

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND  
FAMILIES,

Petitioner,

vs.

Case No. 17-6741

EDU EXPRESS, LLC, d/b/a THE  
LITTLE ENGINE ACADEMY,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 16, 2018, via video teleconference at sites in Tallahassee and Daytona Beach, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Jane Almy-Loewinger, Esquire  
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For Respondent: Joy Vaeth, pro se  
EDU Express, LLC, d/b/a The Little  
Engine Academy  
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STATEMENT OF THE ISSUE

The issue is whether EDU Express, LLC, d/b/a The Little Engine Academy ("EDU Express"), violated Florida Administrative

Code Rule 65C-22.001(11) (b)<sup>1/</sup> by failing to report a suspected incident of child abuse.

PRELIMINARY STATEMENT

On approximately November 14, 2017, the Department of Children and Families ("the Department") issued an Administrative Complaint alleging that a complaint investigation conducted on August 16, 2017, determined the following:

As a mandated reporter, the owner, operator, employee, or substitute failed to report suspected child abuse or neglect as required in section 39.301 Florida Statutes. The owner and director of this facility failed to report that a child was held by the wrist and removed from an incident causing the child's elbow to become dislocated. The child's parent stated that she asked the owner of the facility to make an abuse report, the parent realized six (6) months later that the report was not made and called in a report on August 15, 2017.

According to the Administrative Complaint, the aforementioned allegations amounted to a violation of rule 65C-22.001(11) (b) and a Class I violation of child care licensing standards.

Class I violations are the most serious and pertain to situations in which a child has been harmed or there is imminent danger of future harm. The violation alleged in the Administrative Complaint would be EDU Express's fifth Class I violation within a two-year period. As a result, the

Department notified EDU Express that it was seeking to impose a \$500.00 fine and revoke EDU Express's child care license.<sup>2/</sup>

On December 8, 2017, EDU Express responded by requesting a formal administrative hearing. Within the hearing request, EDU Express noted that it disputed the allegations that: (1) there was suspected child abuse or neglect; and that (2) the parent of the alleged victim requested that an abuse report be filed.

On December 18, 2017, the Department referred this matter to DOAH for a formal administrative hearing.

Via a Notice issued on December 28, 2017, the undersigned scheduled the final hearing to occur by video teleconference on February 16, 2018.

Prior to the final hearing, the Department filed a Notice that it would be treating its Administrative Complaint as an exhibit. The undersigned accepts the Administrative Complaint as the Department's Exhibit 1.

The final hearing was commenced as scheduled.

The Department presented testimony from Betsy Lewis, a Family Services Counselor Supervisor, and Patricia Medico, a Family Services Counselor. The Department did not offer any additional exhibits into evidence during the final hearing.

EDU Express offered the testimony of Joy Vaeth, and EDU Express's Exhibits 1 through 6 were admitted into evidence without objection.

During the final hearing, the undersigned received testimony indicating that EDU Express had closed and that its license had been relinquished or "closed out." The testimony also revealed that another operator had moved into the physical space previously occupied by EDU Express. Because the Department was still seeking to impose a \$500 fine on EDU Express, the undersigned concluded that this proceeding had not been rendered moot.

After the conclusion of the final hearing, the Department filed a composite exhibit describing previous disciplinary actions taken against EDU Express. The undersigned accepts that composite exhibit into evidence and designates it as the Department's Exhibit 2.

The Transcript from the final hearing was filed with DOAH on March 7, 2018, and the Department filed its Proposed Recommended Order on March 12, 2018. The undersigned considered the Department's Proposed Recommended Order during the preparation of this Recommended Order.

EDU Express did not file a proposed recommended order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

1. At all times relevant to the instant case, EDU Express was a Florida-licensed childcare facility owned by Joy Vaeth with 100 to 120 children under its care.

2. The Department is the state agency responsible for licensing and regulating childcare facilities in Florida.

See §§ 402.305-.311, Fla. Stat. (2017).<sup>3/</sup>

3. In order to fulfill its regulatory duty, the Department inspects every childcare facility three times a year. The Department will conduct an additional inspection if it receives a complaint pertaining to a particular childcare facility.

