STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
Petitioner,	)	
vs.	)	Case No. 00-1472
LOUISE DANIELS,	)	
Respondent.	)	

RECOMMENDED ORDER

Notice was provided and on August 23, 2000, a formal hearing was held in this case. The hearing location was the Suwannee County Courthouse, Second Floor, Room 2, 200 South Ohio Avenue, Live Oak, Florida. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Lucy Goddard, Esquire
Department of Children
and Family Services
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For Respondent: Merrill C. Tunsil, Esquire
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STATEMENT OF THE ISSUE

Should Petitioner revoke the foster home license held by Respondent for the alleged use of excessive corporal punishment against a foster child cared for in Respondent's home?

PRELIMINARY STATEMENT

On March 16, 2000, Ms. Judith S. Parks, Operations Program Administrator, Department of Children and Family Services, District 3, wrote Respondent notifying Respondent pursuant to Section 409.175, Florida Statutes, and Rules 65C-13.005, 65C-13.006 and 65C-13.010(1)(b)5, Florida Administrative Code, that Petitioner proposed to revoke Respondent's foster home license. The basis for the proposed action was in relation to an alleged incident on or about December 30, 1999, involving use of excessive corporal punishment against a foster child cared for by Respondent in her home, as evidenced by bruises on that child. The charging document notified Respondent that she could contest the allegations by requesting a hearing to be conducted in accordance with Chapter 120, Florida Statutes. In correspondence from Respondent to Petitioner received by Petitioner's District 3 legal counsel on March 29, 2000, Respondent sought a formal hearing to contest the factual allegations in the complaint letter.

On April 5, 2000, the Division of Administrative Hearings received written notification from Petitioner requesting an Administrative Law Judge to conduct a hearing to resolve disputed

facts between the parties leading to the entry of a recommended order. Section 120.57(1), Florida Statutes.

Following one continuance the hearing was conducted on the aforementioned date.

Petitioner filed a Motion to Use Video Taped Deposition of Minor Child in Lieu of Live Testimony or Alternatively for In-Camera or Separate Examination of Minor Child. This motion was in relation to B.H. who at the time of hearing was six years old and was five years old on or about December 30, 1999, when the alleged incident took place. The alleged incident involves the use of corporal punishment by Respondent directed to A.H., B.H.'s brother. A.H. at the time of the alleged incident was three years old. A.H. was four years old when the motion was filed. The motion is dated August 22, 2000. The video deposition of B.H. referred to in the motion was taken on August 3, 2000, in the presence of Cassie Minnich, Court Reporter; Lucy Goddard, Esquire; and Merril C. Tunsil, Esquire, who questioned B.H. concerning the alleged incident without the child's providing an oath before responding to the questions. B.H.'s guardian ad litem, Ms. Becky Hamalian, was also in attendance. The transcript of the video deposition was identified in the hearing record as DCF Exhibit No. 2. The video-tape of the deposition session was identified as DCF Exhibit No. 3.

At hearing, by agreement between the attorneys, B.H. was presented as a witness in-camera, without Respondent's attendance. The in-hearing examination of the witness B.H. was made in the presence of Ray D. Convery, Court Reporter, the attorneys, Ms. Hamalian as guardian ad litem, and the undersigned. Again, B.H. was questioned without his oath to tell the truth but in consideration of questions designed to test his ability to discern the truth. Through the questioning B.H. did not recount facts implicating Respondent in the use of corporal punishment directed to A.H. on or about December 30, 1999.

In turn Petitioner's counsel sought the introduction of DCF Exhibits Nos. 2 and 3, the video deposition transcript and video-tape of the deposition taken on August 3, 2000, under authority set forth in Section 90.803(23), Florida Statutes. In addition Petitioner's counsel sought the introduction of oral statements attributable to B.H. and A.H. made on December 30, 1999, concerning Respondent's alleged use of corporal punishment against A.H. on or around that date. The basis for the attempted introduction of those hearsay statements was Section 90.803(23), Florida Statutes. By these attempts Petitioner hoped to demonstrate that the statements made by the children outside the hearing, complied with the hearsay exception set forth in Section 90.803(23), Florida Statutes.

