

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND  
FAMILIES,

Petitioner,

vs.

Case No. 16-6032

RUBY'S LITTLE CREATIONS  
CHILDCARE,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 28, 2016, via video teleconference sites in Orlando and Tallahassee, Florida. The parties appeared before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Brian Christopher Meola, Esquire  
Suite S-1129  
400 West Robinson Street  
Orlando, Florida 32801

For Respondent: Jacques Lee Cooper, Esquire  
Attorney DMV  
2509 Eliot Place  
Temple Hills, Maryland 20748

STATEMENT OF THE ISSUE

Whether Ruby's Little Creations Childcare (Respondent) violated provisions of chapter 402, Florida Statutes (2016),

and/or Florida Administrative Code Chapter 65C-22, such that its license should be disciplined.

PRELIMINARY STATEMENT

On September 8, 2016, the Department of Children and Families (Department or DCF) issued an Administrative Complaint (AC) alleging multiple violations of chapter 402 rule 65C-22. Respondent filed an "Official Request for Formal Administrative Hearing." On October 18, 2016, the AC and Respondent's request were forwarded to DOAH. Following input from both parties, the undersigned scheduled the case to be heard on November 28, 2016. The hearing took place as scheduled.

Prior to the hearing, DCF filed an Amended Motion to Allow Child Victim Hearsay. Respondent's counsel did not object to the Amended Motion and it was granted.

At the final hearing, DCF presented the testimony of five witnesses: S.P., mother of two former students of Respondent<sup>1/</sup>; Sheena Simpson, former employee of Respondent; Acacia Vierbicky, DCF child protective investigator; Ida Vargas, DCF family series counselor; and Christina Bryant, DCF child care licensing supervisor. DCF offered ten exhibits which were received into evidence.

Respondent presented the testimony of its owner, Shaquawinna Benjamin, and Shiffone Blake, Respondent's former employee. Respondent offered three exhibits, which were filed with DOAH on

December 15, 2016. Respondent's Exhibit 2 was admitted without objection; however, Petitioner did object to Respondent's Exhibit 1<sup>2/</sup> and Composite Exhibit 3. To the extent that Respondent's Exhibits 1 and 3 contained statements from persons who did not testify and were not subject to cross-examination, those statements were not considered. Included in Respondent's December 15th pleading was a reference to two "Proposed Exhibits for the Respondent." These two proposed exhibits ("1. Character Reference Letters (7) [and] 2. Police Incident Report") were not provided.

At the conclusion of the hearing, the parties were advised when their proposed recommended orders (PROs) would be due. Petitioner moved that the PROs be due 20 days following the receipt of the transcript. Respondent's counsel did not object, and the undersigned granted Petitioner's request. The Transcript was filed on January 10, 2017, and a Notice of Filing Transcript was issued setting forth the due date for the PROs. Petitioner timely filed its PRO, which has been considered in the preparation of this Recommended Order. To date, Respondent has not filed a PRO.

Unless otherwise indicated, all references are to the 2016 version of the Florida Statutes. References to the Florida Administrative Code are to the current version, unless otherwise indicated.

## FINDINGS OF FACT

### BACKGROUND

1. The Department is the state agency responsible for inspecting, licensing, and monitoring child care facilities such as the one operated by Respondent. It is the Department's responsibility to ensure that all such facilities are safe and secure for the protection of the children utilizing those facilities. The Department inspects each licensed day care center several times a year. In the event of a complaint, additional inspections and/or investigations are conducted.

2. Ms. Benjamin owns, operates and directs Respondent. Respondent holds a "Regular License," and is located at 1041 North Pine Hills Road, Orlando, Florida. Respondent opened in May 2014, and was in continuous operation at all times material to this complaint.

3. Ms. Benjamin hired Ms. Simpson to work for Respondent in March 2016. Other employees included Shiffion Blake and Dorothy Massenburg.

4. Ida Vargas is a family service counselor for the Department. Counselor Vargas is trained to inspect day care centers for initial applications, renewal applications and routine inspections. When allegations of violations are reported, Counselor Vargas investigates those allegations. In the process of investigating allegations, Counselor Vargas may inspect the

premises for health and safety issues. She is familiar with Respondent, having inspected it while it was operational.

