STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 14-4042

LIL' ANGELS CHILDCARE, LLC,

Respondent.
_____/

RECOMMENDED ORDER

On November 5, 2014, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings conducted a duly-noticed hearing in this case in Tallahassee, Florida.

APPEARANCES

For Petitioner: Neshia Oglesby, Director
Lil' Angels Childcare, LLC
1087 Mason Avenue
Daytona Beach, Florida 32117

For Respondent: Jane Almy-Loewinger, Esquire
Assistant General Counsel
Department of Children and Families
210 North Palmetto Avenue, Suite 430
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated the provisions of Florida Administrative Code Rule 65C-

22.004(3)(c), as alleged in the Administrative Complaint, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On April 23, 2014, Petitioner, the Department of Children and Families (Petitioner or the Department), filed an Administrative Complaint against Respondent, Lil' Angels Childcare, LLC (Respondent or Lil' Angels), alleging that Respondent violated the provisions of rule 65C-22.004(3)(c), by failing to follow written instructions for dispensing an Epi-Pen to a child with a known peanut allergy. Respondent disputed the allegations in the Administrative Complaint and requested a hearing. On August 29, 2014, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

By notice issued on September 3, 2014, the case was scheduled for October 21, 2014. At the request of the parties, the case was continued and re-scheduled for November 5, 2014, and proceeded as scheduled. Petitioner presented the testimony of Sally Ackerman, Sarah Amarasinghe, and Patricia Medico. Petitioner's Exhibit 3 was admitted into evidence. Petitioner's Exhibits 1 and 2 were offered but not accepted.[1/] Respondent presented the testimony of Neshia Oglesby and Brandi Everett, and offered no exhibits.

The Transcript of the proceedings was filed with the Division on November 18, 2014. Petitioner and Respondent filed their Proposed Recommended Orders on November 24 and December 1, 2014, respectively. All references to the Florida Statutes are to the 2013 codification unless otherwise specified.

FINDINGS OF FACT

1. Lil' Angels is a child-care facility licensed pursuant to chapter 402, Florida Statutes. It has been open under the direction of Neshia Oglesby for approximately seven years.

2. At the time of the incident giving rise to the Administrative Complaint in this case, J.A. was a five-year-old child attending Lil' Angels. He had attended the facility "off and on" since he was a toddler.

3. J.A. suffers from a host of allergies, including foods such as eggs, milk, peanuts, peaches, and hot dogs, and other substances such as cockroaches, grass, and pet dander.

4. J.A.'s file at Lil' Angels contained several forms, including a Department of Health Child Care Food Program "Medical Statement for Children with Disabilities and Special Dietary Conditions" form, dated January 10, 2011, that identified eggs, milk, peanuts, and hot dogs as foods to be omitted from his diet. It did not list any disabilities. Although the form required that any medical condition that restricts the child's diet be identified, no medical condition was listed.

5. His file also contained Authorization to Administer Medication forms, dated January 12, 2012, for the administration of an Epi-Pen JR (Epi-Pen), and Benadryl Elixir; Emergency Care Plans for the administration of certain medications; and information regarding his medical history as part of Lil' Angels' enrollment form.

6. The authorization to administer the Epi-Pen stated, "severe allergic reaction to ingestion of nuts/peanuts/raw eggs/?milk." Similarly, the Emergency Care Plan with respect to use of the Epi-Pen stated the following:

If you see this:	Do this:
1. Itching, rash, hives after ingestion of allergic foods	1. Give Benadryl 2.5 ml PO . . . mild allergic Reaction
2. Difficulty breathing, color change after ingestion of allergic foods.	2. Give Epi-Pen JR + call parent

7. The portion of the Enrollment Form containing J.A.'s medical history indicated that he was allergic to "all nuts, tree nuts, peanuts, coconuts etc., allergic to eggs, allergic to peaches." Under the allergies heading, the form stated that it was permissible to "give a little milk products, eggs, cheese," but no pork or peanuts.

