STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 18-0042

A+ GROWING ACADEMY, INC., d/b/a A+ GROWING ACADEMY, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On March 13, 2018, Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (DOAH) conducted a duly-noticed hearing in this case in Bradenton, Florida.

APPEARANCES

For Petitioner: Lisa Ajo, Esquire
Department of Children and Families
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9393 North Florida Avenue
Tampa, Florida 33625

For Respondent: Peter Mackey, Esquire[1/]
Catherine Z. Mackey, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated the provisions of Florida Administrative Code Rule 65C-22.001(11)

(2013),[2/] as alleged in the Administrative Complaint; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On December 4, 2017, the Department of Children and Families (Petitioner or the Department), filed an Administrative Complaint (AC) against Respondent, A+ Growing Academy, Inc., d/b/a A+ Growing Academy Inc. (Respondent or Academy).

The allegations giving rise to this hearing included:

> 3. On October 16, 2017, Child Care Regulation conducted an inspection at this facility based on a complaint received from a collateral agency. The facility was found to be in violation of Rule 65C-22.001(11), F.A.C. (2013), mandatory report of child abuse. The owner, operator, and staff of a child care facility are mandatory reporters and have a duty to report suspected child abuse or neglect as required by Section 39.201, Florida Statutes. The facility's director and staff failed to report a suspected abuse of a child to the Department's abuse hotline. The hotline received the abuse report from another source, about a week after the alleged incident occurred.
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> 4. According to the complaint, a teacher witnessed another teacher "popping a child on the mouth" and informed the child's grandmother, who also works at the facility. The alleged perpetrator was L.G.,[3/] a teacher. During the inspection and collateral agency's investigation, Director C.H. reported that a teacher, A.T., informed her that another teacher, L.G., told her that L.G. "popped a child on the mouth" for biting another child. C.H. claimed that she did not know she is required to call the abuse hotline before conducting her own internal inquiry. She also admitted to wanting to

> interview the teachers first before reporting because of a personal conflict between L.G. and A.T. The collateral agency arrived before she concluded her internal investigation. Child Care Regulation advised the Director to immediately report suspected abuse to a child, before even conducting an internal inquiry.
>
> 5. A.T. confirmed her account of the alleged abuse. At the time of the incident, she turned around when she heard a child crying. L.G., the other teacher in the classroom, admitted to A.T. for hitting the child on the mouth for biting another child. A.T. told the child's grandmother about this incident, who also works at the facility. The grandmother reported the incident to the facility's Director. Child Care Regulation reminded A.T. about her duties as a mandated reporter. The abuse report was made to the abuse hotline [by] another source.
>
> 6. The collateral agency closed their investigation on November 3, 2017, as not substantiated for the abuse allegations. Nevertheless, it is still the duty of the facility's Director and teachers to report any suspicions of child abuse to the Department's abuse hotline, which they failed to do.

The AC alleged that Respondent violated the provisions of rule 65C-22.001(11) by failing to file an abuse report as directed by the rule. Such violations are described as Class 1 violations of the child care licensing standards.

Class I violations are the most serious in nature, pose an imminent threat to a child including abuse or neglect, and could or do 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.

Respondent timely filed a "Request for Administrative Hearing." On January 4, 2018, the AC and Respondent's request were forwarded to DOAH. Following input from both parties, the undersigned scheduled the case to be heard on March 13. The hearing took place as scheduled.

At the final hearing, the Department requested that judicial notice be taken of the following: section 402.302(3), Florida Statutes (2017); section 39.201, Florida Statutes (2017); and rule 65C-22.001(11). The Department presented the testimony of four witnesses: Colleen Clark, former child protective investigator of the Manatee County Sheriff's Office; Juliette Linzmayer, compliance monitor for the Early Learning Coalition in Manatee County, Incorporated; Aniko Barna-Roche, DCF family services counselor; and Mary Beth Wehnes, DCF regional safety manager for the Child Care Regulation program. DCF offered three exhibits which were received into evidence.

Respondent presented the testimony of Linda Gonzalez, Respondent's former employee, and Charlotte Johnson, Respondent's director. Respondent did not offer any exhibits.

