

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

BROOKSIDE ACADEMY, INC.

Petitioner,

v.

GEORGIA DEPARTMENT OF EARLY
CARE AND LEARNING,

Respondent.

Docket No.:

OSAH-DECAL-CCLC-1405920-60-Woodard



NOV 26 2013

INITIAL DECISION

I. Introduction

Kevin Weston, Initial Decision
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The above-docketed matter concerns Petitioner's appeal from an adverse action taken by Respondent, Bright from the Start: Georgia Department of Early Care and Learning (hereinafter "Respondent" or "DECAL"). Respondent issued a Notice of Intent to Impose Enforcement Fine and Transportation Restriction to Petitioner, Brookside Academy, Inc. (hereinafter "Brookside Academy" or "Petitioner") on August 2, 2013. Respondent informed Brookside Academy that it would be fined \$1,196.00, and restricted from transporting children for a period of twelve months pursuant to Respondent's authority under O.C.G.A. §§ 20-1A-4(2), -4(5), -11(b)(1)(A) and Chapter 591-1-1 of the Official Compilation of Rules and Regulations of the State of Georgia.

Petitioner appealed, and a fair hearing was scheduled and held before the undersigned Administrative Law Judge at the Office of State Administrative Hearings in Atlanta, Georgia on October 11, 2013. Petitioner was represented by Ms. Deborah Ausburn, Attorney at Law, Atlanta, Georgia. Respondent was represented by Ms. Clare Michaud, Attorney at Law and Legal Services Officer, Georgia DECAL, Atlanta, Georgia. For the reasons stated herein,

Respondent's decision to impose a civil monetary penalty and a transportation restriction on Petitioner is **AFFIRMED IN PART** and **REVERSED IN PART**.

II. Findings of Fact

Brookside Academy

1.

Petitioner is licensed by Respondent to operate a child care learning facility. Currently, Petitioner operates two child care centers, one of which is located at 4600 Alexander Drive in Alpharetta, Georgia. The center is owned by Mr. Michael Goldenberg and his wife, Mrs. Mindy Goldenberg. Mrs. Goldenberg also serves as the Alexander Drive facility's director. *Testimony of Michael Goldenberg; Testimony of Mindy Goldenberg.*

2.

Like many child care learning facilities, Brookside Academy provides transportation to the children under its care. Brookside Academy routinely transported children from several local schools to its facility on Alexander Drive. Ms. Lanesha Coates was employed by Brookside Academy as the driver of one of its transportation vehicles. *Testimony of Mindy Goldenberg; Testimony of Michael Goldenberg; Testimony of Lanesha Coates.*

The May 15, 2013 Incident

3.

On May 15, 2013, Ms. Coates was driving one of Brookside Academy's transportation vehicles along her afternoon route. Ms. Coates picked up six children, ranging from ages six to eight, from two stops along her route that afternoon. On Wednesdays, her route included a third stop at River Eves Elementary School to pick up "Anoria", an eight-year-old child who

participated in Brookside Academy's after school program. *Testimony of Lanesha Coates; Petitioner Exhibit 5.*

4.

When Ms. Coates had arrived to pick up Anoria from River Eves Elementary School on prior occasions, Anoria and one of the school's employees had awaited the Brookside Academy transportation vehicle on a curb near the entrance of the elementary school. However, as Ms. Coates approached the entrance to the elementary school on May 15, she noticed that neither Anoria nor the school employee were outside. Ms. Coates pulled the vehicle next to one of the school's employees and asked if she knew where Anoria was. The employee did not know, and directed Ms. Coates to a different entrance. *Testimony of Lanesha Coates; Petitioner Exhibit 5.*

5.

Ms. Coates pulled the transportation vehicle around the school to the other entrance and discovered that the child was not there either. Ms. Coates decided to enter the school and speak with a school official so that she could determine the whereabouts of Anoria. She pulled the vehicle into the parking lot near the entrance, placed the vehicle in park, turned off the engine, and told the six children that she was going to go inside the school but would return momentarily. Ms. Coates then exited the vehicle, leaving vehicle's engine off and the keys still in the ignition. *Testimony of Lanesha Coates; Petitioner Exhibit 5.*

6.