8. Nothing on any of the forms stated that J.A. was so allergic to peanuts that he could not be around them; only that he could not eat them.

9. Lil' Angels had at least one other child with a peanut allergy. Her allergy is apparently limited to ingestion.

10. Lil' Angels at times provides craft projects for the children that involve the use of peanut butter. J.A. has participated in these projects in the past, with precautions, and had no apparent ill-effects from them.

11. On Friday, January 31, 2014, the children in J.A.'s class at Lil' Angels began an art project making bird feeders with pine cones, peanut butter, and birdseed. Miss Brandi was the instructor working with the children. The other children then had a snack with peanut butter and apples while J.A. had apples and caramel. There were no reports of J.A. suffering any ill effects after this activity.

12. On Monday, February 3, 2014, the children worked on finishing the project. Ms. Brandi was the only person who testified that was present during the Monday morning activities, and her testimony was detailed and persuasive, and is credited.

13. There were approximately 11 children in the group. Ms. Brandi gave all of the children their pine cones, and because of J.A.'s allergy, she sat with him during the project. Once everyone had their pine cones, she had J.A. put on gloves, and then let everyone else get their peanut butter. Once the other children got their peanut butter, there was just a small amount left. Ms. Brandi then put a small amount of peanut butter on a

spork, which she then handed to J.A., and let him spread the peanut butter on his pine cone using the spork. Ms. Brandi, who was sitting with J.A. and assisting him because of his allergies, was adamant that he did not eat any peanut butter and her testimony is credited.

14. Because there was very little peanut butter for J.A. to use, he was the first child to wash his hands and go to the rug for book time. While he was on the rug, the other children continued to work on their projects. Once they finished, the other children washed their hands, and joined J.A. on the rug for book time. Ms. Brandi then wiped down the tables, using soap and water followed by bleach and water, and cleaned the bathrooms. It is unclear from the record, but it appears that she cleaned while the children were having book time.

15. After book time, the children lined up and got ready to go outside, where they played a game that involved a lot of chasing each other around the playground. J.A. participated in the activity, and the playground time lasted approximately 45 minutes. After the playground time, the children lined up to get some water, then went inside to wash their hands and sit at the table. J.A. was near the front of the line to wash his hands, and sat down at the table. Ms. Brandi noticed at this point that he was sniffling and scratching his eyes. She did not see any swelling. Ms. Brandi asked him if he was okay, and J.A. said,

"no." Ms. Brandi then contacted Neshia Oglesby, the daycare center's director, who took J.A. out of the classroom. It was approximately 11:00 a.m. at this point.

16. Ms. Oglesby called J.A.'s mother, but was unable to reach her. She then called Sally Ackerman, J.A.'s grandmother, and told her that she believed J.A. had an allergic reaction. Ms. Ackerman had to unload items from her car at her place of business so as to have room to transport J.A., and arrived at the daycare at around 11:30. By this time, J.A. was upset and had been crying. Ms. Ackerman described him as red, itchy, and swollen. It was also at least one and a half hours since the craft activity.

17. J.A. is a shy, reserved child, and was wearing long pants because it was cold outside. Ms. Oglesby's testimony that he did not want to pull down his pants to allow her to administer the Epi-Pen is credited. Ms. Ackerman acknowledged that J.A. did not want Ms. Oglesby to pull down his pants, and that he probably was more comfortable when Ms. Oglesby turned her head to give him some privacy. Instead of Ms. Oglesby administering the Epi-Pen, she read the directions to Ms. Ackerman and walked her through the administration of the device.

18. All of the workers at Lil' Angels had been trained in the use of an Epi-Pen, but some, including Ms. Brandi, had never actually used one. Ms. Oglesby had used an Epi-Pen in the past,

but did not want to here because J.A. is very shy and was already very upset. After the Epi-Pen was administered, J.A. started to improve immediately. His mother then arrived and took him to the emergency room for evaluation.