4. The Department administers rule 65C-22.001, and subsection (11) of the rule subjects childcare facilities to discipline for failing "to perform the duties of a mandatory reporter pursuant to Section 39.201." Such failure "constitutes a violation of the standards in Section 402.301-.319, F.S."

5. Section 39.201(1)(a), Florida Statutes, mandates that "[a]ny person who knows, or has reasonable cause to suspect, that a child is abused . . . shall report such knowledge or suspicion to the [Department] in the manner prescribed in subsection (2)."<sup>4/</sup>

6. On February 24, 2017, an employee of EDU Express inadvertently injured a child's elbow while ending a scuffle between that child and another child.

7. Because EDU Express maintained cameras in its facility, the incident was captured on video.

8. After watching a video of the incident, Ms. Vaeth concluded that she was not required to report the incident to the pertinent authorities:

And I - it was an accident . . . The teacher had been changing a child and off in the distance was another child hitting a child with a drumstick. And, so, the teacher picked up the child she was changing to stop that, because they're one and - or one and a half. And went over and holding one - the child she had been changing, just lifted that child up and away from the child she was hitting so that there was no injury. And in that process the child's arm - the elbow got this injury called Nursemaid's elbow.<sup>[5/]</sup>

So I just - in my mind we're all - you know, talking about the - you know, what happened, and I just didn't think of it as abuse that I needed to report to the hotline. And, even as part of my Exhibit One, this is a flyer at one point, you know, that DCF put out about signs to look for. And, again, when I read this I still don't read this and go, oh, yeah, I should have reported that to the hotline because it was abuse. I just - I didn't believe it was abuse.

My teacher did not purposely set out to injure that child. And in the process of trying to prohibit another child from being injured she pulled the child up by one arm and that arm was injured. So - and, so, anyway, that's just - I just didn't connect the dots.

\* \* \*

And - but I called the parents and I talked to the dad. It's not like I tried to hide it from him. I called him and I told him what had happened. I talked to the mom the next day. Of course, they were upset. Understandably they were upset. But, again, I wasn't - I didn't realize that the - that I had to call the abuse and neglect hotline on situations like this. I know now.

And then, as far as the parent asking me to report it, I -- I do not believe she did. And if she did, I didn't understand it that way. And I - as part of my Exhibit Two I -- we talked on the phone, but she also texted me. And those are the only texts I have. But never once in the text messaging -- I was going back and forth a little bit with her to check on G.H. to see how she was and she never suggested that - that I understood, to call the hotline as suspected abuse.

9. While Ms. Vaeth initially concluded that she was not required to report the incident to the Department, the child's mother concluded otherwise and was under the impression that Ms. Vaeth was going to report the incident.

10. Ms. Vaeth was not under the impression that the mother asked her to report the incident.

11. The child remained under EDU Express's care for another six months.

12. Upon learning that Ms. Vaeth never reported the incident, the child's mother filed a complaint with the Department on August 15, 2017. The Department then conducted an

inspection of EDU Express and evaluated whether the incident amounted to an instance of abuse.

13. Patricia Medico was the family services counselor who had been responsible for conducting the Department's inspections of EDU Express since it opened in 2013.

14. Ms. Medico conducted the inspection resulting from the mother's complaint.

15. During the course of that inspection, Ms. Medico viewed a video of the incident and described what she saw as follows:

She was by herself in the classroom at the time. She had a baby in one arm. Whether the baby was upset or she had just changed it -- she had a baby in her arm and, so, she saw a situation over there. Two children fighting over - I think it was a toy drum. And reached over to move the child so, you know, it may have appeared that she was pulling the child. But as we looked at the video over and over again, that's not what it was. She was just - she was pulling the child to safety is what she was doing and, you know, wasn't aware that anything had happened to the child. Ms. Vaeth did remove that person from her - her position.<sup>[6/]</sup>

16. While there is no evidence that the EDU employee intended to cause injury by grabbing the child's arm and removing the child from the scuffle, that employee did intend to remove the child from the scuffle by grabbing the child's arm.

