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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PATTY'S PINOLE MONTESSORI
SCHOOLS, INC.,

Plaintiff and Appellant,

v.

STATE DEPARTMENT OF SOCIAL
SERVICES,

Defendant and Respondent.

A140416

(Alameda County
Super. Ct. No. RG13684670)

After the State Department of Social Services (the Department) revoked the license of Patty's Pinole Montessori Schools, Inc. (Patty's Montessori or the preschool) to operate a licensed child day care center, Patty's Montessori filed a petition for administrative mandate. The trial court denied the petition, and Patty's Montessori appeals. We shall affirm the judgment.

I. BACKGROUND

The Department is the state agency responsible for licensing child day care facilities. (Health & Saf. Code,¹ § 1596.72, subd. (d).) As part of this responsibility, the Department has authority to suspend or revoke a license on several grounds, including (1) for violation of the California Child Day Care Facilities Act (§§ 1596.70 et seq., 1596.90 et seq., & 1597.30 et seq.) (the Act) and the regulations promulgated under the Act; (2) for aiding, abetting, or permitting such a violation; and (3) for "[c]onduct which

¹ All undesignated statutory references are to the Health and Safety Code.

is inimical to the health, morals, welfare, or safety of . . . an individual in or receiving services from the facility” (§ 1596.885, subds. (a), (b), & (c).)

A. Administrative Proceedings

In October 2012, the Department brought an administrative revocation action seeking to revoke the license of Patty’s Montessori to operate a child day care center. The accusation, as later amended, alleged a number of safety violations, including staff treating children roughly, failing to take action when children behaved in a dangerous manner, failing to supervise children adequately, and leaving children unattended. A hearing took place before an administrative law judge (ALJ).

1. May 2011 Site Visit

Diane Perez, who worked for the Department as a licensing program analyst, testified that she carried out a site visit of the preschool in May 2011 and met with the director, Cynthia Muth. She saw children of approximately four or five years of age taking turns jumping from a play structure and swinging from a canopy awning, which was made of aluminum poles with a fabric cover, then jumping to the ground. Staff members were present but did not intervene. She also saw a boy running to a window and flinging himself body first onto it, and repeating this action two or three times. The window was apparently made of safety glass and did not break. After the second or third time the boy hit the window, Muth went to an open window to tell a staff member in the yard to stop the child. When Perez was alone in a classroom, she saw a four- or five-year-old child come in by himself and remain unattended for a couple of minutes. Perez saw that one of the play structures was chipping and peeling and there seemed to be raised nails on it.

Perez discussed the problems she saw with Muth, who explained that it was picture day and the children were excited because the schedule was different than usual. Perez explained to Muth the deficiencies she had seen and Muth signed an agreement to implement a plan for better supervision and within approximately three weeks provide verification to the Department that staff had received additional training in child

supervision. The preschool provided the Department with a copy of the agenda of a training session held in early June 2011, and the Department cleared the deficiency.²

2. June 2011 Complaint of Lack of Supervision

In late June 2011, the Department received an anonymous complaint about lack of supervision at the preschool. According to the Department's complaint report, "On 6/29/11 around 5 O'clock complainant went to pick up her child from the center and staff was frantically looking for 2 missing students. Complain[an]t over heard [sic] a parent saying that they were looking for children that were missing."³ The Department did not receive an "unusual incident report" from the preschool reporting the situation.⁴

3. July 2011 Site Visit

Perez visited the preschool in early July 2011. In the yard, she saw a four- or five-year-old child sitting on top of a playhouse. The playhouse was about four feet high, had a rounded roof, and was placed on a concrete surface. A teacher was nearby, able to see the child, but did not tell her to get down or help her down.

Perez spoke with a teacher, Rebecca Mayberry, about the incident in which two children had been missing. Mayberry showed her the area from which the children had escaped. She explained that the children, who were five-years-olds, had climbed a picket fence, gone over a cyclone fence into another play yard, and gone through a parking lot into a residential area, off the preschool's premises. Two staff members were monitoring that side of the yard, but did not see the children climb the fence.

² Perez did not recall Muth having provided the required verification, but her signature appears on the letter confirming that the deficiency had been cleared.

³ Patty's Montessori objected to evidence of this report on the ground of hearsay. The trial court ruled the report was admissible as administrative hearsay that would supplement and explain the witness's testimony pursuant to Government Code section 11513, subdivision (d).

