

STATE OF NORTH CAROLINA  
COUNTY OF DUPLIN

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13 DHR 15044

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Mount Zion Christian Church Daycare, Inc.     )  
    Petitioner   )  
   )  
    vs.   )  
   )  
N. C. Department of Health and                     )  
Human Services, Division of Child             )  
Development   )  
    Respondent   )

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**FINAL DECISION**

On November 5, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. On November 8, 2013, the undersigned ruled that Respondent did not deprive Petitioner of property, act erroneously, act arbitrarily, or capriciously, fail to act as required by law or rule, or otherwise substantially prejudice Petitioner's rights in issuing an Order for Petitioner to cease operation of its church day care. On January 17, 2014, Respondent filed its proposed Final Decision with the Office of Administrative Hearings.

**APPEARANCES**

**For Petitioner:**

Gregory S. Connor  
Attorney at Law  
2501 Blue Ridge Road, Ste. 250  
Atrium Building  
Raleigh, NC 27607

**For Respondent:**

Alexandra Gruber  
Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**APPLICABLE STATUTES AND RULES**

N.C. Gen. Stat. §§ 110-88, 110-90, 110-98, 110-106  
Child Care Rules 10A NCAC 09 .0604, .0605, .0302, .0802, .0701, .0901, .0902.

**ISSUE**

Whether Respondent deprived Petitioner of property, otherwise substantially prejudiced Petitioner's rights and acted erroneously, acted arbitrarily or capriciously, or failed to act as required by law or rule when it issued an Order to Cease Operation to Mount Zion Christian Church, Inc., operator of Mt. Zion Christian Church Daycare?

## **EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner: Exhibit A

For Respondent: Exhibits 1-16, 18, 21-26

### **FINDINGS OF FACT**

#### **Parties/Witnesses**

1. N.C. Gen. Stat. § 110-85 mandates that the State of North Carolina protect children in child care facilities by ensuring such facilities provide a physically safe and healthy environment where the developmental needs of the children are met, and these children are cared for by qualified persons of good moral character.

2. Petitioner is a religious-sponsored facility located in Henderson, North Carolina that operates pursuant to a Provisional Notice of Compliance issued by Respondent. Barbara Harris is the administrator of Petitioner. Petitioner has operated its facility since 1997. (*See* Resp. Exh. 1)

3. Respondent is a state administrative agency that operates under the laws of North Carolina and administers the licensing program for child care facilities in the State of North Carolina. *See* N.C. Gen. Stat. § 110-85, *et seq.*

4. Religious-sponsored child care facilities operate pursuant to N.C. Gen. Stat. 110-106, and are exempt from educational and training requirements other child care facilities must comply with. (T. p. 103)

5. Marian Butson is a child care consultant for Respondent. Ms. Butson has worked for Respondent for twenty-seven (27) years, and received a BS degree in Home Economics/Early Childhood from the University of Tennessee in Knoxville. Ms. Butson's responsibilities as a child care consultant for Respondent include inspecting child care centers and family child care homes, providing technical assistance to child care providers, and assisting providers to become and remain licensed. (T. pp. 100-01).

6. Melissa Stevenson is the program manager for the Licensing Enforcement Unit at Respondent's Division. Previously, Ms. Stevenson worked for Respondent as the intake supervisor. Before that, Stevenson worked as an abuse/neglect supervisor for the northeastern region. Prior to coming to Respondent, Ms. Stevenson worked at the Wake County Child Care Resource and Referral Agency as program director. Ms. Stevenson also worked as the director of a licensed, corporate child care facility in Wake County. Ms. Stevenson's responsibilities as licensing enforcement program manager for Respondent include ensuring the consistency of administrative actions. (T. pp.168-69)

7. Respondent regulates approximately 7700 child care facilities in the State of North Carolina. Of those, approximately 4400 are child care centers. There are approximately

500 religious-sponsored facilities in North Carolina. Respondent has issued only one (1) order to cease operations to a religious-sponsored facility in the last year. (T. p. 171).

8. Respondent Division's primary concern is for the health and safety of children in child care facilities. (T. p. 180).

### **Background**

9. On August 20, 2012, Respondent issued Petitioner a Provisional Notice of Compliance based upon non-compliance with child care rules and law resulting in forty-seven (47) violations of child care requirements during three (3) visits to the facility. Respondent's staff cited Petitioner for thirteen (13) repeated violations, including failure to complete mandatory criminal record checks for employees, failure to comply with requirements regarding safe indoor and outdoor environment, nutrition requirements, and failure to keep proper staff, children, and program records. (T. p. 61, Resp. Exh. 2) In the Provisional Notice of Compliance, Respondent also advised Petitioner that:

Further noncompliance with child care requirements as related into this Notice may result in a more stringent administrative action, up to and including an Order to Cease Operation.

