

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE ANGELUS, INC.,)
)
 Petitioner,)
)
 vs.) CASE NO. 91-6193
)
 DEPARTMENT OF HEALTH AND)
 REHABILITATIVE SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the above-styled matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Daniel M. Kilbride, on January 22, 1992, in Hudson, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Stephen C. Booth, Esq.
7510 Ridge Road
Port Richey, FL 34668

For Respondent: Thomas W. Cauffman, Esq.
701 94th Avenue North
St. Petersburg, FL 33702

STATEMENT OF THE ISSUES

Whether the Department of Health and Rehabilitative Services ("DHRS") is authorized to deny re-licensure to Angelus Country Group Home I and Angelus Country Group Home II on the basis that it was improvidently granted and should have been licensed as a "residential habilitation center", as defined in Section 393.063(39), Florida Statutes.

PRELIMINARY STATEMENT

Prior to April 1, 1991, The Angelus timely filed an application for the re-licensure for two group homes which it owns and operates in Pasco County, Florida, the Angelus Country Group Home I and II. The Department determined that the facilities were operating as a residential habilitation center, pursuant to Chapter 393, Florida Statutes, and denied re-licensure as a group home. On April 11, 1991, The Angelus timely filed a request for a hearing under Section 120.57(1), Florida Statutes. This matter was referred to the Division of Administrative Hearings on September 25, 1991. After time for discovery and a continuance requested by the parties, the formal hearing was held in a conference room at the facility, in order to permit the Hearing Officer an opportunity to view the site.

At the hearing the Petitioner called nine witnesses, John C. Viverito, M.D., Marie Areniawski, Pauline Shaver, Director of The Angelus, Frederick Lowdnes, Zoning Administrator for Pasco County, Jack Green, John Grogg, Caroline George, Raymond McClusik, Ann Ahern, and offered four exhibits in evidence. HRS called three witnesses, Robert Calhoun, Kingsley Ross, Assistant Secretary for Developmental Services, Leslie W. Leach, Jr., as an expert witness, and offered one exhibit in evidence.

Both parties agreed to file proposed findings of fact and conclusions of law within 20 days of the filing of the transcript. A copy of the transcript of the proceedings was filed with the Clerk of the Division on May 18, 1992, however; Petitioner filed its proposals on March 24, 1992, and the Department filed its proposals on March 16, 1992. In addition, the Department filed a Motion for an Order Relinquishing Jurisdiction to the Department also on March 16, 1992. Petitioner filed its Response to Respondent's Motion on March 24, 1992. After careful consideration, the Respondent's Motion for an Order Relinquishing Jurisdiction is DENIED on the grounds that are set forth in the body of this Recommended Order. The proposed findings of fact submitted by the parties have been given careful consideration, and relevant facts have been incorporated where supported by competent evidence. My specific rulings on proposed findings are addressed in the Appendix attached to this order.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. Petitioner, The Angelus, Inc., is a nonprofit corporation organized and existing under the laws of the State of Florida.

2. Petitioner serves developmentally disabled clients ranging from age six to fifty-three, who suffer from such disabilities as cerebral palsy and spina bifida. The clients at The Angelus are profoundly disabled and are completely unable to care for themselves and are totally dependent upon the services and care provided by others. All are confined to a wheelchair, are non-verbal and some are blind, deaf and/or mentally retarded.

3. The Angelus operates a residential facility and a day program on seventeen (17) acres of wooded property it owns just east of Hudson, in Pasco County, Florida.

4. On the property, the day program is operated out of a large day program center, which is housed in a 5,000 sq. ft. building. The facility also includes a go-cart track and swimming pool. The day program clients commute to the property. Although the routine at The Angelus is not structured and the staff are not licensed professionals that are capable of treating, diagnosing or rehabilitating the children, training in activities of daily living (ADL) skills, habilitation and recreation takes place at the facility. Each client has an approved habilitation plan, as required by HRS, but individualized evaluation and planning do not take place.

5. In addition, there are presently two individual homes which are designed to accommodate ten residents each. Each home is presently at capacity, with a waiting list. Each house is an independent functioning home with a kitchen and living/TV area and shared bedroom arrangement. Although the children are unrelated, they live together and function as a family. The homes

are located within fifty feet of each other and are connected by a sidewalk. Staff provides 24 hour supervision in shifts at the homes.

