STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REDLANDS CHRISTIAN MIGRANT ASSOCIATION, INC., d/b/a RCMA SMITH BROWN CHILD DEVELOPMENT CENTER,	)	
Petitioner,	)	Case No. 12-2816RX
vs.	)	
DEPARTMENT OF CHILDREN AND FAMILIES,	)	
Respondents.	)	

FINAL ORDER

On September 19, 2012, a duly-noticed hearing was held in Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Timothy P. Atkinson, Esquire
Angela K. Farford, Esquire
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Tallahassee, Florida 32302

For Respondent: Gregory D. Venz, Esquire
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STATEMENT OF THE ISSUES

Whether Florida Administrative Code Rules 65C-22.009(2)(b)1. and 3., are invalid exercises of delegated

legislative authority and whether a statement in a Gold Seal Quality Care Program Fact Sheet constitutes an unadopted rule in violation of section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

On August 17, 2012, Redlands Christian Migrant Association, Inc., d/b/a RCMA Smith Brown Child Development Center (RCMA), filed a Petition for Determination of Invalidity of Existing Rule and Violation of Section 120.54(1), Florida Statutes, for an Agency Statement Defined as a Rule, against the Florida Department of Children and Families. Hearing was set for September 19, 2012.

An Order granting an unopposed Motion to Amend Rule Challenge Petition was entered on August 27, 2012. A pre-hearing Stipulation was filed, which was accepted at hearing. Official recognition was taken of the Recommended Order and the Final Order in Department of Children and Families v. Redlands Christian Migrant Association, Inc., Case No. 12-0750 (Fla. DOAH Aug. 6, 2012; Fla. DCF Aug 27, 2012). Joint Exhibits J-1, a Notice of Gold Seal Revocation, and J-2, a Gold Seal Quality Care Program Fact Sheet, were admitted into evidence. Petitioner RCMA offered an excerpt of the transcribed testimony of Ms. Sherrie Quevedo in the aforementioned case, which was admitted, as discussed in more detail below. Petitioner and Respondent offered the testimony of Ms. Deborah Russo, Child

Care Regulation Director at DCF. Neither party ordered a copy of the Transcript, and the deadline to submit Proposed Final Orders was set for Monday, October 1, 2012. Proposed orders were timely submitted by both parties and were considered.

FINDINGS OF FACT

1. The Department of Children and Families (DCF or Department) is the agency of the State of Florida that regulates child care facilities, large family child care homes, and family day care homes within the state to protect the health and welfare of the children in care.

2. Petitioner RCMA is a child care facility licensed by the Department and located in Arcadia, Florida.

3. RCMA's current child care facility license #CI2DE0009, is effective January 1, 2012, through December 31, 2012.

4. Child care facilities, large family child care homes, and family day care homes in Florida that meet criteria demonstrating that they exceed the minimum licensing requirements and promote quality child care are eligible for Gold Seal Quality Care designation by DCF. Designation indicates a facility providing a higher standard of care.

5. Gold Seal Quality Care designation has no bearing on licensure as a child care facility, large family child care home, or family day care home.

6. A Gold Seal Quality Care designation is an authorization required by law in order for a facility to receive certain tax benefits and enhanced school readiness program reimbursement from the Early Learning Coalition.

7. Issuance of a Gold Seal Quality Care designation is not merely a ministerial act and it is not a license required primarily for revenue purposes.

8. Gold Seal Quality Care designation is a license.

9. DCF granted RCMA Gold Seal designation on March 31, 2008.

10. On December 29, 2011, DCF issued an Administrative Complaint alleging that RCMA committed a Class I licensing violation. The Administrative Complaint sought to impose sanctions against RCMA's child care facility license and to revoke RCMA's Gold Seal designation.

11. On or before April 27, 2012, RCMA's accrediting association, the National Association for the Education of Young Children (NAEYC), revoked RCMA's accreditation. There was no evidence at hearing as to whether its action was based solely upon DCF's allegations in the Administrative Complaint that RCMA had committed a Class I licensing violation.[1/]

12. On or about May 24, 2012, RCMA was notified of the Department's intended action to revoke its Gold Seal designation because NAEYC had revoked RCMA's accreditation. The

notification letter advised RCMA of its right to request a hearing, but was not in the form of an Administrative Complaint.

