

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

vs.

Case No. 20-0100

CHAPPELL SCHOOLS, LLC, D/B/A
CHAPPELL SCHOOLS DEERWOOD,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on March 12, 2020, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David Gregory Tucker, Esquire
Department of Children and Families
5920 Arlington Expressway
Jacksonville, Florida 32231-0083

For Respondent: Jesse Nolan Dreicer, Esquire
Tassone, Dreicer & Hill
1833 Atlantic Boulevard
Jacksonville, Florida 32207

STATEMENT OF THE ISSUES

At issue is whether Respondent committed the Class II violation alleged in the Administrative Complaint and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On December 19, 2019, the Department of Children and Families (the “Department”) filed a one-count Administrative Complaint (the “Complaint”) against Chappell Schools, LLC, d/b/a Chappell Schools Deerwood (“Chappell”). The Complaint stated that during a complaint investigation on October 10, 2019, Department Licensing Counselor Gretrell Marshall observed the following:

A staff member did not comply with the facility's written disciplinary and expulsion policies. Counselor reviewed the facility's discipline and expulsion policy and observed that the director D.T. did not comply with the policy. Counselor reviewed accident/incident reports and observed that a child E.W. bit another child A.H. five (5) times in one (1) week and at least twice in one (1) day during that week. There were other reports that showed the child had bitten other children several times within a two (2) month period. Per director D. T. the child was suspended for one (1) day. According to the facility's Child Management Behavior protocol: After two (2) incidents in one (1) week, the child will be suspended for one (1) day; after five (5) incidents the child will be suspended for one (1) week. The child E.W. mother K.W. arrived at the center for a meeting due to another biting attempt and to discuss a course of action with director.

The Complaint stated that this was a Class II violation of child care licensing standards. It was the facility’s third Class II violation within a two-year period. The Complaint stated that the fine imposed for this violation would be \$60.00 and revocation of Chappell’s Gold Seal Quality Care designation.

Chappell timely filed with the Department a letter that challenged the factual allegations of the Complaint and requested a formal administrative hearing. On January 10, 2020, the Department forwarded Chappell's request

to the Division of Administrative Hearings for the scheduling and conduct of a formal hearing. The case was set for hearing on March 12, 2020, on which date it was convened and completed.

At the hearing, the Department presented the testimony of its Licensing Counselor, Gretrell Marshall. The Department's Exhibits A and B were admitted into evidence. Chappell presented the testimony of its Chief Executive Officer, Nancy Dreicer. Chappell's Exhibits A through C were admitted into evidence.

The one-volume Transcript of the hearing was filed at the Division of Administrative Hearings on April 14, 2020. At the close of the hearing, the parties agreed that they would file their proposed recommended orders within 20 days of the filing of the transcript. In any event, both parties timely filed their Proposed Recommended Orders on April 17, 2020.

All references to the Florida Statutes are to the 2019 edition, unless otherwise noted.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. The Department is authorized to regulate child care facilities pursuant to sections 402.301 through 402.319, Florida Statutes. Section 402.310 authorizes the Department to take disciplinary action against child care facilities for violations of sections 402.301 through 402.319.

2. Chappell operates at eight child care locations in Duval and St. Johns Counties, admitting children from the ages of six weeks to five years. Chappell also has an after school program for children ages five to eight, and a summer camp for children ages five to ten. Chappell is licensed to operate

the Child Care Facility at 8400 Baycenter Road, Jacksonville, Florida, pursuant to License Number C04DU0093. The facility on Baycenter Road is commonly called Chappell's Deerwood facility.

3. Gretrell Marshall works for the Department as a Licensing Counselor. She inspects child care facilities and family daycare homes to ensure they are not operating in violation of Department standards. She has worked for the Department for two years. Ms. Marshall's previous experience includes operating a family daycare home for two years, and seven years as the owner and director of a licensed child care facility in Jacksonville. She has worked as an infant and toddler development specialist and holds a bachelor's degree in psychology.

4. On October 10, 2019, Ms. Marshall went to Chappell to investigate a parent's complaint that a child at the facility was repeatedly biting other children.

5. The Department's rules require child care facilities to document all accidents and incidents that occur while a child is in the care of program staff. The incident reports must be completed on the same day the incident occurs. The documentation of the incident must be shared with the child's parent or guardian on the day the incident occurs.

