STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBORAH SCURRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0713
	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice and in accordance with Section 120.569 and Subsection 120.57(1), Florida Statutes (2003), a final hearing was held in this case on May 6, 2004, in Fort Myers, Florida, before Fred L. Buckine, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Deborah Scurry, pro se
3963 Wheaton Court
Fort Myers, Florida 33905

For Respondent: Eugenie Rehak, Esquire
Department of Children and Family Services
Post Office Box 60085
Fort Myers, Florida 33906

STATEMENT OF THE ISSUE

Whether Respondent proved the allegations contained in its January 30, 2004, notice of revocation of family day care home registration letter to Petitioner.

PRELIMINARY STATEMENT

On January 30, 2004, Respondent, the Department of Children and Family Services (Department or Respondent), by certified mail, notified Petitioner, Deborah Scurry, that her family day care home registration had been revoked for alleged violation of Subsections 402.302(1), 402.302(7) and 402.313(1)(a)(4), Florida Statutes (2003). Petitioner timely requested a de novo hearing pursuant to Chapter 120, Florida Statutes (2003).

On March 4, 2004, the matter was referred to the Division of Administrative Hearings, and the Initial Order was entered. On March 12, 2004, the parties' Joint Response to Initial Order was filed, and on March 16, 2004, the Notice of Hearing, scheduling the final hearing for May 6, 2004, in Fort Myers, Florida, was entered.

On April 15, 2004, Respondent's Motion for Telephone Appearance was filed, and the Order granting Respondent's motion was entered. The final hearing was held as scheduled on May 6, 2004.

At the final hearing, Petitioner testified in her own behalf and presented the testimony of two witnesses: Susan B.

Davis, Respondent's family child care specialist, and Mary Ward, Ward's Day Care operator. Petitioner offered one composite exhibit (P-1), consisting of 17 items, which was accepted into evidence.

Respondent presented the testimony of eight witnesses: Susan Sherman, ARNP for the Child Protection Team; Marie Mead, Child Protection Team investigator; L.D., nine-year-old day care attendee; J.S., five year-old day care attendee[1] (not permitted to testify); Ted Leighton, Respondent's investigator; Celeste Davis, Respondent's child care consultant; Trisah William, Respondent's license specialist; Michelle Molly, Respondent's license supervisor; and L.B., mother of D.B., the injured child. Respondent offered 17 exhibits (R-1 through R-17), which were accepted into evidence.

No transcript of the proceeding was ordered. Petitioner did not submit a proposed recommended order. On May 17, 2004, Respondent submitted a Proposed Recommended Order that was considered by the undersigned in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is the state agency responsible for licensing and regulating child care facilities, including family day care homes.

2. Petitioner, by and through aid, assistance, and training of the federally funded Weed and Seed Support Group program of the Fort Myers area, began her family day care home provider training in 2001 and, upon completion of training, was registered as a family day care home from July 25, 2002, to June 30, 2003.

3. On June 23, 2003, Respondent acted upon Petitioner's re-registration application to provide child care in her home for up to ten children, effective June 30, 2003, through June 30, 2004. Respondent acknowledged that at the time Petitioner's registration was acted upon, Leona Mark, Petitioner's identified substitute caregiver, had cleared her for background screening but she had not completed either the minimum or 30 hours of family day care home training prior to caring for children in a family day care home. Notwithstanding the situation with Ms. Marks, Respondent's recommendation was to "Issue registration to Deborah Scurry to provide child care in her home for up to 10 children." Ms. Mark did not testify, and the record contains no evidence that Ms. Mark completed her training at any time prior to Respondent's notice of revocation letter of January 30, 2004.

4. Respondent, by letter dated January 30, 2004, informed Petitioner that her family day care home registration was

revoked. The revocation letter gave the following basis for revocation:

> On December 22, 2003, the licensing unit received a complaint that a nine month old sustained a skull facture while in your care. The complaint also stated that you left your daycare children with your 15 year old daughter.
>
> During the investigation, you denied ever leaving the daycare children alone and that you always took them with you. The Department, upon conducting interviews, has determined that you did leave the children with your 15-year-old daughter, which is a supervision violation.

The letter cited Subsections 402.302(1) and (7) and 402.313(1)(a)4., Florida Statutes (2003), as the provisions determined to have been violated and the authority for revocation of the registration.

The Injured Child

5. D.B. is Petitioner's nephew, and he was routinely placed in her family day care home when his mother was working. On Friday morning at approximately 6:30 a.m., on December 12, 2003, L.B., D.B.'s mother, left D.B., a nine-month-old child, in Petitioner's family day care home.

