STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 19-6727

SPELLMAN PREP SCHOOL,

Respondent.
_____/

RECOMMENDED ORDER

On January 31, 2020, Hetal Desai, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing by video teleconference with sites in Altamonte Springs and Tallahassee, Florida.

APPEARANCES

For Petitioner: Brian Christopher Meola, Assistant General Counsel
Department of Children and Families
Suite S-1129
400 West Robinson Street
Orlando, Florida 32801-1707

For Respondent: Sharon Swann, pro se
Spellman Prep School
6844 Silver Star Road
Orlando, Florida 32818

STATEMENT OF THE ISSUES

Whether Respondent committed (1) a Class I violation when staff allegedly pulled the hair of a child as a method of discipline; and (2) a Class III violation when it failed to have a signed CF-FSP 5337 Child Abuse and Neglect Reporting Requirements Form (Form) in an employee's personnel file

on three occasions; and if so, what sanction should be assessed against Respondent.

PRELIMINARY STATEMENT

On November 13, 2019, Petitioner, the Department of Children and Families (the Department), served Respondent, Spellman Prep School (School), with an Administrative Complaint (Complaint). The Complaint sought to impose fines for three alleged violations as summarized below.

> (1) A violation of Florida Administrative Code Rule 65C-22.001 (2019)[1] and section 2.8 of the Child Care Facility Handbook (Handbook), when a method of discipline was used at the School that was severe, humiliating, or frightening to children. ($250 fine).
>
> (2) A violation of rule 65C-22.001 and section 3.12.D of the Handbook, for failing to provide a resilient surface beneath and within the fall zone for playground equipment. ($50 fine).[2]
>
> (3) A violation of section 402.305(1), Florida Statutes, rule 65C-22.006, and section 7.4.C of the Handbook, for failing to maintain a Form during Department inspections on October 9, 2019, July 6, 2018, and June 1, 2018. ($25 fine).

The School contested the Complaint and submitted an undated letter requesting a formal administrative hearing. The Department referred the matter to DOAH on December 19, 2019, and it was assigned to an Administrative Law Judge for hearing.

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[1] All references to the Florida Statutes and Florida Administrative Code are to the 2019 versions which were in effect on the date of the alleged violations. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2013).

[2] The Department withdrew the second alleged violation related to the surfacing under and around the playground equipment at the close of its case at the final hearing. As such, no findings of facts or conclusions of law are made regarding this alleged violation.

A prehearing telephone conference was duly noticed and held on January 24, 2020. No representative from the School called into the telephone conference, and nothing substantive was discussed.[3]

At the final hearing, the Department presented the testimony of three witnesses: Willette Tisdale (a Department licensing counselor), Allen Young (a Department child protective investigator), and Christopher Vereen (a Department licensing counselor). Petitioner's Exhibits A through C were admitted into evidence without objection. Respondent presented the testimony of its owner and director, Sharon Swann. Respondent's exhibit was not admitted into evidence.[4]

The hearing was recorded by a court reporter. At the conclusion of the hearing, the parties were instructed they must file proposed recommended orders with DOAH within ten days, unless the transcript of the proceedings was ordered and neither party indicated it was ordering a copy of the transcript. Therefore, the proposed recommended orders were due on or before February 11, 2020. The Department submitted an untimely proposed recommended order on February 20, 2020, and the School did not file a proposed recommended order. For the sake of thoroughness, the Department's proposed recommended order has been reviewed.

[3] The notice for the January 24, 2020, prehearing telephone conference was sent to the School's address of record and was not returned to DOAH as undeliverable. Moreover, at the time and date of the prehearing telephone conference, DOAH staff attempted to reach the School at the phone number of record to determine if it would be participating, but was unable to reach anyone.

[4] Respondent offered one document, to which the Department objected. The document was not admitted into evidence because it was not disclosed to the Department prior to the hearing, was not provided to the undersigned, and was deemed irrelevant.

