RCMA's doorstep, the bus would discharge the children at the closest regular bus stop near RCMA.

5. The School Board has several rules concerning the transportation of students via school bus. No kindergarten or first-grade student, for example, may be left at a bus stop alone. There must be an older sibling with them or a designated adult must be waiting at the bus stop.

6. After the change in School Board policies in 2010, the school bus would drop RCMA children off at a bus stop "one or two blocks" from the Center. RCMA would send two workers down the street to greet the children and escort them back to the Center. Whenever it was raining or threatening rain, the two workers would drive a vehicle from the Center to the bus stop, rather than walking. The Center's vehicle was also an actual school bus, but will be referred to herein as a van to differentiate it from the school bus.

7. There are no rules governing operation of a child day care center which require a facility to provide transportation for children. Each licensed day care center may opt to provide transportation, e.g., for field trips or other excursions, but they are not required to do so. If they opt to provide this

service, then there are rules governing the service. For example, the vehicles must have seat belts and be licensed and insured, and the drivers must be qualified, etc.

8. On October 19, 2011, about three months into the 2011-2012 school year, there were three elementary school-aged children attending the Center: J.H., Chantal, and Brittany. Each of them was a kindergarten or first-grade student. All three of them attended West Elementary School during the school day and then went to the Center after school was out. The children were transported from West Elementary School to the Center on Bus No. 109, driven by Eddie Gibbs. Mr. Gibbs had three stops after picking up children at the school. The last stop was the one near RCMA where J.H., Chantal, and Brittany were to be discharged.

9. On that day, Mr. Gibbs pulled away from the school at approximately 2:00 in the afternoon. He received a call on his radio that two students (one of whom was J.H.) had been left behind. He returned to the school to pick them up and then continued on his route. When he got to his last stop (the one near RCMA), J.H., Chantal, and Brittany all got off the bus. The Center's van and two workers were waiting for these children as was the normal procedure. About 20 to 25 other children got off at this stop as well. Ms. Lee, the RCMA worker, waved at Mr. Gibbs and he drove away.

10. Ms. Lee immediately corralled Chantal and Brittany as they exited the bus. She did not see J.H. Ms. Lee asked the girls where J.H. was, and they told Ms. Lee he had been on the bus, but that his mother had picked him up at a prior bus stop. Ms. Lee took the girls to the van for transport back to the Center. The van driver, Ms. Clark, asked the girls where J.H. was, and the girls told her what they had told Ms. Lee. Neither Ms. Lee nor Ms. Clark was surprised that J.H. was not on the bus because he had been absent from school the past two days and had not ridden the bus to the Center.

11. At the Center, one of the girls changed her story and said that J.H.'s aunt, not his mother, had picked him up at the prior bus stop. Pursuant to RCMA protocol, Ms. Lee advised Ms. Holloman, a co-worker, that J.H. had not been on the bus. Ms. Holloman, again pursuant to protocol, called the Center's family support worker, Ms. Marshall, to report that J.H. had not arrived on the school bus. Either Ms. Lee or Ms. Marshall called the school to confirm that J.H. had been absent that day. However, the school advised the Center that J.H. had been at school and had boarded the bus for transport to the Center.

12. Several things happened quickly after it was determined that J.H. was missing. Ms. Marshall called J.H.'s mother, A.P., to report that J.H. had not gotten off the bus and to inquire as to whether A.P. had picked him up as reported by the two girls.

A.P. worked at a pharmacy and apparently could not receive telephone calls, so the Center's phone call went to her voice mail. At her next break, A.P. checked her messages and found out J.H. was missing. She called the Center to report that she had not picked up J.H., called the school, and got in her car to drive to the Center.

13. Simultaneously, the Center sent all available workers out to scour the streets looking for J.H. Law enforcement was notified as well. Workers went out on foot and in personal and RCMA vehicles to search for J.H.

14. While A.P. was driving to the Center, she sent a text to her sister, C.P., asking her to pray for J.H. because he was missing. C.P. texted back that J.H. was, in fact, at her house, safe and sound. The crisis was over. A.P. went on to the Center and advised them that J.H. had been found.

15. When A.P. picked up her son, she asked him where he had been and how he arrived at his aunt's house. J.H. has verbal and communication difficulties, so even at age five, he could not effectively tell his mother what had transpired after he exited the bus. Despite her efforts, A.P. could never get a clear explanation from J.H. about what happened. She drove J.H. from C.P.'s house to the Center to see if he could tell her where he had been along the route. At one point, they found J.H.'s backpack hanging on a mailbox. A.P. asked the homeowner about

it, but the man said that he had found the backpack lying on the road and hung it on the mailbox so its owner could claim it. He had never seen J.H. earlier in the day.