⁴ California Code of Regulations, title 22, section 101212, subdivision (d)(1)(C) requires a licensee to report to the Department "[a]ny unusual incident or child absence that threatens the physical or emotional health or safety of any child," by telephone or fax within one working day and in writing within seven days.

Perez spoke with Muth and told her she should have filed an unusual incident report. Muth said she had not thought it was necessary to do so because the children were found and returned by a grandparent and no one was hurt. She also told Perez that at the time of the incident, everyone was “running around” and helping look for the children.⁵

Perez also told Muth she had seen children playing with one foot on a play fort and the other on the horizontal boards of a picket fence, their legs straddling the spiked pickets. Teachers were nearby but did not redirect the children. Perez expressed her concern to Muth about the children’s safety, and Muth told her that was how the children played on the structure. Perez advised her to remove the play structure and the points on the pickets.

Perez looked into a classroom and saw two children sitting alone at a table. One of the children said they were hiding from their teacher.

4. Noncompliance Conference

Perez arranged a “noncompliance conference” for mid-July 2011, at which Muth met with Perez, her supervisor, and the Department’s regional manager, Barbara Bobincheck. At the conference, Muth admitted she did not have real control over her staff. She was given a facility evaluation report that instructed her that effective immediately, staff at the preschool must “ensure that all children in care will have 100% supervision at all times,” and that Muth would provide training to staff on proper supervision practices. Neither Perez nor Bobincheck was aware of Muth having complied with these requirements.

After the noncompliance conference, Muth discussed with Perez the incident in which two children climbed the fence and left the facility. Muth told Perez she had seen

⁵ The preschool later filed an unusual incident report in which Muth explained that the boys decided to go play at the home of one of them, that they scaled two fences when the teachers were not looking and ran of out sight, that they ran down the street toward the house, and that they were found and returned to the school within approximately five minutes.

the children hopping the fence, and that “they” had called out to the children to stop, but the children ignored them and kept going. They were “frantically” trying to run after the children, and one of the grandmothers who was present helped. When Muth had spoken with Perez about the incident earlier, she had not told Perez she saw the children go over the fence.

5. April 2012 Incident

Muth sent the Department another unusual incident report in early April 2012. According to the report, two boys were standing on a platform on the far end of the yard, next to an empty field, and climbed over the fence to the grass on the other side. One of the teachers saw the boys go over the fence, called to them to stop, and ran to the fence. She called for help from another teacher, and they brought the boys back into the yard. The platform was removed from that location.

6. April 2012 Site Visit

Perez again visited the preschool in mid-April 2012. She spoke to a teacher who told her that on the day of the April incident, the boys had pushed the play structure to the fence and that she had seen them hop over the fence. The teacher told them to stop, and they obeyed. She and another staff member told the boys to prop up pieces of discarded picket fence and climb it so the teachers could pull them up and over the fence. The teachers did not go around the fence to the boys because there was poison oak in one direction and it would take too long in the other direction.

Perez issued a citation, assessed a penalty, and directed Muth to remove the play structure from the path and secure it to the ground so it could not be moved.

Muth had a second noncompliance conference with Perez, Bobincheck, and Perez’s supervisor in early May. Bobincheck expressed her concern about the children leaving the preschool, and Muth apologized and said she was trying to work on “getting the staff involved with supervision.” The Department directed Muth to provide training and mentoring for her staff and provide written documentation. Although Patty’s Montessori sought out a mentor, the Department did not receive the documentation.

7. July 2012 Site Visit

Perez again visited the preschool in July 2012. The children were having free play outside. Perez saw the head teacher handling children in a rough manner, taking them by the arm to put them on a time-out bench outside, and a volunteer yelling at the children in a harsh tone. Some of the children were jumping on a picket fence and rocking it back and forth. The teacher and volunteer yelled at them to stop, but most of the children continued to rock the fence until the teacher and volunteer got “in the face of the child.” One of the children was throwing sand that was getting into another child’s eyes, and the volunteer yelled at him to stop, without providing any explanation or direction. Perez did not see the staff directing the children in their play, except to reprimand them. At circle time inside, the children did not cooperate with the teacher, and there was “commotion and chaos” in the room. As the circle time “dissolved,” the teacher grabbed a child by his shirt and pulled him forcefully toward her face, looking angry.