FINDINGS OF FACT

1. The Department is responsible for licensing and enforcing regulations to maintain health, safety, and sanitary conditions at child care facilities. *See* § 402.305, Fla. Stat. and Fla. Adm. Code. R. 65C-22.010.

2. The School is licensed by the Department to operate as a child care facility (License ID number C09OR0879) at 6844 Silver Star Road in Orlando, Florida. The School offers day and evening child care services. Sharon Swann has been the director and owner of the School since 1983.

3. S.P.W. was an eight-year-old male who attended the School in the summer of 2019.[5]

Complaint and Investigation

4. On July 31, 2019, S.P.W.'s mother contacted the Department to report that S.P.W. was upset because Ms. Swann pulled his hair, screamed at him, and called him stupid.

5. As a result of the complaint, the next day the Department initiated a visit to the School by a child protective investigator, Alan Young, and a licensing counselor, Willette Tisdale. Mr. Young interviewed S.P.W., Ms. Swann, another facility worker (Whitney Lawrence), and another child who attended the School. Ms. Tisdale observed the interviews.

6. As a result of the interviews, the Department prepared a "Investigative Summary Child Institutional Investigation (without Reporter Information)" (Summary). The unsigned and undated copy of the Summary offered into evidence indicates the investigation into the July 31 incident involving S.P.W. was closed on September 4, 2019.

[5] Minors shall be referred to by their initials to protect their identities.

Incident on July 31, 2019

7. On July 31, 2019, Ms. Swann was watching over the children during naptime. She noticed S.P.W. had his cellphone out on the mat and was distracting other children from napping.

8. Ms. Swann had previously allowed S.P.W. to use his phone when he could not sleep but had warned him about distracting the other kids during naptime. On this occasion, she took the cellphone away from him.

9. When Ms. Swann attempted to talk to him, S.P.W. turned around on his mat, and would not look at her. The Department alleges Ms. Swann then pulled S.P.W.'s hair as punishment. Ms. Swann admitted she tugged S.P.W.'s ponytail and demonstrated her actions at the hearing. She denied, however, that the tugging was done in anger or as a form of discipline. Rather, she claimed she was trying to get his attention to get him to turn around and face her.

10. At this point, S.P.W. became angry, "puffed up," and acted as if he was going to stand up and fight. Ms. Swann told S.P.W. something to the effect of "don't think about fighting me, because I'll put you down like Mike Tyson." S.P.W. calmed down and remained on his mat. Ms. Swann admitted she made the statement regarding Mike Tyson but stated she was not serious and did not intend to hit S.P.W. Based on Ms. Swann's appearance and demeanor at the hearing, the undersigned finds her testimony credible.

11. The Department alleges another School staff member suggested to Ms. Swann that S.P.W. read a book since he was having trouble napping, and Ms. Swann allegedly replied that he was too stupid to read. The Department also alleges S.P.W. was crying after the encounter with Ms. Swann. Ms. Swann denied that she called S.P.W. stupid, or that he was upset after this encounter.

12. The other School staff member who was interviewed by Mr. Young also did not corroborate the Department's allegations that Ms. Swann called the child stupid or that he was crying. These allegations were not proven at

the hearing and were based entirely on hearsay testimony and statements in the Summary.

13. Even if the Summary was the type of document generally admissible under a hearsay exception, this particular Summary is unreliable. For example, the "Complaint Form" notes the complaint was filed by a parent on July 31, 2019, for an incident that occurred on July 30, 2019, but the Summary states the incident occurred the same day S.P.W.'s mother made the complaint (July 31, 2019). There are also inconsistencies between the Department witnesses' testimony regarding the interviews and what was in the Summary. For instance, Ms. Tisdale referred to the other child interviewed by Mr. Young as "J." in her hearing testimony, but this child is referred to as "K." in the Summary. Moreover, in the Summary, there is no reference that S.P.W. cried as a result of Ms. Swann's actions.

14. The Department failed to offer credible evidence establishing the allegations that Ms. Swann was imposing discipline or that she called S.P.W. stupid or dumb. The undersigned also finds the Department had no non-hearsay evidence rebutting Ms. Swann's credible version of events.

