STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PROJECT ESTEEM OF LEON COUNTY, Petitioner, vs. DEPARTMENT OF CHILDREN AND FAMILIES, Respondent.	)	Case No. 15-0777

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case before Administrative Law Judge Diane Cleavinger of the Division of Administrative Hearings (DOAH) on July 9, 2015, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Camille Larson, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is exempt from licensure as a child care facility.

PRELIMINARY STATEMENT

By letters dated December 23, 2014, and January 8, 2015, the Respondent Department of Children and Families (Department, DCF or Respondent) notified Petitioner, Project Esteem of Leon County (Project Esteem or Petitioner), that its request for an exemption from licensure as a child care facility was denied. Petitioner disagreed with the Department's decision and timely requested a formal administrative hearing.

At the final hearing, the Department presented the testimony of three witnesses and offered one exhibit, numbered Exhibit 8, which was admitted into evidence. Petitioner did not call additional witnesses but examined each of Respondent's witnesses. Additionally, 19 Joint Exhibits numbered 1-6, 12, 14, 17-23, and 25 were admitted into evidence.

The Transcript of the hearing was filed on July 27, 2015. After the hearing, Petitioner filed a Proposed Recommended Order on August 4, 2015. Likewise, the Department filed a Proposed Recommended Order on the same date.

FINDINGS OF FACT

1. Petitioner, Project Esteem, operates a program that offers after-school tutoring and academic enrichment for children in kindergarten to fifth grade and ninth to twelfth grade in Tallahassee, Florida. It is funded by a 21st Century Grant as a program to provide activities and supervision to

children in low-income neighborhoods. The 21st Century Grant program is facilitated through the Florida Department of Education. There are several academic and programmatic requirements for a program that receives this type of educational funding from the Department of Education.

2. In July 2013, the Department granted Petitioner an exemption from licensure and recognized Petitioner's program as a strictly instructional "after school program" pursuant to Florida Administrative Code Rule 65C-22.008(2)(c)2. At the time, meals were not served at the program site.

3. The Department based its decision on a Child Care Licensure Survey completed by Project Esteem which indicated that activities in the program would be "exclusively academic/instructional activities" and that only "individually wrapped snacks would be provided." Additionally, the survey indicated that the program would operate for less than four hours and that "[s]tudents could enter and leave the program without any supervision."

4. In December 2014 an updated questionnaire was used by the Department to make licensing determinations. For reasons not related to the Department and not relevant here, Petitioner completed the 2014 survey and submitted it to the Department for its review. Based on that survey, a review of Petitioner's website and other information, the Department denied Petitioner

an exemption from licensure. The Department concluded that Petitioner did not meet the exemption criteria for after school programs contained in Florida Administrative Code Rule 65C-22.008(2)(c)2. and 3. for "strictly instructional or academic/tutorial," non-meal programs, unsupervised entry and exit, and USDA Afterschool Meal Program (AMP) optional programs.

5. At the time of the hearing, the program was located in space provided by the New Mount Zion AME Church. Other than providing space, the church was not affiliated with or an integral part of the operation of Petitioner's program. As such, the program was not exempt as an integral part of a church under section 402.316, Florida Statutes (2015).

6. Project Esteem operated three and one-half hours from 3:00 p.m. to 6:30 p.m., after school and for extended hours during school holidays and summer months. Ms. Stephanie McKoy was the director of the program, and Ms. Adrienne Hampton-Webster was the on-site coordinator for the program.

7. The evidence demonstrated that the program at Project Esteem was "strictly instructional or academic/tutorial in nature" and operated very similar to a school with class periods and field trips. In fact, the clear intent of the program's owner and director was not to be a day care facility, but to function as an educational enrichment facility.[1/]

8. Attendance and student progress were required to be tracked for the 21st Century Grant program and sign in and out logs were used daily for that purpose. Staff met students at the bus and checked them in. The evidence was not clear that safety was the reason Petitioner used such logs, albeit the logs did provide a safety benefit. Older students, whose attendance was logged and of which there were only a few, were free to come and go. On the other hand, elementary students, which were the bulk of Petitioner's students, were required to be signed out by an authorized adult as a safety measure for the children. Such children were prevented from leaving unless an authorized person signed them out and were clearly under the control and supervision of Project Esteem. Additionally, Petitioner, like a school, gathered health information and kept it on file for each student to ensure all health and safety needs were met for the children while at Project Esteem's program. Indeed, the website for Project Esteem, indicated that the program was designed to "help working parents" by providing a safe environment for students during non-school hours or periods when school is not in session. As such, supervision was provided by Petitioner's staff much like a school provides. Under the Department's rule, a comparison of the various exemptions demonstrated that safety or supervisory services during the time a student was at Petitioner's facility, was not the defining criteria for

