

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

GONZALEZ FOODS, INC. D/B/A
CREEKSTONE ACADEMY
Petitioner,

v.

GEORGIA DEPARTMENT OF EARLY
CARE AND LEARNING,
Respondent.

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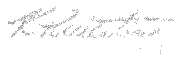


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INITIAL DECISION

I. Introduction



Kevin Westray, Legal Assistant

The above-docketed matter concerns Petitioner’s appeal from adverse action taken by Respondent, Bright from the Start: Georgia Department of Early Care and Learning (hereinafter “Respondent” or “DECAL”). DECAL issued a Notice of Intent to Impose Enforcement Fine to Petitioner, Gonzales Foods, Inc. d/b/a Creekstone Academy (hereinafter “Creekstone Academy” or “Petitioner”) on August 19, 2013. DECAL informed Creekstone Academy that it would be fined \$299.00 for violations of DECAL’s transportation rules.

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 24, 2013. Petitioner was represented by Ms. Deborah Ausburn, Attorney at Law. DECAL was represented by Ms. Clare Michaud, Attorney at Law and Legal Services Officer, Georgia DECAL, Atlanta, Georgia. For the reasons stated herein, DECAL’s decision to impose an enforcement fine on Petitioner is **REVERSED**.

II. Findings of Fact

Creekstone Academy

1.

Petitioner is licensed by DECAL to operate a child care learning facility. Currently, Petitioner operates Creekstone Academy at 475 South Deshon Road in Lithonia, Georgia. The facility is owned by Mr. Eddie Drake and Mrs. Yvette Drake. Mrs. Drake also serves as Creekstone Academy's President. Ms. Diane Lauras is director of the facility. *Respondent Exhibits 1, 2.*

2.

Like many child care learning facilities, Creekstone Academy provides transportation services to the children under its care. Creekstone Academy routinely transported children from several local schools to its facility on Deshon Road. *Testimony of Mrs. Yvette Drake.*

Transportation Rules Governing Child Care Learning Facilities

3.

Child care learning facilities that provide transportation services are required to keep a transportation checklist. This checklist is used to account for each child in the facility's care during transportation. The driver, or another person designated by the facility, is responsible for completing this checklist during trips and must submit it to the facility's director. *Testimony of Ms. Jessica Grant.*

4.

Child care learning facilities are also required to conduct physical investigations of the vehicles after unloading children by walking through the vehicle and checking to ensure that all children have exited. Upon completing this inspection, the staff member must sign the passenger

checklist, which indicates that they have conducted the inspection and concluded that no children remained in the vehicle. *Testimony of Jennifer Bridgeman; Testimony of Cassandra Jakes-Beasley; Respondent Exhibit 1.*

5.

The aforementioned requirements are categorized as “trigger rules” by DECAL. There are approximately thirty transportation trigger rules, violations of which, in DECAL’s judgment, are more serious and justify (or “trigger”) DECAL’s immediate attention. Because of the importance DECAL places on trigger rules, facilities are subject to penalties that increase in severity for each violation. Ms. Jennifer Bridgeman, Regional Director for DECAL, explained at the hearing on this matter that, although the terms “trigger rule” or “trigger violation” appear nowhere in a statute or DECAL’s regulations, facilities were repeatedly apprised of their existence via coverage in local newspapers, webinars, and e-mails. *Testimony of Jennifer Bridgeman.*

6.

DECAL’s policy is to immediately issue a civil monetary penalty for a center’s violation of its trigger rules. According to Ms. Bridgeman, DECAL initially issued enforcement fines only after repeat violations. However, after several incidents in which children died after being left in transport vehicles “the Department made the decision, based on the Commissioner’s stance, that any violation of transportation rules that could subject a child [to] being left in a vehicle would automatically be issued an enforcement fine.” *Testimony of Jennifer Bridgeman.*

DECAL's January 30, 2013 Licensing Study at Creekstone Academy

7.

DECAL's rules require that programs or centers submit an amendment application when seeking a name change.¹ Upon receipt of an amendment application, DECAL may conduct a licensing study to ensure that the applicant remains in compliance with its rules.²

8.

