

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND  
FAMILIES,

Petitioner,

vs.

Case No. 18-5147

MY FIRST STEPS OF BRADENTON,  
INC.,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a final hearing in this matter by video teleconference on March 25, 2019, at sites in Sarasota and Tallahassee, Florida.

APPEARANCES

For Petitioner: Lisa E. Ajo, Esquire  
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For Respondent: Jed Berman, Esquire  
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed a Class I violation and should have a \$500.00 administrative fine imposed, for the reasons given in the Administrative Complaint dated August 23, 2018.<sup>1/</sup>

PRELIMINARY STATEMENT

On August 23, 2018, the Department of Children and Families (Department) notified Respondent, a licensed child care facility, that the Department intended to impose a \$500.00 administrative fine on the ground Respondent's owner used excessive discipline on a child in violation of minimum standards for child discipline practices. Respondent timely requested a hearing to contest the proposed action, and the matter was referred to the Division of Administrative Hearings to conduct a formal hearing.

At the hearing, Petitioner presented the testimony of four witnesses. Also, Department Exhibits 1 through 5 were accepted in evidence.<sup>2/</sup> Respondent presented the testimony of two witnesses. Respondent's Exhibits A through E were accepted in evidence.

A one-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on April 30, 2019, and they have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. The Department is the state agency responsible for licensing and regulating child care facilities.

2. Respondent holds license number C12MA0082 issued pursuant to chapter 402, Florida Statutes, and Florida Administrative Code Chapter 65C-22. It authorizes Respondent to operate a child care facility at 3815 26th Street West, Bradenton, Florida. The owner of the facility is Carina Piovera.

3. First licensed in 1997, the facility provides child care for children ranging from the age of one to five. It employs five teachers and has a capacity of 35 children. Besides routine inspections by the Department every three months, for the last ten years, the facility has been inspected periodically by the Early Learning Coalition, which provides the facility with funding vouchers for families that cannot pay for full child care. Prior to this incident, Respondent never has been charged with a Class I violation. This class of violation is the most serious in nature and is one that could or does result in serious harm or death to a child. Fla. Admin. Code R. 65C-22.010(1)(e)1.

4. Based on a complaint by a parent that Ms. Piovera used excessive discipline on her 18-month-old son, A.M., the Department conducted a two-hour complaint inspection on June 20, 2018. The inspection resulted in the issuance of an Administrative Complaint alleging that Ms. Piovera used

"inappropriate discipline" on the child, in violation of section 2.8A. and F., Child Care Facility Handbook (Handbook), incorporated by reference in rule 65C-22.001(6). The first section requires generally that a child care facility adopt a "discipline policy" that is consistent with section 402.305(12), while the second provision enumerates discipline techniques that are prohibited.

5. The "inappropriate discipline" is described in the Administrative Complaint as follows:

On May 30, 2018, K. Alejandra-Pacheco, a child care personnel, worked on an art project with one of the children in her care, while the other children were climbing up and down the chairs and taking off their shoes. Ms. Alejandra-Pacheco stated that she is not allowed to discipline the children, only the facility director, Carina Piovera. Ms. Piovera came into the classroom and made the children sit down. A.M., a one-year old toddler, was one of the children in the classroom. In it, Ms. Piovera is seen roughly handling A.M. by grabbing him, aggressively wiping his nose, having intense body language when talking to the child, forcefully pushing the child's chair into position at the table, and then aggressively put his hands on the table. A.M. is visibly afraid and upset, crying throughout his interaction with Ms. Piovera, who appears to be intimidating to the child. This incident was recorded by the facility camera.

6. The Department employee who conducted the inspection did not testify at the hearing. However, a Department witness who viewed a video of the incident alleges that Ms. Piovera "used

excessive force during hygiene and behavior redirection," and this was "severe, humiliating, or frightening to the child."

7. The alleged incident occurred in the facility's toddler room. Six children, ranging in age from one to two years old, were in the room, along with a teacher, Ms. Pacheco. A surveillance camera, reloaded every 24 hours, is installed in each classroom to monitor all activities. The video is erased every 30 days by the security company, Swann Communication (Swann). If parents wish to watch their children in real time or within the 24-hour window before the camera is reloaded, they can download an application (app) on their cell phone, view the toddler room, and even make copies of the video. Ms. Piovera stated that she is "very comfortable" with video cameras in each classroom because parents are entrusting their children to her care and want to see how they are being treated.