16. It is approximately 1.7 miles from the Center to C.P.'s house. The route between those two places includes a fairly busy state road, an area with drainage ditches, and various neighborhoods. There were many places along the route that could have been dangerous for a young child.

17. It is not known how J.H. got to his aunt's house. There is no evidence as to whether he was alone or with other people. No one knows if he received a ride or found his way independently. It is impossible to know if J.H. was ever in jeopardy or if he was completely safe. His aunt only remembers hearing a child yelling outside. She assumed it was one of her children, but when she looked outside, she saw J.H. being harassed by some neighborhood Chihuahua dogs. J.H. did not appear to be upset or scared, except for his confrontation with the dogs. That is, he did not seem to be upset about his journey to his aunt's house.

18. How J.H. became lost is not clear. Ms. Lee attempted to recreate the scene at the bus stop: When she arrived at the bus stop as a passenger in Ms. Clark's van, the school bus had not yet gotten to the stop. As was their normal procedure, Ms. Clark parked the van across the street in a church parking

lot to wait for the school bus. When the school bus pulled into the bus stop, Ms. Clark pulled the van in behind the school bus. Ms. Lee then got out of the van and walked up to the school bus. By then, some children had already exited the school bus as she began to look for her charges. The two girls had been sitting together near the front of the bus; J.H. generally sat further back with other students. As Ms. Lee approached the bus, children were already exiting and heading off in different directions. She does not remember being distracted by anything; she just didn't see J.H. get off the bus. To further confuse the situation, J.H. had been absent from school the prior two days and, thus, had not exited the bus on those days either. Ms. Lee does not know how she failed to see J.H. exit the bus.

19. As a result of the incident, the Center terminated the employment of Ms. Lee immediately. However, after reviewing a videotape of the bus on that day, the Center decided that it had been rash. It now wants to "make things right" with Ms. Lee and re-hire her. (The videotape was not entered into evidence by either party.)

20. Interestingly, A.P. did not even know about the arrangement whereby RCMA staff met J.H. and other students at the bus stop. She had never been to the bus stop prior to October 19, 2011. She had a verbal understanding that the Center would get J.H. from school to the facility, but did not have any

details as to how that would be accomplished. As far as A.P. is concerned, the incident concerning J.H. was not foreseeable, and the Center did all it could do in the situation. A.P. kept her children at the Center until moving them recently due to transportation issues.

21. Apart from the action taken by the Department's licensure section, there was also a child protective investigation conducted about the incident as well. That investigation resulted in no findings of abuse or neglect.

CONCLUSIONS OF LAW

22. 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 (2012).

23. Child care facilities are regulated by the Department in accordance with rules duly promulgated pursuant to statute. Rule 65C-22.001(5)(a), for example, addresses the requirement for supervision of children in facilities and states:

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

shall be capable of responding to emergencies, and are accountable for children at all times, including when children are separated from their groups. (emphasis added).

24. The cited rule is the basis for the Department's administrative complaint filed against RCMA. RCMA argues that the rule does not apply to the facts of this case because:

(1) J.H. was not in a room or designated outdoor play area; and
(2) J.H. was not a child "in care" at the time of his disappearance from the bus stop. That argument strains the boundaries of credulity. That interpretation would seem to suggest, for example, that when the Center took children on a field trip to a museum, ball park, or bowling alley, it would not have to supervise them.

25. The question does arise, however, as to whether children at the bus stop are in the care of RCMA, and, if so, at what point in time that care commenced. The Department's rules are mute as to when "care" commences, and there is no case law that clears up this issue. Thus, it becomes a matter of fact as determined by the evidence presented.

26. In this case, there was no written agreement wherein RCMA agreed to assume care of J.H. at any time before he arrived at the Center. J.H.'s mother understood only that J.H. would arrive at the Center, but did not know exactly how. The written admission agreement she signed states only, "Your child's

attendance is very important! Bring your child to the center every day." That would strongly suggest that it is the parent's duty to get the child to the Center. The insurance section of the agreement speaks only to payment for injuries "occurring in the RCMA center." It does not address the issue of transportation at all.

27. Nonetheless, each day RCMA sent two employees to escort the children from the bus stop to the Center. Clearly, the children would be in the custody and control of the employees once the children got off the bus and were accepted by the employees. No rule made them responsible for the children, but RCMA must have recognized some sense of responsibility imposed by sending their staff to the bus stop. The fine hair to be split is the question of care and responsibility from the time the child stepped on the bus until he was seen and placed "in care" by the RCMA employee.