Petitioner submitted an amendment application to DECAL on January 23, 2013, requesting that the name of its child care program be changed from "Kids 'R Kids #31" to "Creekstone Academy" effective February 2013. After receiving Petitioner's amendment application, DECAL conducted a licensing study at Petitioner's facility on January 30, 2013. Ms. Jennifer Grant, a Child Care Consultant with DECAL, conducted this licensing study, which included a review of the facility's transportation records. *Testimony of Jennifer Grant.*

9.

Petitioner provided Ms. Grant with a compilation of its transportation records, including the facility's passenger checklists. Petitioner maintains separate passenger checklists for each route to and from the facility. These checklists include fifteen (15) spaces where the driver is required to list by name each child being transported for the week. Every day, the driver places a mark by each child's name as they are loaded onto, or unloaded from, the bus under the column marked "L" (for "Load") and "U" (for "Unload"). In Petitioner's case, the driver marks the columns next to each child's name with "P", if the child is present, or an "A", if the child is

¹ GA. COMP. R. & REGS. 591-1-1-.16 (c) ("If there is a change in the name of the program or center . . . an application for an amended license shall be submitted at least thirty (30) days prior to the change, except in the case of an emergency.").

² GA. COMP. R. & REGS. 591-1-1-.37(a)(4) ("The Department may conduct inspections and investigations . . . [u]pon receipt and review of a request for an amended license where the Department determines that an on-site inspection is advisable.").

absent. The bottom portion of the checklist also includes a chart, again organized by days of the week, in which the driver may indicate times of departure and arrival and sign to indicate that the physical walkthrough of the vehicle has been performed. *Petitioner Exhibit 3; Respondent Exhibit 3.*

10.

In reviewing Petitioner's records, Ms. Grant took note of the passenger checklist for the week of January 28, 2013. Ms. Grant observed that, based on the checklist, Creekstone Academy's driver or other staff member did not perform a check of its transportation vehicle after a child ("E.K.E.") was transported to the facility from Princeton Elementary on Wednesday January 30, 2013. The portion of the checklist where the staff member was supposed to document the Wednesday afternoon trip had been left completely blank. The driver had marked a "P" next to the E.K.E.'s name under both the Load and Unload columns on the checklist, but had failed to sign the passenger checklist indicating that the driver had performed the mandatory walk-through of the transportation vehicle and ensured that E.K.E. had been unloaded. Ms. Grant electronically scanned the incomplete checklist (hereinafter "Checklist 1") and saved a copy on her laptop. *Testimony of Jennifer Grant; Respondent Exhibits 1, 3.*

11.

Ms. Grant then approached Mrs. Drake, Mrs. Drake's son, and the facility's driver and relayed her findings to them. According to Ms. Grant, Mrs. Drake attributed the failure to complete and sign the checklist to an error on the part of a new driver, whom they were still training. Ms. Grant issued a citation for the transportation violation and concluded her review. *Petitioner Exhibit 6.*

12.

Although Petitioner may have initially appeared to acquiesce to DECAL's issuance of a citation, Petitioner subsequently performed a more thorough investigation of the events of January 30, and the manner in which Checklist 1 was completed. Petitioner then sent a rebuttal statement to DECAL in which it contested the findings of Ms. Grant's licensing study. In this statement, Petitioner argued that it should not have been cited for the transportation violation because Checklist 1 was merely a supplemental page to the complete checklist. This checklist, Petitioner averred, had the driver's signature, indicating that the physical check had been performed once every child, including E.K.E., had been unloaded at the center. *Respondent Exhibit 4.*

13.

DECAL replied to Petitioner's rebuttal statement in a letter dated April 23, 2013. In response to Petitioner's argument regarding the transportation violation, DECAL maintained that even if Checklist 1 was a supplement to the entire checklist for that route, DECAL's rules required that every checklist be completed and signed. Based on this conclusion, DECAL upheld the citation. *Respondent Exhibit 4.*

DECAL's Decision to Impose Enforcement Fine on Creekstone Academy

14.

As a result of the transportation violation observed during the January 31, 2013 licensing study, DECAL issued a Notice of Intent to Impose Enforcement Fine to Petitioner on August 19, 2013. DECAL cited the failure of center staff to sign the January 30, 2013 checklist as the reason for the enforcement fine. Petitioner was notified that DECAL would seek to impose a fine of \$299.00 for the transportation violation. *Respondent Exhibit 1.*

15.

