

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHILDREN'S ACADEMY PRESCHOOL
INC., d/b/a CHILDREN'S ACADEMY
PRESCHOOL I,

Petitioner,

vs.

Case No. 15-6474

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

_____ /

RECOMMENDED ORDER

A hearing was conducted in this case on February 9, 2016, by video teleconference, with sites in Tallahassee and Miami, Florida, before Robert L. Kilbride, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"). The hearing was held pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).^{1/}

APPEARANCES

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For Respondent: Karen Milia Annunziato, Esquire
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STATEMENT OF THE ISSUE

Whether sufficient grounds exist to justify denial of
Petitioner's license renewal application to operate a child care
facility.

PRELIMINARY STATEMENT

On October 2, 2015, Respondent, Department of Children and
Families ("Department" or "DCF"), issued a Denial of Application
for a Child Care Facility License ("Denial of Application") to
Petitioner, Children's Academy Preschool Inc., d/b/a Children's
Academy Preschool I, denying Petitioner's renewal license
application for alleged violations of Florida Administrative Code
Rule 65C-22.002(1)(a) and (b).

The Denial of Application outlined multiple health,
sanitation, and safety hazards specifically related to the
physical aspects of the facility, including holes in the ceiling
and walls, water damage, and active vermin infestation.

Petitioner disputed the allegations of the Denial of
Application and requested an administrative hearing.

The Department forwarded the request for a hearing to DOAH
on November 17, 2015. The final hearing was held as scheduled on
February 9, 2016, by video teleconference.

At hearing, the Department presented the testimony of two witnesses, Ian Fleary and Manuel Falla. The Department's Exhibits numbered 1 through 5 were admitted into evidence. Petitioner presented the testimony of Patrick Adeleke and Daniel Samaria. Petitioner's Exhibits C1 through C10 and D1 through D3 were admitted into evidence.

A transcript of the hearing was not ordered. Petitioner and the Department timely submitted proposed recommended orders, which were reviewed and considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The undersigned makes the following findings of material, relevant, and probative facts:

1. The Department is the state agency charged with regulating, licensing, and overseeing the operation of child care facilities, applying provisions of chapter 402, Florida Statutes, and chapter 65C-22.

2. Petitioner is a child care facility in Miami, Florida, regulated and licensed by the Department. It is located at 13801 Memorial Highway, Miami, Florida, 33161.^{2/}

Stipulated Facts

3. The Department issued Petitioner child care license number C11MD0670 for the period of October 3, 2014, through October 2, 2015.

4. On August 20, 2015, the Department received a renewal application from Petitioner for a child care facility license.

5. On September 25, 2015, the Department conducted a renewal inspection of Petitioner's child care facility.

September 25, 2015, Renewal Inspection

6. The renewal inspection on September 25, 2015, was conducted by Gabriele Derice, BA, MSW, a counselor with the Department. The purpose of the inspection was to check the physical facility, compliance with recordkeeping requirements and training. The goal was to ensure that the health and safety of the children at the facility was protected.^{3/}

7. The owner of the facility, Patrick Adeleke, was not present during the inspection on September 25, 2015.

8. After inspecting the entire facility, Derice issued a report called an Inspection Checklist ("Checklist") on September 25, 2015. Dep't's Ex. 3. Julianne Politesse, a staff member of Petitioner, signed the Checklist acknowledging its receipt on September 25, 2015.

9. The Checklist included multiple violations which were discovered by Derice. The violations were described in the report, which speaks for itself. However, there were four significant areas of noncompliance found at section 14 in the Checklist specifically related to the "Facility Environment."

10. Three of the violations at section 14 of the Checklist were Class III-Technical Support violations, and one violation was a Class I.^{4/}

11. Other areas of noncompliance listed in the Checklist included a combination of Class II and Class III violations. They included outdoor play area, toilets and sink, fire drills and emergency preparedness, food preparation area, outdoor equipment, meals and snacks, catered food and food provided by parents, personnel records, and background screening documents.

12. Of particular note, all classes of violations in the Checklist, including section 14, were notated with "Due Date 10/09/2015."

13. The Department's licensing supervisor, Ian Fleary, testified that the inclusion of a "Due Date" is in keeping with standard DCF procedure and gives the license holder "ample time to comply." Further, the time provided allows the license holder time "to make necessary repairs."

14. There is no dispute that October 9, 2015, was to be the date that the Department's inspectors would return to determine if noncompliant items had been corrected.