19. Ms. Oglesby called J.A.'s mother after the incident to make sure he was alright. However, J.A. never returned to Lil' Angels. J.A.'s mother sent an unsigned note on hospital letterhead to the facility indicating the need to clean all surfaces to ensure the removal of any peanut residue, and to make sure that J.A. was not in the presence of peanuts or peanut oils. Lil' Angels had already cleaned the surfaces, and engaged in retraining of its staff, including having a physician whose child attended the daycare come speak to the staff about peanut allergies.

20. Pat Medico is the family services counselor who inspects Lil' Angels for the Department. She investigated the incident involving J.A. in response to a complaint received by the Department from the Early Learning Coalition, who apparently received a complaint from J.A.'s parent. She spoke to Ms. Oglesby and Ms. Dea, the assistant director of the daycare. Ms. Dea was not present on February 3, and Ms. Oglesby was not in the room during the craft project. Ms. Dea, who did not testify at hearing, related similar information to that provided by

Ms. Oglesby and Ms. Brandi that J.A. had been in the same area as peanuts in the past with no problems.

21. Ms. Medico was concerned that the daycare allowed J.A. to participate in an activity involving peanuts, saying that a peanut allergy can become airborne "at any time." She believed that the doctors' use of the word "ingestion" did not lead her to believe that only an ingested peanut can cause a problem for the child. However, no evidence was provided to indicate that Ms. Medico has the qualifications to express what is clearly an expert medical opinion regarding the scope of peanut allergies. No doctor who treated J.A. and no one specializing in the treatment of allergies testified in this proceeding. Therefore, the scope of J.A.'s allergy and the ability (or lack thereof) of the allergy to become airborne has not been established.

22. No information regarding the instructions on the Epi-Pen's original container label or the Epi-Pen's printed manufacturer label was offered into evidence.

23. Ms. Medico was also disturbed that Ms. Oglesby rejected her suggestion that the facility become a "peanut-free facility," feeling that her reaction to the suggestion (a statement that they were not going to do that) was indicative of not taking the issue seriously. Ms. Oglesby, on the other hand, stated that she felt it was misleading to advertise as a peanut-free environment when so many foods are processed in environments where peanuts

are also processed, and the facility could not guarantee that substances processed in these environments are not present.

24. Ms. Oglesby also believes that the reaction may have been to something other than peanut butter, given both the number of allergies J.A. suffers and the length of time between the craft project and J.A.'s first visible symptoms. Ms. Oglesby has a valid point: there is no way to know on the record presented what exactly caused J.A.'s symptoms. However, even assuming for the moment that the allergic reaction was to peanut butter, there was nothing to alert the daycare at the time of this incident that J.A. could suffer from the simple exposure, as opposed to ingestion, of peanuts.

CONCLUSIONS OF LAW

25. 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 (2014). This proceeding is de novo. § 120.57(1)(k), Fla. Stat.

26. This is a disciplinary proceeding against Respondent's child-care facility license, pursuant to section 402.310(2), Florida Statutes.

27. Petitioner, as the party seeking to impose discipline, has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking &

Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Coke v. Dep't of Child. and Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998).

28. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court:

> Clear 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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 Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elect. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

29. The Department is the agency charged with the responsibility of licensing child-care facilities in the State of Florida. §§ 402.301-402.319, Fla. Stat. The Department is charged in section 402.305(1) to establish, by rule, licensing standards to address the health, sanitation, safety and physical surroundings; the health and nutrition; and the child development

needs of all children in child care. The relevant rules pertaining to this proceeding are located in Florida Administrative Code Rule Chapter 65C-22.

30. Section 402.310 authorizes the Department to take disciplinary action against the license of a child-care facility for violations of the any provision of sections 402.301-402.319 or the rules adopted thereunder, and authorizes the Department to impose an administrative fine, to convert the license to probation status, and to deny, suspend, or revoke the license.

