

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND  
FAMILIES,

Petitioner,

vs.

Case No. 18-0644

SU'S CREATIVE CORNER PRESCHOOL  
NO. 2,

Respondent.

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RECOMMENDED ORDER

On July 3, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Patricia E. Salman, Esquire  
Department of Children and Families  
401 Northwest 2nd Avenue, Suite N-1014  
Miami, Florida 33128

For Respondent: Lucy C. Piñeiro, Esquire  
Lucy C. Piñeiro & Associates, P.A.  
717 Ponce de Leon Boulevard, Suite 309  
Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

The issues are whether Respondent allowed an employee without background screening, unaccompanied by a screened individual, to supervise a class of children in care and, if so, what penalty Petitioner should impose.

PRELIMINARY STATEMENT

By Administrative Complaint served on January 8, 2018, Petitioner alleged that Respondent is licensed to operate a child care facility, holding license C11MD1591. The Administrative Complaint alleges that, during a complaint inspection on October 6, 2017, Petitioner's inspector observed that a classroom of children in care were left alone with a person who proved to be unscreened.

The Administrative Complaint relies on several statutes and rules. Paragraph 1 of the Administrative Complaint states that "this is an administrative action for imposition of a civil penalty for known incidents of occurrence as authorized in section 402.310 . . . and rules 65C-22.010 and 65C-22.012." Paragraphs 3 and 4 of the Administrative Complaint state that Respondent violated "standard #05-13: Supervision; An unscreened individual was left alone to supervise children in care, a Class I violation." Paragraph 4 adds that the \$100 fine is in accordance with sections 402.310 and 402.305(2)(f), Florida Statutes, and Florida Administrative Code Rules 65C-22.010

and 65C-22.003(8) (a). Another paragraph 3 of the Administrative Complaint states that Petitioner is terminating Respondent's Gold Seal Quality Care designation due to the Class I violation, as provided by section 402.281(4) (a).

The subparagraph of section 402.305(2) cited in the Administrative Complaint, section 402.305(2) (f), concerns the minimum training of child care personnel in "[s]pecialized areas," such as computer technology; the purpose of this citation is unclear and may be erroneous. Although uncited by Petitioner, section 402.305(2) (a), Florida Statutes (2017), authorizes Petitioner to adopt minimum standards for level 2 background screening of child care personnel; perhaps Petitioner meant to cite this provision.

Section 402.310(1) (a) authorizes Petitioner to impose discipline upon the holder of a license to operate a child care facility. Section 402.310(1) (a)1. authorizes a fine of \$100 per violation per day, but authorizes a fine of \$500 per violation per day for a violation that could or does cause death or serious harm. Section 402.310(1) (b) requires Petitioner, in setting discipline, to consider the severity of the violation, corrective actions taken by the licensee, and previous violations by the licensee.

As in effect at the time of the inspection, rule 65C-22.010(1)(d)1. defines a Class I violation as a violation of any Class I standard identified in CF-FSP, Form 5316, July 2012. This form is available online at [https://www.flrules.org/Gateway/reference.asp?No=Ref-03034\[,\]](https://www.flrules.org/Gateway/reference.asp?No=Ref-03034[,]) and the thirteenth unnumbered section under chapter 5 states that it is a Class I violation to leave an unscreened individual alone to supervise children in care. (This violation has since been renumbered as Standard 4-18.)

Former rule 65C-22.003(8)(a) concerns the required credentials of a director or a child care facility and is irrelevant to this case.

Section 402.281(4)(a) provides that the commission of a Class I violation is a ground for termination of a Gold Seal Quality Care designation.

Respondent timely requested a hearing.

At the hearing, Petitioner called two witnesses and offered into evidence six exhibits: Petitioner Exhibits 1 through 6. Respondent called one witness and offered into evidence 11 exhibits: Respondent Exhibits 1 through 11. All exhibits were admitted.

The court reporter filed the transcript on August 9, 2018. Both parties filed proposed recommended orders by August 30, 2018.

## FINDINGS OF FACT

1. Respondent is a licensed child care facility operating at 28834 South Dixie Highway in Homestead. Respondent has not previously been guilty of any Class I or II violations for a period of time of not less than two years; in fact, Respondent has never been found guilty of a Class I violation at either of its preschools, which opened in 2003 and 2007.

2. On October 6, 2017, Petitioner's inspector conducted a routine inspection of Respondent's child care facility. She found three infants in the classroom for infants up to 12 months of age and observed that the three infants in care were supervised by Yerelis Escobar with no other adult present in the room.