8. Although the original surveillance video long since has been erased, A.M.'s mother recorded a video of the incident on her cell phone using an app provided by a third party and not Swann. The video has been accepted in evidence as Department Exhibit 2. The video is fairly clear, is a "little fast," and is the only known recordation of the incident still available. Ms. Piovera testified that she has watched it more than 20 times. The Department's allegations are based wholly on its

interpretation of the cell phone video. The incident itself lasts less than a minute.

9. A.M., then 18 months old, and not a one-year-old, as stated in the Administrative Complaint, frequently had allergies or nasal problems, which caused a runny nose or cough. His mother authorized the use of a nebulizer for inhaling medications, but it never was used at the facility. The morning of May 30, 2018, was no different, and A.M. came to the facility that day with a runny nose. Although the mother denied her son had allergies, his runny nose was brought to her attention when she brought the child in that morning. She replied that she had been giving him medicine but "nothing was working."

10. Around 10:21 a.m., and not 11:00 a.m., as stated in the Administrative Complaint, Ms. Piovera entered the toddler room to assist Ms. Pacheco in redirecting the children to a new activity, i.e., to sing a song and do art work, after efforts by Ms. Pacheco to have the children sit down and keep their shoes on were unsuccessful. Redirection is considered a form of discipline by the Department, but Ms. Piovera considers moving to a new task a routine action in caring for toddlers.

11. Just before Ms. Piovera entered the room, A.M. and two other children were standing in their chairs and climbing onto the table. When A.M. saw Ms. Piovera enter the room, he immediately sat down in the chair. Ms. Piovera placed him in an

upright position, adjusted his pants, and observed that his nose needed to be wiped and he had taken one shoe off. His nose had crusted mucous and the discharge was green. The child was crying at this point.

12. The mother acknowledged that A.M. does not like having his nose wiped. Ms. Piovera needed two swipes with a tissue to clean A.M.'s nose. His feet lifted slightly when his nose was wiped, but this was because A.M. was trying to avoid having his nose cleaned. Ms. Piovera also put his shoe back on. Although A.M. began crying when she first touched him, no unusual force or pressure was used, and there were no marks or bruises on the child. Within a few seconds after his nose was cleaned, A.M. became calm, stopped crying, and placed his head on the table. The class then continued with painting activities.

13. A Department witness acknowledged that there was no hitting, spanking, shaking, slapping, or pushing. However, based on her viewing of the incident, she contends Ms. Piovera "kind of twisted his body," "pulled his arms when she first grabbed him to get him to sit down in his chair," "appeared [to be] squeezing his arms," and "felt" there was "forcing or restricting movement" when she turned the child around. There is less than clear and convincing evidence to support these allegations.

14. Around 2:15 p.m., the child was picked up by his mother. Although the mother had viewed the incident on her cell

phone as it happened, she did not say anything to Ms. Piovera at that time or contact the Department to discuss any concerns.<sup>3/</sup>

Notably, when the incident occurred, the mother was in a dispute with Ms. Piovera over an unpaid bill (\$1,345.00), which

Ms. Piovera says still is outstanding. The mother contends the bill has been paid, but Ms. Piovera says the dispute is headed to small claims court.

15. The mother withdrew the child from the facility that day without giving any explanation to Ms. Piovera, and he never returned to the facility. On June 13, 2018, A.M.'s mother raised the May 30 incident with Ms. Piovera for the first time in a series of text messages. Around the same time, she posted the video in a message on her Facebook page.

16. On June 20, 2018, or three weeks after the alleged violation, A.M.'s mother reported the incident to the Department. The mother admits she always was behind in her payments, and, on the day she filed her complaint, she was asked by Ms. Piovera to stop by the facility and pay the balance owed.

17. The Department requested that a child protective investigator (CPI) from the Manatee County Sheriff's Office investigate whether child abuse occurred. A Department representative and the CPI conducted a joint inspection on June 20, 2018. On July 16, 2018, the CPI issued a finding that the charge was unsubstantiated. Resp. Ex. A.



18. Notwithstanding the CPI's determination, the Department points out that this proceeding involves a violation of Handbook standards, while the CPI was looking for indicators of abuse, which are governed by chapter 39. Thus, it contends that the CPI could have a non-substantiated finding in regards to abuse, but Ms. Piovera still could be cited for a rule violation.

