

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

vs.

Case No. 20-2100

KIDDIE ISLAND ACADEMY, LLC,

Respondent.

RECOMMENDED ORDER

John D.C. Newton, II, Administrative Law Judge of the Division of Administrative Hearings (Division), conducted the final hearing in this matter on August 4, 2020, by Zoom conference.

APPEARANCES

For Petitioner: George Gardner, Esquire
Department of Children and Families
Post Office Box 60085
Fort Myers, Florida 33906

For Respondent: Rawsy Williams, Esquire
Rawsy Williams Law Group
701 Brickell Avenue, Suite 1550
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STATEMENT OF THE ISSUES

A. Did Respondent, Kiddie Island, LLC (Kiddie Island), commit child abuse or neglect as defined in chapter 39 or 827 of the 2019 Florida Statutes and therefore violate the standards of sections 402.301 through 402.319 of the Florida Statutes, as implemented by section 8.2(A) of the Child Care

Facility Handbook (Handbook) of Petitioner, Department of Children and Families (Department)?¹

B. If so, what is the proper sanction?

C. Did Kiddie Island fail to report suspected child abuse as required by section 39.201, as implemented by section 8.2(B) of the Handbook?

D. If so, what is the proper sanction?

PRELIMINARY STATEMENT

On March 17, 2020, the Department issued an Administrative Complaint (Complaint) charging Kiddie Island with abusing a child in violation of section 8.2(A) of the Handbook. The Complaint also alleged that Kiddie Island violated the mandatory reporting requirements of section 39.201, Florida Statutes, and the implementing requirements of Handbook section 8.2(B), by not reporting the alleged abuse. The Department proposed to impose fines totaling \$1,000.00. Kiddie Island requested a formal administrative hearing to contest the charges. On May 1, 2020, the Department referred the matter to the Division to conduct the hearing. The hearing was scheduled for July 7 and 8, 2020. It was rescheduled to August 4 and 5, 2020, by an order granting the Department's Motion for Unopposed Continuance. It was held as scheduled.

The Department presented testimony of Sierra Bruner, James Palmer, and Maria Varela. Department Exhibits 1 through 3, 5, 6, 8 through 10, 12, 14 through 16, 18, and 20 through 26 were admitted into evidence.

Kiddie Island presented testimony from Lein Dominguez, Migdalys Fernandez, Amdeli Matos, Ana Perdomo, Diana Varela, and Maria Varela. Kiddie Island Exhibits 1, 2, and 4 were admitted.

¹ All citations to Florida Statutes are to the 2019 codification unless otherwise noted.

The Transcript of the proceeding was filed September 11, 2020. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.²

In the course of this proceeding Kiddie Island made vague statements about including a rule challenge or challenge to a statement as an unadopted rule in its defense. Kiddie Island's pleadings do not assert matters sufficient to raise those issues under the standards of sections 120.56(1) or 120.56(4), Florida Statutes, incorporated by reference in section 120.57(1)(e). In addition Kiddie Island did not advance these arguments in its proposed recommended order, which is the most recent and complete statement of Kiddie Island's claims. Since the arguments are not included in the proposed recommended order they are deemed abandoned. *Wickham v. State*, 124 So. 3d 841, 860 (Fla. 2013) (Failure to pursue a claim amounts to abandonment of the claim.)

FINDINGS OF FACT

1. The Department is the state agency charged with licensing child care facilities.

2. Kiddie Island holds a child care facility license from the Department, authorizing it to care for 165 children. Maria Varela was the owner and director of Kiddie Island at all times material to this matter. Kiddie Island employed her daughter, Diana Varela, as a caregiver at all times material to this matter. Until this matter, the Department had never sanctioned Kiddie Island or received any allegations of abuse by Kiddie Island.

3. K.H. was one of the children for whom Kiddie Island provided child care. At the time of events that are the subject of this proceeding, K.H. was

² This Recommended Order issues after the 30-day period established by Florida Administrative Code Rule 28-106.216 due to unanticipated surgery for the undersigned.

just over one year and nine months old. The entire incident upon which the Department bases its charges was videotaped.

4. On October 8, 2019, Diana Varela and K.H. were sitting on the floor together beside a small mat or other bedding. K.H. was fidgeting and started to pull herself up on a swinging gate.