Moreover, on August 3, 2000, A.H. gave a video-taped deposition before Ms. Minnich, Court Reporter. A.H. was examined by Ms. Goddard and Mr. Tunsil. Ms. Hamalian as guardian ad litem was also in attendance. Respondent offered the transcript of that video-deposition as Respondent's Exhibit No. 1 and the video of that deposition as Respondent's Exhibit No. 2. The A.H. video deposition is subject to consideration consistent with Section 90.803(23), Florida Statutes.

In the event that the out-of-hearing statements by B.H. and A.H., made through the deposition sessions on August 3, 2000, or made orally on December 30, 1999, were not found to be exceptions to hearsay in accordance with Section 90.803(23), Florida Statutes, they are subject to consideration as other forms of evidence. As explained during the final hearing, those statements would be examined to determine if they might be used for purposes of supplementing or explaining other evidence, having been found insufficient in themselves to support a finding of fact based upon the realization that those statements by the children would be inadmissible over objections lodged in civil actions. Section 120.57(1)(c), Florida Statutes.

Consideration of the statements by A.H. and B.H. under Section 90.803(23), Florida Statutes, is controlled by the decisions in State v. Townsend, 635 So. 2d 949 (Fla. 1994) and In the Interest of C.W., a Child v. Dept of Health and Rehabilitative Services, 681 So. 2d 1181, (Fla. 2d DCA 1996).

Having considered these matters, DCF Exhibits Nos. 2 and 3 and Respondent's Exhibits Nos. 1 and 2, in relation to the video-taped depositions given by A.H. and B.H. on August 3, 2000, are denied admission as not constituting exceptions to hearsay under Section 90.803(23), Florida Statutes. The oral statements attributable to B.H. on December 30, 1999, do not constitute exceptions to hearsay under Section 90.803(23), Florida Statutes. The oral statements attributable to A.H. on December 30, 1999, are exceptions to hearsay under Section 90.803(23), Florida Statutes.[1]

DCF Exhibit Nos. 2 and 3 pertaining to B.H. are admissible under Section 120.57(1)(c), Florida Statutes. The oral statements attributable to B.H. on December 30, 1999, are admissible under Section 120.57(1)(c), Florida Statutes.

Respondent's Exhibits Nos. 1 and 2, the August 3, 2000, video-deposition materials in association with A.H. are admissible to the extent they tend to impeach A.H.'s oral statement made on December 30, 1999.

Petitioner presented B.H., Stacey Cleveland, Julia Johnson, Steve Lampros, and Barbara Brannan as its witnesses. DCF's Exhibits Nos. 1 and 4 through 10 were admitted. Ruling was reserved on the admission of DCF's Exhibits Nos. 2 and 3. They are admitted as described above. Respondent testified in her own behalf. Ruling was reserved on the admission of Respondent's Exhibits Nos. 1 and 2. They are admitted as described above.

The hearing transcript was filed on September 7, 2000. Upon the request by counsel for Petitioner, without opposition from Respondent's counsel, the time for filing proposed recommended orders was extended to 20 days from receipt of the transcript by the Division of Administrative Hearings. By such arrangement the requirement for entering a recommended order within 30 days of the date upon which the transcript was received was waived. Section 28-106.216, Florida Administrative Code. On September 25, 2000, Petitioner filed its proposed recommended order which has been considered in preparing the recommended order. Respondent did not submit a proposed recommended order.

FINDINGS OF FACT

1. In accordance with Section 409.175, Florida Statutes, Petitioner licenses family foster homes.

2. At times relevant to the inquiry Respondent has held a family foster home license issued by Petitioner.

3. As a condition of her licensure as a foster parent, Respondent received training in Model Approach to Partnerships and Parenting (MAPP). The MAPP training addressed the imposition of discipline directed to foster children in Respondent's care. The disciplinary policy included a prohibition against disciplinary practices involving corporal punishment. In particular the disciplinary policy prohibited slapping or spanking a child. (DCF Exhibit No. 9) By signing a copy of that disciplinary policy Respondent acknowledged her understanding and

agreement to abide by those terms on May 28, 1999. Generally, by stipulation between counsel, Respondent concedes the existence of the policy prohibiting slapping or spanking a child in her care.

4. Ms. Stacey Cleveland has responsibility in Petitioner's District 3 related to foster home licensing. Ms. Cleveland provided MAPP training to Respondent, including training on discipline and the prohibition against the use of corporal punishment. In 1997, Ms. Cleveland had a specific discussion with Respondent concerning the prohibition against the use of corporal punishment in caring for foster children. At that time Respondent stated her agreement with the prohibition against the use of corporal punishment directed to foster children.

