

Applicant Number

MPT-1

219

THE MPT[®]

MULTISTATE PERFORMANCE TEST

*State of Franklin Department
of Children and Families*

v.

Little Tots Child Care Center

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State of Franklin Department of Children and Families v. Little Tots Child Care Center

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FILE

Fisher & Mason Law Office
953 N. Main St.
Evergreen Heights, Franklin 33720

MEMORANDUM

To: Examinee
From: Gale Fisher
Date: February 26, 2019
Re: Little Tots Child Care Center

We represent Ashley Baker, who became the owner and operator of the Little Tots Child Care Center eight months ago. She has received notice that, in seven days, the Franklin Department of Children and Families (FDCF) will revoke her license to operate the child care center. Because she has no administrative remedy, we have filed a complaint to challenge the license revocation and a motion seeking a preliminary injunction to prevent the revocation until a trial can be had on the merits. The court has set a date 90 days from today for a trial on the merits. The hearing on the preliminary injunction is this Friday.

At the hearing, I expect to call Ms. Baker and Jacob Robbins, a parent, as witnesses. I have attached a note Ms. Baker gave me outlining her proposed testimony. I have also attached recent communications concerning Little Tots and three Notice of Deficiency reports issued by FDCF within the last seven months. I expect that FDCF will oppose our motion and will call the inspectors to testify to what they found during the inspections.

Please prepare the argument section of our brief in support of the Motion for Preliminary Injunction to enjoin FDCF from revoking Ms. Baker's license to operate Little Tots. Follow our office guidelines in drafting your argument. Do not assume that we will have an opportunity to file a rebuttal brief; anticipate any arguments FDCF may make and address them. Be sure to address all the requirements for a preliminary injunction. Because judges must make specific findings as to the evidence relied upon in granting or denying motions for a preliminary injunction, you must marshal and discuss the evidence we have available in support of the requirements for a preliminary injunction. Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your argument.

Fisher & Mason Law Office

OFFICE MEMORANDUM

To: All lawyers
From: Litigation supervisor
Date: August 14, 2016
Re: Guidelines for drafting persuasive briefs

All persuasive briefs in support of motions shall conform to the following guidelines:

Statement of the Case: [omitted]

Statement of Facts: [omitted]

Body of the Argument

Analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated or unsupported arguments.

Organize the arguments into their major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the tribunal should take the position we are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, improper: "The plaintiff failed to exhaust remedies." Proper: "When the plaintiff failed to appear at the administrative hearing, after receiving notice of the hearing, and failed to request a continuance, the plaintiff failed to exhaust administrative remedies."

Do not prepare a table of contents, a table of cases, or an index.

Ashley Baker's Note on Proposed Testimony
February 25, 2019

Eight months ago, I took over the Little Tots Child Care Center to offer services no one else offered in our area. The former owner had a hard time meeting expenses because so many parents could not afford the fees. Little Tots is open more hours than most child care centers so that parents who go to work early or work late shifts can use the center. I applied for and received a government grant to subsidize the center. The grant allows me to charge reduced fees to parents whose income falls below a certain level. The grant also allowed me to hire more staff and expand the number of children Little Tots serves. Little Tots is the only child care center in this neighborhood that serves low-income families.

I have had to juggle this expansion while trying to meet all the state standards. Look at these Notice of Deficiency reports, and you will see that I have been improving all along. If I could have just a few more weeks, I would be able to comply with all the standards.

I understand the need to get completed enrollment forms so that no unauthorized persons pick up the children. We do not want predators or parents with restraining orders coming here. Most parents have completed the enrollment forms. I guess I was too patient with those five who did not complete them. I will have to sit down with these five parents and have them complete the forms when they pick up their children.

Child "A" has been with us for months. He's five; he knows he's allergic to milk and can't drink it. He's never tried to take the milk. But I will improve the supervision when food is out. I found an online education program for child care workers on food safety and will have the staff watch it.