6. The entire Angelus complex operates under the same administration which oversees the day program and the residential homes.

7. The first house, at the current location, was determined to be and licensed as a group home by HRS in 1984, and the second home was built and licensed in 1987. The license of each group home has been renewed annually since that date.

8. Prior to April 1, 1991, The Angelus timely filed an application for re-licensure for the two group homes which it operates.

9. Under a group home license, the licensee is permitted to house 4 to 15 persons in each home.

10. Although inspection of the homes showed only minor discrepancies, the district staff of the Department determined that the facilities were operating as a "residential habilitation center" and seeks to deny re-licensure as a group home.

11. A residential habilitation center is a community residential facility with a clearly defined mission and can house not less than nine residents with no maximum number.

12. Large group homes and small residential habitation centers have overlapping goals and objectives.

13. The Angelus, in its current configuration, meets both the qualifications of a residential habitation center or as a group home. One of the Department's concerns is that since the homes are located on 17 wooded acres and are not in a urban area they are not in a community setting.

14. The Angelus is in compliance with Pasco County zoning codes and is classified as a group home.

15. There are many prospective residents who are waiting to live at the Angelus, and there is a community need for additional facilities for developmentally disabled persons.

16. The care provided by The Angelus Group Home I and The Angelus Group Home II meets the standards and criteria of a group home as defined by statute and should be renewed.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsections 120.57(1) and 120.60, Florida Statutes.

18. The Developmental Services program of the Department of HRS is responsible for the licensure of residential facilities which serve the Department's developmentally disabled clients. Chapter 393, Florida Statutes;

19. All of the Angelus residents are Department clients who suffer from developmental disabilities as defined in Section 393.063(11), Florida Statutes.

20. The Department is authorized to determine the maximum number of clients a facility may accommodate based on the size of the physical facility in accordance with applicable standards. Section 10F-6.002, Florida Administrative Code.

21. The licensed capacity of a facility is limited depending on whether the facility is classified as a "group home" or a "residential habilitation center." The Department may not license new residential habilitation centers or increase the licensed capacity of an existing residential habilitation center, Section 393.063(11), Florida Statutes, but it may continue to license new group homes.

22. Section 393.063(25), Florida Statutes, defines a "group home facility" as ". . . a residential facility which provides a family living environment including supervision and care necessary to meet the physical, emotional, and social needs of its residents. . ."

23. Section 393.063(39), Florida Statutes, defines "residential habilitation center" as ". . . a community residential facility operated primarily for the diagnosis, treatment, habilitation or rehabilitation of its residents, which facility provides, in a structured residential setting, individualized continuing evaluation, planning, 24 hour supervision, and coordination and integration of health or rehabilitative services to help each resident reach his maximum functioning capabilities. . ."

24. Section 393.063(27), Florida Statutes, defines habilitation as ". . . the process by which a client is assisted to acquire and maintain those life skills which enable him to cope more effectively with the demands of his condition and environment and to raise the level of his physical, mental, and social efficiency. It includes, but is not limited to, programs of formal structured education and treatment."

25. Group home facility standards are contained in Section 10F-6.010, Florida Administrative Code, and residential habilitation center standards are contained in Section 10F-6.011, Florida Administrative Code.

26. The Chapter 393 definitions of "group home" and "residential habilitation center" are similar. Both a group home and a residential habilitation center are residential facilities which provide supervision and care for residents. Likewise, Chapter 10F-6, Florida Administrative Code, licensure standards for group homes and residential habilitation centers are similar, although not identical. The licensure standards for both types of facilities require a safe physical facility and a qualified staff which helps clients develop appropriate skills in a homelike atmosphere. Section 10F-6.011(5)(g)1 and Section 10F-6.010(5)(g)1., Florida Administrative Code.

27. Although the definition of "group home" and "residential habilitation center" do not provide a ready means of distinction, the Florida legislature has provided some guidance for the Department in its findings and statement of intent. The legislature seeks to place developmentally disabled clients in residential settings other than large institutions and to allow individuals to achieve their greatest potential for productivity. The Department is charged with redirecting clients from institutional environments into community based residential services. Section 343.062, Florida Statutes. The general trend in the area of developmental disabilities is to break up large institutions and move developmentally disabled adults into communities to achieve lives as close

to normal as possible. This does not mean however, that the Department in its zeal to carry out this expression of legislative intent can ignore the rights of existing residential facilities and simply deny an application for renewal of an existing license holder and reclassify such facilities because of its perceived legislative directive or because of prior Department actions at the time of the original issuance of the license.