15. Petitioner was not informed that the Department's inspectors would return before October 9, 2015, or that another visit by the Department would occur on October 1, 2015.

16. Petitioner testified that he relied on the Checklist as giving him until October 9, 2015, to make necessary repairs and bring the facility into compliance.

October 1, 2015, Return and Re-inspection

17. On October 1, 2015, Fleary made a visit to the facility with Derice and other state representatives. This visit was unannounced, and Petitioner was not aware that the Department and staff were returning that day.

18. Fleary decided to make the visit with Derice due to the serious concerns she reported to him from her first inspection on September 25, 2015.

19. The collection of photographs included in the Department's Exhibit 2 and the videotape footage contained in the Department's Exhibit 5 speak for themselves.^{5/} The undersigned finds that the photographs and videotape footage, Respondent's Exhibits 2 and 5, respectively, accurately depict the conditions found by the inspection team on October 1, 2015.

20. Suffice it to say that the inspectors found, and the undersigned finds, that conditions in the noted areas which existed on October 1, 2015, particularly the kitchen and bathrooms, were deplorable and shocking. The conditions of the noted areas were foul, unsanitary, and exposed the children to health and safety hazards.

21. Notably, an area identified as the kitchen had particularly unsanitary conditions. The undersigned finds that the following general conditions were depicted in the pictures and videotape from the kitchen area:

a. Live roaches and active infestation by roaches and other bugs.

b. Roach droppings (feces) on countertops, storage areas, cabinets, and floor areas.

c. Extensive water damage to the ceiling area and kitchen cabinets.

d. Food stored in the kitchen area in an unsanitary and unhealthy manner.

e. Filthy and grimy counters, floors, and cabinets.

Many of the same unsanitary conditions outlined in a. through e. above existed in bathrooms and storage areas being used by staff or children.

22. During this visit, Fleary met with Adeleke, the owner. Fleary told him that the kitchen area required an "immediate" response and that no food should be prepared, nor should the kitchen be used in any manner. He also discussed his general findings and concerns with the owner.

23. Fleary concluded, and the undersigned finds, that the conditions found in the kitchen area, bathrooms, and storage depicted in the Department's Exhibits 2 and 5 jeopardized the

health and safety of the children and staff, and exposed the children and staff to safety and health risks.

24. Testimony from Fleary revealed that there had been previous investigations at the child care facility by the Miami-Dade County Building Department and that citations (unspecified) had been issued. Based on his review of other documents, he concluded and testified that Miami-Dade County had many of the same interior structural and safety concerns as he and Derice had.

25. The more persuasive testimony, credited by the undersigned, indicated that food which was found in the kitchen area by the inspectors on October 1, 2015, was stored or kept there in anticipation of being served to the pre-school children.

26. The more persuasive testimony, credited by the undersigned, also indicated that the kitchen identified in the photographs was in limited use but that catered food was being kept, stored, or distributed from there.^{6/}

27. The food discovered in the kitchen on October 1, 2015, was brought in by a caterer and was not cooked by Petitioner's staff in the kitchen.

28. To that same point, the inspectors did not find that any stoves in the kitchen had been recently used to cook, nor were any pots or utensils in use on the stove.

29. Fleary conceded that while he was there, he did not observe any staff using the kitchen or the kitchen utensils, or distributing any of the catered food seen in the kitchen. Likewise, he admitted that one toilet in a classroom did not appear to be in use and was being used for storage.

30. Fleary acknowledged that neither he nor anybody else from DCF returned after October 1, 2015, to determine if compliance had been achieved.

31. On redirect, Fleary was asked to explain why a "Due Date" was included on the Checklist dated September 25, 2015. Despite the fact that all violations in section 14-04 of the Checklist noted a "Due Date" of October 9, 2015, he testified that for a Class I violation, an immediate response is required. There was no explanation or evidence regarding what "immediate" meant, or whether or when an immediate response would constitute compliance.

32. When asked directly why there was no follow-up inspection after October 1, 2015, he indicated that this was due to the severity of the case and the internal workload of the Department. He also testified that there was no follow-up, in part, because DCF obtained an Emergency Suspension Order which, essentially, obviated the need to re-inspect after October 1, 2015.^{7/}

33. In addition to the Department's representatives, a program specialist with the Florida Department of Health, Manuel Falla, accompanied the DCF staff on October 1, 2015, for the inspection visit.