5. Investigator Vierbicky has five years of experience as a DCF child protective investigator. Her duties and responsibilities focus on child abuse and/or child neglect issues and include investigating day care centers, institutions where children are involved in Baker Act proceedings, and human trafficking.

#### ENFORCEMENT STANDARDS

6. 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." See Fla. Admin. Code R. 65C-22.010(1)(d)1.

7. Class II violations "are less serious in nature than Class I violations, and could be anticipated to pose a threat to the health, safety or well-being of a child, although the threat is not imminent." See Fla. Admin. Code R. 65C-22.010(1)(d)2.

8. Class III violations "are the most common violations, are less serious in nature than either Class I or Class II violations, and pose a low potential for harm to children." See Fla. Admin. Code R. 65C-22.010(1)(d)3.

## ALLEGATIONS

9. In July 2016, DCF received allegations against Respondent. Those allegations included: children handing out Respondent's flyers in neighborhoods seeking clients; children cleaning Ms. Benjamin's home; and a child being placed in a high chair for punishment.

10. DCF Investigator Vierbicky and Counselor Vargas were assigned to investigate the allegations. Once assigned, DCF employees may conduct further inspections of facilities to ensure children's safety.

### A. PASSING OUT RESPONDENT'S FLYERS

11. Investigator Vierbicky interviewed one of the children who allegedly passed out Respondent's flyers and went to Ms. Benjamin's home and cleaned. The interview occurred at the child's home. Based on the responses she received from the child, Investigator Vierbicky determined to go to Respondent's facility for additional interviews with other children. Counselor Vargas and Investigator Vierbicky went to Respondent's facility to conduct a joint investigation/inspection of Respondent's facility.

12. In June 2016, Ms. Simpson took several of Respondent's children, in Respondent's van, to an apartment complex and told the children to put the flyers on the windshields of parked cars. Ms. Simpson stayed in Respondent's van while the children placed

the flyers on the various cars. Ms. Simpson's testimony is found credible.

13. Investigator Vierbicky, with Counselor Vargas present, interviewed other children as part of the investigation at Respondent's facility. The other children confirmed the first child's recollection of going out into a neighborhood and placing flyers on car windshields or doors. The children also confirmed that Respondent's employees remained in Respondent's van while the children passed out the flyers. This was a Class III violation.

14. Ms. Benjamin admitted that she held weekly staff meetings and discussed ways to improve Respondent's business. Ms. Benjamin denied that she authorized her employees or any children to hand out the flyers. Ms. Benjamin confirmed that the flyers (Petitioner's Exhibit 2) were prepared and paid for by her. Ms. Benjamin admitted that the flyers were by Respondent's door, and available for anyone to take. The flyers did not contain Respondent's license number as required. This was a Class III violation. Investigator Vierbicky and Counselor Vargas confirmed that children in Respondent's care were taken outside Respondent's facility to pass out flyers. This was a Class I violation.

#### B. HOUSE CLEANING

15. Ms. Benjamin admitted that Ms. Simpson brought several of Respondent's children to Ms. Benjamin's home in Respondent's van. Ms. Benjamin denied that she asked Ms. Simpson to bring the

children to the Benjamin home. Ms. Benjamin claimed she asked Ms. Simpson to bring some contracts found on Respondent's printer to her. When Ms. Simpson arrived at the Benjamin home, the children were directed to get out of the van and go into Ms. Benjamin's home.

16. While at Ms. Benjamin's home, one child got into a bathroom cabinet where makeup was kept. The child made a mess with the makeup he found in the cabinet. Ms. Benjamin gave the child cleaning supplies and directed the child to clean up the bathroom mess. The child did so. This was a Class I violation. Ms. Benjamin also admitted that after the bathroom mess was cleaned up, the children got back into Respondent's van. Ms. Simpson then drove the children back to Respondent's facility. This was a Class II violation.

17. Ms. Benjamin did not notify the children's parents or DCF that the children were taken to her home. Additionally, Ms. Benjamin did not notify the child's parents or DCF that the child had cleaned a bathroom. This was a Class I violation.