5. Diana Varela pushed K.H. down and onto the bedding on her stomach. She did not push K.H. forcefully, strike her, or lift K.H. off the floor. Her hand and arm never left K.H.'s body. Diana Varela patted K.H.'s diapered, and therefore cushioned, bottom four times. She did not forcefully strike or spank. Diana Varela then covered K.H. with a small child's blanket. The video recording of the incident and the first-hand testimony about the incident do not indicate that K.H. was injured, that K.H. cried out, or that K.H. was upset.

6. Diana Varela then stood up and walked away from K.H. Shortly after Diana pushed K.H. to the bedding, K.H. sat up and slid the blanket off. Right after that, Diana Varela returned and grasped K.H.'s left arm. She pulled K.H. to her feet and along around a corner, beyond view of the video camera. Nothing in the video recording of the incident or the first-hand testimony about it indicates that K.H. was injured, that K.H. cried out, or that K.H. was upset.

7. Diana Varela's actions were willful, in that she intended to take the actions that she took. There is no persuasive evidence indicating that Diana Varela's actions caused a significant impairment of K.H.'s physical, mental, or emotional health.

8. On October 8 or 9, 2019, K.H.'s mother came to Kiddie Island to review a video recording of the day's events with Maria Varela because K.H.'s mother had a question about a mark on K.H.'s face.³ That mark and the circumstances surrounding it are not part of the charges here or mentioned in the Complaint. However, the mark was the catalyst for K.H.'s mother

³ The evidence about the date is inconsistent. The date would not affect the dispositive facts.

reviewing the video of events described above. Maria Varela learned of the incident involving Diana Varela for the first time when reviewing the video with K.H.'s mother.

9. After viewing the video and leaving Kiddie Island, K.H.'s mother called the child's father and asked him to pick up K.H. He did, and the parents withdrew K.H. from Kiddie Island.

10. Maria Varela determined that Diana Varela did not handle the child properly. Maria Varela placed Diana Varela on a corrective action plan. It included a three-month probation period during which Diana Varela was not permitted to be in a classroom alone and was not assigned to any classroom. The plan also required Diana Varela to conduct research and take trainings. Furthermore, Kiddie Island suspended Diana Varela without pay for two weeks.

11. Kiddie Island also established a facility corrective action plan. It called for the director or assistant director to review facility monitoring videos at the end of each day. The plan further committed Kiddie Island to immediately correct any deficient behavior observed.

12. Kiddie Island did not make an abuse report to the Department of the incident on October 8, 2019. Maria Varela was aware of the requirement to report abuse to the Department. She did not report the incident because she did not believe that it was abuse.

CONCLUSIONS OF LAW

13. Sections 120.569 and 120.57(1), Florida Statutes (2020), grant the Division jurisdiction over the parties to and the subject matter of this proceeding.

14. The Legislature has charged the Department with the responsibility of licensing child care facilities. §§ 402.301 - 402.319, Fla. Stat. (2020). This includes responsibility for imposing sanctions for violations of statutes or rules. § 402.310, Fla. Stat.

15. The Department must prove the grounds for sanctioning Kiddie Island by clear and convincing evidence. *Dep't of Banking & 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).

16. The opinion in *Evans Packing Company v. Department of Agriculture and Consumer Services*, 550 So. 2d 112, 116 n. 5 (Fla. 1st DCA 1989), 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).

17. Also, in disciplinary proceedings, the statutes and rules for which a violation is alleged must be strictly construed in favor of a respondent. *Elmariah v. Dep't of Prof'l Reg.*, 574 So. 2d 164 (Fla. 1st DCA 1990); *Taylor v. Dep't of Prof'l Reg.*, 534 So. 2d 782, 784 (Fla. 1st DCA 1988).

18. Sections 402.301 through 402.319 establish general guidelines for Department regulation of child care facilities. Section 402.305(1)(c) empowers the Department to adopt rules implementing the standards of sections 402.301 through 402.319. The Handbook, incorporated by reference in Florida Administrative Code Rule 65C-22.01(6), establishes Department licensing standards for child care facilities.⁴

19. The Department charges Kiddie Island with violating Handbook section 8.2(A). It provides:

⁴ The handbook may be reached at the Department's website at www.myflfamilies.com/childcare or through the following link: <http://www.flrules.org/Gateway/reference.asp?No=Ref-11491>

Acts or omissions that meet the definition of child abuse or neglect provided in Chapter 39, F.S. or Chapter 827, F.S., constitute a violation of the standards is [sic] section 402.301-.319, F.S., and will support imposition of a sanction, as provided in Section 402.310, F.S.