Incident on October 9, 2019

15. On or about October 9, 2019, Ms. Tisdale returned to the School to conduct a follow-up inspection unrelated to the July 31 incident. During that inspection, Ms. Tisdale discovered the School did not have a signed Form for one of its employees in that employee's personnel file. Ms. Tisdale inquired about the missing Form, but Ms. Swann was unable to immediately locate it. Before Ms. Tisdale left the School, however, Ms. Swann produced a signed copy of the Form.

16. Ms. Swann admitted the signed Form was not in the employee's personnel file but testified she found it in a pile of papers on her desk. There is no dispute the signed Form was provided to Ms. Tisdale on the same day of the inspection.

17. Ms. Tisdale testified she did not accept the Form on October 9 during the inspection because she suspected at the time that Ms. Swann forged the signature of the employee on the Form. At the hearing, however, Ms. Tisdale refused to state Ms. Swann had committed fraud or that the documentation was false. Instead, she stated she did not accept the signed Form because she had already reported the violation when Ms. Swann produced the document and she believed it was a violation of the record-keeping standards if the Form was not in the personnel file.

18. According to the unrefuted testimony of Christopher Vereen, the School had previously been cited on June 1, 2018, and July 6, 2018, for not having signed Forms for all of its employees.

ULTIMATE FACTUAL DETERMINATION

19. The School is not guilty of violating section 2.8.A. of the Handbook because the evidence failed to establish Ms. Swann's actions could be considered severe, humiliating, or frightening, which is an essential element of the disciplinable offense.

20. The School is not guilty of violating section 7.4.C. of the Handbook because the evidence established it maintained the signed Form on-site as required.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction. *See* §§ 120.569, 120.57(1), and 402.310 (4), Fla. Stat.; and Fla. Admin. Code R. 65C-22.010(3).

22. This proceeding, in which the Department seeks to impose discipline upon a license, is penal in nature. Therefore, the burden of proof is on the Department to prove the material allegations by clear and convincing evidence. *See* § 120.57(1)(j); *Coke v. Dept. of Child. & Fam. Servs.*, 704 So. 2d 726 (Fla 5th DCA 1998).

23. The "clear and convincing" standard as stated by the Florida Supreme Court is 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 testimony must be precise and 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

24. Florida Administrative Code Rule 65C-22.001 incorporates the Handbook by reference. Relevant to these proceedings, the Handbook provides the following standards:

> Section 2.8.
>
> 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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> * * *
>
> Section 7.4 Personnel Records
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> Records must be maintained and kept current on all child care personnel, as defined by Section 402.302(3), F.S. These records shall be on-site, available for review by the licensing authority and must include:
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> A. A complete employment application with the required statement pursuant to Section 402.3055(1)(b), F.S.

> B. Documentation of position and date of employment.
>
> C. CF-FSP Form 5337, Child Abuse & Neglect Reporting Requirements [Form], which is incorporated by reference in 65C-22.001(7)(*l*), F.A.C., must be signed on or before hire date and annually thereafter by all child care personnel.

(emphasis added).

25. The foregoing regulatory provisions "must be construed strictly, in favor of the one against whom the penalty would be imposed." *Munch v. Dep't of Prof'l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); *see also*, *e.g., Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011)(noting statutes imposing a penalty cannot be extended by construction).

26. In its late-filed proposed recommended order, the Department argues the hearsay in the Summary and witness testimony may serve as a basis for finding a violation of section 2.8. of the Handbook. *See* Pet'r's Proposed Recommended Order (PRO) at p.6-7. The Department argues hearsay can be used to support, supplement, or explain other evidence, citing Florida Administrative Code Rule 28-106.213.

27. Although "[h]earsay is admissible for limited purposes in an administrative action [and] it may be admitted to supplement or explain other evidence, [it] is not sufficient in itself to support a finding unless it would be admissible in a civil action over objection." *Wark v. Home Shopping Club*, 715 So. 2d 323, 324 (Fla. 2d DCA 1998) (citing section 120.57(1)(c), Fla. Stat.). Here, it is unclear what non-hearsay evidence the Department claims the hearsay evidence is supporting. Although the evidence established Ms. Swann tugged on S.P.W.'s ponytail, there is no non-hearsay evidence establishing that this action was done as a punishment or that it was "severe, humiliating, or frightening" as required.