determining if a program was an after-school program exempt from licensure, since many such programs offer some supervision and control for programmatic and tort liability reasons. Under the Department's rule, supervision and control over a child's entry and leaving the facility was one of many criteria distinguishing certain types of after-school programs defined in subsections (2)(c)2. (supervised programs) and (2)(c)3. (unsupervised entry and exit programs) of rule 65C-22.008(2)(c). However, since supervision of the students' entering and leaving the program was provided by Project Esteem, Petitioner did not meet the requirements of rule 65C-22.008(2)(c)3. for unsupervised programs. Therefore the Department's denial of the exemption delineated in subsection (2)(c)3. of the rule should be upheld.

9. In its program, Project Esteem provided a variety of academic programs for its students, including math, English and music. Further, it provided instruction in activities, such as computing, drumming, dance/fine arts, physical education and karate; tutoring in specific subject areas; personal enrichment/character development; outdoor recreation; homework assistance; summer field trips; and snacks and meals. The equipment list for the program listed flags for football, dodge balls, jump ropes, pogo sticks, and recorders (a musical instrument). Such equipment was used for instruction in those activities, but also sometimes incorporated academic

instruction. These were not strictly music lessons or math lessons; instead, activities were layered so that instruction and academics were provided at the same time. For example, Petitioner's lesson plan involving a drum circle was done for the purpose of teaching the children how to play the drum, but also to teach them the academic subjects of music (rhythms and beats) and math (counting). The evidence did not demonstrate that such equipment was used for free-time play. In fact, there was no evidence that demonstrated such equipment was used outside instructional or academic activities, irrespective of whether such activities were layered or not. Similarly, field trips for academic or instructional purposes are not prohibited by the rule.

10. Meals were contracted to be provided to the students at Project Esteem by Juvenile Transition Team, the non-profit parent company of Project Esteem also directed by Ms. McKoy. The meals provided complied with USDA AMP. However, Project Esteem's staff served the meals at its program and had several employee positions designated for such purpose. The evidence was not clear that such staff prepared the meals. However, the service of the meals by Petitioner disqualified it from exemption under rule 65C-22.008(2)(c)2. and, given these facts, the Department's denial of the exemption should be upheld.

11. There was some evidence that the Department narrowed the scope of rule 65C-22.008(2)(c) by "interpreting" rule 65C-22.008(2)(c)2. to exempt only programs like a ballet or dance school where a child goes after school for instruction in ballet for 30 minutes to an hour and then leaves.[2/] Further, the Department narrowed the meaning of an "academic/tutorial" program to a program that offered one-on-one instruction in a certain topic or subject area. The Department felt Petitioner's manner of teaching or instructing in multiple areas at the same time was prohibited by subsection (2)(c)2. of its rule. However, the language of subsection (2)(c)2. of the rule does not prohibit layering or instructing in more than one subject at a time, but only requires that program "activities" be "strictly instructional or academic/tutorial" in "nature." This narrowing of the language of the rule was not simple interpretation of the rule, but the implementation of policy not otherwise adopted by the agency. Unadopted policy cannot be enforced by an agency. As such, Petitioner's method of teaching, tutoring or instructing in more than one subject area at a time is not prohibited by subsection (2)(c)2. of the rule. However, as indicated earlier, the serving of meals does disqualify Petitioner from exemption under subsection (2)(c)2. of the rule. Therefore, given these facts, the Department's denial of the exemption should be upheld.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015)

13. Chapter 402, Florida Statutes, requires the Department to administer a program for licensure of child care facilities. As part of its program the Department is also responsible for determining whether a facility caring for children qualifies for exemption from licensure or if licensure or registration as a child care facility is required. § 402.305(1)(c), Fla. Stat.

