

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

vs.

Case No. 18-2648

MY DREAM CHILD CARE, INC., d/b/a
ALBERTO'S DREAM CHILD CARE AND
LEARNING CENTER,

Respondent.

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RECOMMENDED ORDER

On July 18, 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 Salman, Esquire
Department of Children and Families
401 Northwest 2nd Avenue, Suite N-1104
Miami, Florida 33128

For Respondent: Juan Mendez Babani, Esquire
Mendez Babani Law
1700 North Treasure Drive
North Bay Village, Florida 33141

STATEMENT OF THE ISSUES

The issues are whether Respondent allowed a person without background screening, unaccompanied by another screened adult, to

supervise a class of three-year-old children; and, if so, the penalty, including whether Petitioner may terminate Respondent's participation in the Gold Seal Quality Care program.

PRELIMINARY STATEMENT

By Administrative Complaint served on April 23, 2018, Petitioner alleged that Respondent is licensed to operate a child care facility, holding license C11MD1305. The Administrative Complaint alleges that, during a complaint inspection on April 3, 2018, Petitioner's inspector observed that a classroom of children were left alone with an unscreened person. The Administrative Complaint alleges that this is a Class I violation, pursuant to sections 402.310 and 402.305(2)(f), Florida Statutes, and Florida Administrative Code Rules 65C-22.010 and 65C-22.003(8)(a). For this offense, the Administrative Complaint imposes a \$100 fine and, pursuant to section 402.281(4)(a), terminates Respondent's status as a Gold Seal Quality Care provider until two years have passed without a Class I violation.

Respondent requested a hearing.

At the hearing, Petitioner called two witnesses and offered into evidence ten exhibits: Petitioner Exhibits 1 through 10. Respondent called no witnesses and offered into evidence no exhibits. All exhibits were admitted.

Neither party ordered a transcript. Both parties filed proposed recommended orders on July 31, 2018.

FINDINGS OF FACT

1. Respondent is a licensed child care facility. Respondent has not previously been guilty of any Class I or II violations for a period of time of not less than two years.

2. In response to a complaint involving the use of an unscreened person to supervise children, Petitioner's inspector visited the facility and checked each of the classrooms. She found that the three-year-old classroom was supervised by Marly Pachon with no other adult present in the room. After examining the personnel records and other sources, the inspector correctly determined that Ms. Pachon had not undergone background screening. The inspector brought this violation to the attention of the director, who promptly remedied the violation by assuming responsibility herself to supervise the class, as the director has successfully completed background screening.

3. After discussing her findings with her supervisor, Ms. Pachon cited Respondent for a violation of Standard 4-18, which, as described below, is a Class I violation. After considering the statutory factors listed below, Petitioner imposed a \$100 fine, which resulted in the termination of Respondent from the Gold Seal Quality Care program.

4. Respondent's defenses are that Ms. Pachon was a volunteer, not an employee, and the subject children were not alone with Ms. Pachon because, in an adjoining room, a screened teacher was supervising her four-year-old class. However, the physical dividers between the classes were sufficient to require the designation of each area as a separate classroom, which was how Respondent was using the space.

CONCLUSIONS OF LAW

5. DOAH has jurisdiction. §§ 120.569 and 120.57(1), Fla. Stat.

6. The burden of proof is on Petitioner to prove the material allegations by clear and convincing evidence.

§ 120.57(1)(j); Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

7. "Child care personnel" must undergo level 2 background screening. § 402.305(2)(a). "Child care personnel" include volunteers working in a child care facility. § 402.302(3). 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).

8. It is a Class I violation to leave an unscreened person alone to supervise a child in care. Standard 4-18, CF-FSP Form 5316, which is incorporated by rule 65C-22.010(1)(e)1. A Class I

violation terminates a provider's Gold Seal Quality Care designation. Fla. Admin. Code R. 65C-22.010(1)(e)1.

9. For the first (or second) Class I violation, Petitioner "shall, upon applying the factors in Section 402.310(1), F.S., impose a fine not less than \$100.00 nor more than \$500.00 per day for each violation, and may impose other disciplinary sanctions in addition to the fine." Section 402.310(1)(b) requires Petitioner to consider the severity of the violation, including the severity of the actual or potential harm; actions taken by the licensee to correct the violation; and any previous actions by the licensee.

10. Petitioner has adequately considered the statutory factors. Although the potential for harm is considerable for an offense of this type, no harm occurred, the director quickly corrected the violation, and Respondent's record has been good. For these reasons, Petitioner selected a fine at the lowest end of the authorized range and imposed no other sanction.

11. Respondent invites consideration of the finding of a violation in light of the loss of Respondent's Gold Seal Quality Care designation, which is conditioned on the absence of Class I violations for a period of two years. § 402.281(4)(a). The Administrative Law Judge acknowledges that the loss of this designation impacts Respondent financially by an amount much greater than a \$100 fine, but the Administrative Law Judge is

unable to justify raising the bar for what Petitioner must prove to establish a violation when the provider is confronted with the loss of this designation. The legislature has enacted rigorous standards for earning and maintaining this designation, and the public, which relies on these designations, has every reason to assume that the designated providers will be held to the same standards as providers without this designation.

RECOMMENDATION

It is

RECOMMENDED that the Department of Children and Families enter a final order finding Respondent guilty of a Class I violation for allowing an unscreened person to be alone with children in care; imposing a \$100 fine; and terminating Respondent's participation in the Gold Seal Quality Care program until Respondent requalifies for this designation.

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



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