28. The Department's reliance on *State ex rel. Railroad Commissioners v. Atlantic Coast Line Railroad Company*, 54 So. 394, at 397. (Fla. 1910) and *Daniel v. Florida State Turnpike Authority*, 213 So.2d 585 (Fla. 1968), is misplaced for two reasons.

29. First, the actions of HRS, at the District level, leading up to its decision to deny the Petitioner's application for the renewal of its two group home licenses is "proposed agency action" and is therefore preliminary, and not final. Petitioner's request for a formal administrative hearing is not an appeal which would render the hearing a review of action already taken by the Department, and would therefore be entitled to great weight. This hearing, conducted in accordance with Sections 120.60 and 120.57(1), Florida Statutes, is a de novo proceeding intended to formulate agency policy. *Florida Department of Transportation v. J.W.C. Co.*, 396 So.2d 778, 786-87, (Fla. 1st DCA 1981); *Beverly Enterprises v. HRS*, 573 So.2d 19, 23 (Fla. 1st DCA 1990). See *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 584 (Fla. 1st DCA 1977).

30. Second, The Angelus has demonstrated that it possessed the statutory prerequisites for licensure as a group home for the Angelus Country Group Home I in 1984, and yearly thereafter, and for the Angelus Country Group Home II in 1987, and yearly thereafter. Petitioner is entitled to renewal of its group home licenses as a matter of right if it complies with the renewal requirements of the statute, and unless the Department files an administrative complaint and can prove a violation of Section 393.0673(1), Florida Statutes, and the rules promulgated pursuant thereto. Refusal to renew a license cannot be used as a substitute for a license revocation proceeding. *Dublin v. Department of Business Regulation*, 262 So.2d 273, 274 (Fla. 1st DCA 1972). *Accord Vocolle v. Riddell*, 119 So.2d 809 (Fla. 2d DCA 1960); *Wilson v. Pest Control Com'n of Florida*, 199 So.2d 777 (Fla. 4th DCA 1967); *Bank of Credit v. Lewis*, 570 So.2d 383 (Fla. 1st DCA 1990).

31. Therefore, the Department has the burden to prove by a preponderance of the evidence that the Petitioner has committed a violation of Section 393.0673, Florida Statutes, in order for the Department to seek to "deny, revoke, or suspend a license or impose an administrative fine." See *Addington v. Texas*, 441 U.S. 426 (1979).

32. The Department has failed to prove by a preponderance of evidence that The Angelus failed to meet the standards for group home facilities, as set forth in Rule 10F-6.010, Florida Administrative Code. In fact the testimony demonstrated that the care provided by The Angelus meets or exceeds the standards for a group home. Although the Department may now desire the two group homes be classified as a single "residential habilitation center," the time to do so was in 1987. Today, as defined in Section 393.063(25), Florida Statutes, The Angelus functions well as a cluster of group homes and meets the mandate of the legislature. Accordingly, The Angelus is properly classified as two group homes, and the license for the Angelus Country Group Home I and II be renewed.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that The Angelus petition for a renewal of its group home licenses for the Angelus Group Home I and II be GRANTED.

DONE AND ENTERED this __19__ day of May, 1992, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this __19__ day of May, 1992.

APPENDIX

The following constitutes my specific rulings, in accordance with section 120.59, Florida Statutes, on findings of fact submitted by the parties.

Petitioner's proposed findings of fact.

Accepted in substance: paragraphs 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 14, 15, 17, 21, 22, 24

Rejected as irrelevant or as a conclusion: paragraphs 6, 7, 13, 15, 20, 23, 25, 26.

Rejected as not proven by a preponderance of the evidence: paragraphs 18, 19

Respondent's proposed findings of fact.

Accepted in substance: paragraphs 1, 3, 4, 5, 6, 7, 8, 9(in part), 10, 12, 13, 14, 15, 16, 17.

Rejected as irrelevant: paragraph 11, 18, 20.

Rejected as not proven by clear and convincing evidence: paragraph 9 (in part: only two clients share a bedroom), 19.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.