14. Section 402.302 broadly defines the terms child care and child care facility. The section states in relevant part:

> (1) "Child care" means the care, protection, and supervision of a child, for a period of less than 24 hours a day on a regular basis, which supplements parental care, enrichment, and health supervision for the child, in accordance with his or her individual needs, and for which a payment, fee, or grant is made for care.
>
> (2) "Child care facility" includes any child care center or child care arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care, wherever operated, and whether or not operated for profit. The following are not included:
>
> (a) Public schools and nonpublic schools and their integral programs, except as provided in s. 402.3025;

> (b) Summer camps having children in full-time residence;
>
> (c) Summer day camps . . . .;

15. Additionally, section 402.316 provides an exemption for church programs. The statute states in relevant part:

> (1) The provisions of ss. 402.301-402.319, except for the requirements regarding screening of child care personnel, shall not apply to a child care facility which is an integral part of church . . . .

16. Section 402.305 establishes the criteria for the Department's licensing standards. It states, in pertinent part:

> (1) LICENSING STANDARDS. The department shall establish licensing standards that each licensed child care facility must meet regardless of the origin or source of the fees used to operate the facility or the type of children served by the facility.
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> * * *
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> (c) The minimum standards for child care facilities shall be adopted in the rules of the department and shall address the areas delineated in this section. The department, in adopting rules to establish minimum standards for child care facilities, shall recognize that different age groups of children may require different standards. The department may adopt different minimum standards for facilities that serve children in different age groups, including school-age children. The department shall also adopt by rule a definition for child care which distinguishes between child care programs that require child care licensure and after-school programs that do not require licensure. Notwithstanding any other provision of law to the contrary, minimum child care licensing standards shall

> be developed to provide for reasonable, affordable, and safe before-school and after-school care. After-school programs that otherwise meet the criteria for exclusion from licensure may provide snacks and meals through the federal Afterschool Meal Program (AMP) administered by the Department of Health in accordance with federal regulations and standards. The Department of Health shall consider meals to be provided through the AMP only if the program is actively participating in the AMP, is in good standing with the department, and the meals meet AMP requirements. Standards, at a minimum, shall allow for a credentialed director to supervise multiple before-school and after-school sites.

Section 402.3045 also reiterates the Department's duty to draft rules that distinguish between child care that is subject to licensure and after-school programs that are not subject to licensure. Neither statute defines the terms "after-school care" or "after-school programs."

17. In an attempt to identify exempt after-school programs, the Department adopted Florida Administrative Code Rule 65C-22.008(2) for school-age children "at least five years of age by September 1st of the beginning of the school year and who attend kindergarten through grade five." The rule states in relevant part:

> (c) An "After School Program" serving school-age children is not required to be licensed if the program meets one of the following criteria, and complies with the minimum background screening requirements . . . .

* * *

2. Program provides only activities that are strictly instructional or tutorial/academic in nature. The program cannot provide any services beyond its regular instructional and tutorial/academic activities, and cannot serve or prepare meals. The program may choose to provide drinks, snacks, and vending machine items that do not require refrigeration. Some examples of these programs include, but are not limited to, computer class; ballet; karate; gymnastics; baseball, and other sports; or

3. Program meets all of the following criteria:

a. Operates for a period not to exceed a total of four hours in any one day; however, the program may extend to providing services before school, on teacher planning days, holidays, and intercessions that occur during the school district's official calendar year; and

b. Allows children to enter and leave the program at any time, without adult supervision; and

c. Does not provide any transportation, directly or through a contract or agreement with an outside entity, for the purpose of field trips, during the hours of operation; and

d. Does not serve or prepare any meals, except those provided through the USDA Afterschool Meal Program (AMP) administered by the Florida Department of Health. The Department will consider meals to be provided through the AMP only if the program is actively participating in the AMP, is in good standing with the Department of Health, and the meal meets AMP requirements. Programs not participating in the AMP may

> choose to provide drinks, snacks, and vending machine items that do not require refrigeration; or . . . .

18. The Rule was promulgated by the Department to allow for exemption from licensure for certain programs that meet the criteria for an "after school program." As indicated, the Department narrowed the scope of rule 65C-22.008(2)(c) by "interpreting" rule 65C-22.008(2)(c)2. to exempt only programs like a ballet or dance school, where a child goes after school for instruction in ballet and then leaves. Further, the Department narrowed the meaning of an "academic/tutorial" program to a program that offered one-on-one instruction in a single topic or subject area. However, neither the statute nor the language of the rule prohibited layering or instructing in more than one subject at a time.

