STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

Case No. 22-0171

vs.

PRIMROSE SCHOOL OF HUNTER'S CREEK,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before Brian A. Newman, Administrative Law Judge of the Division of Administrative Hearings (DOAH), on June 9, 2022, by Zoom video conference in Tallahassee, Florida.

APPEARANCES

For Petitioner: Kathleen Craft Loftus, Esquire
Department of Children and Families
Office of General Counsel
400 West Robinson Street, Suite S1129
Orlando, Florida 32801

For Respondent: Joseph C. Shoemaker, Esquire
Bogin, Munns, & Munns, P.A.
628 South 14th Street
Leesburg, Florida 34748

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent committed two Class 1 violations under classification standard 4.3; and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

On December 13, 2021, the Department of Children and Families (DCF) filed an Administrative Complaint charging Respondent with a Class 1 violation based on the allegation a child was not adequately supervised and left the facility premises without supervision. Respondent requested a hearing involving disputed issues of fact, and the case was referred to DOAH on January 18, 2022.

On May 6, 2022, DCF was allowed to amend its Administrative Complaint, without objection from Respondent, to add a second Class 1 violation for allegedly allowing the same child to leave the facility premises without supervision on a separate occasion.

Prior to the final hearing, the parties filed a Pre-Hearing Stipulation, in which they stipulated to certain facts. To the extent relevant, the parties' stipulated facts have been incorporated in the findings below.

At the final hearing, Petitioner offered Exhibits A through I, which were admitted without objection. Petitioner presented the testimony of James Bernier, Michendy Joseph, and Daphine Joyce Harvey. Respondent offered Exhibits 1 and 2, which were admitted without objection. Respondent presented the testimony of Deborah Shreiner.

The one-volume Transcript of the final hearing was filed on June 28, 2022. The parties requested an extension of time to submit proposed recommended orders which was granted. Thereafter, the parties timely filed Proposed Recommended Orders, which were duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Primrose School of Hunter's Creek, operates a licensed child care facility.

2. Respondent's child care facility is located on the corner of two busy streets. Respondent's parking lot is dedicated to Respondent's child care operation; it is not a shared parking lot. Respondent's parking lot is not fenced, but it is surrounded by bushes that are four feet high. One side of the parking lot is also bordered by a brick wall that is eight feet high. The bushes and wall separate Respondent's parking lot from the sidewalk and the adjacent busy streets.

3. On September 2, 2021, K.G., then a three-year-old child, exited Respondent's child care building, unescorted, and was found alone, just outside the front door of the building. On September 10, 2021, K.G. exited Respondent's child care building, again unescorted, and was found alone in Respondent's parking lot. The evidence is unclear as to how long K.G. was alone, outside of the child care building on either occasion.

CONCLUSIONS OF LAW

4. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

5. This proceeding is penal in nature because DCF seeks to impose discipline upon Respondent's license. *State ex rel. Vining v. Fla. Real Est. Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, DCF must prove the charges against Respondent by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933-34 (Fla. 1996)(citing *Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987)); *Nair v. Dep't of Bus. & Pro. Regul., Bd. of Med.*, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

6. Regarding the standard of proof, in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed the following "workable definition" of clear and convincing evidence:

> [C]lear 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 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the *Slomowitz* court's description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994).

7. Section 402.310, Florida Statutes (2021),[1] authorizes DCF to impose discipline against licensed child care facilities. This statute provides, in pertinent part:

> [DCF] or [a] 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.

§ 402.310(1)(a), Fla. Stat.

[1] All references to Florida Statutes are to the 2021 codification, as the law in effect at the time of the alleged violations.

8. At issue here is whether Respondent committed two Class 1 violations—as opposed to less serious Class 2 or Class 3 violations, which were not charged,—by allowing K.G. to leave Respondent's child care building, unescorted, on two separate occasions. Class 1 violations are "the most serious in nature" and, consequently, carry the highest penalties. Fla. Admin. Code R. 65C-22.010(1)(e)1. and (2)(d).