34. Falla testified that the purpose of his participation was to ensure that a child care food program, administered and monitored by the Florida Department of Health, was running appropriately.

35. He testified that he observed many of the same unsanitary conditions reported by the DCF staff in the Checklist. However, his observations and reporting focused on compliance with the Florida Department of Health child care food program. His findings were documented in the Department's Exhibit 4, entitled "Site Review Form."

36. Falla described conditions in the child care kitchen as "very poor." He claimed that he "had never seen anything like this before." There were active and live insects crawling about, rusty items, holes in the ceiling, and extensive water damage. The kitchen counter had roach droppings, and there were boxes of utensils with roach droppings inside.

37. He commented that the conditions in the kitchen were "very hazardous, and children could get sick."

38. On cross-examination, he conceded that he did not observe any staff serving food from the kitchen, nor were any

children present in the kitchen. He also said that the stove did not appear to be in use, but that the refrigerator was in use. There were food containers inside the kitchen that were being used.

39. Notably, Falla testified that he was confident that food/drink items found on October 1, 2015, in the kitchen refrigerator were being used because Petitioner had submitted certain recent reimbursement receipts to his agency for similar food items. These items included waffles, milk, and juice found in the kitchen or in the refrigerator on October 1, 2015.

40. He also observed that several catered food items prepared for service to the children were located in the kitchen on movable carts.

41. Falla overheard Fleary tell Adeleke during the visit that the kitchen had to be shut down until it was repaired. Based on his observations that day, particularly the kitchen, Falla testified that "health and safety concerns for the children" existed.

42. The review summary contained in Falla's Site Review Form, the Department's Exhibit 4, was read into evidence and stated as follows:

Arrived with PS L Romeo to complete complaint investigation and CCFP review. Review was completed alongside DCF specialists Ms. Derice & regional DCF supervisor Mr. Fleary.

Due to poor conditions of the kitchen and facility DCF has shut down centers kitchen until further notice. As per DCF meals cannot be served on site. As far as CCFP meals go cannot serve/claim meals until DCF completes follow-up process and DCF allows food operation service.

Sponsor has been placed on ADR for all 7 sites. As per owner Mr. Patrick [sic] all sites self-prepare breakfast and snack. However, Mips [sic] list centers as approved to be catered for breakfast, lunch & snack.

43. In his report, under Physical Environment\Food and Nutrition, he reported (by way of his "No" or negative responses) that:

22. Cleaning supplies are not stored separately from food.

23. There was evidence of rodent or insect infestation.

24. There were potentially hazardous foods maintained and (if catered), delivered at improper temperatures.

25. Prepared food was not stored in clean, covered containers that are clearly labeled and marked with date of preparation.

26. Proper procedures were not being followed for washing, rinsing, sanitizing utensils, food preparation equipment, and food contact surfaces.

Adeleke signed Falla's Site Review Form as a representative of Petitioner on October 1, 2015.

44. Daniel Samaria testified that on October 3, 2015, his licensed pest control company, Creepy Critters, inspected

Petitioner's facility and provided pest control services. This involved a two-step process. The first visit on October 3 involved spraying all areas to "flush out" the insects and roaches. The company came back approximately a week later and provided another pest control treatment involving a bait treatment.^{8/}

45. Samaria testified that since the inspections in September and October 2015, he has been providing ongoing and monthly pest control treatments and planned to provide another treatment in February 2016.

46. He found roach droppings, and some roaches were dead. He acknowledged that as a result of his inspection and treatment, Petitioner's "bug problem" has not been eliminated, but it is "under control for now."

47. On cross-examination, he identified the roach problem as involving German roaches, whose presence is generally due to "food, uncleanliness or boxes." In particular, he testified that German roaches thrive in environments where kitchen grease is not cleaned up properly or the area is not degreased properly. The German roaches collect around and feed off the grease.

Testimony of Patrick Adeleke

48. The owner of Petitioner, Adeleke, testified that he had previously used another pest control company which provided

services on weekends, but they were terminated after the October 1, 2015, inspection by the Department.^{9/}

49. Adeleke had operated the day care facility for 23 years. He testified that he had a bachelor's degree from Northeastern University, and an MBA in public administration. He also testified that he worked for HRS (economic division) for several years.