5. From April 23, 1999, through December 30, 1999, A.H. and B.H. lived in Respondent's home as foster children. On December 30, 1999, A.H. was three years old and B.H. was five years old.

6. On December 30, 1999, A.H. and B.H. were involved in a supervised visit with their natural mother at the Petitioner's Live Oak, Florida office.

7. During the visit the natural mother took A.H. to the bathroom and discovered bruises on his buttocks. The natural mother immediately reported the discovery to Petitioner's personnel.

8. Julia Johnson and Steven Lampros, Petitioner's employees, both observed the bruises on A.H.'s buttocks. Mr. Lampros took photographs of the bruises. (DCF Exhibits Nos. 4 through 6)

9. Respondent caused the bruising to A.H.'s buttocks by imposing corporal punishment on A.H. at a time prior to December 30, 1999. This act was contrary to the prohibition against the use of corporal punishment by spanking. Respondent knowingly violated those terms. Respondent's testimony that A.H. may have received the bruises by jumping off the sofa and falling on the wooden arm of that furniture; jumping off the sofa landing on his buttocks on the floor; being pushed by another foster child from a toy jeep or being pushed against the bathroom door by B.H., his brother, is not persuasive.

10. The finding that A.H. was bruised on his buttocks when Respondent spanked him is corroborated by the deposition testimony of Dr. Howard Rogers, a Board-Certified physician in general pediatrics. Dr. Rogers routinely examines children who are the alleged victims of abuse. Dr. Rogers examined A.H. on December 30, 1999. He recalls the examination based upon his report rendered concerning the examination and the photos made by Mr. Lampros on December 30, 1999. Dr. Rogers does not believe that the bruises on A.H.'s buttocks were accidental in nature given the intensity of the bruising and the linear shape of some of the bruises. Within a reasonable degree of medical certainty

Dr. Rogers did not find the bruises to be consistent with any form of trauma other than corporal punishment. According to Dr. Rogers corporal punishment was the more likely cause of the bruising. Dr. Rogers' opinion concerning the appearance of the bruises is credited.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

12. Petitioner seeks to revoke the foster home license held by Respondent based upon the alleged administration of corporal punishment against A.H., a foster child in her care, on or about December 30, 1999.

13. Petitioner issued a foster care license to Respondent under Section 409.175, Florida Statutes.

14. Section 409.175(8)(a) and (b), Florida Statutes empowers Petitioner to discipline the foster home license held by Respondent wherein it states:

> (a) The department may deny, suspend or revoke a license.
>
> (b) Any of the following actions by a home or agency or its personnel is a ground for denial, suspension or revocation of a license:
>
> 1. An intentional or negligent act materially affecting the health or safety of children in the home or agency.

> 2. A violation of the provisions of this section or of licensing rules promulgated pursuant to this section.

15. The foster home license held by Respondent is not a property right, it is a matter of public trust and privilege, not an entitlement. Section 409.175(2)(f), Florida Statutes. Having in mind the nature of the license, to prevail in this case Petitioner must prove its allegations by a preponderance of the evidence. Section 120.57(1)(h), Florida Statutes.

16. As stated in the charge letter, Respondent is alleged to have violated Rule 65C-13.010(1)(b)5, a licensing rule promulgated pursuant to Section 409.175(8)(b), Florida Statutes. Rule 65C-13.010(1)(b)5.f states:

> (1) Responsibilities of the Substitute Parent to the Child.
>
> * * *
>
> (b) Family Care Activities.
>
> * * *
>
> 5. Discipline.
>
> * * *
>
> f. The substitute care parents must not use corporal punishment of any kind.

17. Petitioner has also provided guidance to the Respondent through the MAPP training that Respondent should not engage in corporal punishment by spanking a child, an admonition acknowledged by Respondent.

18. Petitioner has proven by a preponderance of the evidence that Respondent engaged in corporal punishment in spanking A.H. a foster child in her care. Given the absolute prohibition against the use of corporal punishment of any kind in caring for a foster child license, revocation is appropriate.

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That Petitioner enter a final order revoking the family foster home license held by Respondent.

DONE AND ENTERED this 9th day of November, 2000, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 2000.