9. DCF relies exclusively on standard 4.3 (incorporated by reference in rule 65C-22.010(1)(e)1.) to establish that Respondent committed two Class 1 violations. Standard 4.3 provides that the following is a Class 1 violation:

> A child was not adequately supervised and left the facility premises without child care personnel supervision.

DCF alleges that the facts here establish a violation of standard 4.3 because K.G. was not adequately supervised and left the "regulated portion" of the child care facility. *See* Amended Administrative Complaint paragraph 5.

10. The foregoing statutory and rule provisions "must be construed strictly, in favor of the one against whom the penalty would be imposed." *Munch v. Dep't of Pro. Regul., Div. of Real Est.*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); *see Camejo v. Dep't of Bus. & Pro. Regul.*, 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); *McClung v. Crim. Just. Stds. & Training Comm'n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. 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."); *see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011)(statutes imposing a penalty must never be extended by construction).

11. Further, the grounds proven must be those specifically alleged in the Amended Administrative Complaint. *See, e.g., Cottrill v. Dep't of Ins.,* 685

So. 2d 1371, 1372 (Fla. 1st DCA 1996); *Kinney v. Dep't of State*, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); *Hunter v. Dep't of Pro. Regul.*, 458 So. 2d 842, 844 (Fla. 2d DCA 1984). Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. *See* § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action . . . ."); *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. & Pro. Regul.*, 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); *Delk v. Dep't of Pro. Regul.*, 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.").

12. Although other standard violations may be implicated by the facts of this case (including other Class 1 and less serious Class 2 violation standards), DCF steadfastly maintains that standard 4.3 is the only violation charged in this case. (Tr. 144-145). Indeed, standard 4.3 is the only standard DCF cited in the Amended Administrative Complaint and the only standard DCF cited as grounds for discipline in its Proposed Recommended Order.

13. According to DCF, only one standard was cited in this case because DCF is precluded from charging a licensee with alternative violations for the same conduct. (Tr.147-148). DCF did not, however, cite any law that imposes such a limitation.

14. Turning now to the language of classification standard 4.3, DCF is required to prove two elements: 1) a child was not adequately supervised; and 2) the child left the facility premises without child care personnel supervision.

15. The first element is not in doubt; K.G. was not adequately supervised on two occasions. If K.G. had been adequately supervised, the three-year-old would not have been able to exit the child care building alone on two separate occasions. But DCF did not prove that K.G. also left the facility premises. The common understanding of the word "facility premises" includes Respondent's parking lot. The administrative law judge in *Department of Children and Families v. L.O.T. Early Learning Center, LLC*, Case No. 19-0136 (Fla. DOAH June 7, 2019; DCF Sept. 11, 2019) was confronted with the same issue and correctly concluded:

> [T]he term "facility premises" is not defined, but it is not ambiguous, either. The noun "facility," as used in this term, serves as an adjective; it modifies the other noun, "premises." Clearly, the "facility" in view is the daycare, whose "premises" comprise the land, building(s), and other improvements (e.g., the playground, sidewalks, parking lot, etc.), which, collectively, form the campus of the daycare.

Id. at ¶ 17. The judge in *L.O.T. Early Learning Center* also rejected the same argument DCF advances here, that "facility premises" is the daycare building alone. *Id*. at ¶ 18. DCF adopted the *L.O.T. Early Learning Center* Recommended Order in total by a Final Order entered on September 5, 2019, and then by an Amended Final Order entered on September 11, 2019.

16. DCF argues that the undersigned should not reach the same result here because *L.O.T. Early Learning Center* was incorrectly decided. Florida law, however, requires a state agency to follow the precedent it creates by final order unless it provides a reasonable explanation for the inconsistency. As one court explained:

> The concept of stare decisis, by treating like cases alike and following decisions rendered previously involving similar circumstances, is a core principle of our system of justice. ... While it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are

> bound by precedent, it is nevertheless apparent [from the statutory requirement that agencies index their orders and make them publicly available that] the legislature intends there be a principle of administrative stare decisis in Florida.

