STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

v.

CASE NO. 20-0100
RENDITION NO. DCF-21-31-FO

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

Respondent.
_____/

FINAL ORDER

THIS CAUSE is before me for entry of a final order concerning the Department's Administrative Complaint, filed on December 19, 2019, notifying Respondent of a Class II violation of Section 2.8B of the Child Care Facility Handbook, incorporated by reference in Rule 65C-22.001(6), Florida Administrative Code. The Department assessed an administrative fine of $60.00 and revoked Respondent's Gold Seal Quality Care designation.

The Recommended Order, dated May 14, 2020, concluded the Petitioner did not prove by clear and convincing evidence that Respondent committed the alleged violation; finding it did not prove that Respondent failed to comply with its own written disciplinary and expulsion policies. The Petitioner filed exceptions to the Recommended Order but withdrew those exceptions on August 17, 2020. Although Petitioner withdrew its exceptions to the Recommended Order, the arguments made have merit and will be adopted by the Department. Pursuant to section 120.57(1)(l), Florida Statutes, "[t]he agency in its final order may reject or modify the conclusions of law over which it has

substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."

Paragraphs 50, 53, and 54 of the Conclusions of Law and the Recommendation are as follows:

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

The Administrative Law Judge (ALJ) applied the incorrect standard to Respondent's discipline policy. In paragraph 34 of the Recommended Order, the ALJ notes Respondent's arguments "whatever the literal language of the written policy..." At this point, the ALJ departs from the literal language of Respondent's policy and rewrites the policy in Respondent's favor; discretion is added into the policy which is absent in the accepted written policy.

As noted in paragraph 24 of the Recommended Order, DCF requires "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." The written policy is both a representation to parents as to what may happen in the event of persistent inappropriate behavior, and a representation to DCF as to how Respondent will address such behaviors. This policy becomes part of the contract between daycare and parent. See, Waite Development Inc., v. City of Milton, 866 So.2d 153, 155 (Fla. 1st DCA 2004).

In paragraph 35, the ALJ directed attention to a section of the disciplinary policy that neither party argued, which states, "After an incident, our first step: ... If behaviors persist, Chappell will follow the process management flow chart." The ALJ found that this language grants Respondent broad discretion in the policy at issue titled "In the Case of Persistent Inappropriate Behavior;" giving Respondent discretion to define "persistent" for purposes of determining "persistent inappropriate behavior." Such latitude for discretion is not found in the written policy and must therefore be "interpreted" into the policy.

Florida law is well settled that

> " "the cardinal rule of contractual construction is that when the language of the contract is clear and unambiguous, the contract must be interpreted and enforced in accordance with its plain meaning." Columbia Bank v. Columbia Developers, LLC, 127 So.3d 670, 673 (Fla. 1st DCA 2013) (citing Ferreira v. Home Depot/Sedgwick CMS, 12 So.3d 866, 868 (Fla. 1st DCA 2009) ("Contracts are to be construed in accordance with the plain meaning of the words therein, and it is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties.")"

Seawatch at Marathon Condominium Assoc. v. Guarantee Co. of North America, 286 So.3d 823, 827 (Fla. 3d DCA 2019). Similarly, as to statutory construction, a court looks to the plain language of the statute, and if the language is clear and unambiguous the inquiry stops there. Systemax, Inc. v. Fiorentino, 283 So.3d 415, 420 (Fla. 3d DCA 2019).

The lack of a definition of a term in a policy does not render it ambiguous or in need of interpretation by the courts, but rather such "terms must be given their everyday meaning and should be read with regards to ordinary people's skill and experience." Harrington v. Citizens Prop. Ins. Corp., 54 So.3d 999, 1003 (Fla. 4th DCA 2010). The ALJ determined in paragraph 53 that Respondent may decide what "persistent" means, and that the definition of "persistent" is a "judgment call." But the ALJ offers no explanation why this departure from the plain and ordinary meaning of "persistent" into a "judgment call" is required by the language of the policy. The ALJ allowed for the subjective determination by someone at risk of penalty as to what "persistent" means.

One looks to the dictionary for the plain and ordinary meaning of words. City of Miami Beach v. Royal Castle System, Inc., 126 So.2d 595, 598 (Fla. 3d DCA 1961). Merriam-Webster defines "persistent" to be:

> 1. existing for a long or longer than usual time or continuously: such as
> a. retained beyond the usual period
>
> (b-e omitted)
>
> 2a. continuing or inclined to persist in a course
>
> 2b. continuing to exist despite interference or treatment

https://merriam-webster.com/dictionary/persistent (accessed on 26 January 2021).

The child's conduct met the definition of "persistent" – extending beyond the timelines set out in the plain meaning of the policy itself. Alternately, given the interpretation that Respondent provided, the child's behavior continued to exist despite the intervention; again, satisfying the plain meaning of "persistent."

