

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND  
FAMILIES,

Petitioner,

vs.

Case No. 17-6871

A STEP ABOVE CHRISTIAN ACADEMY,  
LLC, d/b/a A STEP ABOVE  
CHRISTIAN ACADEMY, LLC,

Respondent.

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RECOMMENDED ORDER

On February 1, 2018, a formal administrative hearing in this case was held via video teleconference from sites in Daytona Beach and Tallahassee, before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jane Almy-Loewinger, Esquire  
Department of Children and Families  
210 North Palmetto Avenue, Suite 447  
Daytona Beach, Florida 32114

For Respondent: Cynthia McGuire-Moore, pro se  
A Step Above Christian Academy, LLC  
1122 Dr. Mary McLeod Bethune Boulevard  
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUES

At issue is whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

On September 28, 2017, the Department of Children and Families (the "Department") filed an Administrative Complaint (the "Complaint") against Respondent, A Step Above Christian Academy, LLC, d/b/a A Step Above Christian Academy, LLC ("A Step Above").<sup>1/</sup> The Complaint stated that the Department intended to impose a \$50.00 civil penalty and revoke the facility's child care license because of repeated ratio violations at the facility.

A Step Above filed a Request for Administrative Hearing ("Request") on or about November 16, 2017. In the Request, A Step Above stated that it received the Complaint on November 4, 2017. Though the Department initially determined that A Step Above had not timely filed its Request, it later reversed that determination and conceded that the Request was timely filed.

On December 21, 2017, the Department forwarded the Request to the Division of Administrative Hearings for the scheduling and conduct of a formal hearing. The case was originally set for hearing on February 1, 2018, on which date it was convened and completed.

At the hearing, the Department presented the testimony of Betsy Lewis, a family services counselor supervisor; and of Jennifer Overley, a child care regulation licensing counselor. The Department's Exhibits 1 and 2 were admitted into evidence.

A Step Above was represented by its proprietor, Cynthia McGuire-Moore, who testified on behalf of the facility. A Step Above offered no exhibits into evidence.

The one-volume Transcript of the hearing was filed at the Division of Administrative Hearings on February 16, 2018. The Department timely filed its Proposed Recommended Order on February 22, 2018. Respondent did not file a proposed recommended order or any other form of a post-hearing submittal.

Unless otherwise stated, all statutory references are to the 2017 edition of the Florida Statutes.

#### FINDINGS OF FACT

1. The Department is authorized to regulate child care facilities pursuant to sections 402.301-402.319, Florida Statutes. Section 402.311 authorizes the Department to inspect licensed child care facilities. Section 402.310 authorizes the Department to take disciplinary action against child care facilities for violations of sections 402.301-402.319.

2. A Step Above is a child care facility operating pursuant to License Number C07V00425. The facility is located at 1122 Dr. Mary McLeod Bethune Boulevard, Daytona Beach,

Florida 32114. Cynthia McGuire-Moore is the owner of A Step Above.

3. Jennifer Overley works for the Department as a child care regulation licensing counselor. At the time of the hearing, Ms. Overley had worked in this position for two years. Ms. Overley was assigned to A Step Above as a licensing counselor. Among her duties was to inspect the facility on a regular basis to assure that it met the statutory and rule requirements regarding the ratio of staff to children.

4. Ms. Overley testified that she first discovered a ratio violation at A Step Above on December 17, 2015. At the time, there was a requirement of one staff member for each four children. Ms. Overley observed a ratio of one staff member to seven children at A Step Above on that date.

5. Ms. Overley testified that, under these circumstances, the licensing counselor is required to stay at the facility until the management brings it into ratio compliance. On this occasion, Ms. McGuire-Moore remedied the situation by having some parents come in and pick up their children. Because this was a first violation, Ms. Overley offered technical assistance and issued an administrative warning letter.

6. Ms. Overley discovered a second ratio violation on March 30, 2016. She stated that Ms. McGuire-Moore was out of ratio in two rooms. In the first room, the ratio requirement

was one staff person per four children, and the actual ratio was one staff member per seven children. In the second room, the required ratio was one staff member per four children and the actual ratio was one staff member per five children.