The program we offer is excellent. In fact, since I became the owner and expanded the enrollment and improved the child care program, the State University Early Learning Center has been sending students to observe our program. The children are safe and are thriving, even if we've had some missteps while we expanded. For FDCF to come in now and close me down is too harsh.

Caring for children is my passion and my livelihood. If I'm forced to close, I will be without any income, will lose that grant, and will have to find a way to repay my business loans. I risk losing my clients if the court takes too long to resolve this. If my license is revoked, I don't know where these children are going to go or what I will do to make a living. I'm afraid that I would not be able to reopen the child care center even if I got the license back.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES

Northern Regional Office
830 Highway 17
Evergreen Heights, Franklin 33720

February 22, 2019

Ms. Ashley Baker
Little Tots Child Care Center
492 Oak Street
Evergreen Heights, Franklin 33705

NOTICE OF LICENSE REVOCATION

You are hereby notified that, effective March 5, 2019, the license issued to you to operate Little Tots Child Care Center will be revoked due to numerous and repeated instances of noncompliance with critical standards for the operation of a child care center as specified in the Franklin Administrative Code and as authorized by the Franklin Child Care Center Act, Fr. Civil Code § 35.1 *et seq.* You must cease operating the Little Tots Child Care Center on or before March 5, 2019.

The instances of noncompliance are specified in the attached NOTICES OF DEFICIENCIES.

Operating a child care center without a license is a violation of the Franklin Child Care Center Act.

Signed: 

Carla Ortiz
Director, Department of Children and Families

Served by email and in person February 22, 2019, by Cynthia Wood.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
July 16, 2018, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the July 16, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Thirty days ago, Ashley Baker became the owner and operator of Little Tots Child Care Center. Upon assuming ownership, Ms. Baker expanded the number of children in the center and changed some of its operations. This is the first inspection since Ms. Baker became owner. Because of critical deficiencies observed during this inspection, Ms. Baker was warned of the need to improve and was told that, as a result, the center will be inspected every 90 days.

Little Tots has a maximum allowable enrollment of 96 children, in eight rooms: two rooms of 2-year-old children, two of 3-year-old children, two of 4-year-old children, and two of 5-year-old children. It employs 19 persons. Children may attend from 6:30 a.m. to 7:00 p.m., Monday through Friday.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 37 children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker promised to correct this “very soon.”

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on four of the teachers—Anders, Dunn, Green, and Hanes. 34 FR. ADMIN. CODE § 3.12. Ms. Baker promised to “get to it soon.”

Staffing. The staff/child ratios in the 2-year-old and 3-year-old rooms exceeded what is allowed. 34 FR. ADMIN. CODE § 3.13. There were nine children and one staff member in each of the 2-year-old rooms and 11 children and one staff member in each of the 3-year-old rooms. Ms. Baker indicated that this would be corrected “very soon.”

Signed: 

Trent Banks, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

**STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
October 19, 2018, Notice of Deficiencies: Little Tots Child Care Center**

This report summarizes the noncompliance with critical standards observed during the October 19, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 16 children were incomplete in that they still lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker again promised to correct this “right away.”

Staff qualifications. A review of the employee personnel files revealed that there was no documentation showing that a background check had been conducted on two of the teachers, Anders and Dunn, or for newly hired teacher Kane. 34 FR. ADMIN. CODE § 3.12. Ms. Baker promised to “get to it soon.” She also said that Anders is a holdover from the previous owner and should have had the background check done long ago.

Staffing. There were nine children in one of the 2-year-old rooms, with one staff member. This exceeds the allowable staff/child ratio. 34 FR. ADMIN. CODE § 3.13. Ms. Baker indicated that she was still organizing her staff.

Signed: Jerome Waters

Jerome Waters, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
January 23, 2019, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the January 23, 2019, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for five children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 FR. ADMIN. CODE § 3.06. Ms. Baker said that she had given the forms to these five parents but had not yet received them back.