13. It was stipulated by the parties that Petitioner is substantially affected by rules 65C-22.009(2)(b)1. and 3.

14. On August 6, 2012, Administrative Law Judge R. Bruce McKibben issued a Recommended Order on the Administrative Complaint in DOAH Case No. 12-750, concluding that DCF had failed to prove the Class I licensing violation and recommending that the Administrative Complaint and Revocation of Gold Seal Quality Care Designation be dismissed.

15. On August 27, 2012, DCF entered a Final Order rescinding the Administrative Complaint.

16. Ms. Sherrie Quevedo was the Child Care licensing Supervisor for the geographic area including Arcadia, Florida, at the time of the formal hearing on the Administrative Complaint against RCMA's child care facility license. Ms. Quevedo was a supervisor called by Respondent and her statements as to policies of DCF were regarding matters within the scope of her employment. Ms. Quevedo did not work in the policy-making arm of DCF, and she could not speak authoritatively as to the Department's interpretation of statutes implemented by DCF.

17. Ms. Deborah Russo is the Director of Child Care Regulation Office at DCF, where she is responsible, in conjunction with Department leadership and the General Counsel's Office, for establishing Department policies and implementing statutes setting out legislative policies.

18. The Department terminates the Gold Seal designation for a facility when its accreditation expires or when it is revoked by the accrediting organization.

19. Ms. Russo testified that it is DCF's interpretation of section 402.281, Florida Statutes, that the Department does not have discretion not to terminate a child care facility's Gold Seal designation if that facility's accrediting association revokes the provider's accreditation.

20. The Gold Seal Quality Care Program Fact Sheet contains the statement that "section 402.281(3), Florida Statutes, requires that the Department deny or revoke a child care provider's Gold Seal Quality Care designation" if the provider has a Class I violation within a two-year period (the Statement).

21. The fact sheet was distributed to Gold Seal child care facilities throughout the State of Florida in 2009 and the Statement is of general applicability to all child care facilities designated as Gold Seal Quality Care providers.

22. The Statement, or a substantially similar statement reflecting the Department's interpretation of the statute, has not been adopted as a rule under chapter 120, Florida Statutes.

23. RCMA has committed no licensing violations defined by DCF rule as a Class I violation during the two years preceding the rule challenge petition in this case.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this proceeding pursuant to sections 120.56, 120.569 and 120.57(1), Florida Statutes (2012).[2/]

25. On joint request, official recognition has been taken of the Recommended Order and Final Order in Department of Children and Families v. Redlands Christian Migrant Association, Inc., Case No. 12-0750 (Fla. DOAH Aug. 6, 2012; Fla. DCF Aug. 27, 2012).

Existing Rule Challenge

26. Section 402.281, Florida Statutes, is the legislative authorization for the Gold Seal Quality Care designation program and is the enabling statute for Florida Administrative Code rule 65C-22.009.

27. Section 402.281(1)(b) provides that a child care facility that is accredited by a nationally recognized accrediting association approved by the Department, and that

meets all other requirements shall, upon application to the Department, receive a separate "Gold Seal Quality Care" designation.

28. Although section 402.281 thus provides that accreditation is required to initially qualify for Gold Seal designation, it contains no explicit provision regarding the effect of loss of accreditation on maintaining that designation.

29. Section 402.281 states that in order to "obtain and maintain" Gold Seal designation, a provider must not have had certain violations. For example, it states, "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 2 years." This language, paralleled by other provisions regarding Class II and Class III violations, explicitly states that violations not only prevent initial designation, but also "provide grounds for" termination of Gold Seal designation.

30. Section 402.281(5), Florida Statutes, requires Respondent to adopt rules which provide both criteria and

procedures for "conferring and revoking" designations of Gold Seal Quality Care providers.

