

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

vs.

Case No. 15-3827

KINDER KIDS LEARNING CENTER AND
PRESCHOOL, II,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH") heard this case by video teleconference at locations in Tallahassee and Miami, Florida, on December 18, 2015.

APPEARANCES

For Petitioner: Javier Alejandro Ley-Soto, Esquire
Department of Children and Families
401 Northwest 2nd Avenue, Suite N-1014
Miami, Florida 33128

For Respondent: Lucia C. Pineiro, Esquire
Lucia C. Pineiro and Associates, P.A.
717 Ponce de Leon Boulevard, Suite 309
Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

Whether the Petitioner correctly cited the Respondent with a Class I violation when the Respondent left an unscreened individual to supervise children in the Respondent's care, and,

if so, is the proper penalty an imposition of a \$100.00 fine and termination of the Respondent's Gold Seal designation.

PRELIMINARY STATEMENT

By Administrative Complaint dated March 17, 2015, the Petitioner, Department of Children and Families ("Department"), informed KinderKids Learning Center and Preschool, II ("KinderKids"), of its Class I violation. The complaint stated that "during a complaint inspection on 3/12/2015, the child care facility was cited for a Class I violation of Standard #5, Supervision Rule, as an unscreened individual, M. Perez was left alone to supervise children in care. The fine imposed for this Class I violation of 3/12/2015 is \$100.00." The Department also notified KinderKids that it was terminating its Gold Seal designation.

KinderKids requested a hearing to contest the Administrative Complaint. On July 1, 2015, the Department referred the matter to DOAH to conduct the hearing. The hearing was set for October 9, 2015. It was rescheduled to December 18, 2015, upon KinderKids' agreed-to motion to continue. The hearing proceeded as rescheduled.

At the hearing, the Department presented the testimony of Yessenia Plata, family services counselor supervisor and former family services counselor. The Petitioner's Exhibits 1 through 4 were received into evidence. KinderKids presented the

testimony of four witnesses: Fatima Zaldiba, KinderKids' owner and director; Elsita Jalil, KinderKids' pre-kindergarten ("pre-K") age three teacher; Raimy Coipel, KinderKids' pre-K age four teacher; and Tashie de Olma, KinderKids' pre-K age four teacher.

The proceedings of the hearing were recorded and transcribed. The one-volume Transcript was filed at DOAH on January 8, 2016. The parties stipulated to an extension of their proposed recommended order deadline, which the undersigned granted. Both parties filed timely proposed recommended orders.

FINDINGS OF FACT

1. KinderKids is a child care facility licensed by the Department as License No. C11MD1905. KinderKids is located at 26049 South Dixie Highway, Naranja, Florida 33032.

2. Fatima Zaldiba ("Zaldiba") owns and operates KinderKids. KinderKids has been in operation since January 1, 2011. The Department awarded KinderKids a Gold Seal on July 11, 2012.

3. KinderKids offers a full readiness program, infant care, and an aftercare program.

4. On March 12, 2015, Zaldiba informed Raimy Coipel ("Coipel"), the pre-K age four teacher and afternoon director, that a volunteer was coming to the school. Zaldiba instructed Coipel to train and supervise the volunteer with the four-year-olds for two hours.

5. Zaldiba introduced Coipel to the volunteer, Marilys Perez ("Perez"). Coipel took her 12 four-year-old children to the playground area with Perez around four thirty in the afternoon.

6. Coipel left her 12 four-year-old children with Perez on the playground to go meet in the KinderKids' office with Yessenia Plata ("Plata"), the Department's then family service counselor. Coipel asked Elsita Jalil ("Jalil"), a background-screened pre-K teacher, to supervise Perez and her class while she went to the office. Jalil agreed to watch the volunteer and Coipel's class.

7. Plata was assigned to conduct a complaint inspection at KinderKids regarding a child who allegedly cut his hand. Plata arrived at the school after four o'clock in the afternoon. Upon her arrival, Plata met with Coipel and Zaldiba regarding the abuse complaint. Plata briefed them about the complaint and took their statements regarding the complaint.

8. Afterwards, Plata proceeded to walk the facility inspecting the center, going class-by-class checking the ratios of children. Plata took the ratios of the classes inside the building first.

9. That same day Plata also checked the ratios of the children on the playground and Coipel escorted her around. Plata met Perez, the volunteer, who was outside on the

playground watching Coipel's four-year-old class. Plata questioned Perez about the abuse complaint.

10. Jalil met Perez for the first time on March 12, 2015, when Coipel asked Jalil to supervise Perez and her classroom outside on the playground. Jalil never left Perez or the four-year-olds alone. Jalil remained on the playground at the same time with her three-year-old class supervising Perez and the four-year-old class the whole time Perez was with the children while Coipel was away.^{1/}

11. After checking the ratios, Plata and Coipel returned to the KinderKids' office. Plata requested the employee files for Coipel and Perez, the two new individuals working at KinderKids who had not been there at the time of the last inspection, so that she could update their background screening and training.

12. Zaldiba provided Plata Coipel's file, including the requested background screening. Zaldiba informed Plata that she did not have a background screening for Perez because she was on a trial period. Zaldiba even explained that she was not sure if she was going to keep her. Plata responded by telling Zaldiba that Perez had to leave the day care facility immediately because she did not have a background screening and that Coipel should take over the care of the four-year-olds. Zaldiba followed Plata's instructions and had Perez leave immediately.