Perez instructed Muth to provide training to the staff on proper discipline and to provide evidence of the training within a month. Perez was not aware that Muth complied.⁶

Muth had previously been directed to post her citations where parents could see them. At the July 2012 visit, Perez could not find the postings. She questioned Muth, who went to the posting board and said someone had put the framed license in front of one of the postings.

8. April 2013 Site Visit

A site visit conducted in April 2013 showed multiple violations of regulations, including inadequate teacher-child ratio (Cal. Code Regs., tit. 22, § 101216.3, subd. (a)), napping equipment stored improperly (Cal. Code Regs., tit. 22, § 101239.1, subd. (c)(2)), insufficient variety of foods for snacks (Cal. Code Regs., tit. 22, § 101227, subd. (a)(4)), deficiencies in parents’ signatures on the sign-in and sign-out sheets (Cal. Code Regs.,

⁶ Muth testified that she provided training for her staff and sent minutes of the training meeting to Perez, and that in fact she provided training each time she was directed to do so.

tit. 22, § 101229.1, subd. (a)(1)), and a splintered play structure and sand box (Cal. Code Regs., tit. 22, § 101238, subd. (a) [“The child care center shall be clean, safe, sanitary and in good repair at all times to ensure the safety and well-being of children . . .”].) When the representative of the Department who conducted the visit pointed out the deficiencies to Muth, Muth told her that Perez had said “ ‘that was okay to do.’ ” Perez denied having approved any of the violations.

9. ALJ’s Proposed Decision and Department’s Adoption

The ALJ issued a proposed decision recommending that Patty’s Montessori’s license be revoked. He found that the preschool’s personnel had failed to care for and supervise the children (Cal. Code Regs., tit. 22, § 101229), that they violated the personal rights of children in their care (Cal. Code Regs., tit. 22, § 101223), that the preschool failed to report children having eloped from the facility (Cal. Code Regs., tit. 22, § 101212, subd. (d)(1)(C)), that Muth failed to comply with the duties and responsibilities expected of a child care director (Cal. Code Regs., tit. 22, § 101215, subds. (b)(2) & 101215.1, subd. (c)), that Muth had provided false or misleading information to the Department when she said she saw the two children climb the fences during the June 2011 incident (Cal. Code Regs., tit. 22, §§ 101163, subd. (a) & 101215.1), that she had failed to accept accountability for the preschool’s deficiencies and noncompliance with directives of the Department (Cal. Code Regs., tit. 22, § 101214), and that the preschool’s conduct was inimical to the health, welfare, and safety of the children (§ 1596.885, subd. (c)).⁷ In reaching these conclusions, the ALJ

⁷ California Code of Regulations, title 22, section 101229 provides: “(a) The licensee shall provide care and supervision as necessary to meet the children’s needs. [¶] (1) No child(ren) shall be left without the supervision of a teacher at any time, except as specified in Sections 101216.2(e)(1) and 101230(c)(1) [which allow aides to supervise napping children in certain circumstances]. Supervision shall include visual observation.”

California Code of Regulations, title 22, section 101223, subd. (a) requires a licensee to ensure that each child is accorded certain person rights, including the rights to dignity in personal relationships with staff; to safe, healthful and comfortable accommodations, furnishings, and equipment; and to be free from “corporal or unusual

found the testimony of Perez and Bobincheck credible, and portions of the testimony of Muth and preschool employees who testified not credible.

The Department adopted the ALJ's proposed decision.

B. Trial Court Proceedings

Patty's Montessori filed a petition for writ of administrative mandamus, contending it was denied a fair hearing, that the findings were not supported by substantial evidence, that the ALJ improperly based his findings on hearsay, that the facility was operating safely within the bounds of the Act, and that the Department's index of precedential decisions did not support the license revocation.

Before the hearing, the trial court issued a tentative ruling denying the petition for writ of mandate. At the hearing on the petition, Patty's Montessori did not contest the tentative ruling, but asked the court to issue a statement of decision immediately so it could file a notice of appeal.

The trial court denied the petition for writ of mandate, concluding Patty's Montessori received a fair hearing, that the ALJ properly admitted hearsay evidence, and that, based on the trial court's independent judgment, the findings were supported by the

punishment, infliction of pain, humiliation, intimidation, ridicule, coercion, threat, mental abuse or other actions of a punitive nature.”

