

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAXINE S. E. TORRES,)
)
 Petitioner,)
)
 vs.) Case No. 01-3895
)
 DEPARTMENT OF CHILDREN AND)
 FAMILY SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal administrative hearing in this case on February 18, 2002, in Orlando, Florida.

APPEARANCES

For Petitioner: James Sweeting, III, Esquire
506 West Washington Street
Orlando, Florida 32801

For Respondent: Richard Cato, Esquire
Department of Children and
Family Services
400 West Robinson Street
Suite S-1106
Orlando, Florida 32801-1782

STATEMENT OF THE ISSUES

The issues in this case are: (a) Whether Petitioner's license as a family day care home should be renewed; (b) Whether Petitioner was required to list her son, Stephen Randall, as a

household member on her annual registration application for a family day care home for 2000 and 2001; and (c) Whether Stephen Randall was a member of Petitioner's household at any time in 2000 and 2001.

PRELIMINARY STATEMENT

On August 28, 2001, Respondent, Department of Children and Family Services, notified Petitioner, Maxine S. E. Torres, of a Denial of Registration of her request to operate a family day care home. The Notice of Denial of Registration advised Petitioner that the

background screening required pursuant to licensure or registration has revealed that you have been the subject of a report to the central abuse hotline which was subsequently investigated by the Department of Children and Families. The facts underlying confidential abuse reports numbered 2000-001833 and 2000-098735 demonstrate an inability to ensure the safety of children in your care to the level necessary to be registered as a family day care. In addition, you were notified by this office in April of 1999 that a particular family member (Stephen Randall) had been disqualified from contact with client children, yet report number 2000-001833 referenced above indicates that said family member was still in the household and supervising client children. In both your year 2000 and year 2001 applications, you have failed to list said family member.

On September 13, 2001, Petitioner requested an administrative hearing by letter directed to Robert R. Moran, Jr. On October 8, 2001, the Division of Administrative Hearings

received a Request for Administrative Hearing from Respondent. On October 8, 2001, an Initial Order was sent to both parties.

On November 15, 2001, the case was set for final hearing in Orlando, Florida, on December 24, 2001. On December 19, 2001, Petitioner's Motion to Continue Final Hearing was granted and the final hearing was rescheduled for February 4, 2002. On January 18, 2002, Petitioner filed her Second Motion to Continue Hearing, which was granted, and the final hearing was rescheduled for February 18, 2002.

At the final hearing Petitioner presented four witnesses: Julia Scott, Nifa Randall, Jose Torres, and Maxine Torres. Petitioner offered six exhibits which were admitted into evidence and marked Exhibits A through C and E through G. No Exhibit D was offered. Respondent presented six witnesses: Wendy King, Mimi Posipsil, Melanie Schaefer, Maxine McGregor, Charlene Groves, and Susan Wojtowicz. Ms. Wojtowicz was also called as a rebuttal witness. Respondent offered 23 exhibits which were admitted into evidence and marked Respondent's Exhibits A through E, F1 through F6, G through M, N1 and N2, and O through Q.

A Transcript of the proceedings was filed with the Division of Administrative Hearings on March 13, 2002; at the final hearing the parties had requested and were granted 30 days in which to file proposed recommended orders. On April 12, 2002,

the parties jointly moved to extend the time for filing proposed recommended orders and were given until May 3, 2002, at 5:00 p.m., to file their proposed recommended orders. Petitioner did not file a proposed recommended order. Respondent's Proposed Recommended Order was filed on May 8, 2002.

FINDINGS OF FACT

Based on the testimony and demeanor of the witnesses and the documentary evidence presented, the following findings of fact are made:

1. Petitioner's application for license for a family day care home dated October 20, 1997, was received by Respondent on November 20, 1997. Listed among the "household members" on the application was Petitioner's son, Stephen H. Randall, whose date of birth is March 28, 1981.

2. On January 10, 1998, Petitioner submitted her application for registration for a family day care home; the application was received by Respondent on January 14, 1998. Stephen Randall is also listed as a household member on this application.

3. On January 15, 1998, Respondent wrote a letter to Petitioner acknowledging her desire to withdraw her application for license as a family day care home.

4. On February 18, 1998, Petitioner was registered as a family day care home for one year effective February 28, 1998.

The letter advised:

To maintain your registration in accordance with Section 402.313, Florida Statutes, you must do the following:

* * *

(3) Send in background screening forms including fingerprints for household members who become 18 years of age, or for adults who move into your home, or when your substitute changes and has not been screened.

5. On October 26, 1998, Petitioner forwarded a renewal application for registration as a family day care home which listed Stephen Randall as a "household member."

6. As a result of a December 9, 1998, inspection by Respondent, it was determined that an adult who had not been screened was living in the registered day care home and, therefore, Petitioner was notified that screening was to be accomplished "ASAP."