ENDNOTE

1/ Section 90.803(23) states:

> HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM.--
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of

trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child; the nature an duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

> (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Both A.H and B.H. at times they gave out-of-hearing statements on December 30, 1999 and August 3, 2000, were less than eleven years of age as contemplated by Section 90.803(23), Florida Statutes.

On December 30, 1999, the natural mother of A.H. and B.H. was participating in a visit with the children at Petitioner's facility. On that date the natural mother discovered bruises on the buttocks of A.H. as depicted in DCF Exhibits Nos. 4 through 6 admitted as evidence. Upon this discovery, the mother immediately inquired of Ms. Julia Johnson, Family Services Counselor for Petitioner, what should be done.

On this occasion A.H. told Ms. Johnson that "he had been spanked."

When Ms. Johnson refers to A.H.'s remarking that he had been "spanked," that reflects her sense of what the child said, it is not a verbatim recount of the remarks by A.H.

On December 30, 1999, while questioning A.H. at the Petitioner's facility Ms. Johnson recounts A.H.'s reference to "Mother", "Mommie", "Mom." Ms. Johnson attempted to clarify "who Mommie was, was it the Mom he lived with or the Mom that was visiting him there?" A.H. responded that it was the "Mom" he lived with. At that time A.H. was living with the Respondent and not his natural mother. In Ms. Johnson's presence A.H. stated that the "spanking" was done with a belt.

A.H. was taken to Mr. Steve Lampros, a Child Protective Investigator for Petitioner. Mr. Lampros took pictures of the bruises on A.H.'s buttocks. DCF Exhibits Nos. 4 through 6 Ms. Johnson also observed the bruises on A.H.'s buttocks.

Mr. Lampros interviewed A.H. and B.H. on December 30, 1999. A.H. was interviewed first. Mr. Lampros asked A.H. how A.H. got the marks on his backside. Mr. Lampros interpreted A.H.'s response as stating that he received a spanking from Mom. In his remarks A.H. used the term "spanked." A.H. told Mr. Lampros that he was spanked with a belt. Mr. Lampros asked A.H. to clarify whether the mother that A.H. referred to as spanking A.H. was his natural mother or Respondent. During this process A.H. referred to Respondent as being the person who spanked A.H.

On December 30, 1999, when Mr. Lampros questioned B.H. about A.H., Mr. Lampros asked B.H. if "A.H." had been bad and been spanked. B.H. replied that A.H. was spanked and sent to his room. In this interview B.H. told Mr. Lampros that Respondent, whom B.H. referred to as "Mrs. Daniels," had spanked "A." The reference to "A." is taken to mean A.H. B.H. said a dark blue belt had been used in the spanking. In the earlier interview A.H. had referred to the belt as being black in color.

The interview which Mr. Lampros held with A.H., to include the examining and photographing of A.H.'s buttocks took approximately 15 minutes. The actual conversation held between Mr. Lampros and A.H. took approximately 5 to 6 minutes. Mr. Lampros did not find A.H. especially talkative, but A.H. did answer the questions posed to him. A.H. did not give a clear answer concerning the point in time at which he had been spanked. This was in contrast to B.H.'s statement to Mr. Lampros indicating that A.H. was spanked by Respondent the day before the December 30, 1999 interview. B.H. referred to the place in time at which Respondent spanked A.H. as "yesterday."

On December 30, 1999, Mr. Lampros took approximately ten minutes in interviewing B.H. concerning the alleged incident. In the course of this discussion Mr. Lampros asked B.H. if he had been spanked, but spent most of the interview inquiring about A.H. being spanked. B.H.'s comments about A.H.'s spanking were made toward the end of the interview with Mr. Lampros.

As contemplated by Section 90.803(23)(a), Florida Statutes, the statements made by A.H. during the course of his interview on December 30, 1999, refer to child abuse through the Respondent's use of corporal punishment within the context of the prohibited disciplinary practice of slapping or spanking a child who is under foster care. A.H. was the putative victim of child abuse. B.H. was an observer, not a victim. Only A.H.'s statements made on December 30, 1999, are subject to examination pursuant to Section 90.803(23), Florida Statutes.