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on teacher Anders or newly hired teacher Marin. 34 FR. ADMIN. CODE § 3.12. Teacher Dunn is no longer employed at the center. Ms. Baker again said that Anders was hired by the previous owner and that the background check should have been done then.

Staffing. There were nine 2-year-old children in one room, with one staff member. 34 FR. ADMIN. CODE § 3.13. Ms. Baker said that one child was due to move out of town next week. In anticipation of that child's departure, she had enrolled another 2-year-old, but the parents needed the child to begin attending right away. The attendance of the two children overlapped by one week, putting nine children in the same room. Ms. Baker said that by next week, there will be only eight children in each 2-year-old room, and she will be in compliance with § 3.13.

Meals and nutrition. The inspector observed that as children entered the snack room, milk was available to be picked up. There was no supervision of the food area. 34 FR. ADMIN. CODE § 3.37. Child "A" is allergic to dairy products and should not have milk. The restriction is on the child's enrollment form, but teacher Kane said that she was unaware of any dietary restrictions for Child "A." Ms. Baker said that the teacher knew but must have forgotten on a busy morning.

Signed: Tiffany Hall
Tiffany Hall, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

Email Correspondence Regarding Little Tots Child Care Center

From: Jacob Robbins <jsdad@cmail.com>
To: Carla Ortiz <FDCFlicense@Franklin.gov>
Cc: Ashley Baker
Subject: Don't close Little Tots Child Care Center
Date: February 24, 2019, 1:15 pm

I just learned that Little Tots Child Care Center is going to close because you are revoking its license. I have talked with over a dozen parents who are upset. We do not know where to send our kids. My wife commutes to work in an office downtown, and I am a mechanic at the truck depot. The way our hours work out, we need Little Tots because it is the only child care center that meets our schedules. Plus, it is affordable.

I know families that used to rely on relatives to care for their children but were able to send them to Little Tots once Ms. Baker offered discounted rates for those who qualify. Little Tots is a better place for the children than relying on relatives who get sick or just have their own lives to live. It has a good program for the children. My kids love it there. One of my kids was really shy and hesitant to play with other kids but has overcome all that since he started attending Little Tots.

If Little Tots closes, my wife will have to quit her job. That would be bad because her job has the better health benefits. Plus, we need the money she earns to pay for the kids—their dentists' bills, their shoes, clothes, school expenses, extracurricular activities—and we save a bit for emergencies. I heard the same thing from several parents, and I promised them I would write and ask you to reconsider closing this center which we badly need.

I expect the government to care about our children. This is the only low-income child care center within 15 miles of our home. You should be advocating for us, not trying to close down such a wonderful day care.

I am going to get a petition for parents to sign to protest the closing of Little Tots, but I wanted to contact you right away.

Thank you,
Jacob Robbins

LIBRARY

**Excerpts from the
FRANKLIN CHILD CARE CENTER ACT**

§ 1. Findings and legislative purpose. The legislature of the State of Franklin finds the following:

(a) It is the policy of the State of Franklin to ensure the safety and well-being of preschool-age children of the State of Franklin through the establishment of minimum standards for child care centers.

(b) There is a need for affordable and safe child care centers for the care of preschool-age children whose parents are employed.

(c) There is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities.

(d) By providing for affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed.

* * *

§ 3. Licensing of child care centers.

(a) No person may operate any facility as a child care center without a license issued by the Department of Children and Families upon meeting the standards established for such licensing.

(b) The Director of the Department shall establish licensing standards relating to child care centers. The Director shall inspect each licensed facility at least once each year to determine that the facility is in compliance with the standards of the Department.

...

(f) If the operator of a child care center is in noncompliance with those standards deemed critical, the Director may, after notice, impose penalties including but not limited to a civil fine of at least \$500 but not more than \$10,000, or revocation of the license of the operator.