3. The inspector asked the director for the employees' personnel files, and, in producing them, the director discovered that Ms. Escobar's file did not contain documentation of screening. This was Ms. Escobar's first day on the job. Recommended by another teacher at Respondent's preschool, Ms. Escobar had recently worked in a local shelter with children and reportedly had obtained a federal background screening in connection with her job.

4. As the director handed the file to the inspector, the director admitted that she had not obtained documentation of level 2 background screening on Ms. Escobar. The director had

delegated this responsibility to another employee, who had failed to discharge this responsibility and has since been terminated.

5. After confirming the supervision violation, the inspector advised the director that the inspector could not leave the building until supervision of the infant classroom was transferred to a screened individual. The director ordered Ms. Escobar to go home and, as a screened individual, assumed the supervisory responsibilities herself until another screened teacher from the other preschool was able to take over the classroom. Ms. Escobar never returned to the facility, and the director has implemented a double-check system to ensure that all new hires possess level 2 background screening, if they are to be left alone with children in care.

6. After discussing her findings with her supervisor, the inspector cited Respondent for a Class I violation--specifically, a violation of Standard 5-13. After considering the statutory factors listed below, Petitioner imposed a \$100 fine.

7. Respondent's supervisor testified that the requirement of background screening is fundamental and is most important for the most vulnerable children--namely, infants. The supervisor testified that he was unaware of Petitioner's declining to prosecute any provable Class I violation and any Class I penalty less severe than a \$100 fine. This testimony is credited.

8. Respondent claims that, in prior cases, Petitioner has elected not to establish a Class I violation, despite facts establishing such a violation, and instead has imposed a corrective action plan. The problem in Respondent's proof as to these other cases is a failure to preclude the possibility that Petitioner merely has assessed the facts in those cases as insufficient to support a successful prosecution. The problem in Respondent's theory is that it essentially seeks to reject as an abuse of discretion the decision of Petitioner to prosecute a clear violation of a child-safety rule and impose the smallest authorized fine.

9. Respondent is a leading provider of high-quality child care services in Homestead. For the past eight years, Respondent has been accredited by the National Association for the Education of Young Children and is the only preschool holding such accreditation in Homestead. Pursuant to a contract with the Early Learning Coalition, Respondent's school is monitored twice monthly. For its students, 90 percent of whom are at-risk, Respondent offers enrichment programs, such as dance, as well as tutoring and mentoring programs. Respondent also provides its autistic students with daily sessions with a therapist employed by Applied Behavioral Analysis.

10. Respondent is a Gold Seal Quality Care provider. As noted below, this designation is terminated upon the final

assessment of a Class I violation, which is why Respondent seeks to avoid this determination by, for instance, the imposition of a corrective action plan, even with a larger fine. Respondent's annual gross revenues total about \$300,000, but the loss of the Gold Seal Quality Care designation may reduce Respondent's annual gross revenues by as much as \$264,000, which may result in the closure of the preschool.

#### CONCLUSIONS OF LAW

11. DOAH has jurisdiction. §§ 120.569, 120.57(1), and 402.310(2) and (4), Fla. Stat.

12. The burden of proof is on Petitioner to prove the material allegations by clear and convincing evidence. § 120.57(1)(j), Fla. Stat.; Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

13. "Child care personnel" must undergo level 2 background screening. § 402.305(2)(a), Fla. Stat. An employer is prohibited from allowing an employee to have contact with a vulnerable person, such as a child, if such contact requires background screening, unless the employee has successfully completed background screening. § 435.06(2)(a), Fla. Stat.

14. Based on the authority cited above, it is a Class I violation to leave an unscreened individual alone to supervise a child in care, and the proposed \$100 fine is appropriate after consideration of the statutory factors. However, this



determination necessitates the termination of Respondent's Gold Seal Quality Care designation. The significant financial impact resulting from the loss of the Gold Seal Quality Care designation does not justify relaxed enforcement of child-safety laws against the superior day care facilities that have earned this distinction. The same standards with the same level of enforcement must apply to all day care facilities for the Gold Seal Quality Care designation to retain any meaning.

RECOMMENDATION

It is

RECOMMENDED that the Department of Children and Families enter a final order finding Respondent guilty of allowing an unscreened employee, in the absence of a screened individual, to supervise a classroom of children in care; imposing a \$100 fine; and terminating Respondent's Gold Seal Quality Care designation.

DONE AND ENTERED this 7th day of September, 2018, in Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of September, 2018.

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.