Given the nature of the report of bruising, the time taken in conducting the interview, the place in which the interview was conducted, the content of the remarks by the child when identifying the person responsible for administering the corporal punishment, as has been explained, sufficient safeguards of reliability exists concerning A.H.'s remarks. The age of A.H. on December 30, 1999 leads to the conclusion that A.H. did not specifically understand the duty of a witness to tell the truth. No attempt was made to ascertain his ability to tell the truth in the course of the interview. Notwithstanding his age, given the nature of the statements made by A.H. and the method and circumstances under which the spanking was reported, the statements made by A.H. do not lack trustworthiness.

In relation to reliability, while it is recognized that A.H. was young when the interview was conducted on December 30, 1999, as to mental age and maturity, this did not detract from his ability to report the nature and duration of the abuse that has been described, taking into account his relationship to the Respondent.

In determining the trustworthiness and reliability of A.H.'s December 30, 1999 statement, it is noted that the bruises were discovered by the natural mother who immediately sought the assistance of Petitioner's employees. Shortly thereafter in a

brief interview A.H. responded that "Mom" had spanked him and distinguished between the Respondent and his natural mother. His terminology in describing the incident was what you would expect of a child of similar age. There was no apparent motive to fabricate the claim that Respondent spanked him. Given the nature of A.H.'s statement and the supporting physical evidence, the circumstance was not one in which A.H. was unable to distinguish between reality and fantasy. His accusations were not vague nor the product of improper influence. His accusations were not contradictory.

A.H. did not testify at the hearing. Section 90.803(23)(a)2.a, Florida Statutes. For his statement provided on December 30, 1999, concerning corporal punishment administered by Respondent to be admitted as an exception to hearsay, A.H. must be found to be unavailable as a witness consistent with Section 90.803(23)(a)2.b, Florida Statutes, and the cases cited.

To corroborate A.H.'s December 30, 1999 statement accusing Respondent, the deposition testimony of Dr. Howard Rogers, Board Certified in general pediatrics, was presented. That deposition is DCF Exhibit No. 1. Dr. Rogers examined A.H.'s buttocks on December 30, 1999. Dr. Rogers observed bruises on the buttocks as well as the lower back. Based upon his observation, Dr. Rogers expressed, within a reasonable degree of medical certainty, that the bruises on the buttocks were not accidentally obtained. Dr. Rogers observed the bruising by the intensity present and the shape, implying a linear pattern, especially as to the right side of the buttocks, indicating something like a belt or some instrument had been used in establishing the bruises. Given that bruising was found on both sides of the buttocks that was fairly significant, Dr. Rogers, within a reasonable degree of medical certainty, expressed the opinion that the bruising was inconsistent with other forms of trauma than corporal punishment. Dr. Rogers expressed the opinion that it is very uncommon to get bruises on the buttocks that are not inflicted. The appearance of the bruising on A.H.'s buttocks was consistent with something Dr. Rogers sees fairly often in his work. That appearance is associated with the administration of corporal punishment by spanking or paddling, causing bruising. Dr. Rogers' opinion is persuasive when describing the bruises present on A.H.'s buttocks.

No expert testimony was introduced that A.H.'s participation in the hearing would result in substantial likelihood of severe emotional or mental harm.

It has been concluded that A.H. when he provided his statement on December 30, 1999, was incapable of understanding the duty of a witness to tell the truth. Section 90.603(2), Florida Statutes. Thus in keeping with the opinion in State v. Townsend, supra, A.H. was unavailable to testify as a witness at the hearing based upon an existing mental infirmity within the meaning of Section 90.804(1)(d), Florida Statutes, related to his

incompetency to testify, lacking an appreciation of the duty and obligation to tell the truth when the statement was provided on December 30, 1999. Nonetheless, the nature of the incident reported by A.H., together with the continuing physical manifestation of A.H.'s report, the bruising, make A.H.'s statement sufficiently competent without strict adherence to the expectation that A.H. be capable of understanding the duty of a witness to tell the truth.

In a statement provided by A.H. on August 3, 2000, that was video-taped and transcribed, A.H. did not provide a statement that Respondent had spanked him on or about December 30, 1999. The August 3, 2000 statement is not an exception to hearsay envisioned by Section 90.803(23), Florida Statutes.

The video-taped statement given by B.H. on August 3, 2000, did not constitute an out-of-hearing statement made by a child victim in describing an act of child abuse. The August 3, 2000 statement by B.H. is not countenanced by Section 90.803(23), Florida Statutes, as an exception to hearsay.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.