

OF NORTH CAROLINA  
COUNTY OF IREDELL

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14DHR10278

SARAH M CARR, AGAPE PETITIONER,  V.  DIV OF CHILD DEVELOPMENT AND EARLY LEARNING IN DHHS RESPONDENT.	<b>FINAL DECISION</b>
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This matter was heard before the Honorable J. Randall May, Administrative Law Judge, on June 2, 2015 in Newton, North Carolina.

**APPEARANCES**

Sarah M. Carr  
Agape  
PO Box 1505  
Mooresville, NC 28115  
PETITIONER

Letitia C. Echols  
Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**PRE-TRIAL MOTION**

Motion to Quash<sup>1</sup>

**APPLICABLE STATUTES AND RULES**

N.C.G.S. §§ 110-88(6a), 110-91, 110-93(b), 110-98, 110-99, Child Care Rules 10A NCAC 09 .0302, .0401, .0508, .0602, 0605, .0707, .0713 .0901, .2809, 2818, 15A N.C.A.C. 15A .2818 and .2825.

**ISSUES**

Whether the Respondent deprived Petitioner of property, otherwise substantially prejudiced Petitioner's rights, exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously or failed to act as required by law or rule when it issued

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<sup>1</sup> Prior to taking testimony, Respondents Motion to Quash Subpoenas of Barnes, Davis and Strange was heard. This hearing was answered under a separate order filed concurrently with this Decision.

a Provisional License to Agape Child Development and Learning to operate Advance Preschool/Mera Jams.

### **EXHIBITS ADMITTED INTO EVIDENCE**

Respondent's Exhibits 1-13, 16 and 21 were admitted. The undersigned took official notice of the relevant statutes and rules included in Respondent's Exhibit 22. Petitioner identified exhibits, but never offered them into evidence.

### **FINDINGS OF FACT**

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed all the evidence, or lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

#### **Parties/Witnesses**

1. The parties agreed that each was properly notified of the hearing date.
2. Respondent, Division of Child Development and Early Education (the "Division" or "DCDEE"), is an administrative agency of North Carolina State Government operating under the laws of North Carolina and administering the licensing program for child care facilities in the State of North Carolina. *See* N.C.G.S. § 110-85, *et seq.*
3. Pursuant to N.C.G.S. § 110-85, the Division has a mandate to ensure that children in child care facilities are in physically safe and healthy environments where the developmental needs of the children are met.
4. Child care is highly regulated in North Carolina.
5. Jennifer Glover is a child care licensing consultant with the Division. Ms. Glover has worked for the Division for thirteen (13) years. Previously, Ms. Glover worked in corporate child care, home child care, church sponsored child care, and for the Cooperative Extension Service. Ms. Glover earned a Bachelor of Arts degree in Child and Family Development at the University of North Carolina at Charlotte and an Associate's degree in Early Childhood Education from Central Piedmont Community College in Charlotte. Ms. Glover's responsibilities as a licensing consultant for the Division include monitoring licensed child care programs for compliance with child care requirements, and investigating and monitoring complaints in child care centers and homes in Rowan, Cabarrus, Iredell, and Davie counties.

6. Melissa Stevenson is a Licensing Enforcement Program Manager. Ms. Stevenson has worked for the Division for almost ten (10) years. Prior to becoming a program manager, Ms. Stevenson was an Abuse & Neglect Supervisor and an Intake Supervisor. Previously, she worked as a childcare center director and at the Wake County Child Care Resource and Referral Agency. Ms. Stevenson also worked for a corporately owned child care facility chain to assist facilities in the process of being released from administrative actions. Ms. Stevenson earned a Bachelor of Arts degree in Psychology with a minor in Sociology at Meredith College in Raleigh. Ms. Stevenson's responsibilities as Licensing Enforcement Program Manager for the Division include serving as the custodian of records, maintaining the matrix of administrative actions, and supervising the Licensing Enforcement Unit.

7. Petitioner Sarah M. Carr is the Administrator at Advance Preschool/Mera Jams ("Advance Preschool"), located at 633 West McLelland Avenue, Mooresville, N.C., pursuant to a five-star license issued by Respondent.