50. He testified that renovations were started just before the inspection on September 25, 2015. Further, that the areas under renovation (unspecified by him) and two classrooms were closed off and used for storage only.^{10/}

51. Petitioner had a catering contract with Greater of Miami (sp?). That organization delivered hot meals in Styrofoam boxes each day together with plates, utensils, and cups. They were all disposable items.^{11/}

52. Adeleke was not present when the inspection occurred on September 25, 2015. However, he reviewed the Checklist and testified that he relied on the October 9, 2015, due date to make repairs. He felt that the two weeks would give him adequate time to bring all areas of noncompliance into compliance, including the kitchen.

53. Adeleke was present during the October 1, 2015, inspection. He escorted the DCF staff around. On October 1,

2015, he told Fleary that the "only area left to be done" was the kitchen.^{12/}

54. Adeleke testified that the areas depicted in the video (Department's Exhibit 5) were areas of the facility that were either not in use, being renovated, or used for storage. He further claimed that the refrigerator in the video was not being used.^{13/}

55. Petitioner's defense relied, in part, on a collection of pictures that Adeleke testified he took on October 3, 2015 (see Petitioner's Exhibit C1 through C10). From what can be observed in these photos, items depicted in Petitioner's Exhibits C5, C6, and C8 show a kitchen area that appears to be relatively clean and sanitary.

56. The owner testified that Petitioner's Exhibit C5 depicted the kitchen in question and that when the picture was taken, new cabinets had been installed, the kitchen had been painted, and new ceiling tiles were installed.

57. The owner testified that Petitioner's Exhibit C6 depicted a food warmer in the kitchen in question.

58. Finally, the owner testified that Petitioner's Exhibit C8 showed a new kitchen counter surface that was replaced. Petitioner's Exhibit C8 also shows a refrigerator which had been defrosted, cleaned out, and old food items discarded.^{14/}

59. From what can be seen, the undersigned finds that the areas of the facility depicted in Petitioner's Exhibits C1 through C10 appear to be clean.^{15/}

60. Other than the owner's testimony that these pictures were taken on October 3, 2015, there were no witnesses or staff members called to verify or support his testimony concerning the date the pictures were taken. The pictures themselves contain no calendar date or time printed on them. As a result, the undersigned considers these pictures unpersuasive insofar as the October 3, 2015, date is concerned.^{16/}

61. The owner testified that during the October 1, 2015, inspection visit, he told Fleary that the only item which remained to be repaired or cleaned was the kitchen.^{17/}

62. It was undisputed, and the owner testified, that DCF never returned after October 1, 2015, to re-inspect. Adeleke testified that in his experience, DCF typically gives facilities repair deadlines to bring violations into compliance. Further, he relied on the October 9, 2015, deadline to complete the repair work.

63. On cross-examination, the owner testified that he is familiar with the rules and regulations governing child care facilities. He testified that he never saw any roaches prior to October 1, 2015.^{18/}

CONCLUSIONS OF LAW

64. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1).

65. The laws, standards, and rules regulating child care facilities can generally be found in chapter 402 and chapter 65C-22.

Applicable Case Law

66. This case began when the Department issued a letter informing Petitioner that its license to operate a child care facility would not be renewed, as the consequence for several violations found during the renewal inspection. This constituted disciplinary or penal action against Petitioner's child care facility license, pursuant to chapter 402. As such, the Department bears the burden, by clear and convincing evidence, to establish the grounds for discipline and penal sanctions against Petitioner's license. Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998). See also Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

67. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

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 evidence 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. Id. at 116 n.5, citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

68. Whether Petitioner committed the charged violations is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. See McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

69. A new evidentiary record, based upon the historical and objective facts, is developed during a de novo hearing conducted under section 120.57(1) and is intended to formulate final agency action. Haines v. Dep't of Child. & Fams., 983 So. 2d 602 (Fla. 5th DCA 2008). If the purpose of a chapter 120 administrative hearing is to ferret out all the relevant facts and allow the "affected parties an opportunity to change the agency's mind," then, logically, it must be the facts and observations adduced at the final hearing that carry the day, and upon which any final action by the agency is measured. See generally J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013),

citing with approval Couch Const. Co. v. Dep't of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978). See also Caber Systems, Inc. v. Dep't of Gen. Servs., 530 So. 2d 325, 334 n.5 (Fla. 1st DCA 1988).

70. The factual findings made herein were developed applying the standards and discretion afforded to independent hearing officers in chapter 120 proceedings. Goin v. Comm'n on Ethics, supra ("Florida's Administrative Procedures Act relies upon a hearing officer to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence.").