California Code of Regulations, title 22, section 101215, subdivision (b)(2) requires an administrator to have knowledge of and ability to comply with applicable laws and regulations. Section 101215.1, subdivision (c) provides that a “child care center director shall be responsible for the operation of the center, for compliance with regulations, and for communication with the Department”

California Code of Regulations, title 22, section 101163, subdivision (a) prohibits a licensee, officer, or employee of a licensee from making or disseminating any false or misleading statement about the child care center or the services provided there.

California Code of Regulations, title 22, section 101214, subdivision (a) provides that the licensee “is accountable for the general supervision of the licensed child care center and for the establishment of policies concerning its operation.”

weight of the evidence and the ALJ did not abuse his discretion. This timely appeal ensued.

II. DISCUSSION

A. Standard of Review

“A writ of administrative mandate is available ‘for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal’ (Code Civ. Proc., § 1094.5, subd. (a).) The trial court’s inquiry in such a case ‘extend[s] to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.’ (Code Civ. Proc., § 1094.5, subd. (b).) Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc., § 1094.5, subd. (b).)” (*Kifle-Thompson v. State Bd. of Chiropractic Examiners* (2012) 208 Cal.App.4th 518, 523 (*Kifle-Thompson*).

“When a trial court rules on a petition for writ of mandate following a license revocation, it must exercise its independent judgment to determine whether the weight of the evidence supported the administrative decision. [Citations.] After the trial court has exercised its independent judgment upon the weight of the evidence, an appellate court’s function ‘is solely to decide whether credible, competent evidence supports [the trial] court’s judgment.’ (*Yakov [v. Board of Medical Examiners]* (1968) 68 Cal.2d 67,] 69, 72 [‘the question before this court turns upon whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court’s conclusion’].” (*Finnerty v. Board of Registered Nursing* (2008) 168 Cal.App.4th 219, 227.) In performing this review, we resolve all conflicts in favor of the party that prevailed in the trial court. (*Kifle-Thompson, supra*, 208 Cal.App.4th at p. 523.)

We review independently a claim that an agency failed to afford a fair trial, and review questions of law de novo. (*Kifle-Thompson, supra*, 208 Cal.App.4th at p. 524; *Broney v. California Com. on Teacher Credentialing* (2010) 184 Cal.App.4th 462, 472.)

B. Fair Trial

Patty's Montessori contends it was deprived of a fair trial because the ALJ relied on incompetent evidence. As it points out, "[w]hen an administrative agency initiates an action to suspend or revoke a license, the burden of proving the facts necessary to support the action rests with the agency making the allegation. Until the agency has met its burden of going forward with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations or otherwise respond." (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536 (*Daniels*); accord *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881 (*Walker*), overruled on another ground in *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 37–38, 44–45 ["a board commits an abuse of discretion when it revokes a license to conduct a legitimate business without competent evidence of just cause for revocation."].)

Patty's Montessori contends the decision to revoke its license was based on incompetent evidence, specifically Perez's testimony, which it characterizes as "merely personal opinion and speculation." This contention fails. The evidence presented at the administrative hearing included Perez's direct observation of events and the corroborating statements and testimony of staff at the preschool, including Muth herself. The problems Perez saw included the boy repeatedly flinging himself at a window without being stopped immediately, children playing in an unsafe manner by swinging from an aluminum canopy awning or by straddling a spiked fence without staff intervention, a young child sitting on a the rounded roof of a playhouse above a concrete surface without staff intervention, children alone in classrooms, and staff treating children roughly. The two incidents in which children left school premises were confirmed by the unusual incident reports and the statements of Muth and preschool employees. There is no basis to conclude this evidence was not competent.

We similarly reject Patty's Montessori's contention that it was deprived of a fair hearing because the ALJ was prejudiced against it. Although there was conflicting testimony at the hearing, there is no basis to conclude the ALJ acted with bias in making his determinations of fact and in evaluating the credibility of the witnesses. (See *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219–1220 [trial court's expressions of opinions based on observation of witnesses do not establish bias].)

C. Credibility Determination

Patty's Montessori also contends the ALJ improperly relied on Government Code section 11425.50, subdivision (b) to deem Perez's testimony credible and the testimony of some of the preschool's staff not credible. That statute, a part of the Administrative Adjudication Bill of Rights, provides in pertinent part that "[i]f the factual basis for the [ALJ's] decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it." In his decision, the ALJ cited this statute and stated, "Ms. Diane Perez offered compelling evidence at the hearing of this matter. By her demeanor while testifying, by the consistency of her account of her observations regarding respondent's operations and the children affected by those operations, and by her attitude towards the proceedings, Ms. Perez established herself to be a credible, persuasive and trustworthy witness at the hearing of this matter." (Fn. omitted.)

