STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN
AND FAMILIES,

Petitioner,

Case Nos. 14-4586

vs.

PLAY AND LEARN CHILD CARE
CENTER,

Respondent.
_____/

RECOMMENDED ORDER

On December 12, 2014, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Karen A. Milia, Esquire
Department of Children and Families
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Miami, Florida 33128

For Respondent: Lucy C. Pineiro, Esquire
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STATEMENT OF THE ISSUES

The issues are: 1) whether Respondent seated a child in a non-excluded vehicle without an individual seat belt or federally

approved child safety restraint, as allegedly required by section 402.305(10), Florida Statutes, and Florida Administrative Code Rule 65C-22.001(6)(d) and (e); 2) if so, whether this is a Class I violation, as provided by section 402.305(10) and rule 65C-22.001(6)(d) and (e); and 3) if so, whether this Class I violation necessitates the termination of Respondent's Gold Seal designation, as provided by section 402.281.

PRELIMINARY STATEMENT

By Administrative Complaint filed September 23, 2014, Petitioner alleged that Respondent is a licensed child care facility, holding license C11MD1573. The Administrative Complaint alleges that, during a routine inspection on August 14, 2014, Petitioner's inspector cited Respondent for a Class I violation of standard number eight because the inspector observed 25 students on Respondent's bus, which was equipped with seat belts for only 12 seats. The Administrative Complaint alleges that this is a violation of section 402.305(10) and rule 65C-22.001(6)(d) and (e). The Administrative Complaint alleges that this violation is a Class I violation and requires the termination of Respondent's Gold Seal designation.

Respondent requested a formal hearing.

At the hearing, Petitioner called three witnesses and offered into evidence five exhibits: Petitioner Exhibits 1 through 5. Respondent called one witness and offered into

evidence four exhibits: Respondent Exhibits 6, 7, 10, and 12. All exhibits were admitted except Respondent Exhibits 6 and 7, which were proffered.

The court reporter filed the transcript on January 8, 2015. The parties filed proposed recommended orders on January 30, 2015.

FINDINGS OF FACT

1. Respondent is a licensed child care facility. Since 2011, Respondent has transported students attending its facility by the subject bus, which it owns. The bus transports school-aged children from Respondent's facility to their schools in the morning and from their schools to Respondent's facility in the afternoon and transports preschool-aged children during the day on field trips.

2. The bus is a 1997 International 3000 series model with a gross vehicle weight of about 19,500 pounds and a capacity of 29 passengers. The bus is yellow with black markings and has a generous allotment of warning lights, including flashing red lights and a stop arm that extends out from the side of the bus to remind drivers to stop while the bus picks up or discharges students. The bus bears the name of the school in large letters.

3. When Respondent acquired the bus, it had no seat belts. Believing that they were required to provide seat belts for children under five years of age, Respondent's owner installed

seat belts to secure 12 passengers, which was the largest number of children in this age range whom Respondent expected to transport at any one time.

4. On August 14, 2014, a group of Respondent's students, all at least five years old, boarded Respondent's bus at the child care facility for a field trip. Shortly prior to the departure of the bus, Petitioner's inspector arrived at the facility and observed that the bus was occupied by 25 students, but had only 12 seat belts.

5. The inspector informed the owner of Respondent that all of the students were required to have seat belts, but the owner disagreed. The bus then departed with 13 students not wearing seat belts, and the inspector issued a citation for the alleged violation.

6. The owner's disagreement was based on an inspection by another employee of Petitioner that had taken place on April 16, 2014. In that inspection, Respondent was found to be in compliance with all requirements for "seat belts/child restraints," as provided by section 402.305(10) and rule 65C-22.001(6). In fact, Petitioner's inspections of Respondent's bus failed to include any seat-belt citation at anytime during the three years that Respondent owned and operated the bus, even though, at all times after its acquisition, the bus was equipped and used as the inspector observed on August 14, 2014.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction. §§ 120.569 and 120.57(1), Fla. Stat. The parties do not dispute that Petitioner has proposed action determining the substantial interests of Respondent. Petitioner argues, though, that jurisdiction is lacking because there is no material issue of disputed fact. Although the parties do not dispute what transpired on August 14, 2014, it is not clear that the parties do not dispute the material characteristics of Respondent's bus.

8. The burden of proof is on Petitioner to prove the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). Additionally, Petitioner may not take action against Respondent for acts or omissions with which Respondent has not been charged. See, e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005).

9. Respondent's proposed recommended order argues that Petitioner is equitably estopped from asserting a seat-belt violation. In this argument, Respondent relies on the earlier inspections that did not cite any seat-belt violations and the failure, on August 14, 2014, of the inspector to prevent the bus from departing with unbelted children.