13. Plata informed Zaldiba that she was going to give her a Class I violation for having an unscreened person left with the children. Zaldiba explained to Plata that Perez was a volunteer she was trying out to determine if she was going to hire her at KinderKids. Zaldiba also tried to provide Plata with Perez's Volunteer Acknowledgement Form, but Plata would not accept it.^{2/} Instead, Plata repeatedly requested a background screening document for Perez, which Zaldiba did not have for Perez.

14. Since Plata had Zaldiba send Perez away from the facility, Plata was unable to verify Perez's position with her in person. Zaldiba tried to find Perez's information and to make contact with Perez in front of Plata but was not able to do so.

15. Plata requested a Department specialist in background screening to run Perez's name and three individuals named Marilys Perez were found, but none of them looked like the person she had talked to on the playground earlier.

16. Plata determined that no indicators existed for the abuse complaint and closed the case.

17. However, Plata believed that Zaldiba came up with a story about Perez being a volunteer and that it was never proven to her, so she cited KinderKids with a Class I violation.

18. Perez was never paid for her volunteer work.

19. On March 17, 2015, the Department issued KinderKids an Administrative Complaint, citing the Respondent with a Class I violation of Standard #5, Supervision Rule, charging the facility with having Perez as an unscreened individual, left alone to supervise children in their care. The Administrative Complaint also terminated KinderKids Gold Seal designation.

20. KinderKids contested the Administrative Complaint and requested a hearing.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).^{3/}

22. The Legislature has charged the Department with the responsibility of licensing child care facilities, including the administration of the Gold Seal Quality designation program. § 402.281, Fla. Stat.

23. In a proceeding, such as this one where the Department seeks to discipline the Respondent's license and/or to impose an administrative fine, the Department has the burden of proving the allegations charged in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

24. The clear and convincing standard of proof has been described by the Florida Supreme Court, as follows:

Clear and convincing evidence requires that evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

25. At a minimum, the Department requires all child care personnel to have a Level 2 background screening. The Respondent is charged with a Class I violation and is alleged to have violated the following section 402.305(2)(a), Florida Statutes, and Florida Administrative Code Rule 65C-22.006(4)(d)1.

26. Section 402.305(2)(a) provides in pertinent part:

(2) PERSONNEL.—Minimum standards for child care personnel shall include minimum requirements as to:

(a) Good moral character based upon screening. This screening shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter.

27. Rule 65C-22.006(4)(d)1. provides in pertinent part:

(d) Initial Screening. Screening information must be documented on CF-FSP Form 5131, July 2012, Background Screening and Personnel File Requirements, which is incorporated by reference and may be obtained from the department's website www.myflorida.com/childcare or from the following link <http://www.flrules.org/Gateway/reference.asp?No=Ref-03030>. Screening includes the following:

1. Level 2 screening as defined in Section 435.04, F.S. For the purpose of issuing a license, any out-of-state criminal offense, which if committed in Florida, would constitute a disqualifying felony offense, shall be treated as a disqualifying felony offense for screening purposes under this rule.

28. Rule 65C-22.010(1)(d)1. defines Class 1 violation and provides in pertinent part:

(d) "Violation" means a finding of noncompliance by the department or local licensing authority of a licensing standard.

1. "Class I Violation" is an incident of noncompliance with a Class I standard as described on CF-FSP Form 5316, July 2012. Child Care Facility Standards Classification Summary, which is incorporated by reference. A copy of the CF-FSP Form 5316 may be obtained from the department's website at www.myflorida.com/childcare or from the following link <http://www.flrules.org/Gateway/reference.asp?No=Ref-03034>. The effective date of a termination of a provider's Gold Seal Quality Care designation is the date of the department's written notification to the provider. Class I violations are the most serious in nature, pose an imminent threat

to a child including abuse or neglect and which could or does result in death or serious harm to the health, safety or well-being of a child.

29. Section 402.281(4) (a) provides grounds to terminate the Gold Seal designation for a Class I violation and states in pertinent part:

(4) In order to obtain and maintain a designation as a Gold Seal Quality Care provider, a child care facility, large family child care home, or family day care home must meet the following additional criteria:

(a) 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.

30. In this case, the Department failed to prove by clear and convincing evidence that Perez was an unscreened person supervising children alone. Instead, the record demonstrates that Perez was a volunteer under constant supervision by either Coipel or Jalil, two trained background-screened teachers, while with the four-year-olds and not left alone. Therefore, the record lacks any persuasive evidence that any imminent threat existed for any of the children under volunteer Perez's supervised care. Accordingly, KinderKids did not commit a

Class I violation, and the record is void of evidence for the termination of KinderKids' Gold Seal designation.

RECOMMENDED

Based on the forgoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Petitioner, Department of Children and Families, find KinderKids not guilty of Violation 1: Class I violation Standard #5, Supervision Rule, and dismiss the Administrative Complaint.

DONE AND ENTERED this 28th day of March, 2016, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of March, 2016.

ENDNOTES

^{1/} The Petitioner asserts that no other teacher was on the playground with volunteer Perez. The undersigned rejects such assertion and finds the combined credible testimony of Elsitá Jalil, Raimy Coipel, and Fatima Zaldiba that Perez was a volunteer under constant supervision and not alone while with the four-year-olds on the playground more persuasive.

^{2/} The undersigned finds Fatima Zaldiba more credible regarding the volunteer form.

^{3/} References to the Florida Statutes are to the 2015 version, in less otherwise indicated.

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.