7. On January 12, 1999, Respondent sent Petitioner a Certified Letter reminding her that "Adult members residing in the family day care home must go through a background screening process in accordance with Florida Statutes,"

8. On January 28, 1999, Petitioner telephoned Respondent indicating that she "changed her mind about daycare." This

telephone call was followed by a letter from Respondent to Petitioner dated January 29, 1999, indicating, "Per your request January 28, 1999, we have withdrawn your Family Day Care license application and closed your registration effective this date."

9. On April 9, 1999, Petitioner submitted an original registration application which listed her 18-year-old son, Stephen Randall, as living in the home which was to become the registered family day care home.

10. On July 6, 1999, Petitioner, by letter, advised Respondent that "My son Stephen H. Randall is no longer living with me (Maxine Torres)."

11. On July 20, 1999, Respondent mailed Petitioner a letter advising that "The Department of Children & Family Services has registered your Family Day Care Home for one year effective July 30, 1999." The letter also advised Petitioner of the necessity of advising Respondent when unscreened adults move into the home in the same language as contained in paragraph 4, supra.

12. On September 23, 1999, Respondent sent Petitioner a Certified Letter which stated:

We have received your letter dated July 7, 1999 in reference to your son, Stephen Randale [sic], moving out of your home. Should he return, he must be background screened within ten (10) days.

Please remember that all household members must be screened in accordance with F.S. Section 202.303 and 402.305. Failure to do so in a timely manner may result in administrative action, which could result in a fine, suspension, or revocation.

13. On October 31, 2000, the Circuit Court in and for Orange County, Florida, in Case Number CR-O-00-4737/A adjudicated Stephen Henry Randall, Petitioner's son, guilty of violating the following criminal statutes: Subsections 806.13(1)(b)1, 810.02(3), and 812.014(2)(c)5, Florida Statutes, two of which offenses are felonies, and sentenced him to one day in jail and three years' probation. Stephen Randall had been arrested in April 2000 for the criminal offenses he committed. The offenses occurred at a residence two residences away from Petitioner's home, the registered family day care home.

14. Petitioner submitted an application for re-licensure dated May 14, 2000, in which she was required to disclose the name of "everyone who lives in your home." By signing the application, Petitioner attested that the information on the application was "truthful, correct, and complete." Stephen Randall was not listed as living or residing at Petitioner's home.

15. Respondent's investigators and independent witnesses presented credible testimony indicating that Stephen Randall was residing in Petitioner's residence (the registered day care home)

during the calendar year 2000. In particular, an abuse report of an incident in January 2000, indicates that Petitioner reported that she "left her teenage son in the home" purportedly to supervise the children left in Petitioner's care; in June 2000, Petitioner again told an investigator, that if she wasn't there her son, Stephen Randall, her daughter or husband watch the children. In addition, independent witnesses, whose children were at the day care home, reported repeatedly seeing Stephen Randall there.

16. Stephen Randall was living in the residence of Petitioner, which was a registered day care home, during the calendar year 2000 and had not been screened as required by Florida Statutes because Petitioner did not advise Respondent that he had returned and was residing in the home.

17. Respondent investigated two Florida Protective Services abuse hotline complaints against Petitioner and determined the complaints to be well-founded. In both instances, Petitioner failed to properly supervise children left in her care and, as a result, failed to ensure the safety of the children.

18. Independent witnesses confirmed the abuse hotline complaints and presented other complaints, all confirming that Petitioner failed to properly supervise children left in her care and failed to ensure their safety.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of these proceedings. Subsection 120.57(1), Florida Statutes.

20. The burden of proof is upon Respondent to adduce evidence to support the denial of the renewal of Petitioner's application for re-licensure. Dubin v. Department of Business Regulation, 262 So. 2d 273 (Fla. 1st DCA 1972). To meet its burden, Respondent must establish facts upon which its allegations are based by clear and convincing evidence.

Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932, 933 (Fla. 1996); Coke v. Department of Children and Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998); and Subsection 120.57(1)(j), Florida Statutes.

21. Section 402.310, Florida Statutes, authorizes the Department of Children and Family Services to deny a license for the violation of any provision of Sections 402.301 through 402.319, Florida Statutes, or rules adopted thereunder.

22. Section 402.313, Florida Statutes, sets licensing standards for the family day care homes.

23. Subsection 402.313(1)(a)5, Florida Statutes, provides as follows:

(1) Family day care homes shall be licensed under this act if they are presently being licensed under an existing county licensing ordinance, if they are participating in the subsidized child care program, or if the board of county commissioners passes a resolution that family day care homes be licensed. If no county authority exists for the licensing of a family day care home, the department shall have the authority to license family day care homes under contract for the purchase-of-service system in the subsidized care program

(a) If not subject to license, family day care homes shall register annually with the department, providing the following information:

* * *

5. Proof of screening and background checks.

24. Subsection 402.313(3), Florida Statutes, provides, as follows:

Child care personnel in family day care homes shall be subject to the applicable screening provisions contained in ss. 402.305(2) and 402.3055. For purposes of screening in family day care homes, the term includes any member over the age of 12 years of a family day care home operator's family, or persons over the age of 12 years residing with the operator in the family day care home. Members of the operator's family, or persons residing with the operator, who are between the ages of 12 years and 18 years shall not be required to be fingerprinted, but shall be screened for delinquency records.