6. Chappell's "accident/incident report" form contained spaces for the name and age of the child, the names of the teachers and other adults present, and the date and time of the incident. It had multiple choice check-boxes for location (classroom, playground, bathroom, cafeteria, or "other"); markings (abrasion, bite, bruise, bump, cut/tear, fracture, puncture, red mark, rug burn, scratch, sprain, or "other"); appendage (a list of 26 body parts); and first aid given (irrigate, antibacterial soap, bandage, ice pack, splint, or "other"). The form also included space for a narrative description of the accident or incident, and whether the parent was called.

7. Ms. Marshall found several accident/incident reports that student E.W., a two-year-old boy, bit other children and a teacher between August 21 and October 4, 2019.

8. On August 21, 2019, E.W. bit another student in the back while jostling for position in a line. The skin was not broken and the bite did not require first aid. Chappell recorded that the bite left bite marks.

9. An August 27, 2019, incident report described two biting incidents on the same day. First, E.W. bit another student “just because” and pulled another student’s hair. Then, E.W. indicated to the teacher that he had to use the bathroom. The teacher took him to the bathroom but the child just ate toilet paper and urinated on himself. When the teacher tried to change his diaper, E.W. bit and kicked the teacher.

10. For the August 27, 2019, incident, Chappell’s accident/incident report form left blank the first aid treatment space. The report noted the bites left bite marks.

11. On September 11, 2019, E.W. bit another child in the back. Chappell’s accident/incident report recorded that first aid was administered, but did not specify the form of treatment. The report noted that the bites resulted in bite marks.

12. Chappell reported that two biting incidents occurred on September 30, 2019. E.W. bit another student on the back during circle time. Later, when the students went outside to play, E.W. bit another child on the back without provocation. The teacher talked to him about being gentle with friends. The accident/incident report left blank the space for reporting first aid.

13. On October 2, 2019, E.W. bit another student in the back. A different form, called a “behavior incident report,” was used by Chappell to record this incident. This form did not contain the check-boxes of the accident/incident report but simply provided space for a narrative “description of behavior incident.” The narrative stated that E.W. and other students were on the castle playhouse in the playground when E.W., “unprovoked,” bit another

student on the back. Chappell did not record whether this bite left marks or required first aid.

14. On October 4, 2019, at 12:40 p.m., E.W. bit another student on the right shoulder during play time in their classroom. The accident/incident report recorded that the bite left a bite mark. The space on the form to indicate whether the bite required first aid was left blank.

15. A separate accident/incident report completed on October 4, 2019, documented that E.W. bit another student at 3:15 p.m., while the children were lining up at the door of the classroom. The report did not indicate whether there were bite marks or whether first aid was required.

16. Chappell intended to suspend E.W. for one day on October 4, 2019. The school phoned the parents but was unable to get anyone to come in and pick up E.W. Therefore, the suspension was enforced on the next school day, October 7, 2019. The school warned the parents that another biting incident would result in the child's permanent removal from Chappell.

17. On October 23, 2019, E.W. bit another child at the school. Chappell expelled E.W.

18. Nancy Dreicer, the Chief Executive Officer of Chappell, testified that there is a societal problem with small children being suspended and expelled from childcare centers. She stated that more children are expelled from child care centers in the United States than are expelled from grade schools and high schools.

19. Ms. Dreicer testified that disciplinary expulsions were problematic for multiple reasons. Behaviors such as biting are common among two year olds, but a child that age learns nothing from being suspended or expelled from school. The parents are forced to find another child care facility and whatever behavioral issue is causing the child's misbehavior is not addressed. The problem is merely pushed off onto a new child care facility.

20. Ms. Dreicer testified that in 2019, Chappell received a grant from Hope Haven Children's Hospital and the Community Foundation of

Jacksonville to have a behavioral psychologist at the Deerwood facility to work with the children and to train the teachers in dealing with behavior problems.

21. The psychologist worked with E.W., observing the child in the classroom, tracking the timing of his misbehavior, and looking for triggers to his actions. He worked with the teachers on how to identify triggers.

22. Ms. Dreicer pointed out that suspending the child would have meant that the psychologist could not observe him. She noted that nothing approaching a serious injury had occurred, and added that the school would not have kept E.W. in the classroom if there was any possibility of his being a danger to the other students. She believed that E.W.'s behavior was improving, but that biting is such a natural part of a two year old's development that it was very difficult to stop it completely.