#### C. HIGH CHAIR PUNISHMENT

18. S.P., the mother of two children who attended Respondent, arrived at the day care on three or four occasions and found her youngest child (A.P., a three-year-old) sitting in a high chair. Ms. Simpson admitted that she placed A.P. in the high chair at Ms. Benjamin's direction. The disciplinary method used



by Respondent was to place a child in a high chair until the child calmed down. This was a Class I violation. A.P. was a hyperactive child, and when he did something inappropriate, he was placed in the high chair as punishment. Once A.P. calmed down, he was taken out of the high chair, but at the slightest wrong move, he was placed back in the high chair. A photograph of a high chair without a tray attached was entered into evidence (Petitioner's Exhibit 3).

#### D. ADDITIONAL ALLEGATIONS

19. While at Respondent's facility, Investigator Vierbicky and Counselor Vargas conducted an inspection. During the inspection, they discovered several environmental hazards. The DCF workers noticed a set of accordion doors that were unclean and dusty. When they opened the accordion doors, the air condition unit (AC unit) was visible. The AC unit and its filter were filthy. When the AC unit filter was removed there was trash found in the ductwork.<sup>3/</sup> This was a Class III violation.

20. In a different closet, the sleeping mats used by the children for nap time were stacked together with the sheets still attached.<sup>4/</sup> Sleeping mats are to be stored without sheets to limit germ transfers. This was a Class III violation.

21. Ms. Benjamin admitted that Respondent's children were taken on several "nature walks" to Barnett Park (Park), which was down the street from Respondent's facility. There were no

sidewalks on the street, and the children walked from Respondent's facility to the Park either on the street itself or on the shoulder of the street. This was a Class II violation.

22. Ms. Benjamin admitted that on June 20, 2016, she took at least two children to the Park. While at the Park, one of the children inappropriately poked another child with a stick. Respondent failed to apply for approval of a safety plan that would allow the children to leave Respondent's facility and walk to the Park. This was a Class II violation.

23. Ms. Benjamin never sought to have Respondent's facility approved to transport children. Respondent had a van, but it was never inspected. This was a Class III violation. The status of adequate automobile insurance remains unclear. Respondent did not have the appropriate driver credentials or vehicle inspection reports for Respondent's van. Ms. Simpson admitted that she was Respondent's van driver. She never qualified to be the driver for Respondent, her credentials were never scrutinized to become an authorized driver, and she did not have a physical examination on record to be a driver to transport Respondent's children. These were multiple Class III violations. Further, Respondent did not maintain a log of the various trips the children took in the van. This was a Class III violation.

24. During the April 2016 inspection, Counselor Vargas directed Ms. Benjamin to fire Ms. Simpson because Ms. Simpson had

a disqualifying offense in her background screening. The evidence at hearing reflected that Ms. Simpson was still employed by Respondent in June 2016, although Ms. Benjamin testified that Ms. Simpson was fired after Ms. Simpson brought the children from Respondent to Ms. Benjamin's house and back. The exact date of the trip to Ms. Benjamin's house was never established; however, Ms. Simpson was still employed by Respondent in June 2016, without having the requisite clean background screening. This was a Class III violation.

25. Additionally, documentation of training by Respondent's staff was missing from its records. This was a Class III violation.

#### PRIOR VIOLATIONS

26. Respondent has had four prior Administrative Complaints issued against it during its short operation. The four included:

a. April 21, 2016: This Administrative Complaint alleged that Respondent did not timely file its renewal application. Respondent submitted the appropriate renewal form 25 days after the due date. The administrative fine of \$100 was paid on May 9, 2016.

b. December 1, 2015: This Administrative Complaint alleged that Respondent's personnel records did not include a signed CF-FSP 5337 Child Abuse and Neglect Reporting Requirements form. The administrative fine of \$30 was paid on May 9, 2016.

c. November 3, 2015: This Administrative Complaint alleged that Respondent's personnel

records did not include: a signed CF-FSP 5337 Child Abuse and Neglect Reporting Requirements form; the appropriate background screening documents (CF-FSP Form 5131) for employees; the completed Child Care Affidavit of Good Moral Character prior to the hire date for employees; and the verification of employment history for the past 2 years. The administrative fine of \$185 was paid on May 9, 2016.

d. May 8, 2015: This Administrative Complaint alleged that Respondent did not timely file its renewal application. Respondent submitted the appropriate renewal form 25 days after the due date. The administrative fine of \$50 was paid on May 19, 2015.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes.