**Excerpts from Franklin Administrative Code
Chapter 34. Child Care Centers**

§ 3.01 General

The Department of Children and Families has determined that the standards listed in this Section apply to child care centers. Because of the actual or potential harm to children, noncompliance with the following regulations will be determined to be critical violations: Enrollment Procedures, Staff Qualifications, Staffing, Program, Structure and Safety, Meals and Nutrition, and Health.

* * *

§ 3.06 Enrollment procedures

...

(b) A written enrollment application with the signatures of the enrolling parents shall be on file for each child. The application shall contain the following information:

...

(8) Name, address, and telephone number of all persons authorized to pick up the child, which includes both

- (i) a primary list of persons authorized to pick up the child regularly and
- (ii) a contingency list of persons authorized to pick up the child occasionally, including conditions, if any, for releasing the child to such persons.

* * *

§ 3.12 Staff qualifications

(a) Each child care center shall subject all persons who work with children to criminal background checks and shall require them to authorize the background checks and to submit to fingerprinting. No person who has been convicted of a felony shall be employed at a child care center.

...

§ 3.13 Staffing

...

(d) The group sizes and ratio of staff to children present in any classroom at any one time shall be as follows:

<u>Children's age</u>	<u>Ratio of staff to children</u>
Two years	1 staff member to 8 children
Three years	1 staff member to 10 children
Four years	1 staff member to 10 children
Five years	1 staff member to 20 children

* * *

§ 3.37 Meals and nutrition

...

(g) A child requiring a special diet due to medical reasons, allergic reactions, or religious beliefs shall be provided with meals and snacks according to the written instructions of the child's parents or legal guardian.

Lang v. Lone Pine School District
Franklin Court of Appeal (2016)

Blake and Olivia Lang, parents of Michael, age seven, sued the Lone Pine School District (District) for violating Michael's rights as a child with disabilities and sought preliminary and permanent injunctive relief. The trial court conducted a hearing on the Langs' motion for a preliminary injunction to allow Michael to attend school with a service animal, and granted that motion. The trial court stayed the effective date of the order three weeks to permit the District time to prepare for the presence of the service animal. The District filed an interlocutory appeal from the trial court's grant of the preliminary injunction. This action was brought under the Franklin Education Act. The parties did not raise, nor do we address, the question whether the plaintiffs also have a claim under the Americans with Disabilities Act or the Individuals with Disabilities Education Act.

We review the trial court's decision under the abuse of discretion standard and affirm.

Background

At the hearing, Blake and Olivia testified that during kindergarten and first grade at Lone Pine Elementary School, Michael received various accommodations to address his learning disability, but he still struggled. Last winter, the Langs found a service dog program for children with disabilities. In late spring, Sandy, a service dog, went home with the Langs, after which the Langs noticed a significant improvement in Michael's ability to focus and remain attentive to tasks. In June, an educational specialist recommended that the service dog should accompany Michael to school. The Langs then asked the District to permit Michael to attend school with the service animal.

Cody Black, the educational specialist, testified that he observed Michael with Sandy and found that Sandy provides comfort to Michael and eases his anxieties. This permits Michael to better focus on tasks before him. Black offered the opinion that Michael would perform better in school if Sandy were with him. Specifically, when Michael is accompanied by Sandy, his behavior and social skills improve and he is therefore less likely to be disruptive. Black also testified that service animals provide a similar benefit to disabled students at all levels of education throughout the state, as well as a positive educational lesson for all students.

MacKenzie Downs, principal of Lone Pine Elementary School, testified that the District denied the Langs' request because (1) a district-wide policy prohibits animals in school buildings other than service animals for those with vision impairments, (2) the teachers and staff at Lone Pine are not trained to handle the dog, and (3) there are children at the school who are allergic to dogs. Downs agreed that Michael needs an accommodation and said that she stands ready to support Michael with other methods of assistance. Joe Ramirez, Michael's first-grade teacher, testified that Michael has improved over the course of the past school year despite not having a service animal with him at school. He also testified that the District has purchased several new computers designed for children with learning disabilities. He offered the opinion that using the new computers would help Michael continue to improve, and he saw no need for the service animal to be at school. He confirmed that he and his fellow teachers have received no training in handling service animals.