Ms. Coates walked to the entrance and briefly entered the school. Ms. Coates suddenly came to the realization that leaving six children in the vehicle unsupervised was ill-advised. Ms. Coates then turned around and started walking back toward the vehicle. *Testimony of Lanesha Coates; Petitioner Exhibit 5.*

7.

As she was exiting the building, Ms. Coates encountered an unidentified parent, who was picking up her child from the elementary school. The parent advised Ms. Coates that it was irresponsible to leave young children in a vehicle unattended and informed her that one of the children had climbed into the driver's seat. Ms. Coates turned to look at the vehicle and observed that one of the children was sitting in the driver's seat. *Testimony of Lanesha Coates; Petitioner Exhibit 5.*

8.

Ms. Coates quickly returned to the vehicle, having been absent for about one minute in total. The vehicle's engine remained off at all times when Ms. Coates was absent from the vehicle. She gave up on waiting for the child she was sent to pick up from the elementary school and decided to return to Brookside Academy. *Testimony of Lanesha Coates; Petitioner Exhibit 5.*

9.

While Ms. Coates was en route to Brookside Academy, Ms. Maggie Barnes, a supervisor with Brookside Academy, received a call from the unidentified parent who had approached Ms. Coates at River Eves Elementary School. The parent relayed to Ms. Barnes what she had seen at the elementary school. Ms. Barnes took down the parent's phone number and awaited Ms. Coates' return. *Testimony of Maggie Barnes; Petitioner Exhibit 5.*

10.

After Ms. Coates arrived at Brookside Academy with the transportation vehicle and unloaded the children, Ms. Barnes approached her and asked her about the incident at River

Eves. According to Ms. Barnes, Ms. Coates became defensive, but did not deny that the incident had taken place. *Testimony of Maggie Barnes; Petitioner Exhibit 5.*

11.

After speaking with Ms. Coates, Ms. Barnes informed Mrs. Goldenberg of the incident and gave her the phone number of the parent with whom she had spoken earlier that afternoon. Mrs. Goldenberg called the parent, who repeated her account of the incident. Mrs. Goldenberg terminated Ms. Coates that same afternoon. Mrs. Goldenberg called DECAL at approximately 4:15 p.m. that afternoon. According to Mrs. Goldenberg, no one with the agency answered her call, so she reported the incident in a voicemail. She also called the parents of all the children who were on the transportation vehicle and informed them of the incident. *Testimony of Mrs. Goldenberg; Petitioner Exhibit 5.*

DECAL's Investigation of the May 15, 2013 Incident

12.

On May 20, 2013, Mr. Coty Johnson, a Child Care Consultant with DECAL, conducted a monitoring visit at Petitioner's child care center on Alexander Drive. During this visit, he spoke with Mrs. Goldenberg, who informed him of the May 15, 2013 incident. Mr. Johnson relayed what Mrs. Goldenberg had told him to DECAL's Complaints Investigation Division. *Petitioner Exhibit 5.*

13.

One day later, Ms. Beverly Pollard, a Child Care Consultant with DECAL, commenced an investigation of Brookside Academy. During this investigation, Ms. Pollard conducted interviews of those involved in the incident and its aftermath, including Mrs. Goldenberg, Ms. Barnes, Ms. Coates, as well as the children who were on board the vehicle, and their parents. At

the conclusion of her investigation, Ms. Pollard determined that Brookside Academy had committed four violations on May 15, 2013, three of which resulted from the driver's exit of the vehicle at River Eves Elementary: leaving children unsupervised, leaving children unattended in a vehicle, failing to document the passenger checklist,¹ and failure of the driver to remove the keys when leaving the vehicle.² *Respondent Exhibit 2; Petitioner Exhibits 5, 8.*

14.