23. The Department has adopted a Child Care Facility Handbook (the "Handbook"), intended to be used on conjunction with sections 402.26 through 402.319. The Handbook has been adopted by reference in Florida Administrative Code Rule 65C-22.001(6).¹ The Introduction to the Handbook states, "To protect the health and welfare of children, it is the intent of the Legislature to develop a regulatory framework that promotes the growth and stability of the child care industry and facilitates the safe physical, intellectual, motor, and social development of the child."

24. Section 2.8 of the Handbook, titled "Child Discipline," provides, in relevant part:

A. The child care facility shall adopt a discipline policy consistent with Section 402.305(12), F.S., including standards that prohibit children from

¹ The cited rule references the May 2019 edition of the Handbook. However, the version of the Handbook provided on the Department's website and through the hyperlink provided in the rule as published in the Florida Administrative Register is dated December 2019. To further complicate matters, the version of the Handbook introduced at the hearing was dated October 2017. The October 2017 and December 2019 editions are identical in all respects relevant to the determination in this proceeding, which leads to the inference that the May 2019 edition is likewise identical.

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.

B. The child care facility operators, employees, and volunteers must comply with written disciplinary and expulsion policies.

C. Verification that the child care facility has provided the parent or guardian a written copy of the disciplinary and expulsion policies used by the program must be documented on the enrollment form with the signature of the custodial parent or legal guardian.

* * *

E. A copy of the current^[2] disciplinary and expulsion policies must be available for review by the parents or legal guardian and the licensing authority. Providers must have a comprehensive discipline policy that includes developmentally appropriate social-emotional and behavioral health promotion practices, as well as discipline and intervention procedures that provide specific guidance on what child care personnel should do to prevent and respond to challenging behaviors. Preventive and discipline practices should be used as learning opportunities to guide children's appropriate behavioral development (emphasis added).

25. Pursuant to section 2.8.A of the Handbook, Chappell has adopted and implemented a discipline policy, titled "Child Management Behavior Protocol." Chappell's policy sets forth the following mission statement:

Chappell recognizes the importance of promoting acceptable behavior and methods of discipline within the child care setting. We believe that all

² The word "current" is not in the October 2017 edition of the Handbook. This is the only relevant difference between section 2.8 in the October 2017 Handbook and section 2.8 in the December 2019 edition of the Handbook

children have the right to expect positive approaches to discipline, which foster self-esteem, respect, tolerance and self-control. Behaviors which injure people either emotionally or physically or damage property are real problems to adults/staff and the other children. These behaviors must be dealt with in an appropriate manner.

26. After setting forth a catalogue of acceptable and unacceptable methods of discipline to be applied in specific instances of misbehavior, the Chappell discipline policy next stated the process to be followed “In The Case of Persistent Inappropriate Behavior” as follows, in relevant part:

- The child’s parents/caregivers will be involved at first hit, kick, thrown toy, etc. The Director will discuss the situation with the parents/caregivers in an attempt to find the possible cause of the behavior.
- The Director and the parents/caregivers will together develop strategies for dealing with the unwanted behavior, which could be implemented at home.
- Should it be necessary and with the consent of the parent/caregiver, advice and assistance will be sought from relevant external specialists to address the matter.
- After two incidences in one week, which caused or could have caused injury to self or others, the child will be suspended for one day, and after five such incidences the child will be suspended for a week. However, if the Director at any time feels the behavior is extreme and dangerous to other children or teachers, the child will be removed from the Center. This may be a temporary or permanent expulsion....

27. There was no question that the Chappell discipline policy meets the requirements of the Handbook.

28. The Class II violation alleged by the Department is that Chappell failed to follow its own discipline policy in the case of E.W., thereby violating section 2.8.B of the Handbook, which requires child care facilities to “comply with written disciplinary and expulsion policies.”

29. The Department points out that the Chappell discipline policy specifies that after two incidences in one week that “caused or could have caused injury,” the child will be suspended for one day, and that five such instances will result in one week’s suspension. The Chappell policy gives the Director discretion to remove a child for extreme or dangerous behavior. The Department notes that the policy does not give the Director discretion to waive the stated discipline schedule.

30. Ms. Marshall calculated that under Chappell’s written policy, E.W. should have been suspended for one day after the two biting incidents on August 27, 2019, and again following the two biting incidents on September 30, 2019. Chappell did not suspend E.W. on either occasion.

31. Ms. Marshall calculated that in the space of the five days between September 30 and October 4, 2019, E.W. was involved in five biting incidents. Ms. Marshall testified that, under Chappell’s policy, E.W. should have been suspended for one week. Chappell gave E.W. a one-day suspension on October 7, 2019.