Preliminary Injunction Standard

Preliminary injunctive relief is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. A party seeking a preliminary injunction must meet this four-factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of a preliminary injunction serves the public interest.

(1) Likelihood of success on the merits

First, as to the likelihood of success on the merits, the moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. *Smith v. Pratt* (Fr. Ct. App. 2001). As the court ruled, if the movant shows that his chance of succeeding on his claim for relief is better than a mere possibility, the court should grant the motion for preliminary relief.

The trial court found that there was no dispute that Michael is a child with a disability and requires an accommodation. The trial court found that while there was a dispute as to the type of

accommodation needed and whether the service animal is a proper or necessary accommodation, this was an issue to be decided when the matter is tried on the merits. In the meantime, the Langs have established that the service animal may well be the sort of accommodation needed. Hence, the Langs have shown a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial.

(2) Irreparable harm

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In other words, if the moving party, the Langs, could be compensated through damages for the wrong suffered, they would not have suffered an irreparable injury. The alleged harm here is the harm to Michael of continuing to attend school without the accommodation that may be most helpful to him. While the trial court could award damages to the Langs after a trial on the merits, here it found that no amount of monetary damages could substitute for providing Michael the education he needs.

(3) Balance of benefits and hardships

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Put another way, the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. The District argues that the trial court failed to properly consider the costs of permitting the animal to accompany Michael.

The trial court acknowledged that the District would suffer hardships if the injunction were granted. The District's policy currently allows service animals for those with vision impairments but not for those with learning disabilities like Michael's. To permit the animal to accompany Michael, the District must expand its policy, prepare its staff for the presence of the animal, educate parents, and determine how to accommodate children with dog allergies. The trial court found that these steps would cost the District time and money—costs that may be substantial. The trial court weighed the harms cited by the District against those of Michael's loss of an accommodation that will help him overcome his learning disability. Michael is in second grade and has already experienced two years of schooling that has been stressful for him. The sooner Michael's needs are met, the better for him, the trial court concluded, especially given that Michael is in an early

formative period. In sum, the trial court weighed the hardships and found that the balance of harms favored the Langs.

(4) Public interest

Fourth, the trial court must consider whether issuance of the preliminary injunction serves the public interest. This criterion cuts both ways on the facts of this case. On the one hand, the District correctly notes that its need to conserve resources and to assure the well-being of all its students serves the public interest. On the other hand, the Langs are also correct that the injunction will serve the statutory purposes of the laws protecting disabled children by permitting the use of service animals in schools. Additionally, the presence of the service animal in Michael's classroom provides important educational lessons for his classmates and for children throughout the school. These children will learn about the important role of service animals in assisting persons with disabilities. The trial court did not err in concluding that issuance of the injunction served the public interest.

The District also argues that the injunction imposes a continuing duty of supervision on the court, which would be an improper use of judicial resources. "Courts should be reluctant to issue injunctions that transform the court into an ad hoc regulatory agency to supervise the activities of the parties." *Franklin Env't'l Prot. Agency v. Bronson Mfg., Inc.* (Fr. Ct. App. 1999). However, the District overstates the difficulty of enforcement. The trial court ordered the District to permit Michael to attend school with the animal. Compliance with this order is simple. If the District admits Michael with the service animal, it will be in compliance with the injunction. If the District refuses to admit Michael with the service animal, it will be in violation of the injunction.

The trial court issued a preliminary injunction effective until trial on the merits. The trial court did not abuse its discretion.

Affirmed.

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

1) MPT1 - Please type your answer to MPT 1 below When finished with this question, click to advance to the next question.