28. Reading the supervision rule in whole and extrapolating its general intent, i.e., the care and supervision of children by the child care center staff, Ms. Lee and Ms. Clark--as agents of the Center--were responsible for J.H. as soon as they saw him exit the school bus. However, they could not take the child into their custody until, and unless, they saw him. There is no evidence in this case as to why J.H. was not seen, but it could have been because he hid from the Center's workers or because

they failed to search for him appropriately. The actual facts may never be known. It is clear, however, that the bus driver did not completely meet his duty of insuring that young children are received by an adult. While he did make some sort of eye contact with Ms. Lee, he did not see Ms. Lee or anyone else assume custody and control of J.H.

29. 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. Osborne Stern and Co. v. Dep't of Banking and Fin., 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. and Fam. Servs., 801 So. 2d 980, 982 (Fla. 1st DCA 2001).

30. 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).

31. 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).

32. Accordingly, the Department must have proven the allegations by the presentation of distinctly remembered, precise, explicit, and clear testimony. There was no testimony from anyone as to what transpired with J.H. after he got on the school bus. Neither the bus driver, nor Ms. Lee, nor J.H. himself could say what happened at the bus stop. No one saw J.H. once he stepped onto the ground.

33. The Department did not provide any persuasive evidence as to the facts concerning the Center's care and supervision of J.H. That is, the Department cannot say that J.H. was ever received into the Center's care or that the Center failed to supervise him. The weight of the evidence provided by the Department was not sufficient in the mind of this finder-of-fact to meet its burden of proof.

34. Notwithstanding the Department's failure to prove, by clear and convincing evidence, that a violation occurred, a short

discussion of the proposed penalties is in order: Rule 65C-22.010 sets forth the process for enforcing the rules governing child care centers. The rule includes directives as to how violations are to be categorized and the appropriate fines or sanctions for each violation. In this case, described as the failure to supervise a child resulting in an imminent threat to the child that could result in serious harm, the violation was categorized as a Class I violation. As the first Class I violation, a fine of \$100 to \$500 would be warranted. See Rule 65C-22.010(2)(e). However, absent any evidence as to where J.H. went from the moment he exited the bus, it is impossible to determine whether there was ever an imminent threat to his safety. Thus, whether this was a Class I offense or whether some other classification applies, cannot be definitively established by the facts.

35. Section 402.281 addresses the Gold Seal program. In order to be approved for or retain an accreditation under Gold Seal, a facility must meet and maintain certain standards. Subsection (4)(a) of the statute states that in order to maintain the designation of a Gold Seal provider:

The child care provider must not have had any class I violations, as defined by rule, within the 2 years preceding its application for designation as a Gold Seal Quality Care provider. Commission of a class I violation shall be grounds for termination of the designation as a Gold Seal Quality Care

provider until the provider has no class I violations for a period of 1 year.

36. It is clear RCMA did not have any Class I violations in the two years preceding its designation as a Gold Seal provider. The alleged Class I violation found in the present action would be grounds for termination. However, the statute does not mandate termination, only that the Class I is grounds for such. Under the Department's rules, it can impose whatever sanction best meets the offense at issue.

37. The facts of this case are simple: The Center's employees, sent to escort a child, did not see and, therefore, did not take control of the child. He ended up at his aunt's house by some unknown means and via an undetermined route. The story ended well, but could have had bad results. Everyone involved is sorry the incident occurred and determined that no such thing ever happen again. Absent its Gold Seal accreditation, the Center will not have funds to provide care for many of the indigent children it serves.

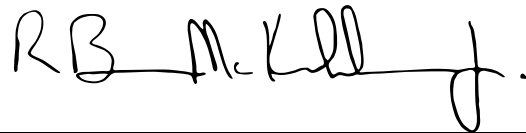
38. The facts of this case were extremely difficult. Each party's position was tenable, but each was based on speculation and innuendo. There is no clear picture of what actually happened with J.H., so it is impossible to prove negligence or the absence of negligence. The Department was justified in seeking sanctions against the Center, but could not fully

substantiate its claims based on all the evidence presented. Thus, a separate order will be entered denying the award attorneys fees and costs in this case.

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, dismissing the Administrative Complaint and Revocation of Gold Seal Quality Care Designation in its entirety.

DONE AND ENTERED this 6th day of August, 2012, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of August, 2012.

ENDNOTE

^{1/} Unless stated otherwise herein, all references to Florida Statutes shall be to the 2011 codification.

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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.