31. Respondent adopted Florida Administrative Code Rule 65C-22.009, entitled Gold Seal Quality Care Program.

32. Rule 65C-22.009(2)(b) provides in relevant part:

> (b) Gold Seal Quality Care Enforcement.
>
> 1. Gold Seal Quality Care providers must maintain accreditation by a Gold Seal Quality Care Accrediting Association in order to retain their designation. A child care facility's Gold Seal designation will be terminated upon expiration of accreditation. In order to obtain and maintain Gold Seal Quality Care provider designation, a child care facility must meet the additional criteria outlined in Section 402.281(3), F.S.
>
> * * *
>
> 3. If a provider's accreditation is revoked by the accrediting association, termination of the provider's Gold Seal Quality Care designation by the department will be effective on the date of revocation.

33. Section 120.56(1)(a) provides that any person substantially affected by a rule may seek an administrative determination of its invalidity on the ground that the rule is an invalid exercise of delegated legislative authority.

34. It was stipulated that Petitioner is substantially affected by rule 65C-22.009(2)(b)1. and 3. Petitioner has standing to challenge these rules as invalid exercises of delegated legislative authority.

35. Section 120.52(8), provides:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

36. Petitioner first alleges that rule 65C-22.009(2)(b)1. and 3. enlarge, modify or contravene section 402.281. These rule provisions state that a facility must maintain accreditation by an approved Accrediting Association and that

upon expiration or revocation of this accreditation the Department will terminate Gold Seal designation. The rule provisions do not enlarge, modify, or contravene section 402.281(1)(b), which speaks only to the requirements for a facility to be initially granted Gold Seal designation and does not address grounds for revocation.

37. Neither do these rule provisions enlarge, modify, or contravene section 402.281(4), which provides that certain violations shall be "grounds for" termination of Gold Seal designation. The statute nowhere states or suggests that these were intended to be the exclusive grounds for termination. Petitioner argues, under the well-known rule of statutory construction expressio unius est exclusio alterius, that these violations are therefore the only grounds upon which designation may be revoked. Under Petitioner's interpretation of the statute, a facility, once designated as a Gold Seal Quality Care provider, could retain that status indefinitely even while providing sub-standard care, so long as it received no violations. Such a construction of the statute would defeat the very purpose of the legislation and is rejected. Smalley Transp. Co. v. Moed's Transfer Co., 373 So. 2d 55, 57 (Fla. 1st DCA 1979)(quoting U.S. Supreme Court for proposition that "expressio unius" gives way to contrary intent of the drafters); American Ins. Assn. v. Dep't of Rev. Case No. 97-0323RP

(Fla. DOAH Aug. 29, 1997)(other guides to legislative intent may prevail over "expressio unius" doctrine), per curiam aff'd, Liberty Mut. Ins. Co. v. Dep't of Rev., 746 So. 2d 449 (Fla. 1st DCA 1999). Section 402.281(4) itself refers to violations as "additional" criteria in order to obtain and maintain designation. The setting by rule of a criterion for revocation of Gold Seal designation other than violations is in no way contrary to the statute, but is necessary to fulfill its purpose.

38. In fact, the statute contains a direct mandate in section 402.281(5) that the Department adopt rules which provide criteria for revoking Gold Seal designation. This language is directly contrary to Petitioner's argument that it was the unstated legislative intent that the violations established by statute as grounds for revocation were to be the sole basis for such revocation. Since the Legislature required the Department to adopt a rule providing criteria for revocation of designation, the Department had rulemaking authority to provide that revocation of accreditation by the approved accrediting association should be one such criterion. Hanger Prosthetics & Orthotics, Inc., v. Bd. of Orthotists and Prosthetists, 948 So. 2d 980 (Fla. 1st DCA 2007). Rule 65C-22.009(2)(b)1. and 3. do not exceed the grant of rulemaking authority.

39. Petitioner finally alleges that these rules, requiring revocation of Gold Seal designation upon expiration or revocation of accreditation, vest unbridled discretion in the agency, in violation of section 120.52(8)(d). In fact, however, the rules leave no agency discretion on this point at all. They provide that if the accreditation granted by the accrediting association expires or is revoked by the association, that the Department will revoke Gold Seal designation. No discretion, unbridled or otherwise, is left to the Department under such circumstances.