8. The Division initially issued a three-star license to operate Advance Preschool to Agape Child Development and Learning on March 8, 2010. Petitioner received a three-star license on September 8, 2010. The most recent five-star license was issued by the Division to operate Advance Preschool on September 17, 2013. Up to seventy-eight (78) children may be cared for at Advance Preschool: Thirty (30) in Building A; eighteen (18) in Building B, with no children allowed in the sanctuary located in Building B; and thirty (30) in Building C. (R. Ex. 1)

### **Background**

9. On January 9, 2014, Child Care Consultant Jennifer Glover and Lead Consultant Kris Updike conducted an unannounced annual compliance visit. During the visit, eleven (11) violations of child care statutes and rules were cited. (R. Ex. 2) (T. pp. 24-25)

10. While Consultants Glover and Updike were monitoring, Petitioner asked why playground 2 and the kitchen in space 2 were being monitored. When Consultant Glover reminded Petitioner that she had informed them that the center was not using space 3, Ms. Carr stated that the kitchen in space 2 was not in use and that food was catered for the center. When Glover asked where the food was catered from, Petitioner answered "from this kitchen" (indicating space 2). (R. Ex. 2)

11. Ms. Glover testified that after monitoring the kitchen in space 2, Petitioner questioned their need to monitor the kitchen. Petitioner then stated that she would be videotaping the visit from that point forward. At that point, Consultant Glover used her mobile phone to call Cindy Yount, Licensing Supervisor, and informed her that Petitioner was videotaping them.

12. Consultant Glover testified that she turned on the speaker phone and Petitioner complained to Supervisor Yount that the consultants arrived too early for their annual compliance visit. (R. Ex. 2) (T. pp. 102-103) After Supervisor Yount explained that the visit could be conducted between two (2) months before and one (1) month after the month the annual compliance was due, Petitioner complained that it was a bad day and she was not prepared for the

compliance visit, as they had been there last on September 17, 2013. Supervisor Yount reminded Petitioner that the annual compliance date was different than the rated license date. (R. Ex. 2)

13. Glover testified that Petitioner complained that the consultants were rude, negative, and had bad attitudes. Supervisor Yount informed Petitioner that she could cooperate with the consultants or the visit would end. Supervisor Yount eventually declared that the visit was over and that there may be repercussions from the visit. (R. Ex. 2) (T. p. 103)

14. Consultant Glover provided technical assistance to Petitioner on several matters, including how to keep screen time usage within time allowed; how to properly space pickets on stairways to avoid injury to children; accurate completion of daily sign in and sign out sheets; and attendance records. (R. Ex. 2) Glover also provided a list of items that were not monitored during the visit due to Petitioner's lack of cooperation.

15. On June 5, 2015, Respondent received a complaint regarding Advance Preschool, which alleged that Petitioner cared for thirty-six (36) children in a space licensed for thirty (30) children for four (4) months; meal patterns were not followed, as Petitioner served too much juice and not enough milk; fruit was not provided at breakfast and crackers were served for snack each day; the playground did not have enough mulch; only one (1) monthly fire drill was held between November 2013 and June 2014; staff/child ratios were not met on a daily basis; staff never received employee handbooks; the building and furnishings were in disrepair; and infants' bottles were being warmed in the microwave. (R. Ex. 4) (T. pp. 32-35)

16. Consultants Glover and Updike went to Advance Preschool on June 6, 2014 to investigate the complaint received on June 5, 2014. (R. Exs. 4, 6) During their visit, the consultants substantiated the following violations: 1) staff/child ratios as groups exceeded the maximum amount of children for any group and children of varying ages were cared for in mixed groups; 2) new staff were not trained within the time frames required; 3) walls and ceilings were not clean and in good repair; 4) accurate attendance records were not maintained; children's records were not made available for review; and 5) nutrition, as Petitioner served 100% juice in 6.75-ounce boxes to children more than once per day, which exceeded the amount that could be served and the number of servings allowed pursuant to the nutritional guidelines of 10A NCAC 09.901(e). (R. Exs. 4, 6)