71. Petitioner has asserted, in part, that the Department is estopped to find violations because Petitioner had until October 9, 2015, to comply and correct the violations. Aside from the fact that the undersigned finds that it was not shown that the conditions were improved in a timely manner, this argument is still unavailing because the evidence does not support several elements necessary to successfully utilize the doctrine of equitable estoppel against a governmental agency. Council Bros. v. City of Tallahassee, 634 So. 2d 265 (Fla. 1st DCA 1994).

72. For instance, it has not been demonstrated that the affirmative action of the Department listing a due date of

October 9, 2015, went beyond mere negligence. Nor has it been shown that failing to apply the doctrine will cause a serious injustice to Petitioner. In fact, just the opposite might occur if the doctrine were applied resulting in extended exposure of children and staff to unsanitary conditions. Council Bros., supra.

73. Finally, the undersigned concludes that applying the doctrine in this situation would unduly harm the public by allowing a publicly unhealthy and unsanitary condition to continue to exist. See also Associated Indus. Inc. Co. v. Dep't of Labor & Emp. Sec., 923 So. 2d 1252 (Fla. 1st DCA 2006) ("Equitable estoppel will apply against a governmental entity only in rare instances and under exceptional circumstances."). Those rare instances or exceptional circumstances do not exist in this case.

Applicable Statutes

74. Several statutes and rules are implicated by the facts of this case and must be considered. The applicable statutes, followed by the rules, are outlined below.

Legislative Intent

75. In this case, and under the circumstances presented herein, it useful to briefly survey limited excerpts of the Legislative Intent, outlined in section 402.26. These legislative goals will assist the parties, and the undersigned,

in arriving at the correct recommendation to address the violations discovered at Petitioner's facility.

76. A good starting point is to determine what underlying goals the Legislature has sought to achieve in Florida's child care industry and how enforcement mechanisms available to the Department should be utilized to further those goals.

77. Section 402.26, entitled "Child care; legislative intent," provides, in condensed form, as follows:

(1) The Legislature recognizes the critical importance to the citizens of the state of both safety and quality in child care. . . . For many families, child care is an indispensable part of the effort to meet basic economic obligations or to make economic gains. . . . In addition, the Legislature recognizes the abilities of public and private employers to assist the family's efforts to balance family care needs with employment opportunities.

(2) The Legislature also recognizes the effects of both safety and quality in child care in reducing the need for special education, public assistance, and dependency programs and in reducing the incidence of delinquency and educational failure. . . .

(3) To protect the health and welfare of children, it is the intent of the Legislature to develop a regulatory framework that promotes the growth and stability of the child care industry and facilitates the safe physical, intellectual, motor, and social development of the child.

(4) It is also the intent of the Legislature to promote the development of child care options in the private sector and disseminate

information that will assist the public in determining appropriate child care options.

(5) It is the further intent of the Legislature to provide and make accessible child care opportunities for children at risk, economically disadvantaged children, and other children traditionally disenfranchised from society.

78. Section 402.305, entitled "Licensing standards; child care facilities," provides, in relevant 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.

(a) The standards shall be designed to address the following areas:

1. The health, sanitation, safety, and adequate physical surroundings for all children in child care.

* * *

(5) PHYSICAL FACILITIES.--Minimum standards shall include requirements for building conditions, indoor play space, outdoor play space, napping space, bathroom facilities, food preparation facilities, outdoor equipment, and indoor equipment.

79. Pertinent provisions of section 402.308, entitled "Issuance of License," provide as follows:

(1) ANNUAL LICENSING.--Every child care facility in the state shall have a license which shall be renewed annually.

* * *

(3) STATE ADMINISTRATION OF LICENSING.--In any county in which the department has the authority to issue licenses, the following procedures shall be applied:

* * *

(b) Prior to the renewal of a license, the department shall reexamine the child care facility, including in that process the examination of the premises and those records of the facility as required under s. 402.305, to determine that minimum standards for licensing continue to be met.

* * *

(d) The department shall issue or renew a license upon receipt of the license fee and upon being satisfied that all standards required by ss. 402.301-402.319 have been met.

80. Section 402.310 authorizes the Department to take disciplinary action and impose other penalties against child care facility licenses for violation of applicable statutes and rules.

The statute states in pertinent part:

(1)(a) The department or local licensing agency may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder:

1. Impose an administrative fine not to exceed \$100 per violation, per day. However, if the violation could or does cause death or serious harm, the department or local licensing agency may impose an administrative fine, not to exceed \$500 per violation per day in addition to or in lieu of any other disciplinary action imposed under this section.