I. Little Tots has more than a mere possibility of prevailing on the merits of its claims.

A. Little Tots has more than a mere possibility of prevailing on the merits of its claims that the Department revoked its license without the statutorily required notice.

On February 22, 2019, the Department of Children and Families (the "Department") served Little Tots Child Care Center ("Little Tots") with notice that, effective March 5, 2019, Little Tots' license to operate as a child care center was revoked. Little Tots has raised a fair question about whether, and has a more than a mere possibility of prevailing on its claim that, this notice did not comply with the notice requirement of Section 3(f) of the Franklin Child Care Act (the "Act").

A party moving for a preliminary injunction must show that it "is likely to succeed on the merits[.]" *Lang v. Lone Pine Sch. Dist.* (Fr. Ct. App. 2016).

Under the Court of Appeal's precedent, however, this showing is satisfied so long as the moving party "raise[s] a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial," and "need only demonstrate that his chances to succeed on at least one of his claims are

better than negligible," *id.* (citing *Smith v. Pratt* (Fr. Ct. App. 2001))--that is, "better than a mere possibility." *Id.* Little Tots more than meets that standard with respect to its claim that the Department's notice did not comply with the Act's notice requirement.

Section 3(f) of the Act provides that if an operator of a child care center is in noncompliance with those licensing standards that the Director of the Department has established and deemed critical, "the Director may, after notice, impose penalties including . . . revocation of the license of the operator." Act sec. 3(f). This provision is, at the least, ambiguous on whether it merely requires notice of a final revocation decision to take effect on a future date, as the Director interprets the provision, or whether it requires notice that the operator's license *will* be revoked by a certain date if the operator does not cure their center's noncompliance with the Department's critical licensing standards. The better reading is the latter. The point of an administrative notice requirement such as this one is that it gives affected parties an opportunity to object to the agency's decision. A notice requirement that, as the Director reads it, merely requires that an administrative agency give a licensee two weeks notice of the agency's final license-revocation decision, with no opportunity to cure the noncompliance for which the licensee's license is being revoked, is little better than no notice at all.

Further, the stated legislative purpose of the Act, to provide for child care centers for the children of those parents who, absent their services, could not be employed, *see* Act sec. 1(d), would be vitiated if licensed facilities could not cure non-compliance with the Department's licensing standards before a final revocation decision. A reading of the Act that requires the Department to put child care centers on notice that their licenses are at risk before finally revoking them will increase the number of child care centers, without derogating from the Act's purpose to keep child care centers safe, *see* Act sec. 1, as the Department would still be free to revoke licenses if child care centers failed to cure non-compliance within a reasonable time.

The Department will likely respond that its notices of deficiencies given to Little Tots fully satisfy the Act's notice requirement, as indeed the Department has suggested in those notices. *See, e.g.*, Notice of July 16, 2018 ("This constitutes notice pursuant to sec. 3 of the . . . Act."). That reading of the Act, even if permissible, is far from the only one permissible. Section 3(f) of the Act does not call for mere notice of non-compliance. Rather, it requires notice of the Director's revocation decision, *see* Act sec. 3(f) ("the Director may, after notice . . . impose penalties including . . . revocation of the license of the operator"), as the Director appears to recognize, given its attempt to satisfy that requirement by serving Little Tots with notice of its final revocation decision. There is, at the least, more than a mere possibility that after a trial on the merits, this Court will read Section 3(f) not only to require notice of non-compliance, but notice that

the Director intends to revoke an operator's license for non-compliance if that non-compliance is not cured.

B. Little Tots has more than a mere possibility of prevailing on its claim that the Director's revocation decision was unreasonable.

If the Court concludes that Little Tots has more than a mere possibility of prevailing on its notice claim, that is the end of the likelihood-of-success analysis; a movant for a preliminary injunction need only demonstrate that his chances of succeeding on "at least one of his claims are better than . . . a mere possibility[.]" *Lang v. Lone Pine Sch. Dist.* (Fr. Ct. App. 2016). But if the Court does not make that finding, Little Tots still satisfies the likelihood-of-success requirement, because it has more than a mere possibility of prevailing on its claim that the Director's revocation decision was unreasonable.