19. The Department's interpretation of the statutes it administers and over which it has jurisdiction is afforded wide discretion. Cone v. State, Dep't of Health, 886 So. 2d 1007, 1009 (Fla. 1st DCA 2004). As the court stated in Republic Media, Inc. v. Dep't of Transp., 714 So. 2d 1203, 105 (Fla. 5th DCA 1998):

> an agency is afforded wide discretion in the interpretation of a statute which it is given the power and duty to administer. Its construction of the statute will not be overturned on appeal unless its clearly erroneous.

20. Moreover, even if a court takes issue with the agency's interpretation of a statute, "it shall not substitute its judgment for that of the agency on an issue of discretion." § 120.68(7), Fla. Stat. Natelson v. Dep't of Ins., 454 So. 2d 31 (Fla. 1st DCA 1984). See Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844-845 (1984); and Pershing Industries, Inc. v. Dep't of Banking and Fin., 591 So. 2d 991 (Fla. 1st DCA 1991). See also Bowles, Price Adm'r v. Seminole Rock and Sand, Co., 325 U.S. 410, 413-414 (1945); Legal Envtl. Assistance Fund, Inc. v. Bd. of Cnty. Comm'rs of Brevard Cnty., 642 So. 2d 1081, 1083 (Fla. 1994); and Pan Am. Airways, Inc. v. Fla. Pub. Serv. Comm'n, 427 So. 2d 716, 719-20 (Fla. 1984).

21. Notably, this action is not a rule challenge, and the Department's interpretation of its statute as permitting it to use service of meals in after-school programs, irrespective of whether such meals are AMP compliant as a distinguishing criterion in its rules defining after-school programs, are not at issue here.

22. However, while an agency's reasonable interpretation of its rules is afforded some deference, agencies are bound by the plain and unambiguous language of the rules they adopt and cannot through interpretation add to or subtract from the rules they have adopted. See §§ 120.52(8) and (16); 120.536; and § 120.54, Fla. Stat. See also McLaughlin v. State, 721 So. 2d

1170 (Fla. 1998). Moreover, such agency rules must be clear as to their meaning. As a consequence, the clear language of the rules which must be complied with should be construed in favor of the person from whom compliance is sought. See Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Herein, the language of the rule does not prohibit layering of subjects or instructing in more than one subject at a time. The Department's attempted narrowing of the language of its rule to so limit its application was not a simple or reasonable interpretation of the rule, but the implementation of policy not otherwise adopted by the agency. Such unadopted limitations on the plain language of a rule are unenforceable. As such, Petitioner's method of teaching, tutoring or instructing in more than one subject area at a time, or in taking field trips for academic or instructional purposes is not prohibited by subsection (2)(c)2. of the rule.

23. In this case, Petitioner met the broad definition of a child care provider since it provided care and supervision of children on a regular basis supplementary to "parental care, enrichment, and health supervision for the child." In meeting this definition, Petitioner must become licensed as a child care provider unless it meets one of the exemptions for after school programs in rule 65C-22.008(2)(c).

24. As the person seeking the exemption, Petitioner must establish by a preponderance of the evidence that it is entitled to the exemption. See Fla. Dep't of Transp. v. J.W.C. Co., 778 (Fla. 1st DCA 1981).

25. However, the service of the meals by Petitioner disqualified it from exemption under rule 65C-22.008(2)(c)2. since service of such meals is prohibited under that subsection of the rule. Additionally, since supervision of the students' entering and leaving the program was provided by Project Esteem, Petitioner did not meet the requirements of rule 65C-22.008(2)(c)3. for unsupervised programs. Finally, Project Esteem was not a church-affiliated or sponsored program and did not meet the exemption for such programs contained in section 402.316 or 402.301(5). Given these facts, the Department's decision to deny Petitioner an exemption from licensure should be upheld.

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 finding that the decision to deny the exemption from licensure as a child care facility was proper and dismissing the request for hearing filed in this cause.

DONE AND ENTERED this 30th day of October, 2015, in Tallahassee, Leon County, Florida.

Diane Cleavinger
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2015.

ENDNOTES

[1/] The evidence did not demonstrate that Petitioner was a membership organization affiliated with a national organization that would be exempt under section 402.316.

[2/] Notably, many dance or theater schools offer classes in a variety of dance styles combined with theater training and students often remain for multiple classes. This multiple of class offerings is similar to the multiple classes/instruction provided by Petitioner.

COPIES FURNISHED

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.