Patty's Montessori contends the ALJ's reliance on Government Code section 11425.50 was improper because that statute is inapplicable to license revocation hearings held under section 1596.887. This contention is without merit. Section 1596.887, subdivision (a) provides that proceedings for the revocation of a license "shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code." Government Code section 11501, subdivision (c), in turn, provides that "Chapter 4.5 (commencing with Section 11400)

applies to an adjudicative proceeding required to be conducted under this chapter” Government Code section 11425.50 is part of Chapter 4.5, and hence applies to license revocation proceedings.⁸

In its reply brief, Patty’s Montessori argues for the first time that the ALJ failed to identify any specific evidence of the “observed demeanor, manner, or attitude” of the witnesses to support his credibility determinations. (See Gov. Code, § 11425.50, subd. (b); see also *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 587–588.) It is well established that we need not consider issues raised for the first time in a reply brief. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 548.)

Moreover, the argument fails on the merits. First, in finding Perez and Bobincheck’s testimony credible, the ALJ identified Perez’s “demeanor while testifying, . . . the consistency of her account of her observations regarding respondent’s operations and the children affected by those operations, and . . . her attitude towards the proceedings,” and Bobincheck’s “demeanor while testifying and the consistency of her testimony.” He also provided specific examples of the portions of the witnesses’ testimony that he found either credible or not so. This appears to us to meet the standards of Government Code section 11425.50, subdivision (b). In any case, whether or not the ALJ’s identification of the witnesses’ “observed demeanor, manner, or attitude” met these standards—and were thus entitled to “great weight” on review—the question before us is whether substantial evidence supports the decision below. (See *California Youth Authority v. State Personnel Bd.*, *supra*, 104 Cal.App.4th at p. 596.) Even without according “great weight” to the ALJ’s credibility determinations, the evidence is sufficient to support the findings that Patty’s Montessori committed multiple violations of

⁸ Patty’s Montessori also argues that section 11425.50 applies to “presiding officers,” not to administrative law judges. A “presiding officer” for purposes of Chapter 4.5, is defined as “the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding.” (Gov. Code, § 11405.80.)

the applicable regulations and that its conduct was inimical to the health, welfare, and safety of the children.

D. Reliance on Hearsay

Patty's Montessori contends the decision was improperly based on inadmissible hearsay. This hearsay, according to Patty's Montessori, was the anonymous report to the Department that two children at the preschool had briefly escaped in June 2011. Patty's Montessori argues this report was the only evidence that the two boys left the parking lot and went into a residential area, and there is no evidence of how the parent who made the report knew staff were frantically looking for the missing children. We reject this contention.

Government Code section 11513 governs the introduction of evidence at a formal administrative adjudication. Subdivision (c) of that statute provides that “[t]he hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.”

Subdivision (d) of that statute provides in pertinent part: “*Hearsay evidence may be used for the purpose of supplementing or explaining other evidence* but over timely objection shall not be sufficient *in itself* to support a finding unless it would be admissible over objection in civil actions.” (Italics added.)

Patty's Montessori is correct that under Government Code section 11513, subdivision (d), hearsay evidence alone is insufficient to support a finding. (*Daniels, supra*, 33 Cal.3d at p. 538 [“[t]he legislative mandate of Government Code section 11513 against sole reliance on hearsay evidence is emphatic”]; *Walker, supra*, 20 Cal.2d at p. 881 [“Hearsay evidence alone is insufficient to support the revocation of [a legitimate business license]”; *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 596–597 [hearsay may be admissible in administrative proceeding, but mere uncorroborated

hearsay does not constitute substantial evidence[.]) Here, however, the hearsay report Patty's Montessori challenges was not the only, or even the primary, evidence of the June 2011 incident. When Perez visited the preschool in July 2011, Mayberry showed her the area where the children had escaped and explained that they had climbed two fences and gone through a parking lot into a residential area. Muth confirmed that the incident had occurred and that "everybody" had helped look for the children. Muth later told Perez she had seen the children hop the fence, that the children ignored calls to stop, that staff members were "frantically" running after them, and that a grandmother who was present helped. Under Government Code section 11513, subdivision (d), the hearsay report could properly be admitted to supplement this evidence. (See *Bledsoe v. Biggs Unified School Dist.* (2008) 170 Cal.App.4th 127, 141.)⁹

E. Prior Record of Safety

Patty's Montessori contends its license was "unlawfully revoked" because it had a 10-year record of operating safely and in compliance with the Legislature's intent in enacting the Act. It argues the Department targeted it for closure "based solely on Inspector Perez's strange animosity and abnormal obsession with discrediting Cindy Muth and her staff."