20. Here the Department charges Kiddie Island with child abuse. Section 39.01(2) defines abuse as "any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired." This does not encompass every inappropriate, ill-considered, or improper treatment of a child. "Abuse" is something more than poor or even unacceptable child care.

21. For instance the opinion in *In re S.W.*, 581 So. 2d 234 (Fla. 4th DCA 1991), determined that striking a child with a belt hard enough to leave bruises did not amount to "abuse." The court reversed an adjudication of dependency because the evidence was "simply insufficient to support a finding of abuse." *Id.* at 235. The court explained its decision by focusing on the requirement that a child's health be "significantly impaired." It said: "There was no evidence of significant impairment to the child caused by the belt incident. No treatment was necessary for the injuries, and no one testified that the child was in any way emotionally impaired by the incident." *Id.* See also *In re W.P.*, 534 So. 2d 905 (Fla. 2d DCA 1988) (Opinion reversed adjudication of dependency. Father slapping child's face hard enough to leave a mark and mother pulling child's hair, neither of which acts required medical attention, were not "abuse," in the absence of "testimony from any witness that the slap or hair pulling significantly impaired W.P.'s physical, mental, or emotional health."). Although the definition of "abuse" includes a limitation for corporal punishment imposed by a parent or guardian, that provision did not play into the *S.W.* and *W.P.* holdings.

22. Section 827.03(1)(b) defines child abuse as "[i]ntentional infliction of physical or mental injury upon a child" or "[a]n intentional act that could

reasonably be expected to result in physical or mental injury to a child" Opinions interpreting section 827.03(1)(b) apply the same reasoning and reach essentially the same conclusions about "abuse" as the opinions interpreting section 39.01(2). *See State v. Lanier*, 979 So. 2d 365 (Fla. 4th DCA 2008) (A caregiver intentionally stomping on a child's foot and leaving no bruises or trauma that required treatment was not child abuse.).

23. Section 827.03(1)(d) defines "mental injury" as "injury to the intellectual or psychological capacity of a child as evidenced by discernible and substantial impairment in the ability of the child to function within the normal range of performance and behavior as supported by expert testimony."

24. The record contains no evidence of mental injury or the likelihood of mental injury as defined by statute. The record also does not establish by clear and convincing evidence that the actions of Diana Varela, pushing K.H. to the bedding and patting her diapered bottom, or even pulling her up by one arm and out of the room, could be reasonably expected to result in physical or mental injury as defined by statute. Diana Varela's treatment of K.H., while understandably objectionable to K.H.'s parents and improper in Maria Varela's judgment, did not amount to "abuse" as the Legislature has defined it.

25. The Department also charges Kiddie Island with violating Handbook section 8.2(B). It provides that, "failure to perform the duties of a mandatory reporter pursuant to Section 39.201, F.S., constitutes a violation of the standards in Section 402.301-.319, F.S." That charge rests wholly on the Department's assertion that Diana Varela abused K.H. Since the Department did not prove the alleged abuse, it did not prove the alleged failure to report.⁵

⁵ The Department's complaint does not refer to Handbook section 2.8(F)(1) prohibiting "rough or harsh handling of children" or section 8.2(C) prohibiting "aggressive, demeaning, or intimidating" interactions with children, both of which seem like they may have been more appropriate charges.

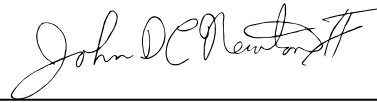
26. The Department proposes findings on and makes arguments about a mark on K.H.'s face that is unrelated to the Diana Varela incident, which Kiddie Island maintains resulted from K.H. pulling a toy down from a shelf. The Complaint does not include allegations related to this matter. Therefore, the Department cannot impose sanctions related to it.

27. An agency may not impose punishment based on matters (either factual or legal) not specifically alleged in its administrative complaint. *Klein v. Dep't of Bus. & Prof'l Reg.*, 625 So. 2d 1237 (Fla. 2d DCA 1993). *See also Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); *Marcelin v. Dep't of Bus. & Prof'l Reg.*, 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000)("Marcelin first contends that the administrative law judge found that he had committed three violations which were not alleged in the administrative complaint. This point is well taken... . We strike these violations because they are outside the administrative complaint."); and *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated."). The Department did not prove the charges of the Administrative Complaint by clear and convincing evidence.

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.

DONE AND ENTERED this 26th day of October, 2020, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
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this 26th day of October, 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.