On July 22, 2013, Mrs. Goldenberg sent a Plan of Correction to DECAL. In this Plan of Correction, Mrs. Goldenberg pledged to hold a two-hour training course on DECAL's Core Rules and Regulations "with an emphasis on proper transportation procedures." This course, according to Mrs. Goldenberg, would be mandatory for all of her staff at both centers to attend. DECAL accepted Petitioner's Plan of Correction as satisfactory on July 24, 2013. *Testimony of Mrs. Goldenberg.*

¹ DECAL requires that child care centers maintain a passenger checklist and use it in the course of transporting children. The child care center's driver, or another staff member designated by the center, is responsible for marking the checklist as the children are loaded onto, and unloaded from, the vehicle. In reviewing Petitioner's transportation records, Ms. Pollard discovered that Petitioner's passenger checklists for May 15, 2013 "reflected that two children were loaded onto the vehicle at a local elementary school and unloaded at the center when the children had not been present at all on that date." While this violation was unrelated to the incident at River Eves Elementary, DECAL nonetheless considered it in assessing the penalties against Petitioner. *Respondent Exhibit 2.*

² Specifically, Ms. Pollard found violations of the following rules:

- GA. COMP. R. & REGS. 591-1-1-.32(6) Supervision. Children shall be supervised at all times. "Supervision" means that the appropriate numbers of staff members are physically present in the area where children are being cared for and are providing watchful oversight to the children, chaperons and students in training. The persons supervising in the child care area must be alert, able to respond promptly to the needs and actions of the children being supervised, as well as the actions of the chaperons and students in training, and provide timely attention to the children's actions and needs.
- GA. COMP. R. & REGS. 591-1-1-.36(6)(i). A child shall never be left unattended in a vehicle.
- GA. COMP. R. & REGS. 591-1-1-.36(6)(c). The driver or other designated person shall immediately document in writing, with a check or other mark/symbol on the checklist, each time a child gets on and off the vehicle so that each child is accounted for every time the vehicle is loaded or unloaded. The driver or other designated person shall also document in writing the following information on the checklist:
- GA. COMP. R. & REGS. 591-1-1-.36(7). The motor shall be turned off, the brake set and the keys removed whenever the driver leaves the vehicle. Transporting vehicles shall be parked or stopped so that no child will have to cross the street in order to meet the vehicle or arrive at a destination

Petitioner Exhibit 8.

DECAL's Transportation Rule Policy

15.

DECAL has designated approximately thirty of its transportation rules as “trigger rules”. Violations of trigger rules, in DECAL’s judgment, are more serious and justify (or “trigger”) DECAL’s immediate attention. Because of the importance DECAL places on trigger rules, child care centers are subject to immediate penalties, such as a transportation restriction, should they violate a trigger rule. *Testimony of Elisabetta Kasfir.*

16.

Ms. Elisabetta Kasfir, Child Care Services Director for DECAL, explained at the hearing on this matter that a child being left on a vehicle by a child care center’s driver constitutes a violation of a trigger rule. Ms. Kasfir testified that DECAL’s policy is to impose immediate restrictions on a child care program’s license for incidents involving a trigger rule violation. According to Ms. Kasfir, DECAL immediately imposes restrictions for such incidents to “protect the continued safety of the children who attend that program and the public.” Ms. Kasfir further explained that, in assessing the appropriate restriction, DECAL weighs the seriousness of the incident against mitigating factors, such as the child care center’s record, the circumstances under which the incident was reported, and the other pertinent information. *Testimony of Elisabetta Kasfir.*

DECAL's Decision to Impose Enforcement Fine and Transportation Restriction

17.

After its investigation into the May 15, 2013 incident, DECAL issued a Notice of Intent to Impose Enforcement Fine and Transportation Restriction to Brookside Academy on August 2, 2013. DECAL listed the violations reported in the May 21, 2013 investigation as the reason it

sought to impose a \$1,196.00 fine (\$299.00 for each rule violation) and restrict Petitioner's ability to transport children for a period of twelve months from the receipt of the August 2, 2013 notice. *Respondent Exhibit 2.*

18.

Brookside Academy immediately appealed DECAL's decision, which was received and filed by DECAL on August 7, 2013. DECAL referred the matter to the Office of State Administrative Hearings for adjudication.

19.