28. The Department is the state agency responsible for licensing and regulating Respondent's facilities. See §§ 402.301 and 402.319, Fla. Stat. The Department is authorized to issue a license to Respondent when specified requirements are met. See § 402.308(3)(d), Fla. Stat.

29. The Department bears the burden to prove that Respondent committed the violations alleged in the September 8, 2016, AC. As stated by the Supreme Court of Florida in Department of Banking & Finance, Division of Security & Investor Protection v. Osborne Stern & Company, 670 So. 2d 932, 934 (Fla. 1996):

The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). Thus, the majority is correct in its observation that appellants had the burden of presenting evidence of their fitness for registration. The majority is also correct in its holding that the Department had the burden of presenting evidence that appellants had violated certain statutes and were thus unfit for registration. The majority's conclusion, however, that the Department had the burden of presenting its proof of appellants' unfitness by clear and convincing evidence is wholly unsupported by Florida law and inconsistent with the fundamental principle that an applicant for licensure bears the burden of ultimate persuasion at each and every step of the licensure proceedings, regardless of which party bears the burden of presenting certain evidence. This holding is equally inconsistent with the principle that an agency has particularly broad discretion in determining the fitness of applicants who seek to engage in an occupation the conduct of which is a privilege rather than a right.

30. Section 402.301 provides the following:

Child care facilities; legislative intent and declaration of purpose and policy.—It is the legislative intent to protect the health, safety, and well-being of the children of the state and to promote their emotional and intellectual development and care. Toward that end:

(1) It is the purpose of ss. 402.301-402.319 to establish statewide minimum standards for the care and protection of children in child care facilities, to ensure maintenance of these standards, and to approve county administration and enforcement to regulate

conditions in such facilities through a program of licensing.

(2) It is the intent of the Legislature that all owners, operators, and child care personnel shall be of good moral character.

(3) It shall be the policy of the state to ensure protection of children and to encourage child care providers and parents to share responsibility for and to assist in the improvement of child care programs.

31. Section 402.310 provides the following in pertinent part:

(1) (a) The department . . . 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:

\* \* \*

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 predisciplinary 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. The department shall implement this subparagraph on January 1, 2007, and the implementation is not contingent upon a specific appropriation.

32. Section 402.305 provides in pertinent part:

(12) CHILD DISCIPLINE.—

(a) Minimum standards for child discipline practices shall ensure that age-appropriate, constructive disciplinary practices are used for children in care. Such standards shall include at least the following requirements:

1. Children shall not be subjected to discipline which is severe, humiliating, or frightening.

\* \* \*

3. Spanking or any other form of physical punishment is prohibited.

33. Section 402.318 provides:

Advertisement.—A person, as defined in s. 1.01(3), may not advertise a child care facility, family day care home, or large family child care home without including within such advertisement the state or local agency license number or registration number of such facility or home. Violation of this section is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

34. Rule 65C-22.001 provides in pertinent part:

(5) Supervision.

(a) Direct supervision means actively watching and directing children's activities within the same room or designated outdoor play area, and responding to the needs of each child. Child care personnel at a facility must be assigned to provide direct supervision to a specific group of children, and be present with that group of children at all times. When caring for school-age children, child care personnel shall remain responsible for the supervision of the children in care, shall be capable of responding to emergencies, and are accountable for children at all times, including when children are separated from their groups.

\* \* \*

(6) 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.

\* \* \*

(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.

\* \* \*

(8) Child Discipline.

\* \* \*

(b) All child care personnel must comply with the facility's written disciplinary policy. Such policies shall include standards that prohibit children from being subjected to discipline which is severe, humiliating, frightening, or associated with food, rest, or toileting. Spanking or any other form of physical punishment is prohibited for all child care personnel.

\* \* \*

(11) Child Safety.

(a) Acts or omissions that meet the definition of child abuse or neglect provided in Chapter 39, F.S., constitute a violation of the standards in Sections 402.301-.319, F.S.,

and shall support imposition of a sanction, as provided in Section 402.310, F.S.