25. Subsection 402.305(2), Florida Statutes, sets forth the minimum standards for child care personnel in a day care center. In particular, Subsection 402.305(2)(a), Florida Statutes, states:

(2) PERSONNEL.--Minimum standards for child care personnel shall include minimum requirements as to:

(a) Good moral character based upon screening. This screening shall be conducted as provides in Chapter 435, using level 2 standards for screening set forth in that chapter.

26. Subsection 435.04(1), Florida Statutes, "Level 2 screening standards" provides:

All employees in positions designated by law as positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall include, but not be limited to, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

27. Subsection 435.04(2)(w), Florida Statutes, "Level 2 Screening standards" provides:

(2) The security background investigations under this section must ensure that the no person subject to the provisions of this section have been found

guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under any of the following provisions of the Florida Statutes or under any similar statute of another jurisdiction:

* * *

(w) Chapter 812, relating to theft, robbery, and related crimes, if the offense is a felony.

28. Subsections 39.201(4) and (6), Florida Statutes, provide, in pertinent part, as follows:

(4) The department shall establish and maintain a central abuse hotline to receive all reports made pursuant to this section in writing or through a single statewide toll-free telephone number, which any person may use to report known or suspected child abuse abandonment, or neglect

* * *

(6) Information in the central abuse hotline may not be used for employment screening, except as provided in s. 39.202(2)(a) and (h). Information in the central abuse hotline and the department's automated abuse information system may be used by the department, its authorized agents, or contract providers, the Department of Health, or county agencies as part of the licensure or registration process pursuant to ss. 402.301-402.319 and ss. 409.175-409.176.

29. Subsections 39.202(1), (2)(a)4 and (j), Florida Statutes, provide as follows:

(1) In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare,

all records held by the department concerning reports of child abandonment, abuse, or neglect, including reports made to the central abuse hotline and all records generated as a result of such reports, shall be confidential and exempt from the provisions of s. 119.07(1) and shall not be disclosed except as specifically authorized by this chapter. Such exemption from s. 119.07(1) applies to information in the possession of those entities granted access as set forth in this section.

(2) Access to such records, excluding the name of the reporter which shall be released only as provided in subsection (4), shall be granted only to the following persons, officials, and agencies:

(a) Employees, authorized agents, or contract providers of the department, the Department of Health, or county agencies responsible for carrying out:

* * *

4. Licensure or approval of adoptive homes, foster homes, or child care facilities, or family day care homes or informal child care providers who receive subsidized child care funding, or other homes used to provide for the care and welfare of children.

* * *

(j) The Division of Administrative Hearings for purposes of any administrative challenge.

30. Rule 65C-20.009, Florida Administrative Code, States,
in part:

* * *

(3) Supervision by Staff.

(a) At all times, which includes when the children are sleeping, the operator shall remain responsible for the supervision of the children in care and capable of responding to the emergencies and needs of the children. During the daytime hours of operation, children shall have adult supervision which means watching and directing children's activities, both indoors and outdoors, and responding to each child's needs.

31. Credible testimony established that Stephen Randall resided in Petitioner's home during some or all of calendar year 2000. During this period of time, Petitioner continued to operate her family day care home and did not inform Respondent that her son resided there.

32. As a household member residing in Petitioner's home, Stephen Randall was subject to background screening. As Stephen Randall had been adjudicated guilty of a third degree felony listed in Subsection 435.04(2), Florida Statutes, his living at Petitioner's home could disqualify Petitioner from operating a registered family day care home. In addition, Petitioner's failure to submit Stephen Randall for background screening within ten (10) days of his return to residence in the family day care home could be the basis for registration denial or revocation.

33. Petitioner knew that she was required to notify Respondent of the identity of all household members, including her son, Stephen Randall, so they could be properly screened.

Petitioner failed to advise Respondent of her son's return and residence in her home.

34. Respondent is authorized to use the information in the abuse hotline and automated abuse information system in the registration process for family day care home facilities, which would imply, since the denial of registration is part of the registration process, the authority to use such information to deny the registration of a family day care home. Subsections 39.201(6) and 39.202(2)(a), Florida Statutes. When Respondent attempts to use the allegations contained in those abuse reporting systems to deny a family day care home registration, it must prove those allegations by clear and convincing evidence. In the instant case, Respondent has, through documentary evidence and the testimony of its investigators and independent witnesses, proved by clear and convincing evidence that Petitioner failed to meet minimum standards of care to ensure the safety of children in her care.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Children and Family Services deny Petitioner's application for re-licensure of her family day care home.

DONE AND ENTERED this 16th day of May, 2002, in
Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 16th day of May, 2002.

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.