The ALJ has read a judgment call into a plain and unambiguous word, "could," in Respondent's policy, and imposed an otherwise absent requirement of an injury to trigger the policy. The written policy refers to behavior that "could" cause injury but the ALJ writes into the policy that an actual injury must occur. Merriam-Webster defines "could" as the past tense of "can." https://www.merriam-webster.com/dictionary/could (accessed on 26 January 2021). Merriam-Webster defines "can" as being physically or mentally able to, or "used to indicate possibility." https:www.merriam-webster.com/dictionary/can (accessed on 26 January 2021). The ALJ is without power to rewrite Respondent's policy beyond its plain meaning.

Thus, no valid reason justified the ALJ's departure from the plain meaning of Respondent's policy to afford them the authority to deviate from their policy. Consistent with the written language of the policy and Respondent's actions, the policy is valid, and Respondent failed to follow it.

Paragraphs 50, 53, and 54 of the Conclusions of Law are rewritten as follows, which I find to be as or more reasonable than the rejected paragraphs:

> 50. The Department proved by clear and convincing evidence that Chappell failed to comply with its own written disciplinary and expulsion policies.
>
> 53. Whether inappropriate behaviors are "persistent," and whether a child's actions are potentially injurious to others, are not 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 did not cause

injury to others. However, she conceded that biting is an act that could cause injury to another child.

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. The facts demonstrated that Respondent's policy was clear and unambiguous, and further that Respondent failed to follow its policy in respect to the child at issue.

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 affirming the Administrative Complaint finding Respondent committed the Class II violation, assessing a fine of $60.00, and revoking Respondent's Gold Seal Quality Care designation.

Paragraphs 36 and 37 of the Findings of Fact are as follows:

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 policy.

Although paragraphs 36 and 37 are labeled as Findings of Facts, they are instead Conclusions of Law and will be treated as such. In these paragraphs, the ALJ incorrectly applied its own determinations of language in Respondent's policy, contrary to established law, as more thoroughly explained in the prior legal discussion.

Paragraphs 36 and 37 of the Conclusions of Law are revised as follows, which are as or more reasonable than the rejected paragraphs:

36. Respondent's discipline policy, "In the Case of *Persistent* Inappropriate Behavior," does not give Chappell discretion to determine when the child's

behaviors have reached the stage of "persistence" warranting commencement of the disciplinary process.

37. Ms. Dreicer's testimony was not consistent with the Chappell disciplinary policy. Though the facility eventually expelled the child, it did not follow its policy.

Paragraph 38 of the Findings of Fact is as follows:

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

The Finding of Fact in paragraph 38 is not supported by competent substantial evidence. As stated in paragraph 26, Respondent's policy, "In the Case of Persistent Inappropriate Behavior," states, "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." Gretrell Marshall, family services counselor at Florida Department of Children and Families, testified to the following accident/incident reports involving E.W. biting other children and a teacher:

- August 21, 2019, E.W. bit another student in the back
- August 27, 2019, E.W. bit another student and a teacher
- September 11, 2019, E.W. bit another student in the back
- September 30, 2019, E.W. bit two students in the back
- October 2, 2019, E.W. bit another student in the back
- October 4, 2019, E.W. bit two students

Tr. at 20- 23 and Petitioner's Ex. B. After the two biting incidents on October 4, 2019, Respondent suspended E.W. for one day. Tr. at 25. Due to E.W.'s biting incidences which could have caused injury to others, if Respondent had followed its policy, he

should have had multiple one-day suspensions and a week-long suspension well before his one-day suspension following the October 4, 2019 incidences.

Respondent did not follow its policy as is required by Section 2.8.B of the Handbook, thereby committing a Class II violation as provided for in Section 11.3 of the Department's Form CF-FSP 5316, "Child Care Facility Standards Classification Summary." Thus, the Department did present clear and convincing evidence that Respondent committed the Class II violated as alleged by the Department.

Paragraph 38 of the Findings of Fact is revised as follows:

38. Clear and convincing evidence was presented that Chappell committed the Class II violation alleged by the Department.

Accordingly, the Recommended Order is approved and adopted as modified and the December 19, 2019, Administrative Complaint is **UPHELD**.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 26th day of February, 2021.

Shevaun Harris, Secretary

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY A PARTY PUSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE. SUCH APPEAL IS INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF CHILDREN AND FAMILIES AT 1317 WINEWOOD BOULEVARD, BUILDING 2, ROOM 204, TALLAHASSEE, FLORIDA 32399-0700, AND A SECOND COPY ALONG WITH THE FILING FEE AS PRESCRIBED BY LAW, IN THE DISTRICT COURT OF APPEAL WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED (RECEIVED) WITHIN 30 DAYS OF RENDITION OF THIS ORDER.[1]

Copies furnished to the following via Electronic Mail on date of Rendition of this Order.[1]

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[1] The date of the "rendition" of this Order is the date that is stamped on its first page.