28. The Department argues the Summary and its witnesses' testimony regarding the interviews with S.P.W. and the other child is admissible pursuant to a hearsay exception for child victim statements, pursuant to section 90.803(23), Florida Statutes, which provides:

> (23) Hearsay exception; statement of child victim.
>
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
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> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
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> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial

> or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

29. This exception is inapplicable for numerous reasons. First, the Department made no attempts to invoke this hearsay exception at the hearing. Even if it had, it has not alleged that S.P.W. was a victim of "child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration" as referenced in the exception. *See* § 90.803(23)(a), Fla. Stat. On the contrary, the Department found no signs of abuse.

30. Second, even if the exception applied, the Department did not attempt to establish the predicate for admission of hearsay statements that is required by section 90.803(23)(a)1. There was no evidence of the maturity level of S.P.W. or the other child interviewed. The duration of the offense (mere seconds) was short and did not rise to the level of corporal punishment or abuse. There was no evidence about the relationship between Ms. Swann and S.P.W., but he and his sibling remained at the School after the incident. There was also no other evidence of similar behavior between Ms. Swann and S.P.W. or any other child at the School. The Department also put on no evidence of the reliability of the statements made by S.P.W. or the other child. Because the Department failed to satisfy the predicate necessary for the application of the child victim hearsay exception, neither the Department's witnesses' testimony as to what S.P.W. and other child stated or the Summary containing what the children told the Department's investigator can be the basis of any finding of fact.

31. Finally, the Department argues the Summary and hearsay testimony can be considered because "no objection to the hearsay testimony was raised by the Respondent." PRO at p. 7. Regardless of whether there was an objection, because Section 90.803(23) is inapplicable and no proper predicate

was established for this exception, this hearsay evidence cannot alone support a finding of fact. *See* § 120.57(1)(c), Fla. Stat. and Fla. Admin. Code R. 28-106.213(3).

32. Although Ms. Swann's actions in pulling S.P.W.'s ponytail and making the Mike Tyson comment were not professional, the Department failed to establish Ms. Swann's conduct was discipline that was "severe, humiliating, or frightening," nor could Ms. Swann's conduct be considered equivalent to "[s]panking or any other form of physical punishment." *See* Handbook at § 2.8. Ms. Swann's testimony established she gently pulled on S.P.W.'s ponytail to get him to turn his head, and there is no clear and convincing evidence this harmed, humiliated, or frightened him. As such, the Department failed to prove Count I of the Administrative Complaint. *See generally Dep't of Child. & Fam. v. My First Steps of Bradenton, Inc.,* Case No. 18-5147 (Fla. DOAH May 8, 2019; Fla. DCF Aug. 9, 2019) (finding no violation of section 2.8.A. of the Handbook where although child "began crying when she first touched him, no unusual force or pressure was used, and there were no marks or bruises on the child . . . and within a few seconds after the contact the child became calm, stopped crying, and placed his head on the table.").

33. Regarding the third alleged violation of Respondent's failure to maintain a signed Form, section 7.4.C. of the Handbook does not require such Form be located in the employee's personnel file. Rather, it clearly states that this Form must be located "on-site." *See* Handbook at § 7.4; c*ompare* Handbook at § 7.4.1. C. (requiring that for a child care facility waiting for an out of state background check "the Department's email informing of the individual's eligibility for a provisional hire status must be in the personnel file." (emphasis added)). The Department failed to prove by clear and convincing evidence that Respondent did not maintain the Form in question "on-site." *See McClung v. Crim. Just. Stds. & Training Comm'n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("No conduct is to be regarded as included

within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.").

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 as amended at the final hearing.

DONE AND ENTERED this 2nd day of March, 2020, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 2nd day of March, 2020.

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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.