10. Equitable estoppel is rarely available to administrative litigants. Assoc. Indus. Ins. Co. v. Dep't of

Labor & Emp't Sec., 923 So. 2d 1252, 1255 (Fla. 1st DCA 2006). Equitable estoppel requires: 1) a representation of a material fact that is contrary to a later-asserted position; 2) the other party's reliance on the representation; and 3) a change in position by the other party due to the reliance on the representation. When the party to be estopped is a governmental agency, equitable estoppel also requires that: 1) the government's conduct exceeds mere negligence and causes serious injustice and 2) the application of estoppel against the government will not unduly harm the public interest. Id.

11. Respondent cannot satisfy any of these conditions. First, the failure of earlier inspections to cite a seat-belt violation or the failure of the inspector to seize control of the bus on the day of the inspection is not a representation or a series of representations. Second, any failures as to past inspections would involve an issue of law, not an issue of fact. Third, Respondent never changed its position due to any relied-upon representation, a failure to cite the absence of seat belts, or a failure of the inspector to seize control of the bus. When Respondent purchased a bus without a full complement of seat belts, Respondent was not relying on anything said or done by Petitioner. If the law requires seat belts, it is irrelevant to any estoppel analysis whether the first citation was issued at the time of the first inspection or the twentieth inspection.

Lastly, if the law requires seat belts, any failure by Petitioner's inspectors would not rise to a serious injustice, and a ruling that would prevent the enforcement of such a seat-belt law would unduly harm the public interest. Respondent's argument on equitable estoppel is entirely without merit.

12. Respondent's proposed recommended order also argues that Florida Administrative Code Rules 65C-22.010 and 65C-22.012 are invalid exercises of delegated legislative authority on the grounds that Petitioner has exceeded its grant of rulemaking authority and enlarged, modified, and contravened the statutes implemented by the rules. Respondent has not invoked DOAH's jurisdiction to invalidate rules because Respondent has not filed an original petition with DOAH seeking this relief. § 120.56(1)(c). Thus, the rules are presumptively valid, City of Palm Bay v. Department of Transportation, 588 So. 2d 624, 628 (Fla. 1st DCA 1994), at least at the level of the DOAH proceeding. But see Willette v. Air Prod., 700 So. 2d 397, 399 (Fla. 1st DCA 1997) (in a judicial proceeding, an unchallenged rule must yield to a contradictory statute). Respondent's arguments against the validity of the subject rules are therefore rejected.

13. The Administrative Complaint cites section 402.305(10), which directs Petitioner to establish enforceable standards, but

does not do so itself. This statute directs Petitioner to establish:

> Minimum standards [that] shall include requirements for child restraints or seat belts in vehicles used by child care facilities and large family child care homes to transport children, requirements for annual inspections of the vehicles, limitations on the number of children in the vehicles, and accountability for children being transported.

Plainly, this subsection omits specific, enforceable standards for seat belts, annual vehicle inspections, the maximum number of children on a vehicle, and accountability for the children being transported. For this reason, Petitioner has not proved any violations of section 402.305(10).

14. However, as directed by section 402.305, Petitioner has adopted minimum standards for the operation of child care facilities in rule 65C-22.001, which is entitled, "General Information." These minimum standards include a number of specific, enforceable requirements concerning the transportation of students. Rule 65C-22.001(6) provides:

> Transportation. For the purpose of this section, vehicles refer to those that are owned, operated or regularly used by the child care facility and vehicles that provide transportation through a contract or agreement with an outside entity. Parents' personal vehicles used during field trips are excluded from meeting the requirements in paragraphs 65C-22.001(6)(a)2., (b) and (c), F.A.C.

(a) When any vehicle is regularly used by a child care facility to provide transportation, the driver shall have the following:

1. A valid Florida driver's license,

2. An annual physical examination which grants medical approval to drive, and valid certificate(s) of course completion for first aid training and infant and child cardiopulmonary resuscitation (CPR) procedures.

(b) All child care facilities must comply with the insurance requirements found in Section 316.615(4), F.S.

(c) All vehicles regularly used to transport children shall be inspected annually by a mechanic to ensure proper working order. Documentation by the mechanic shall be maintained in the vehicle.

(d) The maximum number of individuals transported in a vehicle may not exceed the manufacturer's designated seating capacity or the number of factory installed seat belts.

(e) Each child, when transported, must be in an individual factory installed seat belt or federally approved child safety restraint, unless the vehicle is excluded from this requirement by Florida Statute.