As Patty's Montessori notes, the Legislature has found that "good quality child day care services are an essential service for working parents" (§ 1596.72, subd. (e)), and that "affordable, quality licensed child care is critical to the well-being of parents and

⁹ Patty's Montessori also suggests Mayberry could not have seen the children enter a residential neighborhood, and argues they got no farther than a school parking lot. We first note that the unusual incident report prepared by the preschool stated that the boys "ran down the street towards" the home of one of them, and thus provides independent support for the factual finding that the boys went into a residential development. In any case, whether or not the children reached the adjacent residential neighborhood, there is an abundance of non-hearsay evidence that they left the main school grounds by climbing two fences, no one knew where they were, and the staff was "frantically" searching for them. The anonymous report could properly be used to supplement these accounts, but there is no reason to conclude it was the sole, or even a primary, basis of the conclusion that the children were not adequately supervised.

children in this state” (§ 1596.73, subd. (e)). Without citation to the record, Patty’s Montessori asserts that it operated for more than 10 years without a single injury, that the children were well cared for, that not a single parent had complained, that not a single child had been withdrawn by a dissatisfied parent, and that the facility contributed positively to the children’s development. Therefore, the preschool argues, its continued operation would fulfill the intent of the Legislature.

We first note that it is counsel’s duty to draw the court’s attention to the portions of the record that support their arguments, and that arguments not supported by citations to the record may be treated as waived. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1140–1141; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Our own review of the record has not disclosed evidentiary support for these assertions.¹⁰

In any case, the argument is without merit. The Department is authorized to revoke a license for violations of the Act or its implementing regulations or for “[c]onduct which is inimical to the health, morals, welfare, or safety of either an individual in or receiving services from the facility” (§ 1596.885, subds. (a)–(c).) We are aware of nothing in the Act that requires the Department to wait until a child is injured before exercising this authority. The record contains evidence of multiple safety problems and violations of the applicable regulations, and Patty’s Montessori has not met its burden to show the weight of the evidence does not support the Department’s determination.

¹⁰ In another portion of its opening brief, Patty’s Montessori points out that Muth testified, “I haven’t had any injuries.” This testimony was given in response to a question about whether any of the children had been injured by straddling the pickets on the fence as Perez had suggested could happen after her July 2011 site visit. Patty’s Montessori also points out that its counsel argued in his opening and closing statements that the preschool was safe, no child had been injured, and parents were satisfied. “It is axiomatic that arguments of counsel are not evidence.” (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 895, fn. 9.)

F. Index of Precedential Decisions

Finally, we reject Patty's Montessori's argument that the judgment should be reversed because none of the decisions in the Department's index of precedential decisions closely resembles this case. It argues that the one decision in the Department's index in which a license was revoked under analogous facts, *In re Bailey* (99 CDSS 02),¹¹ is distinguishable in that there several parents had complained about the care being provided at the facility and children had suffered injuries as a result of the violations.

California Government Code section 11425.60 provides that a decision may be expressly relied on as precedent only if it has been designated as a precedential decision by an agency, authorizes agencies to designate decisions as precedent if they contain "a significant legal or policy determination of general application that is likely to recur," and requires agencies to maintain an index of "significant legal and policy determinations made in precedent decisions." (Gov. Code, § 11425.60, subs. (a)–(c).) Patty's Montessori draws our attention to no authority suggesting a license may be revoked only in circumstances similar to those in a prior precedential decision. Whether or not the violations in *In re Bailey* were more egregious than those here, substantial evidence supports the trial court's findings.

III. DISPOSITION

The judgment is affirmed.

¹¹ Available at <http://www.cclld.ca.gov/res/pdf/bailey9611140p.PDF> (as of Nov. 21, 2014).

Rivera, J.

We concur:

Reardon, Acting P.J.

Bolanos, J.*

* Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.