At the hearing on this matter, Petitioner stipulated to the facts of the May 15, 2013 incident and to DECAL's assertions that a civil monetary penalty of \$1,196.00 was in order. Petitioner vehemently disagreed, however, with DECAL's decision to impose a twelve-month transportation restriction. Petitioner argued that a less harsh punishment was due. Petitioner stressed the fact that it had self-reported; that it had taken immediate corrective action in the wake of the incident by submitting an action plan and firing the offending employee; that this was its first such incident; and that it had complied at all times with DECAL's procedures. Petitioner proffered several exhibits attesting to the quality of the services it provides at its centers, including photographs of its centers and letters from satisfied parents. *Testimony of Mindy Goldenberg; Testimony of Michael Goldenberg; Petitioner Exhibit 7A-7M.*

20.

Petitioner argued that DECAL did not have the statutory authority to impose a transportation restriction. According to Petitioner, Georgia law allows DECAL to impose a restriction on a license only where it deems that it is necessary for the protection of the public. Because no children were harmed in the incident and Petitioner had already taken appropriate

corrective action on its own, the transportation restriction was not necessary for the protection of the public. Therefore, Petitioner contended, the imposition of a restriction on Petitioner's license exceeded DECAL's statutory authority.

21.

Petitioner also argued that imposition of a transportation restriction on its program constituted a civil monetary penalty in excess of that which DECAL is authorized by Georgia law to impose. Specifically, Petitioner explained that since its business is dependent upon transportation of children from their schools to its centers, DECAL's forced shutdown of such operations would result in crippling economic repercussions. The amount of money Brookside Academy would lose due to the transportation restrictions, Petitioner speculated, would be far in excess of the amount of the monetary penalty DECAL was authorized to impose. According to Petitioner, this foreclosed DECAL from imposing the twelve-month restriction.³ *Testimony of Michael Goldenberg; Testimony of Mindy Goldenberg.*

III. Conclusions of Law

1.

This appeal concerns adverse action taken by Respondent against Petitioner's license. Accordingly, the burden of proof rests on Respondent to prove that its proposed action is correct. GA. COMP. R. & REGS. 616-1-2-.07(a). The standard of proof is by a preponderance of the evidence. GA. COMP. R. & REGS. 616-1-2-.21(4).

³ At the conclusion of the hearing on this matter, the undersigned administrative law judge permitted both parties to submit briefs on the issue of whether economic repercussions resulting from a transportation restriction could constitute a civil monetary penalty. After the time frame set by the undersigned had expired, neither party had submitted the requested briefs.

2.

Petitioner stipulated to the facts of the incident precipitating the penalties imposed by DECAL and to the appropriateness of the fine. Accordingly, the only remaining issue for the undersigned to determine is whether DECAL correctly decided to impose a twelve-month transportation restriction on Petitioner for the violations described *supra*.

DECAL is Authorized by Georgia Law to Impose Transportation Restrictions on Petitioner

3.

Respondent, the Georgia Department of Early Care and Learning (DECAL), is the state agency responsible for administering the early care and education needs of young children in Georgia. See O.C.G.A. § 20-1A-1 et seq. Its responsibilities include promulgating regulations that govern Georgia center-based child care facilities. O.C.G.A. § 20-1A-4(5) (2013). Georgia law also grants DECAL a myriad of enforcement powers designed to ensure that such facilities adhere to its regulations O.C.G.A. § 20-1A-12 (2013).

4.

Georgia law authorizes DECAL to “[l]imit or restrict any license as [it] deems necessary for the protection of the public, including, but not limited to, restricting some or all services of . . . a program for a time certain.” O.C.G.A. § 20-1A-12(c)(8) (2013). Pursuant to this authority, DECAL’s rules specify that it may “restrict or limit the holder of a regular, restricted or temporary license from providing certain kinds of care or services to children or limiting the number and/or age of the children who may be served if [it] determines that the holder of the license either cannot comply with these rules or has not complied with these rules.” GA. COMP. R. & REGS. 591-1-1-.38(e).

5.

DECAL's rules describe very broad circumstances in which it is authorized to restrict a child care center's license. Georgia law grant's DECAL the discretion to "deem" its restriction as "necessary for the protection of the public." O.C.G.A. § 20-1A-12(c)(8) (2013). This language indicates that the legislature vested DECAL with the authority to identify threats to public safety and impose restrictions in response to such threats. See Webster v. Doe, 486 U.S. 592, 600 (1988) (holding that where a statute provided that an agency's director could "deem" an action necessary, it "strongly suggest[ed] that [the statute's] implementation was 'committed to agency discretion by law'"). Petitioner's argument that the "necessary for the protection of the public" language in section 20-1A-12(c)(8) is a limitation on DECAL is therefore erroneous.