17. Of the allegations made, Consultant Glover testified that Consultants Glover and Updike determined that staff/child ratio, nutrition, and sanitation violations were substantiated during the June 25, 2015 visit. (R. Ex. 6)

18. On June 6, 2014, Respondent received another complaint regarding Advance Preschool alleging that a staff member who does not have a GED was responsible for eleven (11) children, ages birth to four (4), on the morning of June 6, 2014; and on May 29, 2014, the same teacher was solely responsible for twenty (20) children from birth to school age. (R. Ex. 5) (T. pp. 35-36)

19. Consultants Glover and Updike visited Advance Preschool on June 26, 2014 to investigate the intake report review the June 6, 2014 Complaint Report with Petitioner. (R. Ex. 8) (T. pp. 43-44)

20. Consultant Glover reiterated that children enrolled in the licensed program may not participate in activities with children from the MCO Bible Camp at any time and Advance Preschool staff may not care for children from the unlicensed program at the same time. In addition, separate attendance records must be kept for each facility. (R. Ex. 8) (T. pp. 43-44)

21. During the July 16, 2014 visit to Advance Preschool, the Division's consultants cited eight (8) violations, five (5) of which were repeated from the January 9, 2014 visit. (R. Ex 9) The violations included: 1) meals and snacks did not comply with required meal patterns; 2) broken indoor and outdoor equipment were used by enrolled children; 3) hazardous items—power tools, hand tools, and construction materials (attractive nuisances themselves) on the ramp to space 2—were not stored appropriately or removed, and a nail protruded from the stairs; (T. p. 49); 4) the facility did not provide at least thirty (30) square feet indoors and one hundred (100) square feet outdoors for fifty percent (50%) of the children present; 5) accurate records were not maintained for all children during the visit, as two children who were present during lunch were not on the attendance records and three children who were reported to be present were not on the sign in sheets; and Petitioner provided TruMoo Chocolate milk to enrolled children during lunch, although flavored milk may not be served to children in child care, which was a repeated violation from the June 6, 2014 visit. (R. Exs. 6, 9) (T. pp. 29, 61)

22. Consultant Glover testified that she recommends an administrative action be taken when violations are repeated. (T. p. 50)

23. Consultant Glover testified that she recommended to her supervisor and lead consultant that the Division issue a provisional license to Petitioner due to the twenty-six (26) violations cited during five visits to Advance Preschool between January 9, 2014 and July 16, 2015. Of the violations cited, five were repeated. (T. pp. 50-52)

24. During her cross examination of Consultant Glover, Petitioner requested a bench conference because she felt that she was prejudiced against and disadvantaged because she had no legal representation. She then requested for the first time a mistrial or continuance of the matter so that she could obtain counsel. (T. pp. 62-64) Petitioner's motion was denied. *Id.*

25. Manager Stevenson testified that of the one hundred twenty-five (125) administrative actions reviewed by the Division's Internal Review Panel, thirteen (13) were provisional licenses. (T. pp. 67)

26. Manager Stevenson testified that the Division issues provisional license to allow a provider to be able to come into compliance with violations cited and to enable providers to maintain compliance with child care requirements. This allows the Division to monitor and guide the provider and assure that the changes made are implemented. (T. p. 68)

27. Subsequently, Manager Stevenson testified that a notice of administrative action (provisional license) was issued. (R. Ex. 16) (T. p. 86)

28. Manager Stevenson testified that Petitioner's receipt of subsidized child care funds would be impacted while she operates under a provisional license. (T. p. 71)

### **Respondent Rests**

29. Petitioner called Consultant Glover in her case in chief and renewed her motion to continue during her direct examination of Consultation Glover, which this court denied a second time. (T. p. 93)

30. Petitioner renewed her motion to continue a third time and this court denied the motion again. (T. pp. 134- 137)

31. Approximately five (5) hours into the hearing, and for the first time, Petitioner asked the undersigned to recuse himself and her motion was declined as per N.C.G.S. § 150B-32(b). (T. pp. 134)

### **Petitioner Leaves the Courtroom Abandoning Her Case**

32. After informing the court of her decision to leave the hearing, Petitioner then asked this court not to ask any additional questions until she left the hearing. Petitioner then left the courtroom without a final argument and did not return. (T. p. 137)