17. The child suffered some degree of harm due to the EDU employee grabbing his or her arm.



18. There is no sufficiently detailed evidence as to whether the child's physical, mental, or emotional health was significantly impaired by the harm suffered by the child. For example, there was no evidence regarding the severity of the child's injury or whether she experienced any pain. Also, there is no detailed evidence about the amount of treatment that was necessary to treat the child's condition.<sup>7/</sup>

19. The incident on February 24, 2017, did not result from any ambivalence on Ms. Vaeth's part or any disregard for the welfare of the children under her care.

20. With the exception of an earlier incident which led to the Department charging EDU Express with multiple violations, Ms. Medico was never under the impression that the children at EDU Express were in an unsafe environment.

#### CONCLUSIONS OF LAW

21. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017).

22. A proceeding, such as this one, to impose discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, DCF must prove the charges against EDU Express by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932,

933-34 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

23. Regarding the standard of proof, the court in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), stated that:

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 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.

Id.

24. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal has also followed the Slomowitz test, adding the interpretive comment that "[a]llthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

25. Section 402.310, Florida Statutes, authorizes the Department to impose discipline against licensed childcare facilities. This statute provides, in pertinent part, that the Department "may administer . . . disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder." § 402.310(1)(a), Fla. Stat.

26. The Department's Administrative Complaint alleged that EDU Express violated rule 65C-22.001(11)(b). The aforementioned rule pertains to "child safety" and provides that "[f]ailure 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."

27. Section 39.201(1)(a) mandates that:

Any person who knows, or has reasonable cause to suspect,<sup>[8/]</sup> that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter, or that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care shall report such knowledge or suspicion to the department in the manner prescribed in subsection (2).

28. Section 39.01(2), Florida Statutes, defines "abuse" as:

any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that

causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.

29. Section 39.01(30)(a) provides that "harm" to a child's health or welfare can occur when someone:

Inflicts or allows to be inflicted upon the child physical, mental, or emotional injury. In determining whether harm has occurred, the following factors must be considered in evaluating any physical, mental, or emotional injury to a child: the age of the child; any prior history of injuries to the child; the location of the injury on the body of the child; the multiplicity of the injury; and the type of trauma inflicted. Such injury includes, but is not limited to:

Willful acts that produce the following specific injuries:

- a. Sprains, dislocations, or cartilage damage.
- b. Bone or skull fractures.
- c. Brain or spinal cord damage.
- d. Intracranial hemorrhage or injury to other internal organs.
- e. Asphyxiation, suffocation, or drowning.
- f. Injury resulting from the use of a deadly weapon.
- g. Burns or scalding.
- h. Cuts, lacerations, punctures, or bites.

- i. Permanent or temporary disfigurement.
- j. Permanent or temporary loss or impairment of a body part or function.

As used in this subparagraph, the term "willful" refers to the intent to perform an action, not to the intent to achieve a result or to cause an injury.

(emphasis added).

30. In order for the Department to prove that EDU Express violated its duty to report under rule 65C-22.001(11)(b), the Department had to prove that EDU Express knew, or had reasonable cause to suspect, that the incident on February 24, 2017, was "abuse" within the meaning of section 39.01(2).

31. Therefore, the Department had to prove the following elements by clear and convincing evidence: (a) that the EDU employee committed a willful act; (b) that the willful act resulted in physical or mental harm; and that (c) the physical or mental harm significantly impaired the child's physical, mental, or emotional health.

32. Moreover, the pertinent statutory provisions must be strictly construed in EDU Express's favor. Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

33. Even though there is no evidence indicating that the EDU employee at issue intended to cause injury by grabbing the child's arm and removing the child from the scuffle,

the evidence clearly and convincingly demonstrates that the EDU employee intended to remove the child from the scuffle by pulling that child's arm. Thus, the EDU employee committed a "willful act" within the meaning of section 39.01(30)(a).