Petitioner appealed DECAL's decision on August 30, 2013. DECAL referred the matter to the Office of State Administrative Hearings for adjudication.

16.

At the hearing on this matter, Petitioner argued that its driver had signed the passenger checklist as was required by DECAL's rules. Petitioner explained that Checklist 1 was not the entirety of the passenger checklist, but only the second page of a two-page passenger checklist. Petitioner produced what it contended was the entire passenger checklist at the hearing. This document included both the aforementioned Checklist 1 along with a second passenger checklist (hereinafter "Checklist 2"). Checklist 2 was completed on a form identical to the one used for Checklist 1 and is populated with the same times, dates, and routes. Checklist 2 differs from Checklist 1 only in that it includes the names of sixteen (16) other students and the driver's signature in the appropriate space. *Testimony of Rosa Brinston; Testimony of Yvette Drake; Petitioner Exhibit 3.*

17.

Ms. Rosa Brinston, a staff member with Petitioner, was present on the route described in Checklist 1 and Checklist 2. She testified that the driver completed a two-page passenger checklist consisting of Checklist 2 and Checklist 1 for that route. Ms. Brinston further testified that she witnessed the driver completely perform the requisite physical check of the vehicle after all children had been unloaded upon completion of the route. *Testimony of Rosa Brinston; Petitioner Exhibit 3.*

18.

According to Ms. Bridgeman, Checklist 2 appeared complete and would not, by itself, result in a citation for a transportation violation. However, she testified that, even if Checklist 1 had been only the second page of a two-page document consisting of Checklists 1 and 2, Petitioner would still have been cited because Checklist 1 did not have the driver's signature.

Testimony of Jennifer Bridgeman; Petitioner Exhibit 3.

19.

Ms. Grant testified that she did not recall seeing Checklist 2 during her review of Petitioner's transportation records on January 31, 2013. She further testified that, if she had looked over Checklist 2 during her review and found that it had been completed satisfactorily, she would not have scanned it into her electronic records because she only scans documents that are problematic. *Testimony of Jessica Grant; Petitioner Exhibit 3.*

20.

Petitioner further argued at the hearing that DECAL had the burden of demonstrating of showing that Petitioner both (1) failed to sign the passenger checklist and (2) failed to conduct the physical check of the vehicle. According to Petitioner, DECAL failed to demonstrate this, considering that Petitioner's staff members testified that the physical check was completed.

III. Conclusions of Law

1.

This appeal concerns adverse action taken by DECAL against Petitioner's license. Accordingly, the burden of proof rests on DECAL 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).

2.

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).

Failure to Sign the Passenger Checklist Constituted a Violation of DECAL's Rules

3.

As discussed *supra*, DECAL's regulations require child care facilities to maintain a passenger transportation checklist, which is used "to account for each child during transportation." GA. COMP. R. & REGS. 591-1-1-.36(6)(c). Immediately upon unloading the last child at any location, a staff person who was present on the vehicle during the trip is required to thoroughly check the transportation vehicle to ensure that all children have been unloaded from the vehicle. GA. COMP. R. & REGS. 591-1-1-.36(6)(e)5.a. This check includes physically walking through the vehicle, visually inspecting all seat surfaces, and looking under all seats and in all compartments or recesses of the vehicle's interior. Id. After completing this walkthrough, the staff member must sign the aforementioned passenger transportation checklist, which indicates that all of the children have exited the vehicle. Id.

4.

DECAL sufficiently demonstrated at trial that Petitioner violated its transportation rules by failing to sign the passenger checklist. Petitioner admitted that Checklist 1 was not signed, but averred that a signature was not necessary since it was part of a single document. However,

there is nothing on either Checklist 1 or Checklist 2 which would indicate that either checklist is but a single page of a two-page document, such as simply writing "Page 1 of 2" at the bottom of each page. Therefore, each document must be treated as an independent checklist, with the information completed thereon applicable only to itself and unincorporated by the other document.

5.