At the conclusion of the hearing, the parties were advised when their proposed recommended orders (PROs) would be due. The Transcript was filed on March 26, 2018, and a Notice of Filing

Transcript was issued setting forth the due date for the PROs. Following one extension of time in which to file the PROs, Petitioner timely filed its PRO. Respondent filed its PRO one day late, but because the Recommended Order had not been issued, and no objection was filed by Petitioner, Respondent's PRO has been considered along with Petitioner's PRO in the preparation of this Recommended Order.

On March 9, 2018, the parties filed a Joint Pre-hearing Stipulation. The parties agreed to several facts. However, the testimony at hearing contradicted some of those admitted facts. To the extent that any of those facts are relevant, they are included below.

Unless otherwise indicated, all statutory references are to the 2017 version of the Florida Statutes. References to the Florida Administrative Code Rules are to the version in effect at the time of the allegation, unless otherwise indicated.

FINDINGS OF FACT

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. Respondent is a licensed child care facility located in Manatee County, Florida.

3. On October 12, 2017, Ms. Linzmayer received a complaint from an anonymous source who said she worked at the Academy. As a result of that complaint, Ms. Linzmayer was prompted to call the Department's abuse hotline.

4. Ms. Clark was working as an investigator for the Manatee County Sheriff's Office, Child Protective Investigation Unit in October 2017. When notified of the potential abuse allegation, Ms. Clark conducted an investigation on October 12, 2017. The scope of Ms. Clark's investigation centered on the allegations that a teacher had hit a child in the mouth. Ms. Clark spoke with employees at the Academy and then met with the alleged victim (A.O.) and the child's family at a local law enforcement office.

5. Ms. Clark's investigation did not substantiate the case (of actual abuse) because she did not have proof that something did or did not happen. Ms. Clark notated that the Academy had not contacted the abuse hotline regarding the suspected child abuse and there was no incident report.[4/]

6. Ms. Barna-Roche conducts health, safety, routine and renewal inspections, as well as complaint inspections of child

care facilities. After receiving the hotline abuse allegation, Ms. Barna-Roche inspected the Academy and spoke with several of its employees. As a result of her inspection, Ms. Barna-Roche found that the Academy failed to report the alleged child abuse.

7. The only first-person account of the alleged classroom events of October 6, 2017, was provided by Ms. Gonzalez, a former teacher at the Academy. Ms. Gonzalez was in the two-year-old classroom, with another teacher, Ms. Tover. Ms. Gonzalez credibly testified that she did not "pop" a child in the mouth, and that she had never told Ms. Tover she had "popped" or used physical or inappropriate force relative to A.O.

8. Ms. Gonzalez provided a brief history of her association with Ms. Tover, which was unflattering to both. For a time Ms. Gonzalez lived in the same house with Ms. Tover and members of Ms. Tover's family. A disagreement arose regarding Ms. Gonzalez's dog, and Ms. Gonzalez was asked to leave the house. In order to gather her belongings from the house, Ms. Gonzalez was forced to call law enforcement for assistance. This disagreement appears to have spilled over to the Academy, where both women worked.

9. As part of her supervisory duties, Ms. Johnson (also known as Ms. Charlotte or Charlotte Hill) makes it a point to observe the children as they enter and leave the Academy. She conducts these observations in order to address any potential

issues regarding a child's well-being and to provide excellent service to the children and their parents in the care provided.

10. Ms. Johnson was not in the two-year-old classroom on October 6, 2017, but observed the children entering and leaving the Academy that day. Ms. Johnson did not see the alleged abuse victim, A.O., with a fat or bloody lip as he left Respondent's facility on October 6, 2017.

11. Ms. Johnson was aware that Ms. Gonzalez had lived in the same house as Ms. Tover and her sister, and Ms. Johnson knew that Ms. Gonzalez moved out of the house prior to October 2017. Ms. Johnson was aware of some interpersonal issues between Ms. Tover and Ms. Gonzalez that were not associated with the Academy.

12. Both Ms. Gonzalez and Ms. Johnson acknowledged being mandatory reporters, and clearly testified that had either seen or thought there was abuse, they would have reported it.

13. As alleged in paragraph 4 of the AC above, in one instance Ms. Tover is alleged to have "witnessed another teacher 'popping a child on the mouth' and informed the child's grandmother, who also works at the facility." Yet, in paragraph 5 of the AC, Ms. Tover "confirmed her account of the alleged abuse. At the time of the incident, she turned around when she heard a child crying." (emphasis added). Ms. Tover did

not testify at hearing. There is no evidence that any abuse occurred.

