Respondent, premises owner, appeals from a recommended decision and order sustaining a Class 1 violation of Section 28-210.1 of the Administrative Code of the City of New York (Code) for alteration of a residence as a dwelling for occupancy by more than the legally approved number of families. In the notice of violation (NOV), the issuing officer (IO) stated that on December 20, 2010, he observed that the premises, legally approved as a two-family dwelling, had been converted into three single room occupancies (SROs) on the second floor. The IO stated further that two of the SROs had key-locking devices and that all had beds, personal items, and toiletries. He noted that he was unable to gain access to a fourth room. The IO indicated on the NOV that Petitioner, the Department of Buildings (DOB), was seeking per day penalties pursuant to Code Section 28-202.1.

At the hearing, Petitioner offered a certificate of occupancy for the premises showing that the first and second floors were authorized as dwelling units, and the cellar was authorized for storage. The IO affirmed his statements on the NOV. The IO testified that because he was unable to gain access to a fourth room with a key-locking device, he left an appointment card for reinspection.[1] He testified further that the occupants present in the apartment did not allow him to take photographs of the interior of the apartment.

In rebuttal, Respondent's attorney asserted that the second-floor apartment was leased to four students, who maintained a common household and did not live separately and apart. In support, Respondent offered a copy of the lease, which named the four students as tenants. Additionally, Respondent offered the testimony of one of the students, who appeared as a witness, and affidavits from the other three students.

The administrative law judge (ALJ) found that Respondent's evidence, including the testimony of the student, was insufficiently credible to refute Petitioner's case. Accordingly, the ALJ sustained the NOV and imposed per day penalties for the maximum period of 45 days. The main issue on appeal is whether Respondent's evidence was sufficient to show that the four students occupied the second floor apartment as a family maintaining a common household.

Code Section 28-210.1 makes it unlawful "to convert any dwelling for occupancy by more than the legally authorized number of families or to assist, take part in, maintain or permit the maintenance of such conversion."

Section 310.2 of the New York City Building Code (BC)[2] defines "family" to include "[n]ot more than three unrelated persons occupying a dwelling unit and maintaining a common household . . . ." That section also provides:

[1] The IO's reinspection on January 14, 2011 resulted in the issuance of another violation of Code Section 28-210.1 for the conversion of the fourth room into an SRO.
[2] Found in Title 28 of the Code.

> A common household is deemed to exist if all household members have access to all parts of the dwelling unit. Lack of access to all parts of the dwelling unit establishes a rebuttable presumption that no common household exists.

On appeal, Respondent, by her attorney, argues that the presence of key-locking devices, absent any other indicia of separate living, was insufficient to prove the existence of SROs. Respondent reiterates that the apartment was occupied by four students living together as one family and maintaining a common household. For the first time on appeal, Respondent contends that Petitioner failed to make out a Class 1 violation of Code Section 28-210.1 by showing that the two-family residence had been altered for occupancy by more than four families. Respondent asserts that Petitioner only alleged the existence of three SROs, and therefore did not establish that the apartment was occupied by four families. Because Respondent did not make this argument at the hearing, the Board need not consider it. However, the Board notes that the conversion of the second floor apartment into three SROs, in conjunction with the first floor apartment, amounts to occupancy of the premises by four families.

Petitioner did not answer the appeal.

Whether the four students constituted a *common household*

On this record, the Board finds that Respondent failed to show that the four students occupied the second floor as a family maintaining a common household. At the hearing, the IO testified that he went to the premises on a complaint of illegal occupancy. He testified further that the second floor apartment had been converted into three SROs, two with key-locking devices and all containing toiletries and personal items. The IO also stated that a fourth room in the apartment was locked, and the occupants present during his inspection were unable to give him access. The IO asserted that the occupants would not allow him to take photographs. He submitted a sketch of the apartment indicating three SROs, with notations of toiletries, personal items and key-locking devices. Contrary to Respondent's assertion on appeal, Petitioner's evidence consisted of more than the IO's observation of key-locking devices and identified other indicia of separate living.

Respondent claimed that the second floor apartment was rented to four students, unrelated by blood or marriage, who attended St. John's University. In support, Respondent offered a lease showing the names of the four students. Shi Chun Yuan, one of the students, testified that he and three other students shared the kitchen and bathroom. Mr. Yuan testified further that on the date of the violation, he and two of his roommates were present. He did not dispute that three of the four rooms in the apartment had key-locking devices, but asserted that the students kept neither toiletries nor cooking utensils separately in their rooms. Mr. Yuan testified further that he collected money from the students and paid Respondent the rent due under the lease each month. Mr. Yuan's testimony was essentially reiterated in three affidavits given by the other three students, with the additional statement that the locks on the bedroom doors were for privacy.

Reply Exh. E

On appeal, as at the hearing, Respondent's attorney argues that the second floor was not occupied as SROs, but by a "family" of four students who maintained a common household. However, under BC Section 310.2, a "family" is defined as not more than three unrelated persons occupying a dwelling unit and maintaining a common household. Here, by Respondent's own admission, the apartment was occupied by four unrelated persons. Moreover, because of the presence of key-locking devices on three of the four rooms, the students did not have access to all parts of the apartment. Therefore, under BC Section 310.2, a rebuttable presumption was created that no common household existed. The ALJ did not credit the student's denial that he and the other students were living separately and apart, and the Board sees no reason to disturb this credibility finding. The Board notes that the three students present during the IO's inspection were unable to open the locked room of the fourth student, belying the claim that the students did not live separately and apart.

Accordingly, the Board affirms the ALJ's recommended decision and order.