(*Id.*)

10. Petitioner did not appeal the Provisional Notice of Compliance issued on August 20, 2012. (T. p. 118)

11. Respondent included a corrective action plan ("CAP") along with the Provisional Notice of Compliance, and required Petitioner maintain compliance with all applicable child care requirements including, but not limited to, those requirements related to rules 10A NCAC 09 .2707 (criminal records), 10A NCAC 09 .0604 and .0605 (safe indoor and outdoor environment), 10A NCAC 09 .0302 and .0802 (program records), 10A NCAC 09 .0701 (staff records), 10A NCAC 09 .0901 and .0902 (nutrition requirements). (*Id.*)

12. The CAP "is a plan to help the provider understand where the deficiency had been, and to find ways to help them maintain compliance in the future." (T. pp. 104-05).

13. One of the requirements of the CAP was to complete a rules review with all staff at the facility present. The child care rules change frequently. Respondent has various ways of assisting providers with staying in compliance with the changing rules. (Butson testimony) Among other things, Respondent posts new rules on its website, and child care consultants speak to providers about new and upcoming rule changes when they make visits to facilities. Respondent Division generally does not cite a facility for a violation the first time Respondent finds a facility out of compliance with a new or changed rule, but gives them a chance to come into compliance. (T. pp. 106-07)

14. On September 10, 2012, Marian Butson conducted an Administrative Action Follow-Up visit with Petitioner, and discussed the Provisional Notice of Compliance and the CAP with Petitioner. (Resp. Exh. 3) Ms. Butson left documentation at the facility after her visit. Such documentation included the following statement:

If the operator fails to correct any documented violations within the established time period, Respondent of Child Development may deny, suspend, terminate, or revoke any permit to operate.

(*Id.*)

15. At that visit, Ms. Butson documented two (2) violations, including one for failure to update the emergency medical plan to reflect current staff at the facility. (*Id.*) The emergency medical plan that's required to be posted at a facility:

lists staff members who will be responsible . . . for performing CPR, First Aid, calling an ambulance, calling the parent, going with the child if they were to be transported, who to call as far as medical consultant if they needed to ask questions, who would call 911.

(T. p. 125)

16. At the September 10, 2012 visit, Ms. Butson also provided technical assistance regarding replacement of cribs to comply with new federal requirements which were anticipated to take effect January 1, 2013. The facility director advised Butson that she had submitted the request for cribs to the home church in Durham. (T. p. 120, Resp. Exh. 3, p. 4)

17. Petitioner's response to the cited violations was due September 24, 2102. Respondent received Petitioner's corrective action letter, responding to the violations cited during the September 10, 2012 visit, on October 19<sup>th</sup>, 2012. Petitioner's corrective action letter only partly addressed the cited violations in that Petitioner did not address how the facility would maintain compliance in the future. (T. p. 121)

18. On October 12, 2012, Marian Butson conducted an Administrative Action Follow-Up visit to Petitioner, and cited ten (10) violations of child care requirements, including a repeat violation related to the emergency medical plan. Ms. Butson cited violations regarding failure to obtain initial criminal checks and three-year re-checks, failure to have a medical statement from all staff within 60 days of employment, failure to complete monthly playground inspections, and failure to complete ITS-SIDS training for staff assigned to the infant room. Ms. Butson also cited the facility for problems with the outdoor area, including standing water, and a pipe draining what appeared to be cooking grease. (Resp. Exh. 5)

19. ITS-SIDS training is required every three (3) years if the center cares for children less than 12 months of age. The training includes safe sleep practices for infants, and addresses issues such as propping bottles, putting children down on their backs to sleep, putting other

things in the bed with the child, and reviews the requirement for visually checking children and documenting those visual checks. (T. p. 126)

20. During the October 12, 2012 Administrative Action Follow-Up visit at Petitioner's facility, Ms. Butson cited Petitioner for nine (9) violations of child care requirements, including two (2) repeated violations. One repeated violation concerned a safe outdoor environment, while the other was a failure to comply with the criminal record check requirements. Other violations included failure to maintain the required daily attendance record. (T. p. 129)