34. The evidence also clearly and convincingly demonstrates that the child suffered some degree of "harm" within the meaning of section 39.01(30)(a).

35. However, there is no detailed evidence as to whether the child's physical, mental, or emotional health was significantly impaired by the harm suffered by the child. For example, there was no evidence regarding the severity of the child's injury or whether she experienced any pain. Also, there is no detailed evidence about the amount of treatment that was necessary to treat the child's condition. Compare Dep't of Child. and Fam. Servs. v. Little People's Place and D.A., Case No. 09-6581 (Fla. DOAH April 15, 2010), adopted in part or modified (Fla. DCF Sept. 2, 2010) (considering the meaning of "abuse" in rule 65C-22.001(11) and finding the following: "The willful act resulted in physical harm to J.B. J.B. suffered bruises on the back and front of his neck. The bruises lasted approximately six days. They initially appeared as red marks and then changed in color to purple, yellow, and brown. Expert medical testimony at the hearing determined that the bruises are consistent with abuse caused by excessive force.").

36. Without such evidence, the Department cannot demonstrate by clear and convincing evidence that EDU Express violated rule 65C-22.001(11) (b).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families dismiss the Administrative Complaint at issue in this proceeding.

DONE AND ENTERED this 11th day of April, 2018, in Tallahassee, Leon County, Florida.

*Garnett Chisenhall*

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Filed with the Clerk of the  
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this 11th day of April, 2018.

ENDNOTES

<sup>1/</sup> Rule 65C-22.001(11) (b) has been amended since the event at issue in this proceeding occurred. A new version of Rule 65C-22.001 went into effect on October 25, 2017. However, the version of the rule in effect when the event at issue occurred is the rule that applies. See generally Anglicklis v. Dep't of Prof'l Reg., 593 So. 2d 298, 300 (Fla. 2d DCA 1992) (holding that

the appellants could not be found to have violated a rule that was not in effect at the time of the audit).

<sup>2/</sup> The Department classifies violations by severity, with Class I violations being the most severe. Rule 65C-22.010(2)(d)1.b. mandates that "[f]or the third and subsequent violation of a Class I standard, the Department shall suspend, deny or revoke the license. The Department . . . may also impose a fine not less than \$100.00 nor more than \$500.00 per day for each violation in addition to any other disciplinary sanction."

While EDU Express accumulated enough serious violations to trigger a mandatory suspension or revocation of its license, the testimony of Patricia Medico, the Department's family services counselor who had been responsible for inspecting EDU Express since it opened in 2013, indicated that the violations did not result from a disregard for the welfare of the children at EDU Express. For example, when asked if she had any concerns about the owner of EDU Express, Joy Vaeth, running a daycare center again, Ms. Medico testified that, "She cares so much about what she does. She's a hardworking lady. She works a lot of hours. I - my concern is common sense issues that are not being addressed." Ms. Medico also testified that she never felt that the children in Ms. Vaeth's care were in an unsafe environment.

<sup>3/</sup> Unless stated otherwise all statutory citations will be to the 2016 version of the Florida Statutes.

<sup>4/</sup> Section 39.201(2)(a) provides that:

Each report of known or suspected child abuse, abandonment, or neglect by a parent, legal custodian, caregiver, or other person responsible for the child's welfare as defined in this chapter, except those solely under s. 827.04(3), and each report that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care shall be made immediately to the department's central abuse hotline. Such reports may be made on the single statewide toll-free telephone number or via fax, web-based chat, or web-based report. Personnel



at the department's central abuse hotline shall determine if the report received meets the statutory definition of child abuse, abandonment, or neglect. Any report meeting one of these definitions shall be accepted for the protective investigation pursuant to part III of this chapter. Any call received from a parent or legal custodian seeking assistance for himself or herself which does not meet the criteria for being a report of child abuse, abandonment, or neglect may be accepted by the hotline for response to ameliorate a potential future risk of harm to a child. If it is determined by a child welfare professional that a need for community services exists, the department shall refer the parent or legal custodian for appropriate voluntary community services.