7. Ms. McGuire-Moore was not at the facility when Ms. Overley first arrived. Ms. McGuire-Moore's appearance restored the required ratio in one of the rooms. Ms. McGuire-Moore proceeded to rearrange the children in the second room to bring it into ratio.

8. Ms. Overley testified that she issued an administrative letter to Respondent for the second violation. She also counseled Ms. McGuire-Moore regarding ratio violations and how to stay in ratio.

9. Ms. Overley discovered a third ratio violation on June 16, 2016. At that time, a ratio of one staff person per six children was required, and she observed that the ratio was one staff person to nine children. Before Ms. Overley left the facility, another staff person arrived to bring it into the required ratio. The Department issued A Step Above a fine and another administrative warning letter.

10. Ms. Overley testified that she discovered the fourth ratio violation on July 21, 2016. The ratio on that day was one staff member to ten children when it should have been one staff member to four children. Ms. Overley stated she

stayed on-site until another staff person arrived. A Step Above was issued another fine, another administrative action letter, and was placed on six-months' probation. The probation period ran from October 2016 to February 2017. Ms. Overley also stated that during the probation period, she visited the daycare every month as required by law, and noted that A Step Above was in ratio for the entire term of its probation.

11. Ms. Overley testified that in February 2017, the facility was placed on a provisional license because Ms. McGuire-Moore had allowed her director's credential to lapse. Ms. McGuire-Moore received her new director's credential in October 2017 and A Step Above was shortly thereafter returned to the status of a regular license. At the outset of the hearing, the Department stipulated that its revocation action was based only on the facility's repeated ratio violations and not on Ms. McGuire-Moore's lapsed director's license.

12. As to the fifth and final ratio violation that led the Department to seek revocation of A Step Above's license, Ms. Overley testified that she went to the facility on September 21, 2017, to check on the status of Ms. McGuire-Moore's director's credential renewal. While there, Ms. Overley noted that the facility was once again out of ratio. The required ratio was one staff person per four children, and A Step Above was at one staff person per twelve children. Some

of the children were infants. Because this was the fifth ratio violation, the Department began revocation proceedings.

13. Ms. Overley testified that she had several conversations with Ms. McGuire-Moore as to the need to remain within ratio. Ms. Overley suggested that the facility reduce the need for employees by enrolling older children and declining to care for infants and one-year-olds, whose care requires more staffing.

14. Ms. Overley testified that she conducted an inspection of A Step Above on December 15, 2017, while this formal hearing on revocation was pending. She observed the facility to be out of ratio yet again, with a ratio of one staff person per eight children, when the proper ratio was one to four. Ms. Overley was unsure how to proceed, as the revocation process was already underway and a formal hearing was scheduled. She consulted her supervisor, and together they determined that a cease and desist letter should be issued to A Step Above.

15. Ms. Overley delivered the cease and desist letter on December 22, 2017, with directions that A Step Above should close its doors by December 29, 2017. Ms. Overley testified that she has since gone by the facility three times and has observed no activity.

16. Family services counselor supervisor Betsy Lewis testified regarding the matrix that the Department follows when

it discovers violations. Ms. Lewis testified that chapter 402 sets forth the Department's enforcement procedures and standards. Violations are classified according to their severity, with Class I being the most severe and Class III being the least severe. The ratio violations in this case are Class II violations, indicating that there is no imminent danger to a child, but there is the potential for harm.

17. Ms. Lewis testified that Department rules provide for progressive discipline for repeated violations. As to Class II violations, a first violation would result in only a citation and technical assistance to the daycare. A second Class II violation results in a \$50.00 fine, and a third Class II violation results in a \$60.00 fine. A facility receiving a fourth Class II violation is usually placed on probation, as A Step Above was in this case. A fifth violation requires the Department to suspend or revoke the daycare's license and to impose a fine of up to \$100.00. Under all the circumstances, the Department chose to seek revocation and a \$50.00 fine.

18. Ms. McGuire-Moore testified on behalf of A Step Above. She did not contest the violations, but also declined to take responsibility for them. She blamed her employees for not showing up on time. Ms. McGuire-Moore also stated that she had been unaware that a daycare's license could be revoked for repeated ratio violations.



CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

20. The Department has the burden of establishing the grounds for revocation of Respondent's licensure by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998).

21. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 n.5 (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. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

22. Judge Sharp, in her dissenting opinion in Walker v. Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

[C]lear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the factfinder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

23. At all times material to this case, Respondent was a provider of child care, pursuant to section 402.302, which provides the following relevant definition:

(1) "Child care" means the care, protection, and supervision of a child, for a period of less than 24 hours a day on a regular basis, which supplements parental care, enrichment, and health supervision for the child, in accordance with his or her individual needs, and for which a payment, fee, or grant is made for care.

(2) "Child care facility" includes any child care center or child care arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care, wherever operated, and whether or not operated for profit . . . .

24. Section 402.310(1)(c) requires the Department to adopt rules establishing the grounds under which it may deny, suspend,

or revoke a license and establishing a uniform system of procedures to impose disciplinary sanctions for violations of sections 402.301-402.319. Pursuant to this directive, the Department has adopted Florida Administrative Code Rule 65C-22.010.

25. Rule 65C-22.010(1)(e) provides, in relevant part:

(e) "Violation" means noncompliance with a licensing standard as described in an inspection report resulting from an inspection under Section 402.311, F.S., as follows with regard to Class I, Class II, and Class III Violations.

1. "Class I Violation" is an incident of noncompliance with a Class I standard as described on CF-FSP Form 5316, October 2017. Child Care Facility Standards Classification Summary, which is incorporated by reference . . . . [Any violation of a Class II standard that results in death or serious harm to a child shall escalate to a Class I violation. Class I violations are the most serious in nature.

2. "Class II Violation" is an incident of noncompliance with an individual Class II standard as described on CF-FSP Form 5316. Class II violations are less serious in nature than Class I violations . . . .

26. CF-FSP Form 5316 provides that a violation of the ratio standard is a Class II violation.

27. Section 402.305(4)(a) sets forth the staffing ratios for licensed child care facilities as follows:

(4) STAFF-TO-CHILDREN RATIO.—

(a) Minimum standards for the care of children in a licensed child care facility as established by rule of the department must include:

1. For children from birth through 1 year of age, there must be one child care personnel for every four children.
2. For children 1 year of age or older, but under 2 years of age, there must be one child care personnel for every six children.
3. For children 2 years of age or older, but under 3 years of age, there must be one child care personnel for every 11 children.
4. For children 3 years of age or older, but under 4 years of age, there must be one child care personnel for every 15 children.
5. For children 4 years of age or older, but under 5 years of age, there must be one child care personnel for every 20 children.
6. For children 5 years of age or older, there must be one child care personnel for every 25 children.
7. When children 2 years of age and older are in care, the staff-to-children ratio shall be based on the age group with the largest number of children within the group.

28. The Department proved by clear and convincing evidence that A Step Above committed the five ratio violations alleged in the Complaint, and that A Step Above even committed a

sixth violation after it was notified of the Department's intent to revoke its license and while this case was pending.

29. Rule 65C-22.010(2)(d)2. provides the following standard of progressive enforcement for Class II violations:

2. Class II Violations.

a. For the second violation of the same Class II standard, the Department shall impose an administrative fine of \$50.00 for each such violation.

b. For the third violation of the same Class II standard, the Department shall impose an administrative fine of \$60.00 per day for each such violation.

c. For the fourth violation of the same Class II standard, the Department shall place the provider's license on probation status for a period not to exceed six months, and shall also impose a fine of \$75.00 per day for each such violation.

d. For the fifth and subsequent violation of the same Class II standard, the Department shall suspend, deny, or revoke the license, and shall also impose an administrative fine of \$100.00 per day for each such violation.

30. The quoted rule requires the Department to suspend or revoke a license for a fifth or subsequent violation of the same Class II standard. The Department chose to seek revocation rather than suspension of A Step Above's license. Under the facts of the case, this was not an unreasonable exercise of the Department's enforcement discretion. Given that the license is

being revoked, the undersigned concludes that the requested \$50.00 civil penalty would constitute redundant punishment.

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 License Number C07VO0425 issued to A Step Above Christian Academy, LLC, d/b/a A Step Above Christian Academy, LLC.

DONE AND ENTERED this 21st day of March, 2018, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of March, 2018.

ENDNOTE

<sup>1/</sup> No explanation was provided as to the "d/b/a" designation that merely repeats the full name of Respondent. The designation has been retained on the assumption that it has some significance to the Department.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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