The presence of the staff member's signature on the checklist serves several important functions. It indicates that the staff member has performed the physical check and concluded that all passengers, who are listed by name on the same form, have been unloaded. E.K.E.'s name is on Checklist 1 and he is marked as present for the Wednesday afternoon route on the same document. However, without the driver's signature in the appropriate space on Checklist 1, there is no affirmation by the driver that she has done a physical check of the vehicle and ascertained that E.K.E. has exited the bus. Failing to sign the checklist not only creates the risk that the driver may have actually overlooked a passenger, but it leaves DECAL with ambiguity as to whether the driver is in complete compliance with its rules.

6.

Petitioner argued at the hearing on this matter that, because DECAL failed to specify in its rules that a signature is required on every page of a checklist, the absence of a signature on Checklist 1 did not constitute a violation. Petitioner's argument fails because there is no "two-page document." As discussed *supra*, the two-page document cited by Petitioner is, in fact, two separate passenger checklists and they did not cease being checklists through Petitioner's actions. Petitioner treated Checklist 1 as a checklist at all times—marking where E.K.E. was loaded and unloaded and signing for a physical walkthrough of the vehicle—until Wednesday

afternoon, January 30, 2013, at which point the driver failed to sign the checklist. As both documents remained checklists, the driver's failure to sign each was a violation according to the most natural reading of the rule. See GA. COMP. R. & REGS. 591-1-1-.36(6)(c) ("A passenger transportation checklist . . . shall be used to account for each child during transportation . . .) (emphasis added); GA. COMP. R. & REGS. 591-1-1-.36(6)(e)5.a ("Immediately upon unloading the last child at any location . . . the responsible person on the vehicle shall . . . [s]ign the passenger transportation checklist with their full name, indicating all of the children have exited the vehicle) (emphasis added). DECAL is not required carve out an exception in its rules that would provide that a signature is not required where the facility treats two separate checklist forms as two pages of one document.

*DECAL is Not Authorized to Impose a Fine on Petitioner for the January 30, 2013
Transportation Violation*

7.

DECAL seeks to impose a \$299.00 fine on Petitioner for the foregoing transportation violation. According to its own rules, DECAL is authorized to impose a fine of up to \$299.00 for each rule violation that "demonstrates a reckless and serious disregard for the physical or mental health or safety of a child in care but which may or may not result in physical injury to a child or for any other violation of these rules for which a license may be revoked."³ GA. COMP.

³ DECAL's authority to impose enforcement fines is organized into a penalty schedule. The fines that DECAL's rules authorize it to impose increase in amount depending on the egregiousness or consequences of the conduct. The fine that DECAL seeks to impose against Petitioner is in the lowest tier (\$50.00-\$299.00). The text of the penalty schedule reads as follows:

The amount of the enforcement fine will be assessed in accordance with the following:

- (i) a fine of five hundred dollars (\$ 500) per day for each rule violation may be assessed for any violation of these rules which has resulted in a disabling or permanent injury or the death of a child;
- (ii) a fine ranging from three hundred dollars (\$ 300) to four hundred ninety-nine dollars (\$ 499) per day for each rule violation may be assessed for any violation of these rules which has resulted in an injury or harm to a child but has left no disabling or permanent physical damage;
- (iii) a fine ranging from fifty dollars (\$ 50) to two hundred ninety-nine dollars (\$ 299) per day for each rule violation may be assessed for any violation of these rules which demonstrates a reckless

R. & REGS. 591-1-1-.38(f)5.(iii). Therefore, to impose a fine on Petitioner, DECAL must demonstrate that the transportation violation constituted either (1) a reckless and serious disregard for the physical or mental health of a child or (2) a violation for which Petitioner's license may be revoked. See id.

8.

DECAL cannot base its decision to fine Petitioner on its revocation authority because it failed to establish that it would be authorized to revoke Petitioner's license based on the January 30, 2013 transportation violation. DECAL may revoke any license in the following instances:

- Where DECAL is refused access to the center for the purpose of determining whether the center is in compliance with its rules
- Where DECAL determines that a non-correctable deficiency exists in the operation or management of the center; or
- Where DECAL determines that a correctable abuse, dereliction or deficiency in the operation or management of the center has not been corrected within a reasonable time after:
 - having been brought immediately to the attention of the director of the center
 - having been advised in writing of the deficiencies and setting a time not to exceed ten (10) working days for the filing of an acceptable plan of correction; and
 - the licensee fails to submit an acceptable plan of correction within the specified time limits; or
 - the licensee fails to follow the accepted plan of correction; or
- Where the director or employees of a center do not undergo the applicable records checks and receive satisfactory determinations; or
- Where there is a flagrant abuse, dereliction or deficiency that constitutes shocking intentional misconduct; or
- Where the licensee knowingly makes any false statement of material information in connection with any statement made or on any documents submitted to DECAL as part of an inspection, survey, or investigation, or in the alteration or falsification of records maintained by the licensee; or
- Where the licensee fails to pay a civil penalty or enforcement fine after the time period for requesting an appeal of the notice of imposition of civil penalty or enforcement fine has expired and the licensee has not submitted an appeal within required time frame . . . ; or

and serious disregard for the physical or mental health or safety of a child in care but which may or may not result in physical injury to a child or for any other violation of these rules for which a license may be revoked.

GA. COMP. R. & REGS. 591-1-1-.38(f)5.(i)-(iii).

- Where the licensee fails to pay a civil penalty or enforcement fine after the licensee has submitted a timely appeal and the imposition of the civil penalty or enforcement fine has been affirmed . . .

GA. COMP. R. & REGS. 591-1-1-.38 (c).

9.

Petitioner's alleged rule violations do not fit the description of those enumerated in DECAL's revocation rules. DECAL seeks to impose a fine against Petitioner for the one-time occurrence of a transportation violation. Neither this violation nor any contemporaneous conduct on the part of Petitioner would justify revocation of Petitioner's license to operate a child care facility. The violation was not, for example, a "non-correctable deficiency" or one that constituted "shocking intentional misconduct." The record divulges no pattern of transportation violations for which Petitioner was required to implement a plan of correction. Petitioner has simply not engaged in conduct that would warrant revocation of its license. Accordingly, the \$299.00 enforcement fine cannot be justified on the basis that the violation could have resulted in the revocation of Petitioner's license.

10.

DECAL may impose a \$299.00 fine for violations that would not ordinarily result in revocation, where the violations are a reckless and serious disregard for the physical or mental health of a child. GA. COMP. R. & REGS. 591-1-1-.38(f)5.(iii). Reckless conduct is that which is "characterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk" BLACKS LAW DICTIONARY 1276 (7th ed. 1999). It involves "an indifference to consequences or an indifference to the safety and rights of others." 57A AM. JUR. 2D *Negligence* § 274.

Recklessness requires a degree of fault greater than ordinary negligence but less than intentional wrongdoing. BLACKS LAW DICTIONARY 1277 (7th ed. 1999).

11.

DECAL did not demonstrate that Petitioner's violations constituted a reckless disregard for the physical or mental health of a child. The actual conduct in question involves the omission of action: the failure of a staff member, on one occasion, to sign a form. This oversight, while it is serious, does not rise to the level of reckless conduct.

12.

Petitioner demonstrated at the hearing that its staff members exercised care in transporting passengers. Petitioner accomplished this in part through testimony that its staff members actually did conduct a physical walkthrough of the bus once all children had been unloaded. While this testimony is insufficient to defeat DECAL's allegation that Petitioner committed a rule violation, it nonetheless serves to undermine any contention that Petitioner's staff members behaved recklessly.

13.

Although the undersigned has already rejected the idea that the two passenger checklists are actually one document, the fact that Petitioner completed a perfectly compliant passenger checklist simultaneously with a non-compliant one is nonetheless relevant. The existence of the compliant passenger checklist (Checklist 2) suggests that Petitioner's non-compliance with regard to Checklist 1 was attributable to forgetfulness or, at most, a misunderstanding of DECAL's rules. Though Petitioner's conduct may have created the risk of possible harm to a child, it by no means suggests a conscious disregard of, or indifference to, that risk.⁴

⁴ The court is concerned that by instituting trigger rules only through e-mails and other informal means, DECAL has circumvented the rulemaking process outlined in the Administrative Procedure Act, OCGA § 50-13-1 et seq.

IV. Decision

IT IS ORDERED that Respondent's decision to impose an enforcement fine against Petitioner in the amount of \$299.00 is hereby **REVERSED**.

SO ORDERED, this 5th day of December 2013.



M. PATRICK WOODARD, JR.
Administrative Law Judge

However, as the court reversed DECAL on grounds other than improper rulemaking, this issue is not discussed further.