21. The daily attendance record, or sign-in, sign-out sheet is needed for an accurate accounting of how many children are present at a facility. The sign-in, sign-out sheet would be available so the facility could account for the children if there had been a "fire or any other catastrophe." (*Id.*)

22. On November 15, 2012, Ms. Butson conducted an Administrative Action Follow-Up visit at Petitioner's facility, and cited eight (8) violations of child care requirements, including repeat violations related to medical statements for staff, criminal records checks for staff, daily attendance records, and outdoor premises. (Resp. Exh. 7) Buston provided a visit summary to Petitioner for the November 15, 2013 visit. That summary indicated that the facility was not in compliance with Stipulation #1 of the CAP, which required the facility comply with all applicable child care requirements at all times. The summary also noted that:

Failure to maintain compliance with applicable child care requirements and the Corrective Action Plan included with the Provisional Notice of Compliance could result in further Administrative Action, up to and including an Order to Cease Operation and/or assessment of a Civil Penalty.

(Resp. Exh. 7, p. 3)

23. On December 13, 2012, Ms. Butson conducted an Administrative Action Follow-Up visit at Petitioner's facility. During that visit, Ms. Butson cited Petitioner for four (4) violations of child care requirements, including repeat violations related to medical statements for staff, and attendance records. Ms. Butson also documented the facility's failure to obtain a satisfactory Environmental Health Inspection required to operate. (Resp. Exh. 9)

24. On January 28, 2013, Ms. Butson conducted an Administrative Action Follow-Up visit at Petitioner's facility, and cited Petitioner for seven (7) violations of child care requirements, including repeat violations related to medical statements for staff and criminal record checks. In the documentation provided to Petitioner at this visit, Ms. Butson described the various areas of non-compliance with the CAP, and reminded Petitioner that it could be ordered to cease operation should it continue to fail to comply with the terms of the Provisional Notice of Compliance. (Resp. Exh. 11)

25. During a February 20, 2013 Administrative Action Follow-Up visit to Petitioner's facility, Ms. Butson cited Petitioner for two (2) violations of child care requirements, including

repeat violations for failing to comply with the requirement for an evacuation crib that complied with new federal requirements, as well as criminal record checks. (Resp. Exh. 13)

26. During the April 2, 2013 Administrative Action Follow-Up visit to Petitioner's facility, Ms. Butson cited Petitioner for eleven (11) violations of child care requirements, including repeat violations regarding the outdoor premises and evacuation crib requirements. (Resp. Exh. 15)

27. During her September 10, 2012 visit to the facility, Ms. Butson provided technical assistance to Petitioner regarding the new federal requirements for an evacuation crib. The evacuation crib requirements would become effective on January 1, 2013. (Resp. Exh. 3, p. 4). As of Butson's April 2, 2013 visit, Petitioner had not obtained the proper cribs in compliance with this requirement. (Resp. Exh. 15)

28. At the contested case hearing, Petitioner's administrator, Barbara Harris, testified on Petitioner's behalf, and admitted to the following violations: diapering surfaces (T. pp. 66-67), employee health statement (T. pp. 76, 84-85), emergency medical plan (T. pp. 67-69), medical statement (T. pp. 76, 81-82, 85), criminal record checks (T. pp. 77, 82), outdoor environment (T. pp. 81, 89), health questionnaire (T. p. 82), playground inspection form (T. p. 81), daily attendance records (T. pp. 82-83, p.85), child health assessment record (T. p. 83), electrical outlets (T. p. 84), propped bottle (T. p. 85), infant visual check documentation (T. p. 85), hand washing (T. pp. 87-88), and evacuation crib (T. p. 89)

29. Violations relating to children's medical records have a bearing on the safety of children. If a child is injured, and the facility lacks the proper paperwork on the child, the child may not receive appropriate medical treatment, because health care providers may not have access to a child's medical history. (T. p. 190)

30. Staff medical statements have a bearing on the safety of children, because a medical professional must certify that a teacher is fit to care for children. (T. p. 190)

31. Playground inspections are required to prevent children from being injured while outdoors. (T. p. 190)

32. On August 7, 2013, Respondent issued a Written Warning to Petitioner for receiving two (2) provisional sanitation classifications within 12 months in violation of Sanitation rule 15A NCAC 18A .2834. At the time of hearing, Petitioner still did not have an approved sanitation inspection for its facility. (T. p. 80, Resp. Exh. 26)

33. Ms. Harris understood the facility is expected to comply with the child care rules and regulations at all times. (T. p. 89)

34. During the period leading up to issuance of the Provisional Notice of Compliance on August 20, 2012, Petitioner's compliance history was 69%. (Resp. Exh. 2)

35. During the period leading up to the issuance of the Order to Cease Operation on May 28, 2013, Petitioner's compliance history was 73%.