2. Convert a license or registration to probation status and require the licensee or registrant to comply with the terms of probation. A probation-status license or registration may not be issued for a period that exceeds 6 months and the probation status license or registration may not be renewed. . . .

3. Deny, suspend, or revoke a license or registration.

(b) In determining the appropriate disciplinary action to be taken for a violation as provided in paragraph (a), the following factors shall be considered:

1. The severity of the violation, including the probability that death or serious harm to the health or safety of any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of ss. 402.301-402.319 have been violated.

2. Actions taken by the licensee or registrant to correct the violation or to remedy complaints.

3. Any previous violations of the licensee or registrant.

(c) The department shall adopt rules to:

1. Establish the grounds under which the department may deny, suspend, or revoke a license or registration or place a licensee or registrant on probation status for violations of ss. 402.301-402.319.

2. Establish a uniform system of procedures to impose disciplinary sanctions for violations of ss. 402.301-402.319. The uniform system of procedures must provide for the consistent application of disciplinary actions across districts and a progressively increasing level of penalties from pre-

disciplinary actions, such as efforts to assist licensees or registrants to correct the statutory or regulatory violations, and to severe disciplinary sanctions for actions that jeopardize the health and safety of children, such as for the deliberate misuse of medications. . . .

(d) The disciplinary sanctions set forth in this section apply to licensed child care facilities, licensed large family child care homes, and licensed or registered family day care homes.

(2) When the department has reasonable cause to believe that grounds exist for the denial, suspension, or revocation of a license or registration; the conversion of a license or registration to probation status; or the imposition of an administrative fine, it shall determine the matter in accordance with procedures prescribed in chapter 120.

Applicable Rules

81. Several provisions of the Florida Administrative Code are also applicable, particularly when enforcement of the child care licensing laws is implicated. In particular, rule 65C-22.002, entitled "Physical Environment," states, in relevant part:

65C-22.002 Physical Environment.

(1) General Requirements.

(a) All child care facilities must be clean, in good repair, free from health and safety hazards and from vermin infestation.

82. Likewise, other enforcement rules exist. In particular, rule 65C-22.010, entitled "Enforcement," provides, in applicable part:

65C-22.010 Enforcement.

(1) Definitions.

* * *

(b) "Probation" is a licensing status indicating the license is in jeopardy of being revoked or not renewed due to violations of licensing standards. Probation may require the licensee to comply with specific conditions intended to ensure that the licensee comes into and maintains compliance with licensing standards. Examples of such conditions are: a deadline to remedy an existing violation, a specified period during which compliance with licensing standards must be strictly maintained; and specified conditions under which the facility must operate during the probationary period.

(c) "Standards" are requirements for the operation of a licensed facility provided in statute or in rule.

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

1. 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.

* * *

(2) Disciplinary Sanctions.

(a) Enforcement of disciplinary sanctions shall be applied progressively for each

standard violation. In addition, providers will be offered technical assistance in conjunction with any disciplinary sanction. The department shall take into consideration the actions taken by the facility to correct the violation when determining the appropriate disciplinary sanction.

* * *

(e) Disciplinary sanctions for licensing violations that occur within a two year period shall be progressively enforced as follows:

1. Class I Violations.

a. For the first and second violation of a Class I standard, the department shall, upon applying the factors in Section 402.310(1), F.S., issue an administrative complaint imposing a fine not less than \$100 nor more than \$500 per day for each violation, and may impose other disciplinary sanctions in addition to the fine. (Emphasis added).

b. For the third and subsequent violation of a Class I standard, the department shall issue an administrative complaint to suspend, deny or revoke the license. The department, upon applying the factors in Section 402.310(1), F.S., may also levy a fine not less than \$100 nor more than \$500 per day for each violation in addition to any other disciplinary sanction.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS

83. Based on the persuasive and credible evidence presented, the undersigned concludes that:

84. The Department proved that the violations outlined in the September 25, 2015, "Checklist" (Department's Exhibit 3) existed on September 25, 2015.

85. Further, that on October 1, 2015, it was clear under section 402.308 that all standards required by sections 402.301 through 402.319 and chapter 65C-22 had not been met.

86. Petitioner had not corrected any of the Checklist violations as of October 1, 2015, and several material violations, which justify disciplinary action, existed and were still not corrected by October 9, 2015.