33. Petitioner stated that she was nervous, broken, and that she could not stay here for all this. Petitioner further admonished the undersigned not to ask any more questions until she had left the room. (T. p. 137)

### **Rebuttal**

34. Licensing Enforcement Manager Melissa Stevenson was called to the stand in rebuttal. (T. p. 138)

35. Manager Stevenson corrected her prior testimony indicating that Petitioner's receipt of subsidized child care funds would be impacted while she operates under a provisional license. Manager Stevenson testified that Petitioner's receipt of subsidized child care funding would not be impacted due to the provisional license. (T. p. 138)

36. At the conclusion of the case Counsel for the Respondent was asked to propose a decision and to circulate it. This proposal has been used to an extent in the formulation of this decision.

## **Statutory Authority**

1. Pursuant to N.C.G.S. § 110-88(6a), the Child Care Commission has adopted rules for administrative actions against a child care facility when the Division's investigations substantiate the occurrence of child abuse or neglect at the facility.

2. All child care facilities must comply with all State and federal laws and local ordinances pertaining to child health, safety, and welfare. Except as otherwise provided herein, the standards in this section shall be complied with at all child care facilities. N.C.G.S. § 110-91(9).

3. Each child care facility shall have a planned schedule of developmentally appropriate activities displayed in a prominent place for parents to review and the appropriate materials and equipment available to implement the scheduled activities. N.C.G.S. § 110-91(12).

4. Pursuant to N.C.G.S. § 110-93(b), if a provider fails to conform to the required rules and standards authorized by Article 7, the Secretary may issue a provisional license under the policies of the Commission. The Division must notify the provider in writing, by registered or certified mail, the reasons the Division issued a provisional license.

5. Pursuant to N.C.G.S. § 110-98, it is unlawful to provide child care in violation of child care statutes.

6. Under N.C.G.S. § 110-99 (a1), at all times, each child care facility shall display its current license in a prominent place. Any license issued under this Article remains the property of the State and may be removed by persons employed or designated by the Secretary if the license is revoked or suspended, or in the event that the rating is changed.

7. The applicant shall demonstrate to the Division representative that the following information is available for review in the center's files:

(d)(4) daily records of arrival and departure times at the center for each child. 10A NCAC 09.0302.

8. Pursuant to 10A NCAC 09.0401(a), the Division has authority to issue a provisional license for any period of time not to exceed twelve consecutive months: (1) To allow a specific time period for correcting a violation of the building, fire, or sanitation requirements, provided that the appropriate inspector documents that the violation is not hazardous to the health or safety of the children, but nevertheless necessitates a provisional classification until corrected; or (2) To allow a specific time period for the facility to comply fully with all licensing requirements other than building, fire, or sanitation; and to demonstrate that compliance will be maintained, provided that conditions at the facility are not hazardous to the health or safety of the children or staff.

9. That Petitioner did not request a continuance at any time prior to the hearing pursuant to 26 NCAC 03.0118(a).

## 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.

2. That Petitioner has not shown that Respondent deprived Petitioner of property, otherwise substantially prejudiced Petitioner's rights, exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it issued a Provisional License to Agape Child Development and Learning to operate Advance Preschool/Mera Jams.

3. The Petitioner has not shown that it would be unfair, prejudicial, or that she would not be afforded less than an objective tribunal by allowing the undersigned to refuse to grant her motion for a recusal as per N.C.G.S. § 150B-32(b).

4. That Petitioner was not entitled to a continuance as she failed to request a continuance five (5) days prior to the hearing and has not shown good cause for a continuance. (26 NCAC 03.0118(a))

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

### DECISION

The Respondent's decision to issue a provisional license to Petitioner is **AFFIRMED**.

### ACKNOWLEDGMENT

It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge, or the Court, reference is being made to the undersigned Administrative Law Judge with the Office of Administrative Hearings.

### 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.

IT IS SO ORDERED.

This the 28<sup>th</sup> day of August, 2015.

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J. Randall May  
Administrative Law Judge