

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIMBERLY STRANGE-BENNETT,)
)
 Petitioner,)
)
vs.) Case No. 02-1224
)
DEPARTMENT OF CHILDREN AND)
FAMILY SERVICES,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was conducted in this case on May 23, 2002, in Ocala, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kimberly Strange-Bennett, pro se
Post Office Box 58
Orange Lake, Florida 32681

For Respondent: Ralph J. McMurphy, Esquire
Department of Children and
Family Services
1601 West Gulf Atlantic Highway
Wildwood, Florida 34785

STATEMENT OF THE ISSUE

The issue is whether Respondent should approve Petitioner's application for a family day care home license.

PRELIMINARY STATEMENT

By letter dated February 6, 2002, Respondent Department of Children and Family Services (Respondent) advised Petitioner Kimberly Strange-Bennett (Petitioner) that her application for a license to operate a family day care home was denied. The letter stated that the denial was based on a confirmed Florida Abuse Hotline Information System report (abuse report). The letter also advised Petitioner to cease and desist operation of her family day care home, First Step Learning Center, until such time as Petitioner procures a license from Respondent.

Petitioner requested an administrative hearing to contest the denial of her licensure application in a letter dated February 14, 2002. Respondent received Petitioner's letter on February 20, 2002.

By letter dated March 14, 2002, Respondent provided Petitioner with the details of the charges in the abuse report. The letter stated that the abuse report was based on a hotline complaint that Petitioner had used excessive corporal punishment on her stepchildren. According to the letter, Petitioner admitted during the ensuing investigation that she had administered corporal punishment, bruising and disfiguring the children. The letter states that Petitioner and her husband admitted to using physical discipline on the children.

On March 22, 2002, Respondent referred the case to the Division of Administrative Hearings. Subsequently, the Division of Administrative Hearings issued an Initial Order on March 25, 2002.

Petitioner filed a response to the Initial Order on April 1, 2002. Respondent filed its response on April 2, 2002. Based on these responses, Administrative Law Judge P. Michael Ruff issued a Notice of Hearing dated April 12, 2002. The Notice of Hearing scheduled the hearing for May 23, 2002.

On May 21, 2002, Respondent filed a Motion for Continuance. The motion alleged that the appearance of Respondent's counsel in the instant case conflicted with his appearance in another case that was scheduled for the same date and time at a different location. That same day, the Division of Administrative Hearings transferred the case to the undersigned.

An Amended Notice of Hearing dated May 21, 2002, changed the time and location of the hearing to eliminate any scheduling conflict with another case. Accordingly, Respondent's Motion for Continuance was denied by Order dated May 22, 2002.

During the hearing, Petitioner testified on her own behalf and presented the testimony of two witnesses. Petitioner offered one composite exhibit consisting of three written hearsay statements that were excluded for lack of authentication.

Respondent presented the testimony of two witnesses. Respondent offered the above-referenced abuse report as its only exhibit. The abuse report is not admissible as an exception to the rule against hearsay pursuant to Section 90.803(8), Florida Statutes, relating to public records and reports. Additionally, Sections 39.202(2)(a) and 39.202(2)(j), Florida Statutes, do not create an exception to the rule against hearsay so as to allow the undersigned to rely on the hearsay within hearsay contained in the report to establish the facts of the instant case. However, the abuse report is admissible under the limited circumstances set forth in Section 120.57(1)(c), Florida Statutes.

The parties did not file a transcript of the proceeding.

On June 12, 2002, Petitioner filed an unopposed Motion for Extension of Time. On June 17, 2002, the undersigned issued an Order extending the time for the parties to file their proposed recommended order.

Petitioner filed a Proposed Recommended Order on June 21, 2002. Respondent filed a Proposed Recommended Order on June 22, 2002.

FINDINGS OF FACT

1. In 1996, Petitioner lived with her husband, their newborn child, three of her husband's children from a former marriage, and two of her children from a former marriage.

Petitioner's stepchildren were: (a) I.M.B., a 15-year-old male; (b) S.J.B., a 14-year-old male; and (c) S.Y.B., a 13-year-old female. Petitioner's children by her former marriage were: (a) R.D.F., a six-year-old male; and (b) D.F., a five-year-old female.

2. At the end of the school year in 1996, Petitioner spanked her stepdaughter for reasons related to her school work. She also spanked her stepsons for school-related reasons. However, the physical punishment of the stepchildren by Petitioner was not excessive. There is no competent evidence that Petitioner beat the stepchildren leaving bruises, scars, or other disfigurement.

3. Petitioner's husband spanked his children at times, using a switch or an extension cord. After one such occasion, Petitioner's stepdaughter asked for some rubbing alcohol to treat a bruise. Petitioner has no first-hand knowledge about the bruise. There is no persuasive evidence that Petitioner's husband ever disciplined his children so severely as to scar or disfigure them.

4. Since 1996, Petitioner completed her training as a licensed practical nurse. She continues to work part-time in that capacity. Petitioner has also earned money babysitting for other parents. Petitioner has never used corporal punishment of any kind to discipline other people's children.

5. Petitioner has completed all necessary training to operate a family day care home. She knows that corporal punishment is not an acceptable way to discipline children in a day care facility. She understands that when children do not behave appropriately, she may do one of the following: (a) talk to the child; (b) place the child in time-out for one minute per year of age; or (c) call the child's parent.

6. Petitioner currently lives with her husband, their son, and Petitioner's children from her former marriage. Petitioner's stepdaughter also lives with Petitioner. Petitioner's stepdaughter is 18 years of age and will be available to serve as a substitute caretaker if Petitioner is licensed to operate a family day care home facility.

7. One of Petitioner's stepsons, I.M.B., is deceased. The other stepson, S.J.B., is in jail. S.J.B.'s son lives with Petitioner.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569, 120.57(1), and 402.310(2), Florida Statutes.

9. Petitioner has the burden of proving that she is entitled to a license to operate a family day care home facility. Florida Department of Transportation v. J. W. C.

Company, 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v.

Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

10. Respondent has authority to issue a license to operate a child care facility "upon receipt of the license fee and upon being satisfied that all standards required by ss. 402.301 - 402.319 have been met." Section 402.308(3)(d), Florida Statutes.

11. Section 402.305(12), Florida Statutes, provides as follows in pertinent part:

(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 provided in chapter 435, using the level 2 standards for screening set forth in that chapter.

12. Section 435.04, Florida Statutes, sets forth the Level 2 screening standards. This statute does not include having a confirmed Florida Protective Service System (FPSS) abuse report as a disqualifying offense.

13. Section 39.202(2)(a)4., Florida Statutes, allows Respondent's employees to have access to FPSS abuse reports if they are responsible for licensure or approval of child care facilities. The statute provides Respondent with an opportunity

to consider abuse reports in deciding whether to license a family day care home facility.

14. Similarly, Section 39.202(2)(j), Florida Statutes, allows the Division of Administrative Hearings to have access to the reports for purposes of any administrative challenge. However, the statute does not provide authority for an Administrative Law Judge to treat such reports as sufficient in themselves to support findings of fact. Section 120.57(1)(c), Florida Statutes.

15. Section 39.01(2), Florida Statutes, states as follows:

(2) "Abuse" means any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.

16. Petitioner and her husband occasionally disciplined their children by spanking them. There is no persuasive evidence that either one of them ever abused their children or anyone else's children. Petitioner has met her burden of proving that she is entitled to a license to operate a family day care home.

RECOMMENDATION

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

RECOMMENDED:

That Respondent enter a final order granting Petitioner a license to operate a family day care home.

DONE AND ENTERED this 12th day of July, 2002, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of July, 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.