87. Based on the credible and persuasive evidence, the undersigned finds that the Class I violation under section 14-04 of the "Checklist" was not brought into compliance by October 9, 2015.

88. Nonetheless, the undersigned is constrained by the explicit and clear provisions of rule 65C-22.010, which sets forth a mandatory progressive disciplinary scheme that the Department was obligated to follow.

89. This rule was created by and must be read in pari materia with the enabling statute, section 402.310(1)(c), which provides:

The department shall adopt rules to:

1. Establish the grounds under which the department may deny, suspend, or revoke a license or registration or place a licensee or registrant on probation status for violations of ss. 402.301-402.319. (Emphasis added).

90. The rule adopted to implement this provision, 65C-22, expressly provides that a license may only be revoked or denied for a Class I violation for the third or fourth violation in a two-year period.^{19/}

91. Since this was the first Class I violation for Petitioner in a two-year period, the mandatory progressive disciplinary sanctions of rule 65C-22.010(2)(e)1.a. applied and had to be followed. The Department was entitled to impose a fine of not less than \$100, nor more than \$500 per day, for each violation and had the discretion to impose other disciplinary sanctions in addition to the fine.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned is constrained by the progressive disciplinary standards mandated by rule 65C-22.010(2)(e)1.a. to recommend the following:

1. Children's Academy Preschool Inc., d/b/a Children's Academy Preschool I, be issued its renewal license converted to probation status as permitted by section 402.310(1)(a)2. See Dep't of Child. & Fams. v. Davis Fam. Day Care, Case No. 11-0916 (Fla. DOAH Oct. 25, 2011; Fla. DCF Feb. 8, 2012). As conditions of the probation status, unannounced periodic inspections by the Department should be made, requiring strict compliance with licensing standards. Furthermore, as a condition of probation,

adequate monthly pest control and cleaning services must be provided to the extent reasonably necessary to control the problem and eliminate the exposure of children and staff to health or safety concerns.

2. Conversion to probation status should be imposed for a minimum of six (6) months from the date of the Department's final order.

3. Children's Academy Preschool Inc., d/b/a Children's Academy Preschool I, should be assessed a daily administrative fine of \$100 for the period from September 25 through October 9, 2015, for a total amount of \$1,400, to be paid as a condition of probation within 60 days.

In closing, this recommendation comports with the progressive discipline required by rule 65C-22.010. It also strikes the best balance of respecting the legislative intent to provide child care services to the economically disadvantaged, while at the same time protecting the safety and welfare of the children using a child care facility which had been used by the local community for over 15 years.

DONE AND ENTERED this 8th day of March, 2016, in
Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of March, 2016.

ENDNOTES

^{1/} References to Florida Statutes are to the 2015 version, unless otherwise indicated.

^{2/} From the collection of photos reviewed by the undersigned and other evidence presented, it was evident that this facility serves a large population of "children at risk, economically disadvantaged children, and other children traditionally disenfranchised from society." See § 402.26, Fla. Stat.

^{3/} There was no evidence to show or suggest that this renewal inspection was "unannounced."

^{4/} It is the Class I violation that forms the crux of the enforcement action and dispute in this case.

^{5/} There is no compelling need to describe in this Recommended Order the details of the pictures and videotape clips, since the conditions at the facility are well documented and portrayed.

^{6/} In fact, during Fleary's interview of Adeleke on October 1, 2015, Adeleke informed Fleary that the food kept or stored in the kitchen was served, or would be served, to the children.

7/ The Department did not offer this order into evidence, and scant details were provided. However, the issuance of this order was not disputed.

8/ The service on October 3, 2015, cost \$30.00. The extent and usefulness of pest control services, at that price, is questionable for a facility as large and overrun by pests, as it was. The undersigned also notes that there was no evidence solicited from Samaria, as an independent witness, to support or help explain the pictures offered into evidence by Petitioner regarding the renovations which purportedly were finished and existed on October 3, 2015 (the same day Samaria was present). See Pet'r's Exs. C1-C10.

9/ Based on the photographs and videotape taken on October 1, 2015, which were carefully reviewed by the undersigned, Adeleke's testimony regarding these pest control services, or at least, any consistent or adequate pest control services prior to October 1, 2015, is rejected as not being credible. This finding is reached, in part, in light of the widespread and active vermin infestation and deplorable bug condition that existed on October 1, 2015. Notably, there were no other witnesses, staff members, or business records offered to confirm any prior pest control service or cleaning service. The appalling condition of the facility belied any claim that regular or adequate pest control or cleaning services had previously been provided.