32. Ms. Dreicer conceded in the abstract that biting is an act that could cause injury to another child. She did not concede that E.W.’s biting was injurious or threatened actual injury to the other children at the child care facility. It was a developmental behavior issue that the facility’s staff and a psychologist were attempting to correct. Chappell ultimately decided that it had to expel the child, but only after making every effort to correct the biting behavior.

33. Chappell argued that neither the Department’s Handbook nor Chappell’s policy defines the term “injury.” Ms. Marshall believed that a bite is always an injury. It leaves a mark, however temporary, and requires some

treatment. Chappell noted that none of the bites recorded in its accident/incident reports broke the skin of the other child or required treatment of any kind. Ms. Dreicer and the staff of the Deerwood facility made a determination that E.W.'s behavior presented no danger of injury to the other children.

34. Chappell argues that, whatever the literal language of the written policy, the director of a child care facility must be allowed to exercise discretion on a case-by-case basis in making disciplinary decisions. Chappell points to section 2.8.E of the Handbook, with its admonitions that a comprehensive disciplinary policy must be “developmentally appropriate” and that discipline practices “should be used as learning opportunities to guide children’s appropriate behavioral development.” Ms. Dreicer forcefully made the case that suspending or expelling a two year old teaches nothing and abdicates the facility’s responsibility to the child.

35. Neither party appeared to take note of another section of the Chappell disciplinary policy. The undersigned observes that, while the language of the Chappell policy quoted above appears to prescribe a rigid disciplinary process admitting no exceptions, another portion of the policy gives Chappell discretion as to when the disciplinary process commences:

After an incident, our first step:

We will tend to the injured child to see if medical attention is needed. We will give the child who hit, kicked, etc. an opportunity to apologize and provide comfort. We will notify both sets of parents and prepare an incident report (Attachment 1). DCF requires the report be signed by a parent or caregiver the day of the incident. *If behaviors persist, Chappell will follow the process management flow chart. (Attachment 2)[³]* (emphasis added).

³ The referenced attachments were not part of the record. From the context, the undersigned has inferred that the referenced “flow chart” was a graphic representation of the disciplinary procedure quoted at Finding of Fact 26 above.

36. The underscored language, read together with the title of the discipline policy, “In The Case of *Persistent* Inappropriate Behavior,” gives Chappell discretion to determine when the child’s behaviors have reached the stage of “persistence” warranting commencement of the disciplinary process. The Department did not account for this discretion in finding that Chappell violated section 2.8.B of the Handbook.

37. Ms. Dreicer’s testimony was consistent with the Chappell disciplinary policy. Though the facility eventually expelled the child, it exercised the discretion afforded by the policy to determine whether the child’s behavior was potentially injurious and whether the behavior was persistent enough to warrant invocation of the disciplinary process.

38. Clear and convincing evidence was not presented that Chappell committed the Class II violation alleged by the Department.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

40. The Department has the burden of establishing the grounds for discipline against Respondent's license by clear and convincing evidence. *Dep't of Banking and Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Coke v. Dep't of Child. & Fam. Servs.*, 704 So. 2d 726 (Fla. 5th DCA 1998).

41. In *Evans Packing Company v. Department of Agriculture and Consumer Services*, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), the court defined clear and convincing evidence 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 evidence 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 the firm belief of 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).

42. Judge Sharp, in her dissenting opinion in *Walker v. Department of Business and Professional Regulation*, 705 So. 2d 652, 655 (Fla. 5th DCA 1998) (Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

[C]lear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. *In re Inquiry Concerning a Judge in re Graziano*, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995), cert. denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L. Ed. 2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. *Id.* It must produce in the mind of the factfinder a firm belief or conviction as to the truth of the allegations sought to be established. *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994).

43. At all times material to this case, Respondent was a provider of child care, pursuant to section 402.302, which provides the following relevant definition:

(1) “Child care” means the care, protection, and supervision of a child, for a period of less than 24 hours a day on a regular basis, which supplements parental care, enrichment, and health supervision for the child, in accordance with his or her individual needs, and for which a payment, fee, or grant is made for care.

(2) “Child care facility” includes any child care center or child care arrangement which provides child care for more than five children unrelated to

the operator and which receives a payment, fee, or grant for any of the children receiving care, wherever operated, and whether or not operated for profit

44. Section 402.305(1) directs the Department to “establish licensing standards that each licensed child care facility must meet regardless of the origin or source of the fees used to operate the facility or the type of children served by the facility.”