40. Petitioner failed to prove that either rule 65C-22.009(2)(b) 1. or 3. is an invalid exercise of delegated legislative authority.

Unadopted Rule Challenge

41. Petitioner further asserts that a portion of the Department's Gold Seal Quality Care Program Fact Sheet constitutes an unadopted rule:

> Gold Seal Quality Care designees are advised that section 402.281(3), Florida Statutes, requires that the Department deny or revoke a child care provider's Gold Seal Quality Care designation if the provider has licensing standards violations as follows:
>
> A Class I violation within a two-year period.

42. Petitioner suggests, consistent with the Recommended Order in DOAH Case. No. 12-750, that statutory language

providing simply that the violations "shall be grounds for" revocation means that some discretion as to whether to in fact revoke is left with the Department. If the Department has a different interpretation of the statute that is not readily apparent from its literal reading, or has exercised its discretion to conclude that it should revoke designation in every such case, Petitioner argues, this is a Department policy which must be adopted by rule, and not simply set out in an unadopted fact sheet. Respondent argues conversely, consistent with its Final Order in the same case, that the statutory language providing that the violations are "grounds for" revocation means revocation is required when the violations occur as a matter of statutory policy, and that the fact sheet simply reiterates this.

43. Under section 120.56(4), a Petitioner has the burden to prove that the statement constitutes a rule and that the agency has not adopted the statement by rulemaking procedures. S.W. Fla. Water Mgmt. Dist. v. Charlotte Co., 774 So. 2d 903, 908 (Fla. 2d DCA 2001). Under section 120.56(4)(b), the burden to prove that rulemaking is not feasible or not practicable then falls upon the agency.

44. On the issue of whether or not the statement in the fact sheet constitutes an agency statement of policy or merely a simple recitation of policy already set forth in the statute,

Petitioner offered an excerpt of transcribed testimony given by Ms. Sherrie Quevedo, the Child Care Licensing Supervisor for the area including DeSoto County, in Department of Children and Families v. Redlands Christian Migrant Association, Inc., Case No. 12-0750 (Fla. DOAH Aug. 6, 2012; Fla. DCF Aug. 27, 2012).

45. While this excerpt of Ms. Quevedo's prior testimony is hearsay, it was given in a related case involving the same parties when she was a supervisor working for Respondent at the regional staff level. She had been called as a witness by Respondent, and her statements were regarding matters within the scope of her employment. The excerpt of transcribed testimony would be admissible at civil trial under section 90.803(18)(d), Florida Statutes, as an admission. Lee v. Dep't of HRS, 698 So. 2d 1194, 1200 (Fla. 1997)(statements made by employee of HRS during the scope of his employment was admissible). It is sufficient to support a finding here. § 120.57(1)(c).

46. Ms. Quevedo's testimony that the source of the policy requiring mandatory revocation of Gold Seal certification following violations was "instructions from the child care program office in Tallahassee" is given little weight, however. Ms. Quevedo did not work in the policy-making arm of the Department, and she could not speak authoritatively as to the Department's interpretation. Given her position as an employee at the regional level, Ms. Quevedo's "instructions" would come

from Tallahassee regardless of whether mandatory revocation was a statutory policy, or alternatively was the Department's own policy created in the course of implementing the statute.

47. Section 120.56(1)(b) provides:

> The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

48. In order to demonstrate standing, Petitioner must show that: 1) the agency statement of policy results in a real or immediate injury in fact; and 2) the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Medicine, 917 So. 2d 358, 360 (Fla. 1st DCA 2005); Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999).