The most recent notice of deficiency that Little Tots received states four points of non-compliance. *See* Not. of Deficiencies, Jan. 23, 2019. The fourth and last is not a non-compliance at all. The inspector observed that milk was available to be picked up in a snack room and that one of the children at Little Tots who ate in that snack room was, according to their enrollment form, allergic to dairy products. The inspector concluded that the theoretical possibility that that child, Child "A," would drink the milk was a violation of 34 Fr. Admin. Code. 3.37. Section 3.37(g) provides that children who require special diets due to, inter alia, allergic reactions shall be "provided with meals and snacks" according to their

parents' written instructions. Child "A" was not "provided" with milk; milk was merely made available for the other children at the care center. At trial, Ashely Baker, the operator, would testify that Child "A" knows he is allergic to milk and has never tried to take the milk made available to his peers. Under these circumstances, it is incorrect to say that milk has been provided to Child "A"; the milk has been provided to those children who actually drink and are not allergic to milk. Just as no one would say that a cafeteria "provides" meat to vegetarian students who do not take it, Little Tots has not "provided" milk to Child "A." Further, to the extent the Court does view this is a violation, Ms. Baker would testify that she intends to cure it by having staff supervise the food when it is put out to ensure that allergic children cannot drink the milk.

The three other citations for non-compliance with critical standards in the January 23 notice are both factually and legally correct. But they are relatively minor and either have been or are in the process of being cured. First, one room of two-year-old children had one more child per staff member than the Department's regulations allow. But that violation was temporary, and a result of exigent circumstances, as the notice itself notes; there was a one-week overlapping period of enrollment between an incoming child whose parents needed them to begin attending right away and an outgoing child. Within one week of the notice, the violation was cured. Second, five of the enrolled children's enrollment forms were partially incomplete. This was a dramatic reduction from thirty-seven incomplete enrollment forms in the Department's

first deficiency notice, and sixteen in the second. Little Tots is on track to completely curing this deficiency. Moreover, it is at least in part outside Little Tots' control. Little Tots has asked the outstanding five parents to fully complete the enrollment forms, but still has not received them. Little Tots' only option to comply with the regulation, if the parents continue to fail to fill them out, is to disenroll these five children. This would flout the purpose of the Act.

Finally, two teachers, including one new hire and one hold-over, have not received background checks. In the past, Little Tots has speedily cured this deficiency as to its new hires. *Compare* Not. of Deficiency, Oct. 19, 2018 (noting no background check for newly hired teacher Kane) *with* Not. of Deficiency, Jan. 23, 2019 (not mentioning a missing background check for Kane). There is no reason to think that Little Tots would not speedily cure this deficiency for its latest new hire as well. As to Teacher Anders, a hold-over from the previous owner, Little Tots has, concededly, repeatedly failed to get this background check done, apparently on the mistaken belief that because she was a hold-over from prior ownership, prior ownership was responsible for getting her background check and had done so. Little Tots is no longer under that mistaken belief and will procure a background check for Teacher Anders, as it has done for all its own hires.

In sum, the deficiencies the Department found are either non-existent, cured, or in the process of being cured shortly. Some, such as the teacher/student ratio,

were minor or temporary, and Little Tots has improved on all fronts of actual non-compliance since its first deficiency report, falling from four missing background checks to two, four rooms with teacher/student ratio violations to one, and 37 missing enrollment forms to five. It is unreasonable, under these circumstances, for the Department to revoke Little Tots' license without giving it an opportunity to cure its outstanding points of non-compliance--especially in light of the purposes of the Act, namely to provide affordable child care to parents who would otherwise go unemployed. If Little Tots closes, Jacob Robbins, a parent whose children are served by Little Tots, would testify that his and other families would have no affordable child care center to send their children within 15 miles of their homes, and that his wife would have to quit his job. Closing Little Tots over its outstanding and soon-to-be-cured violations would gravely undermine the Act's purpose with respect to low-income families in the local community. At a minimum, Little Tots has more than a mere possibility of prevailing on its claim that the Department's revocation is unreasonable.