(f) When transporting children, staff-to-child ratios must be maintained at all times. The driver may be included in the staff-to-child ratio. Prior to transporting children and upon the vehicle(s) arrival at its destination, the following shall be conducted by the driver(s) of the vehicle(s) used to transport the children:

1. Driver's Log. A log shall be maintained for all children being

transported in the vehicle. The log shall be retained for a minimum of four months. The log shall include each child's name, date, time of departure, time of arrival, signature of driver, and signature of second staff member to verify the driver's log and that all children have left the vehicle.

2. Upon arrival at the destination, the driver of the vehicle shall:

a. Mark each child off the log as the children depart the vehicle;

b. Conduct a physical inspection and visual sweep of the vehicle to ensure that no child is left in the vehicle; and

c. Sign, date and record the driver's log immediately, verifying that all children were accounted for, and that the visual sweep was conducted.

3. Upon arrival at the destination, a second staff member shall:

a. Conduct a physical inspection and visual sweep of the vehicle to ensure that no child is left in the vehicle; and

b. Sign, date and record the driver's log immediately, verifying that all children were accounted for and that the log is complete.

(g) Each vehicle shall be equipped with contact information for all children being transported. When transporting children with chronic medical conditions (such as asthma, diabetes or seizures), their emergency care plans and supplies or medication shall be available. The responsible adult shall be trained to recognize and respond appropriately to the emergency.

15. As noted above, the Administrative Complaint alleges that Respondent has violated rule 65C-22.001(6)(d) and (e). This case does not involve the transporting of children in excess of the overall capacity of the bus, so the relevant portion of rule 65C-22.001(6)(d) pertains to the transporting of students for whom seat belts are not available.

16. Thus, as relevant to the case, rule 65C-22.001(6)(d) and rule 65C-22.001(6)(e), respectively, limit the number of passengers to the number of seat belts and require the passengers to wear the seat belts. The first issue is whether the exempt-vehicle provision in rule 65C-22.001(6)(e) also applies to rule 65C-22.001(6)(d). If the exemption does not apply to both subsections and the subject bus constitutes an excluded vehicle, each seat on Respondent's bus could be required to be equipped with a seat belt, but the students would not be required to wear them. This would make no sense. See, e.g., Tampa-Hillsborough Cnty. Expressway Auth. v. Morris Alignment Serv., Inc., 444 So. 2d 926, 929 (Fla. 1983) (construction of statute must avoid "absurd" result). "'[T]he words of a statute must be read in their context and with a view toward their place in the overall statutory scheme.' (citation omitted)." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). A court must construe a regulatory statute as a "'coherent regulatory scheme'

(citation omitted)" and "'fit, if possible, all parts [of the statute] into a harmonious whole.' (citation omitted)." Id.

17. In Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989), the U.S. Supreme Court was faced with a interpretative problem similar to that posed by the mention of excluded vehicles in rule 65C-22.001(6)(e), but not rule 65C-22.001(6)(d). The statute before the court authorized the taxation of "pay or compensation for personal services as an officer or employee of the United States . . ., if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation. (emphasis supplied)." The state imposed its personal income tax on the retirement pay received by a retired federal employee. The court held that the highlighted portion of the statute meant that it applied to retired, as well as active, federal employees. The state argued that, even if so, the highlighted portion of the statute did not modify the reference to the officer or employee in the clause prohibiting discrimination in the taxing scheme. The court conceded that the state's "hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation." Id. at 809. But, to avoid an "implausible" interpretation in which a state could impose an income tax in a discriminatory fashion against retired federal employees, but not active federal employees, the court

read the nondiscrimination clause to apply to both classes of federal employees. Id. at 809-10.

18. Applying these rules of statutory construction to rule 65C-22.001(6)(d) and (e), the excluded-vehicle provision applies to both subsections to avoid an absurd or implausible result and to achieve a coherent regulatory scheme on the transportation provided by child care facilities. This reading of the rule is also supported by the principle that disciplinary provisions must be construed strictly, and any ambiguities must be construed in favor of the licensee. See, e.g., McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984).

19. The next issue is to determine which party bears the burden of proving whether the bus is excluded from the seat-belt requirements. Absent clear legislative intent to the contrary, the party with the burden of proof must prove the nonavailability of an exception to a general statute, if the exception is within the enacting clause establishing the liability.