14. The testimony provided by Ms. Linzmayer, Ms. Clark, and Ms. Barna-Roche relies upon hearsay, and in some cases hearsay upon hearsay. Their testimony is found to be insufficient to meet the burden in this proceeding.

15. The lack of direct evidence of the alleged abuse is troublesome. The indication that Ms. Tover "witnessed" the abuse or turned around after she heard a two-year-old child cry and was told something occurred is insufficient to overcome the direct testimony of the alleged perpetrator, who denied the accusation. It is true that additional training in spotting child abuse or suspected child abuse, and reporting such abuse or suspected child abuse is warranted at the Academy; however, the evidence is not clear and convincing that any abuse, real or suspect, occurred on October 6, 2017.

CONCLUSIONS OF LAW

16. 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.

17. In cases where a state agency alleges that a licensee engaged in wrongdoing, the burden is on the Department to prove the wrongdoing. Dep't of Banking and Fin. v. Osborne Stern &

Co., 670 So. 2d 932, 934 (Fla. 1996). Factual findings based on record evidence must be made indicating how the alleged conduct violates the statutes or rules or otherwise justifies the proposed sanctions. Mayes v. Dep't of Child. and Fam. Servs., 801 So. 2d 980, 982 (Fla. 1st DCA 2001).

18. The standard of proof in this case is clear and convincing evidence because the Department is seeking to discipline Respondent's license, thus making the matter penal in nature. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

19. The clear and convincing evidence standard is greater than the preponderance of the evidence standard used in most administrative proceedings. The clear and convincing standard is quite stringent. It has been described as follows:

> [C]lear 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

20. 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]lthough 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).

21. The Department is authorized by section 402.310, Florida Statutes, to impose sanctions against child care 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.

22. Rule 65C-22.001(11), Child Safety, provides the following:

> (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.

23. In pertinent part, section 39.201 provides the following:

> (1)(a) Any person who knows, or has reasonable cause to suspect, 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).
>
> (b) Any person who knows, or who has reasonable cause to suspect, that a child is abused by an adult other than a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter, shall report such knowledge or suspicion to the department in the manner prescribed in subsection (2). (emphasis added).

24. Section 39.01(2) defines "abuse" as:

> [A]ny 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.

25. In order for the Department to prove that the Academy violated its duty to report under rule 65C-22.001(11), the Department had to prove by clear and convincing evidence that the Academy knew, or had reasonable cause to suspect, that the incident on October 6, 2017, was "abuse" within the meaning of section 39.01(2).

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

27. There is no evidence to substantiate the claim that the Academy knew or had reasonable cause to suspect that child abuse occurred. Without such evidence, the Department cannot demonstrate by clear and convincing evidence that the Academy violated rule 65C-22.001(11). The evidence strongly suggests that there was a great deal of animosity between two of Respondent's workers who would go to unfortunate lengths to cause problems.

RECOMMENDATION

Upon consideration of the evidence and testimony presented at the final hearing, and 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 dismissing the Administrative Complaint.

DONE AND ENTERED this 25th day of April, 2018, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2018.

ENDNOTES

[1/] Mr. Mackey first entered his appearance at the hearing. The DOAH docket reflects that Drew Chesanek, Esquire, of the Mackey Law Group, P.A., executed the Joint Response to the Initial Order in January 2018. A Notice of Substitution of Counsel was filed on March 7, 2018, introducing Catherine Mackey, Esquire, to the file. A second Substitution of Counsel was filed on March 12, 2018, reiterating that Ms. Mackey was stepping in for Mr. Chesanek.

[2/] Chapter 65C-22 was revised and amended in October 2017. Rule 65C-22.001(11) was repealed and moved to the DCF Child Care Facility Handbook, effective October 25, 2017. Both parties agreed that rule 65C-22.001(11) was the rule in effect when this allegation arose.

[3/] In order to protect the child's privacy, the Recommended Order refers to the child and the parents by initials.

[4/] An incident report (IR) is required when something happens to a child at a child care center. The IR is shared with the parents of the child or children involved in the incident, and kept on file at the child care facility. In this instance, the IR would have covered the alleged action of A.O. biting another child, and a separate IR for the alleged "popping."

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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.