49. In order to constitute a real and immediate injury in fact, "the injury must not be based on pure speculation or conjecture." See Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

50. In Florida Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978), the court held that Jerry, who had completed disciplinary confinement imposed under

a rule, no longer had standing to challenge that rule because there was no immediate injury unless and until it was again applied to him. The court was unwilling to presume that Jerry would commit another assault or engage in other misconduct while in custody that would result in application of the rule once again, even though he was at all times subject to the rule. Later cases have followed the Jerry rationale.[3/] See, e.g., Dep't of Corr. v. Van Poyck, 610 So. 2d 1333 (Fla. 1st DCA 1992) rev. denied, 620 So. 2d 763 (Fla. 1993).

51. The injury to Petitioner here is equally speculative, is not immediate, and is governed by Jerry. The alleged unadopted rule mandating revocation of Gold Seal designation after certain violations could create no injury to Petitioner unless and until Petitioner had committed one or more of the violations subjecting it to such revocation. While Respondent issued an Administrative Complaint on December 29, 2011, alleging that Petitioner had committed a Class I violation and seeking to revoke Petitioner's Gold Seal designation, Respondent subsequently rescinded that complaint on August 27, 2012, after formal hearing. It was stipulated here that Petitioner has committed no licensing violations defined by DCF rule as a Class I violation during the two years preceding the rule challenge petition in this case. The mere possibility of injury at some later date does not meet the "immediate injury" prong of the

standing test. Further, no evidence was presented to show that the charge in the Administrative Complaint that Petitioner had committed a Class 1 violation was the reason that NAEYC revoked accreditation.[4/]

52. Petitioner failed to demonstrate standing to challenge the statement regarding revocation following a Class I violation contained in the Gold Seal Quality Care Program Fact Sheet.

53. Redlands Christian Migrant Association, Inc., d/b/a RCMA Smith Brown Child Development Center, failed to prove that Florida Administrative Code Rule 65C-22.009(2)(b)1. or 3. was an invalid exercise of delegated legislative authority and did not demonstrate standing to challenge the Gold Seal Quality Care Program Fact Sheet as an unadopted rule in violation of section 120.54(1)(a).

FINAL ORDER

Upon consideration of the above findings of fact and conclusions of law, it is

ORDERED:

The Petition for Determination of Invalidity of Existing Rule and Violation of Section 120.54(1) is DISMISSED. The final portion of Petitioner's Proposed Final Order is treated as a Motion for Attorney's fees and is DENIED. Respondent's Motion for Attorney's fees is DENIED.

DONE AND ORDERED this 9th day of October, 2012, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 9th day of October, 2012.

ENDNOTES

[1/] Revocation of accreditation by an Accrediting Association solely on the basis of an Administrative Complaint later determined at hearing to be unfounded, in turn requiring the Department to follow its rule and revoke Gold Seal designation, would create a disturbing "Catch 22" for a provider. A restructured rule which established substantive criteria to evaluate whether a facility's standard of care warranted revocation of designation, coupled with license revocation procedures allocating to DCF the burden to prove that allegation, would avoid any suggestion of abdication of rulemaking responsibilities or irrebuttable administrative presumption, allegations not made here. § 120.60(5); § 402.281(5); Gaudet v. Bd. of Prof. Eng., 900 So. 2d 574, 580 (Fla. 4th DCA 2004); Little v. Dep't of Labor & Emp. Sec., 652 So. 2d 927 (Fla. 1st DCA 1995); Cf. Ayala v. Dep't. of Prof. Reg., 478 So. 2d 1116 (Fla. 1st DCA 1985).

[2/] All references to statutes are to the versions in effect in 2012. References to rule 65C-22.009 are to the version adopted on January 13, 2010, which is now in effect, and not to any amendments noticed on July 20, 2012.

[3/] The Florida Supreme Court disapproved Jerry to the extent that it conflicted with Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351

(Fla. 1982)(association representing its members need not suffer an immediate and direct injury to its own interests as an association).

[4/] In Jerry, the court noted that had it been confronted with a situation in which a loss of gain time had been imposed for Jerry's earlier violation of the rule, this would have constituted an injury in fact and Jerry would have had standing. The facts presented here do not raise the issue of whether or not the "Catch 22" mentioned in note 1 above would constitute sufficiently "real and immediate" injury to confer standing.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a

second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.