<sup>5/</sup> With the Department's consent, Ms. Vaeth introduced as EDU Express's Exhibit 4, a printout from KidsHealth.org describing Nursemaid's Elbow. According to this document, Nursemaid's Elbow is a common injury among toddlers and preschoolers. It occurs "when a ligament slips out of place and gets caught between two bones of the elbow joint." Sometimes, the injury heals on its own. "In most cases, a health care professional gets the ligament back in place by doing a quick, gentle move of the arm." A child with Nursemaid's Elbow experiences some pain when the injury occurs, "but it doesn't cause long-term damage."

The document from KidsHealth.org also states that Nursemaid's Elbow occurs because the ligaments of children 1 to 4 years old "are a bit loose." Therefore, "it can be easy for a ligament in the elbow to slip into the joint and get stuck." Nursemaid's Elbow can result from "just a small amount of force." As a result, the document counsels caregivers from: (1) pulling a child up by the hands; (2) swinging a toddler by holding the hands or wrists; or (3) jerking an arm when pulling a toddler along.

Fortunately, elbow ligaments tighten as children grow older, and most children will not suffer from Nursemaid's Elbow after they turn five years old.

With regard to the signs and symptoms of Nursemaid's Elbow, a child experiencing this condition "will not want to use the

injured arm because moving it is painful." The child "will keep the arm in a straight position or with a slight bend in the elbow." The injury will not be obvious because Nursemaid's Elbow "doesn't cause deformity or swelling."

If there is no swelling or other injury, a physician will treat Nursemaid's Elbow by performing "a gentle maneuver called a reduction." This procedure only takes a few seconds, and the child can "sit on the parent's lap while the doctor gently takes the arm from a straight position and bends it upward or straightens the arm while turning the palm to the floor." A child "might have a brief moment of pain during the reduction, but [will] quickly feel much better." Most children "have full use of the arm within 5 to 10 minutes, but some cases may require more than one reduction to successfully fix the injury." After a reduction, the child could be concerned about pain and may not want to use the arm. If the child is experiencing discomfort, the physician may put the arm in a sling and direct a parent to administer acetaminophen or ibuprofen for pain relief. In some cases, a physician may place a splint or partial cast "to protect the arm until a specialist can check it after a few days of rest."

As for prevention, the document from KidsHealth.org warns that some children are more prone to sustaining Nursemaid's Elbow than others and might experience it again even when parents try hard to prevent it.

While the document from KidsHealth.org was hearsay, it supplemented or corroborated Ms. Vaeth's direct testimony about Nursemaid's Elbow. As a result, the undersigned can base findings of fact on that document. See § 120.57(1), Florida Statutes (providing that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

<sup>6/</sup> The Department's investigation included an assessment by a child protective investigator of whether this incident amounted to child abuse. After examining the videotape of the incident, the Department concluded that there was no abuse. Nevertheless, the Department initiated the instant investigation based on its determination that EDU Express should have reported the incident.

<sup>7/</sup> EDU Express introduced an exhibit consisting of text messages between Ms. Vaeth and the child's parents on February 25 and 26,

2017. There are statements therein indicating that the child was not fully utilizing her arm after the incident and that the parents were attempting to consult with an orthopedic physician who would accept their insurance. EDU Express also introduced an "Accident/Incident" signed on February 25, 2017, by Ms. Vaeth and one of the child's parents. The report states that the child's arm "may have been dislocated." The report also notes that the child "was favoring" her arm when her father picked her up on the day of the incident. Finally, the report notes that the parents took the child to either an emergency room or urgent care that night. Another EDU Express exhibit is an e-mail between Ms. Vaeth and the child's grandmother indicating that the parents were taking the child to see her primary care physician on February 27, 2017 "in order to get a referral."

<sup>8/</sup> Section 39.201(1)(a)'s reference to having "reasonable cause to suspect" is most reasonably interpreted to refer to instances in which a person did not witness an instance of child abuse but has good reason to believe that abuse occurred. See Urquhart v. Helmich, 947 So. 2d 539 (Fla. 1st DCA 2006).

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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.