#### CONCLUSIONS OF LAW

19. Because this proceeding is penal in nature, the Department bears the burden of proving by clear and convincing evidence that Respondent is guilty of the charges in the Administrative Complaint. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

20. Section 402.310 provides in part that:

(1)(a) The department or local licensing agency may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder:

1. Impose an administrative fine not to exceed \$100 per violation, per day. However, if the violation could or does cause death or serious harm, the department or local licensing agency may impose an administrative fine, not to exceed \$500 per violation per day in addition to or in lieu of any other disciplinary action imposed under this section.

21. The Administrative Complaint alleges that by using an inappropriate discipline technique on a child, Respondent

violated section 2.8A. and F. of the Handbook, adopted and incorporated by reference in rule 65C-22.001(6); and that this conduct constitutes a Class I violation, for which a \$500.00 fine should be imposed.

22. Paragraphs 2.8A. and F. of the Handbook read as follows:

A. The child care facility shall adopt a discipline policy consistent with Section 402.305(12), F.S., including standards that prohibit children from being subjected to discipline which is severe, humiliating, frightening, or associated with food, rest, or toileting. Spanking or any other form of physical punishment is prohibited.

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F. The following discipline techniques shall be prohibited in the child care facility:

1. The use of corporal punishment/ including, but not limited to:

a) Hitting, spanking, shaking, slapping, twisting, pulling, squeezing, or biting;

b) Demanding excessive physical exercise, excessive rest, or strenuous or bizarre postures;

c) Compelling a child to eat or have in his/her mouth soap, food, spices, or foreign substances;

d) Exposing a child to extreme temperatures;

e) Rough or harsh handling of children, including but not limited to: lifting or jerking by one or both arms; pushing; forcing or restricting movement; lifting or moving by grasping clothing; covering a child's head.

23. Section 2.8A. requires a licensee to adopt a discipline policy consistent with section 402.305(12). Because Respondent is not charged with failing to adopt a policy, this provision cannot form the basis for imposing a sanction on Respondent's license.

24. A Class I violation "is an incident of noncompliance with a Class I standard as described in CF-FSP Form 5316, October 2017, Child Care Facility Standards Classification Summary, which is incorporated by reference." Fla. Admin. Code R. 65C-22.010(1)(e)1. Appendix A, Glossary, page 298 of the Classification Summary defines a Class I violation as "the most serious type of noncompliance with child care standards that could result or does result in death or serious harm to the health, safety and well-being of a child and includes overt abuse and negligence related to the operation and maintenance of a facility or home."

25. Further, a "serious injury" is defined in section 1.2 of the Handbook as "any injury/incident resulting in death or serious physical or emotional harm to a child."

26. As previously found, there is less than clear and convincing evidence that Respondent's owner engaged in a discipline technique that is prohibited by section 2.8F. of the Handbook. To the contrary, the more persuasive evidence shows that Ms. Piovera did not use excessive force, that is, handle

A.M. in a rough or harsh manner, "jerk" his arms, and push the child in an inappropriate way or unnecessarily restrict his movement. And the evidence does not support a conclusion that the "discipline" administered to the child was severe, humiliating, or frightening.

27. Assuming for the sake of argument only that Ms. Piovera's interaction with the child constituted a failure to comply with the child discipline standards, her conduct did not rise to the level of a Class I violation. Even if she jerked the child's arm, pushed him into position, and restricted his movement while she wiped his nose and placed a shoe back on his foot, this did not and could not result in death or serious physical or emotional harm to A.M., as required by the Department's rules.

#### 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 dismissing the Administrative Complaint, with prejudice.

DONE AND ENTERED this 8th day of May, 2019, in Tallahassee,  
Leon County, Florida.

*D. R. Alexander*

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D. R. ALEXANDER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of May, 2019.

ENDNOTES

<sup>1/</sup> The Administrative Complaint is dated August 22, 2017, which the agency concedes is a typographical error.

<sup>2/</sup> Department Exhibit 5, identified in the record as a "copy of [the mother's] invoice for services rendered to Ms. Piovera," was to be late-filed within seven days after the hearing. However, it was never filed.

<sup>3/</sup> A.M.'s mother watched videos of her son on a regular basis and would telephone Ms. Piovera when she observed anything out of the ordinary. For example, if she saw her son having his diapers changed and he had a diaper rash, she would immediately telephone Ms. Piovera and instruct her to "go wash his butt, don't do this, don't use any wipes." It is telling that she did not call Ms. Piovera on May 30, 2018.

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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.