10/ Conspicuously, and again, there were no witnesses, staff members, or documents offered to confirm any (1) prior or ongoing renovation work, (2) cost of materials, or (3) other evidence to support his testimony. As a result, the undersigned does not credit his testimony on this subject.

11/ The undersigned concludes that all food used or consumed on the premises was catered in, and the kitchen was not being used for cooking. Nonetheless, the undersigned finds that the kitchen was used for food storage and that the refrigerator in one of the classrooms was actively in use. (For instance, the videotape of that classroom showed several dead roaches in the bottom of the refrigerator where juices, cups, and bottles were stored.)

12/ To the extent this claim suggests that other photographed areas, besides the kitchen, were clean and sanitary on October 1, 2015, it is rejected as specious and contrary to other credible evidence. For instance, his testimony is seriously undermined by the pictures and video tapes themselves which show that many other areas of the facility, besides the kitchen, were still

filthy and unsanitary on October 1, 2015. This included several bathrooms, classrooms, and storage areas.

^{13/} These claims are contradicted, in part, by the video clip of the refrigerator which was in a room where children were located and had several drink items inside and dead roaches in the bottom.

^{14/} Again, significantly, no other witnesses, staff members, receipts, or business records were offered to verify or support any of the activity date(s) or renovation work in the kitchen, making the date(s) of completion uncertain and unclear to the undersigned.

^{15/} But the undersigned hastens to note that these pictures do not cover all of the suspect areas and pictures offered into evidence by the Department. Further, they do not prove compliance with all the violations noted in the September 25, 2015, Checklist (Department's Exhibit 3). Also, the date they were actually taken is a matter of serious debate.

^{16/} An additional concern is that Petitioner's Exhibits C1 through C10 were not provided to the Department's counsel in a timely fashion, violating the undersigned's Order of Pre-hearing Instructions dated December 3, 2015. These pictures only surfaced, apparently, shortly before the hearing on February 9, 2016. Further, the undersigned notes that "Petitioner's Exhibit List," on page 3 of the Joint Pre-hearing Stipulation, dated February 1, 2016, inexplicably does not include Petitioner's Exhibit C as being an exhibit that existed on the date the stipulation was filed. Finally, conspicuously absent in both the Joint Pre-hearing Stipulation and Petitioner's Petition in Opposition to the Denial of Application for Child Care License and Request for Formal Administrative Hearing, dated November 6, 2015, is any reference, assertion, or mention of Petitioner's alleged compliance and renovations being completed on October 3, 2015 (as allegedly depicted in Petitioner's Exhibit C1 through C10). All of this leads the undersigned to the conclusion that little weight should be given to Petitioner's photographs, Exhibits C1 through C10, concerning the date they were allegedly taken. (See generally Fla. R. Civ. P. 1.380(b)(2) and the Author's Comments and cases construing subdivision (b)(2) of the rule). Furthermore, as previously noted, there were filthy and bug-infested areas of the facility other than the areas shown in Exhibits C1 through C10. The undersigned concludes that even if the date of Petitioner's pictures is credited, which it is not,

other unhealthy or unsafe areas of the facility were not cleaned or repaired before the due date October 9, 2015.

^{17/} Again, the undersigned finds this statement to be unpersuasive and contrary to what the videos and pictures showed. The video and pictures showed other areas, besides the kitchen, that were still filthy and unsanitary on October 1, 2015. He promised Fleary that they would not use or allow cooking in the kitchen. He testified that Fleary would not listen to him.

^{18/} The undersigned rejects this testimony as incredible, particularly in light of the pictures and videos taken on October 1, 2015. The bug infestation problem was widespread, open, and obvious.

^{19/} In the absence of any specific law or rule to the contrary, this conclusion is not changed merely because Petitioner was up for renewal of its license. The undersigned has not been provided any statute or rule from the parties suggesting that a renewal applicant is held to a different standard than an active licensee. If this case had been presented as a violation reported by the public with disciplinary enforcement imposed, the path and options would have been even more clear. Regardless, a renewal scenario does not dictate a different outcome. For renewal of a license, the condition of the premises is still judged against the same standards as it would be had a violation been anonymously reported or discovered. (See generally § 402.308(3)(b) and (d), Fla. Stat.). The parties have not cited any statute or rule to the contrary.

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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.