31. The factual allegations contained in the Administrative Complaint state the following:

> 3. During a Routine Inspection on February 12, 2014, licensing counselor Pat Medico, determined that:
>
> Child J.A. was known to have a peanut allergy and was allowed to participate in an activity with peanut butter. The facility did not follow written instructions for dispensing an epi-pen, in that that owner could not find the epi-pen when the child developed watery eyes and began scratching his face. The epi-pen was not administered until the grandmother arrived at least 30 minutes after the incident. The owner/director admitted she did not know how to use the epi-pen. Doctor E.B. at the Halifax Health Medical Center stated that this is a severe life threatening allergy and this child may not be in the same room with any peanuts or peanut products or oils. The Doctor stated that this child cannot even interact with children who have been involved in activities that use peanuts. There is a risk of serious harm to this child.

32. Based upon these factual allegations, the Administrative Complaint asserts that Respondent has violated Florida Administrative Code Rule 65C-22.004(3)(c), which states:

> (3) Medication. Child care facilities are not required to give medication; however, if a facility chooses to do so, the following shall apply:
>
> * * *
>
> (c) Prescription and non-prescription medication brought to the child care facility by the custodial parent or legal guardian must be in the original container. Prescription medication must have a label stating the name of the physician, child's name, name of the medication, and medication directions. All prescription and non-prescription medication shall be dispensed according to written directions on the prescription label or printed manufacturer's label.

33. Petitioner did not prove the allegations in the Administrative Complaint by clear and convincing evidence.

34. With respect to the facts alleged in the Administrative Complaint, Petitioner proved simply that J.A. had a peanut allergy; that J.A. participated in a craft project involving peanut butter but did not eat any; and that Lil' Angels had instructions to use the Epi-Pen upon ingestion of peanuts, as opposed to exposure. Petitioner did not present the testimony of any health care practitioner to establish that J.A. had an allergy to all exposures to peanuts, and no expert testimony that would establish that an allergy to peanuts could change from ingestion

to exposure at any time. While that assumption on the part of Petitioner was apparent at hearing, there simply was no admissible evidence to support the assumption. Indeed, while the Administrative Complaint specifically referenced statements by a physician regarding J.A.'s allergy, that physician did not testify.

35. Moreover, because licensing statutes are penal in nature, they are strictly construed in favor of the licensee. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes and rules must be construed in terms of their literal meaning, and the language used may not be expanded to broaden its application. Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 99-100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991). Here, the only rule violation alleged addresses the administration of medication. It does not address whether children with allergies should be allowed to participate in activities involving items a child cannot safely ingest.

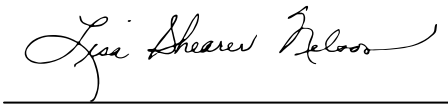
36. The specific rule violation alleged requires that medication shall be dispensed "according to written directions or prescription label or printed manufacturer's label." None of these items were offered into evidence. Absent these items, the only evidence presented regarding the use of the Epi-Pen was the

Authorization to Administer Non-Prescription Medication and Emergency Care Plan forms for J.A. on file with Lil' Angels. In each of these forms, authorization to give the Epi-Pen was limited to administration following ingestion of certain foods, including peanuts. Under these facts, it cannot be established that Lil' Angels failed to administer the Epi-Pen in accordance with written instructions, let alone written instructions specified in the rule.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families enter a Final Order dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 9th day of December, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of December, 2014.

ENDNOTE

[1/] Petitioner's Exhibit 1 is the Administrative Complaint in this case. Petitioner could identify no evidentiary basis for offering the exhibit, which is simply the charging document in the case. Petitioner's Exhibit 2 is labeled as a composite exhibit of J.A.'s medical records (the child whose allergy is at issue in this case), and consists of what purport to be lab results from LabCorp, patient records from a treating physician, and records from Halifax Health emergency department. However, no person from any of these entities testified and there was no testimony or documentation establishing the criteria identified in section 90.803(6), Florida Statutes, to admit the documents as business records from the various entities from which they originated. Inasmuch as the records constitute hearsay not falling within an exception identified in section 90.803, the statements therein cannot form the basis for a finding of fact.

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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.