20. The earliest case on this point is Baeumel v. State, 26 Fla. 71, 7 So. 371 (1890), in which an indictment charged the defendant with engaging in business as a dealer selling alcoholic beverages without a license. The statute required a dealer selling alcoholic beverages to obtain a license and designated as a dealer any person who sold alcoholic beverages, but an independent clause within the sentence setting forth the second

requirement excluded certain activities by compounding druggists. Quoting with approval a treatise on criminal procedure, the Supreme Court stated:

> ["]'if there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or a subsequent statute, that is matter of defence, and is to be shown by the other party.'"

26 Fla. at 75, 7 So. at 372 (citations omitted). Under this principle, the defendant bore the burden of proving that he was entitled to the druggist exclusion.

21. In State v. Buchman, 361 So. 2d 692 (Fla. 1978), the defendants were charged with the sale of unregistered securities under section 517.07, which prohibited the sale of unregistered securities unless the securities or transaction was exempt under section 517.05 and 517.06, respectively. Section 517.17 affirmatively placed the burden of proving entitlement to an exemption on the person claiming the exemption. Noting that the legislative intent and the exemptions were in separate statutes, the Court held that the burden was on the defendants, not the state, as to these exemptions. See also Terranova v. State, 474 So. 2d 1206 (Fla. 2d DCA 1985) (defendant had burden of proving exemption under section 489.103 after state proved that defendant had contracted without a licensed in violation of section 489.127).

22. In State v. Thompson, 390 So. 2d 715 (Fla. 1980), a defendant was convicted of possessing a short-barreled shotgun in violation of section 790.221, which, in a single sentence, prohibited the possession of certain weapons, but an independent clause within the sentence excluded antique firearms. The grammar of the two statutes in Baeumel and Thompson was identical in that the exception was contained in an independent clause--i.e., a clause with a subject and predicate--separated from the enacting clause by a semicolon. Noting that the exception clause "constitut[ed] a member of a complex or compound sentence [rather than] a completed sentence, 390 So. 2d at 716 n.3, the court applied Baeumel and held that the defendant bore the burden of proving the antique-weapon defense.

23. In State v. Robarge, 450 So. 2d 855 (Fla. 1984), the defendant was convicted of possessing a firearm without a license in violation of section 790.05, which prohibited, in a single sentence, the possession of a firearm "without having a license." Concluding that "without having a license" was not an exception in a subsequent clause, the court held that the state had the burden of proving that the defendant lacked a license.

24. The subject exclusion is a dependent clause within the enabling provision of rule 65C-22.001(6)(e), so, under the four above-discussed cases, Petitioner bears the burden of proving that the bus is not excluded from the seat-belt law.

25. In the alternative, even if the seat-belt exclusion were an affirmative defense, Respondent would not bear the ultimate burden of proof on this issue. Respondent would have to "go forward with evidence that the affirmative defense exists," and "once [Respondent] has presented competent evidence of the existence of the defense, the burden of proof remains with [Petitioner]." Wright v. State, 442 So. 2d 1058, 1060 (Fla. 1st DCA 1983).

26. Construing the meaning of the exempt-vehicle provision of rule 65C-22.001(6)(e) requires reference to a series of statutes and rules. Section 316.613, which requires child-restraint devices in certain "motor vehicles," excludes a "school bus" and incorporates the statutory definition of "school bus" at section 316.003(45). § 316.613(2)(a). Section 316.614, which requires the use of seat belts in certain "motor vehicles," likewise excludes a "school bus," but does not incorporate the definition of "school bus." § 316.614(3)(a)1. For present purposes, this recommended order disregards as irrelevant any distinction between "vehicle" in rule 65C-22.001(6)(e) and "motor vehicle" in sections 316.613 and 316.614 and the failure of section 316.614(3)(a)1. to incorporate the statutory definition of "school bus" at section 316.003(45).

27. Section 316.003(45) defines a "school bus" as:

> Any motor vehicle that complies with the color and identification requirements of chapter 1006 and is used to transport children to or from public or private school or in connection with school activities, but not including buses operated by common carriers in urban transportation of school children. The term "school" includes all preelementary, elementary, secondary, and postsecondary schools.

28. Respondent's child care facility satisfies the definition of a preelementary school. In dictum in a case involving a nonpublic-sector bus transporting children from a public elementary school to an after-school child care facility, the Florida Supreme Court acknowledged that a statute covering any private "nursery [or] preelementary . . . school" "purport[ed]" to cover the child care facility. Travelers Indem. Co. v. Suazo, 614 So. 2d 1071 (Fla. 1992).

29. Unfortunately, there are no color and identification requirements for school buses in chapter 1006. Section 1006.25 provides:

> (1) DEFINITION.—For the purpose of this part, a "school bus" is a motor vehicle regularly used for the transportation of prekindergarten disability program and kindergarten through grade 12 students of the public schools to and from school or to and from school activities, and owned, operated, rented, contracted, or leased by any district school board, except:
>
> (a) Passenger cars, multipurpose passenger vehicles, and trucks as defined in 49 C.F.R. part 571.