Gessler v. Dep't of Bus. & Pro. Regul., 627 So. 2d 501, 504 (Fla. 4th DCA 1993), *superseded on other grounds*, *Caserta v. Dep't of Bus. & Pro. Regul.*, 686 So. 2d 651 (Fla. 5th DCA 1996). *See also* § 120.68(7)(e)3., Fla. Stat., and *Amos v. Dep't of HRS*, 444 So. 2d 43, 47 (Fla. 1st DCA 1984).

17. DCF's assertion that *L.O.T. Early Learning Center* was incorrectly decided is not an adequate explanation for departing from this precedent. But even without this precedent, the undersigned would independently reach the same conclusion here, and reject DCF's argument that the "regulated portion of the child care facility premises" is the same as "facility premises," the latter being the broader term actually contained in DCF's rule. An agency must follow its own rule; if a change is required, it must do so by rulemaking, not an abrupt change of policy. *Cleveland Clinic Hosp. v. Ag. for Health Care Admin.*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996). Thus, if DCF wants to add modifiers to "facility premises" to narrow the term, prospectively, to mean only the "regulated portion" thereof, it should do so through rulemaking so licensees have advance notice of the new standard they must conform to. *See Breesman v. Dep't of Pro. Regul.*, 567 So. 2d 469, 471-72 (Fla. 1st DCA 1990). It cannot do so in the context of a disciplinary proceeding.

18. DCF next argues that it is not bound by *L.O.T. Early Learning Center* alone because a contrary result was reached in another case tried at DOAH that was also adopted by DCF final order. In *Department of Children and Families v. Kids Village Early Learning Center*, Case No. 17-2598 (Fla. DOAH Aug. 1, 2017; DCF Oct. 9, 2017), the administrative law judge found the licensee guilty of a Class 1 violation because a child left the child care building and wandered into a parking lot. *Kids Village*, *L.O.T. Early*

Learning Center and this case all involve allegations of child elopement from a child care building, but that is where the similarity ends.

19. First and foremost, *Kids Village* did not analyze whether the licensee violated standard 4.3. In *Kids Village*, DCF alleged that the licensee's lack of supervision posed an imminent threat to the child, which could have resulted in death or serious harm—a Class 1 violation under standard 4.2. The licensee was not charged with a violation of standard 4.3; as such, *Kids Village* does not analyze whether the child left the "facility premises," when he wandered into the parking lot, because it was unnecessary to do so to decide that case.

20. *Kids Village* is also factually distinguishable from the instant case. The evidence there was that the child care facility was located in a strip mall and that it shared a parking lot with other retail businesses. In fact, the judge found that the child was left in the strip mall parking lot, unsupervised, for at least five minutes, and almost reached the neighboring Dollar General store that shared the same parking lot. Thus, *Kids Village* is factually distinguishable from this case and from *L.O.T. Early Learning Center,* because the parking lot the child wandered into was not part of the child care center's campus. For these reasons, the precedent established by DCF in *Kids Village* has no application here.

21. DCF failed to prove that K.G. left the facility premises unsupervised on September 2, 2021, or September 10, 2021, and, therefore, failed to prove that Respondent committed a Class 1 violation under standard 4.3.

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 finding that Respondent did not violate standard 4.3, and dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 15th day of August, 2022, in Tallahassee, Leon County, Florida.

BRIAN A. NEWMAN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2022.

COPIES FURNISHED:

Danielle Thompson, Agency Clerk
Department of Children and Families
2415 North Monroe Street, Suite 100
Tallahassee, Florida 32303

Joseph C. Shoemaker, Esquire
Bogin, Munns, & Munns, P.A.
628 South 14th Street
Leesburg, Florida 34748

Kathleen Craft Loftus, Esquire
Department of Children and Families
Office of General Counsel
400 West Robinson Street, Suite S1129
Orlando, Florida 32801

Andrew McGinley, Acting General Counsel
Department of Children and Families
Office of the General Counsel
2415 North Monroe Street, Suite 100
Tallahassee, Florida 32303

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.