## **Administrative Action**

36. On February 26, 2013, Respondent's Internal Review Panel recommended the issuance of an Order to Cease Operation to Petitioner based on thirty-two (32) violations cited during the Provisional Notice of Compliance period. (Resp. Exh. 21) Among other things, the Internal Review Panel reviewed the facility's low compliance history, and repeated violations when arriving at their determination. (T. p. 175, Resp. Exh. 21)

37. On March 22, 2013, Respondent sent Petitioner a proposed Notice of Administrative Action, and gave Petitioner fifteen (15) days to respond. (Resp. Exh. 22)

38. On May 21, 2013, Respondent's Internal Review Panel reviewed Petitioner's response, and recommended issuance of the Order to Cease Operation. The panel noted that Petitioner had been unable to achieve and maintain compliance, and that the operator had not made changes to the program "that would lead to an effective business operation." The panel also noted that there was not enough information in the Petitioner's response, or during visits made after the issuance of the proposed action, to dispute the basis of the proposed action. (T. pp. 178-79, Resp. Exh. 23)

39. At hearing, Melissa Stevenson confirmed that in situations where noncompliance is at issue, Respondent's Internal Review Panel looks for what a provider will do to ensure compliance in the future. (T. p. 179)

40. Respondent's Division looks at any type of administrative action "as an opportunity for the provider to work with [its] consultants, and using the experience of the consultants to be able to make corrections." (T. pp. 179-80)

41. In this case, the Internal Review Panel determined that Petitioner was unable to maintain compliance, even after the issuance of the Provisional Notice of Compliance. (T. p. 180)

42. At the hearing, Ms. Butson explained that several things contributed to the difficulties leading to the issuance of the Provisional Notice of Compliance and the Order to Cease Operation:

- 1) Initially, Petitioner's facility "had a director on-site all the time." Later on, Ms. Harris was not present as often at the facility, and other staff acted as director of the facility.
- 2) Since Petitioner's facility opened in 1997, there have been many rule changes. Since Ms. Harris took a second job and returned to school, she was less available to ensure the facility kept up with and complied with the rules and laws. (T. pp. 161-62)

## CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to Chapters 110 and 150B of the North Carolina General Statutes. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. All parties have been correctly designated, there is no question as to misjoinder or nonjoinder, and the Notice of Hearing was proper.

3. The primary purpose of child care regulation in this State is to protect children in child care facilities by ensuring these facilities provide a physically safe and healthy environment where the developmental needs of these children are met, and where these children are cared for by qualified persons of good moral character. N.C. Gen. Stat. § 110-85

4. At all times relevant to this matter, Petitioner's facility was subject to regulation by the State of North Carolina pursuant to N.C. Gen. Stat. 110-106.

5. Pursuant to N.C. Gen. Stat. § 110-106(b)(3), Respondent has the authority to order a facility to cease operation if it fails to meet minimum requirements or fails to achieve compliance with applicable child care laws and rules.

6. At all times relevant to this matter, Petitioner's facility operated pursuant to a Letter of Compliance issued by the Respondent.

7. Petitioner failed to maintain a seventy-five percent (75%) compliance history as required by N.C. Gen. Stat. 110-90(4)(c).

8. Petitioner failed to maintain compliance with law and rule as required by N.C. Gen. Stat. 110-98.

9. Petitioner failed to comply with the Corrective Action Plan ("CAP") issued with the Provisional Notice of Compliance issued in August of 2012.

10. Petitioner demonstrated a pattern of repeated noncompliance with North Carolina Child Care laws and rules, in spite of Respondent's issuance of a Provisional Notice of Compliance and technical assistance provided by Division field staff.

11. Many of the violations cited by Respondent against Petitioner have a direct impact upon the health and safety of children.

12. Child care facilities must comply with all applicable rules and statutes at all times. Correcting a violation does not negate that a violation has been cited.



13. Respondent did not deprive Petitioner of property, did not otherwise substantially prejudice Petitioner's rights, did not act erroneously, did not act arbitrarily or capriciously, or did not fail to act as required by law or rule by issuing an order to cease operation to Petitioner.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to issue the Order to Cease Operation to Petitioner.

### **NOTICE**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 18<sup>th</sup> day of February, 2014.

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Melissa Owens Lassiter  
Administrative Law Judge