6.

Petitioner does not contest that the violations precipitating the restriction of its license in fact occurred. By definition, Petitioner "has not complied with [DECAL's] rules." GA. COMP. R. & REGS. 591-1-1-.38(e). Accordingly, DECAL violated neither its own rules nor Georgia law in imposing the transportation restrictions on Petitioner.

Respondent Failed to Establish that Restriction of Petitioner's License was the Appropriate Penalty

7.

The undersigned Administrative Law Judge ("ALJ") stands in the shoes of the referring agency and "has all the powers of the referring agency with respect to a contested case." O.C.G.A. § 50-13-41(b). Further, the ALJ "shall make an independent determination on the basis of the competent evidence presented at the hearing" and "may make any disposition of the matter available to the Referring Agency." GA. COMP. R. & REGS. 616-1-1-.21(1). Accordingly, where DECAL may determine that a transportation restriction was necessary for the protection

of the public, an ALJ is authorized to disagree with that determination and conclude that such a restriction was unnecessary.

8.

Although DECAL did not exceed its authority in imposing the transportation restriction on Petitioner, it nevertheless failed to demonstrate that such a restriction was appropriate. According to DECAL, its trigger rules dictate that it impose an immediate restriction in response to an incident involving the violation of its transportation rules. These restrictions, such as the one placed on Petitioner, are meant to be for the protection and continued safety of children. However, the record demonstrates that the twelve-month transportation restriction DECAL seeks to place on Petitioner is not necessary for the continued protection of children.

9.

At the hearing on this matter, Petitioner demonstrated that, despite the occurrence of one incident, it satisfactorily provides for the protection of the children in its care. Petitioner showed that it has a sterling safety record and that the May 15, 2013 incident was the first of its kind. After the incident, Petitioner took immediate corrective action—firing the driver responsible for the violation, notifying the parents of the children involved, and reporting to DECAL the same day. Moreover, Petitioner implemented a plan of correction, requiring that its drivers undergo renewed training on DECAL's transportation rules. Petitioner established that its safety record, the corrective measures it took immediately following the incident, and its continued cooperation with DECAL warrant the conclusion that a twelve-month restriction is unnecessary.

10.

DECAL, on the other hand, failed to establish that it correctly determined that all of Petitioner's transportation operations should be halted for twelve-months. DECAL could not

have logically reached the conclusion from the May 15, 2013 violation—a one-time lapse in judgment on the part of one driver, lasting approximately one minute, which caused no harm to any child—that the continued operation of *all* of Petitioner’s transportation operations was a danger to the public. The danger exhibited by the May 15, 2013 incident was due to the one driver’s misconduct, not to any deficiency attributable to Petitioner’s child care program in its entirety.

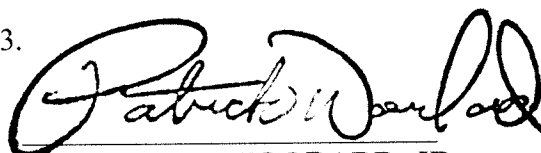
11.

Although DECAL argued at the hearing that the twelve-month restriction was comparatively lenient, Petitioner presented persuasive evidence that such a restriction would devastate Petitioner’s business. Petitioner’s business is dependent on its ability to transport children to and from its centers and it presented a very plausible argument at the hearing on this matter that it would suffer severe economic losses if it could not transport children for one year. This penalty would be grossly disproportionate to the harm caused by Petitioner’s violation and, as discussed *supra*, would not serve to redress any deficiency in Petitioner’s transportation program.

IV. Decision

IT IS ORDERED that Respondent’s decision to impose an enforcement fine against Petitioner in the amount of \$1,196.00 is **AFFIRMED**. Respondent’s decision to impose a twelve-month transportation restriction on Petitioner is hereby **REVERSED**.

SO ORDERED, this 20th day of November 2013.


M. PATRICK WOODARD, JR.
Administrative Law Judge