45. Section 402.310(1) provides, in relevant part:

(c) The department shall adopt rules to:

1. Establish the grounds under which the department may deny, suspend, or revoke a license or registration or place a licensee or registrant on probation status for violations of ss. 402.301-402.319.

2. Establish a uniform system of procedures to impose disciplinary sanctions for violations of ss. 402.301-402.319. The uniform system of procedures must provide for the consistent application of disciplinary actions across districts and a progressively increasing level of penalties from predisciplinary actions, such as efforts to assist licensees or registrants to correct the statutory or regulatory violations, and to severe disciplinary sanctions for actions that jeopardize the health and safety of children, such as for the deliberate misuse of medications . . .

46. To implement these statutory directives, the Department has adopted chapter 65C-22, “Child Care Standards.” Rule 65C-22.001(6) adopts by reference the Handbook and requires licensed child care facilities to follow the standards set forth therein.

47. Rule 65C-22.010 “establishes the grounds under which the Department shall issue an administrative fine, deny, suspend, revoke a license or registration or place a licensee or registrant on probation status as

well as uniform system of procedures to impose disciplinary sanctions.”

Rule 65C-22.010(1)(e)2. defines violations of licensing standards in terms of their relative severity, as follows:

(e) “Violation” means noncompliance with a licensing standard as described in an inspection report resulting from an inspection under Section 402.311, F.S., as follows with regard to Class I, Class II, and Class III Violations.

1. “Class I Violation” is an incident of noncompliance with a Class I standard as described on CF-FSP Form 5316, May 2019 Child Care Facility Standards Classification Summary and CF-FSP Form 5427, May 2019, School-Age Child Care Facility Standards Classification Summary, which are incorporated by reference. Copies of the CF-FSP Form 5316 and CF-FSP Form 5427 may be obtained from the Department’s website at www.myflfamilies.com/childcare or from the following links: <http://www.flrules.org/Gateway/reference.asp?No=Ref-10471> and <http://www.flrules.org/Gateway/reference.asp?No=Ref-10473>.

However, any violation of a Class II standard that results in death or serious harm to a child shall escalate to a Class I violation. The effective date of a termination of a provider’s Gold Seal Quality Care designation is the date of the Department’s written notification to the provider. However, any violation of a Class II standard that results in death or serious harm to a child shall escalate to a Class I violation. Class I violations are the most serious in nature.

2. “Class II Violation” is an incident of noncompliance with an individual Class II standard as described on CF-FSP Form 5316. Class II violations are less serious in nature than Class I violations.

3. “Class III Violation” is an incident of noncompliance with an individual Class III standard as described on CF-FSP Form 5316.

Class III violations are less serious in nature than either Class I or Class II violations.

48. The allegation made in the Complaint is that Chappell violated section 2.8.B of the Handbook by failing to comply with its own written disciplinary and expulsion policies.

49. Section 11.3 of the Department's Form CF-FSP 5316, "Child Care Facility Standards Classification Summary," provides that a violation of section 2.8.B constitutes a Class II violation.

50. The Department did not prove by clear and convincing evidence that Chappell failed to comply with its own written disciplinary and expulsion policies.

51. The Department correctly stated that Chappell's rules prescribe a disciplinary procedure to be followed when there is "persistent inappropriate behavior" that "causes or could cause injury to self or others." The Department alleges that Chappell did not follow the prescribed disciplinary procedure in the case of E.W.

52. The Department's allegation assumes that E.W. engaged in persistent inappropriate behavior that caused or could have caused injury to others.

53. Whether inappropriate behaviors are "persistent," and whether a child's actions are potentially injurious to others, are judgment calls that must be made by the director and staff of the child care facility. Chappell offered the testimony of Ms. Dreicer to demonstrate that the child's behavior posed no danger of injury to others. Chappell's contemporaneous documentation of the biting incidents confirmed that E.W.'s bites never broke the skin or necessitated treatment. The Department offered no counterpoint save for Ms. Marshall's assertion that biting is always injurious.

54. No parent wants their child to receive bites at school, and it is understandable that a parent reported E.W.'s biting to the Department, which is certainly empowered to investigate and evaluate the wisdom of the facility's judgments. However, the facts demonstrated that Chappell's

disciplinary policy provided more discretion than the Department initially conceded and that Chappell's on-the-ground assessment of the situation was a reasonable attempt to correct a behavior common to two-year-old children.

RECOMMENDATION

Based upon 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 14th day of May, 2020, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 14th day of May, 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.