(b) Motor vehicles subject to, and meeting all requirements of, the United States Department of Transportation, Federal Motor Carrier Safety Regulations under Title 49, Code of Federal Regulations and operated by carriers operating under the jurisdiction of these regulations but not used exclusively for the transportation of public school students.

(2) SPECIFICATIONS.—Each school bus as defined in 49 C.F.R. part 571 and subsection (1) that is rented, leased, purchased, or contracted for must meet the applicable federal motor vehicle safety standards and other specifications as prescribed by rules of the State Board of Education.

(3) STANDARDS FOR LEASED VEHICLES.—A motor vehicle owned and operated by a county or municipal transit authority that is leased by the district school board for transportation of public school students must meet such standards as the State Board of Education establishes by rule. A school bus authorized by a district school board to carry passengers other than school students must have the words "School Bus" and any other signs and insignia that mark or designate it as a school bus covered, removed, or otherwise concealed while such passengers are being transported.

(4) OCCUPANT PROTECTION SYSTEMS.—Students may be transported only in designated seating positions, except as provided in s. 1006.22(12), and must use the occupant crash protection system provided by the manufacturer, which system must comply with the requirements of 49 C.F.R. part 571 or with specifications of the State Board of Education.

30. At the hearing, the parties referred specifically to 49 C.F.R. sections 571.208 and 571.222. These lengthy regulations

do not contain any specifications for the color and identification of school buses. Section 571.3(b) defines a "bus" as a motor vehicle designed to carry more than ten persons, and a "school bus" as a "bus that is sold . . . for purposes that include carrying students to and from school or related events," subject to an exception involving an urban common carrier that is not relevant to the present case.

31. It is appropriate to refer to these federal regulations to the extent that they are incorporated, directly or indirectly, in the excluded-vehicle provision of rule 65C-22.001(6)(e). As should be clear from section 1006.25, which is referenced strictly for establishing the requirements as to color and identification marks, the federal regulations do not play a role in this case.

32. It is inappropriate to refer to these federal regulations, as Respondent's proposed recommended order appears to do, as independent authority relieving Respondent of any seat-belt obligation that may be imposed under state law. Such a use of federal law essentially represents a preemption argument, which invites a determination that the state law is unconstitutional under the Supremacy Clause of the U.S. Constitution. See, e.g., Wos v. E. M. A., 133 S. Ct. 1391 (2013). An Administrative Law Judge lacks the authority to make

such a determination. See, e.g., Key Haven Ass'n Enter., Inc. v. Bd. of Trs., 427 So. 2d 153, 157 (Fla. 1983).

33. The only rule that the Administrative Law Judge could find specifying the minimum requirements for school buses applies to new buses and was adopted by the Florida Department of Education (FDOE): rule 6A-3.0291. Pursuant to this rule and section 1006.25, FDOE has published Florida School Bus Specifications, revised 2013, which is available at http://www.fldoe.org/core/fileparse.php/7585/urlt/0085480-floridaschoolbusspecifications.pdf.

34. Applying to all public school buses purchased after the effective date of the document, the Florida School Bus Specifications specifies that all buses shall be yellow, id. at p. I-6, with black trim, id. at p. III-13, and shall bear lettering at least eight inches high stating "School Bus." Id. at p. III-13. Other lettering requirements are also contained in the Florida School Bus Specifications, revised 2013, such as indications of the "Emergency Door," the warning to "Stop When Red Lights Flash," "Emergency Exits," and optional American flags. Id. Also, the signal arms must be red with the warning to "Stop" in letters at least six inches high. Appendix A graphically displays these various requirements.

35. The factual record in this case reveals that Respondent owns and operates a big, yellow bus with black trim equipped with

a stop arm; warning lights, including flashing red stop lights; and large letters identifying the name of Respondent's child care facility. The big yellow vehicle with black trim and an array of warning lights is instantly recognizable as a school bus.

36. Thus, Respondent's bus is what it appears to be at first glance--a school bus. And a school bus is excluded from the seat-belt provisions of rule 65C-22.001(6)(d) and (e). Petitioner has thus failed to prove the material allegations of the Administrative Complaint, and it is unnecessary to address the second and third issues set forth in the Statement of the Issues.

RECOMMENDATION

It is

RECOMMENDED that the Department of Children and Families enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 9th day of February, 2015, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of February, 2015.

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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.