B. Little Tots would be irreparably harmed if an injunction is not granted because the permanent closure of Little Tots cannot be remedied by monetary relief.

A movant for a preliminary injunction must show that it would "suffer irreparable harm if the injunction is not granted." *Lang*. An injury is irreparable

"when the injured party cannot be adequately compensated by damages[.]" *Id.* If Little Tots is forced to close, even temporarily, Ms. Baker would testify that it risks losing its clients and that it would possibly not be able to reopen even if it prevailed at a trial. If Little Tots is closed pending a full trial, its clients may find other means of child care, and may opt not to return even if Little Tots reopens, and even if Little Tots gets its license back at trial, it may not be able to reopen because of the crippling losses it and its operator will suffer during the pendency of trial. This harm cannot be remedied by damages, or "measured by any certain pecuniary standard." *Lang*. It would be impossible to calculate the lost income Little Tots would have made had it not gone out of business, and even if it were possible to measure these damages, the closure of Little Tots could not be remedied by damages alone. Little Tots is not just a business, but the personal passion of its operator, and a needed mainstay for its customers. Damages could not remedy its closure.

C. The benefits of granting Little Tots an injunction outweigh the hardships to the Department.

To obtain a preliminary injunction, a movant must show that the benefits of granting the injunction to the movant outweigh the hardship to the non-movant, and that greater injury would result from failing to grant the relief sought than from granting it. *See Lang*. The injury to Little Tots if injunctive relief is not granted is incalculable--the potential end of its business, and at the very least the

loss of many of its clients, as well as the loss of employment for its operator and potential default on her business loans. The injury to the Department is that a child care center will remain in operation at which at most five children lack fully completed enrollment forms and two teachers lack completed background checks, with both points of non-compliance in the process of being cured.

The Department will correctly point out that the lack of background checks, and proper enrollment forms that identify persons who are authorized to pick up children, are serious safety matters. However, there is no evidence that either of the teachers without background checks, one of whom is an employee of long standing, have committed any misconduct or have any criminal or civil history, or that the five children have been picked up by persons other than their parents or relatives. The safety risks presented by these points of non-compliance are real, but not substantial, and most importantly, they are in the process of being cured; Little Tots has procured completed enrollment forms for 32 of the 37 children who originally lacked them and should soon procure completed enrollment forms for the outstanding five, has historically obtained a background check for each teacher that it has hired, and now understands that it must procure a background check for Teacher Anders, whom it formerly believed already had a background check. Hence, the safety risks at play are not only non-substantial, but temporary and in the process of being eliminated, and are heavily outweighed by the incalculable harm to Little Tots if injunctive relief is denied.

D. The issuance of a preliminary injunction would serve the public interest.

A movant for a preliminary injunction must show that injunctive relief would serve the public interest. *See Lang*. The argument here is simple. If injunctive relief is denied, Little Tots will be closed for at least the duration of trial, which is not for another 90 days, and may be closed permanently. In the meantime, there would be no affordable child care center for many families in the area. Some parents would have to quit their jobs; others would have to rely on relatives who cannot always be relied upon to provide child care, and certainly do not provide it up to the level of Little Tots. This harm to the public interest is exactly what the Act was enacted to prevent. *See Act. Sec. 1*. The Department will argue that its safety concerns outweigh the enormous detriment to the public interest of Little Tots' temporary or even permanent closure. But as explained above, its safety concerns, while real, are not substantial, and are in the process of soon being cured completely. Because injunctive relief would prevent the harms to the public that Little Tots' closure would pose, pending a decision on the merits on whether the Department's revocation decision was justified, it would serve the public interest.

END OF EXAM