(b) Failure to perform the duties of a mandatory reporter pursuant to Section 39.201, F.S., constitutes a violation of the standards in Sections 402.301-.319, F.S.

35. Rule 65C-22.002 provides in pertinent part:

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.

\* \* \*

(10) Health and Sanitation.

\* \* \*

(c) Bedding and Linens.

\* \* \*

3. Linens, when not in use, must be stored in a sanitary manner which prevents the spread of germs or lice from other linens.

\* \* \*

(11) Equipment and Furnishings.

(a) Indoor Equipment.

\* \* \*

2. Toys, equipment, and furnishings must be safe and maintained in a sanitary condition, and shall be cleaned and sanitized or disinfected immediately if exposed to bodily fluids, such as saliva.

36. Rule 65C-22.003 provides in pertinent part:

(4) Documentation of Training. Effective October 1, 2010, the department's Training Transcript will be the only acceptable verification of successful completion of the department's training. Training completion documented on CF-FSP Form 5267, March 2009, Child Care Training Course Completion Certificate, which is incorporated by reference, will no longer be accepted by the department after October 1, 2010, nor will any previous version of the form. Form CF-FSP 5267 is provided to participants upon completion of a department approved training course. A copy of the department's Training Transcript may be obtained from the department's website at [www.myflorida.com/childcare](http://www.myflorida.com/childcare).

(a) A copy of the Training Transcript must be included in each staff member's child care personnel record and maintained at each child care facility.

37. Rule 65C-22.006 provides in pertinent part:

(4) Personnel Records. Records shall be maintained and kept current on all child care personnel, as defined by Section 402.302(3), F.S., and household members if the facility is located in a private residence. These shall include:

\* \* \*

(g) Driver's license and driver physical examination documentation. A copy of the driver's license and the physician certification, or another form containing the same elements of the physician certification, granting medical approval to operate the vehicle, and valid certificate(s) of course completion for first aid training and infant and child cardiopulmonary resuscitation (CPR) procedures must also be maintained in the driver's personnel file.

38. According to rule 65C-22.010(2)(a), enforcement of disciplinary sanctions shall be applied progressively for each standard violation. The various class violations are found in paragraphs 6, 7, and 8, above.

39. The Department proved by clear and convincing evidence that Respondent has committed four Class I violations and multiple Class II and Class III violations.

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 REVOKING Respondent's license.<sup>5/</sup>

DONE AND ENTERED this 8th day of February, 2017, in Tallahassee, Leon County, Florida.



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LYNNE A. QUIMBY-PENNOCK  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of February, 2017.

ENDNOTES

1/ In order to protect the children's privacy, this Recommended Order refers to the children and their parents by initials.

2/ At the beginning of the hearing, Respondent expressed the intention to call Dorothy Massenburg, the author of Exhibit 1 to testify. However, the hearing was longer than either party anticipated, and Ms. Massenburg did not testify. The undersigned offered the parties the opportunity to continue the hearing to a date certain, or keep the record open to allow Ms. Massenburg's deposition to be taken and included in the record. Petitioner rested its case, and Respondent's representative opted to end the hearing on November 28, 2016.

3/ The following week a re-inspection was conducted and the AC unit and filter were clean.

4/ The following week a re-inspection was conducted and the environmental hazards were corrected.

5/ The AC indicated the Department was proposing a revocation of Respondent's license and a total fine of \$2,000. The fine was not listed in the Department's PRO recommendation and will not be included.

COPIES FURNISHED:

Paul Sexton, Agency Clerk  
Department of Children and Families  
Building 2, Room 204  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700  
(eServed)

Jacques Lee Cooper, Esquire  
Attorney DMV  
2509 Eliot Place  
Temple Hills, Maryland 20748  
(eServed)

Brian Christopher Meola, Esquire  
Suite S-1129  
400 West Robinson Street  
Orlando, Florida 32801  
(eServed)

Rebecca Kapusta, General Counsel  
Department of Children and Families  
Building 2, Room 204  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700  
(eServed)

Mike Carroll, Secretary  
Department of Children and Families  
Building 1, Room 202  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700  
(eServed)

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.