6. At that time, neither L.B. nor Petitioner noticed a bump on D.B.'s head. According to Petitioner, D.B. became "fussy" during morning breakfast at approximately 7:00 a.m., at which time she noticed a small bump on his head. The bump was

soft to her touch, and she thought no more about it. During lunch, Petitioner's daughter noticed that the bump had gotten larger and told her mother, who, by telephone, attempted to reach L.B., but was unsuccessful.

7. When L.B. came to pick D.B. up at approximately 6:30 or 7:00 p.m., on December 12, 2003, Petitioner and L.B. discussed the bump on D.B.'s head. L.B. recalled that while playing D.B.'s sibling had hit him on the head with a plastic toy bat at some earlier time and that D.B. had fallen out of bed and hit his head on the floor. L.B. testified that she does not know where D.B. hit his head. It could have happened at home while playing with siblings, when he fell out of bed, or when he was with his father. She was firm in her conviction and belief that D.B. was not injured while in Petitioner's family day care home.

8. There is no evidence of record to account for D.B.'s whereabouts on Saturday and Sunday, December 13 and 14, 2003. On Monday, December 15, 2003, L.B. dropped D.B. off at Petitioner's family day care home. On Tuesday, December 16, 2003, D.B. was again dropped off at Petitioner's family day care home. On Wednesday, December 17, 2003, Petitioner noticed that the bump had gotten larger and called L.B. L.B. came later in the day and carried D.B. to the Emergency Room at Cape Coral Hospital for a medical examination.

Medical Examination of the Injured Child

9. A Medical Examination report, dated December 19, 2003, was completed by Susan Sherman (Nurse Sherman), ARNP of the Child Protection Team. The Medical Examination report provides Dr. Michael Weiss' findings, which are as follows:

> X-RAY FINDINGS: A copy of the report for CT of the head without contrast and a complete skeletal survey are available. These x-rays were read by Dr. Michael Weiss on December 19, 2003. On the CAT scan of the head without contrast, the findings are as follows, "The ventricles are normal in size and midline in position. There is no intracranial hemorrhage. No intra or extra-axial fluid collection. There is a stellate fracture of the left parietal bone. There is also a high right parietal fracture identified. There is no evidence of depression on either side. There is an associated soft tissue hematoma." The impression of the CT scan is as follows: "Biparietal skull fractures, rule out child abuse."
>
> Findings and recommendations were reviewed with Dr. Burgett at the time of study. (Dr. Burgett is a pediatrician at the Physician's Primary Care.) . . . (emphasis added)

10. Notwithstanding the findings of Dr. Weiss, Nurse Sherman reported her impression and plan as follows:

> IMPRESSION: Biparietal skull fractures. From the x-ray report, the skull fracture on the left side of his head is a stellate fracture. There is also a fracture of the parietal bone on the right side of the head. These injuries are consistent with physical abuse.

> PLAN: The child will be followed medically by his primary care provider. At this time, I do not recommend the child be sheltered. My only recommendation is the child not return to the day care setting. This mother needs to find alternative childcare for [D.B.].

11. It was reasonable for Nurse Sherman to take the protective approach and recommend that D.B. not return to the family day care home because she believed Petitioner had a history of utilizing substitute caregivers who had not completed required training, and, she also believed that on more than one occasion in the past, Petitioner's child-to-child caregiver ratio was exceeded. An acceptable ratio requires a specific number of caregivers per the number of children within a specific age range. Petitioner had more children than she had certified caregivers required for the separate age range(s) of children found in her family day care home. However, the Department did not charge "past violations of overcapacity" and/or "utilizing substitute caregivers who were not properly qualified" in the January 30, 2004, revocation letter.

12. The evidence of record was inconclusive to demonstrate to any reasonable degree of certainty: first, the date D.B. sustained his injury/injuries; second, whether D.B. was injured while in the care of Petitioner; third, whether D.B. was injured while in the care of his mother; or forth, whether D.B. was injured while in the care of his father.

13. On December 22, 2003, Respondent received a compliant report of a license violation, to wit: over-capacity and background screening. The complaint report was assigned to and investigated by Celeste Davis and a second unnamed person. Ms. Davis closed her report on December 23, 2003. Ms. Davis' investigation found eight children in care: one infant, three preschoolers, and four school-age children. Petitioner was within her ratio at the time of this inspection. Through interviews with the children at the day care, Ms. Davis determined that Petitioner, on occasion, left her day care children alone with L.S., her teenaged daughter, who was not a qualified caregiver. Regarding D.B.'s head injury, Petitioner informed Ms. Davis that the injury did not occur when D.B. was in her care and probably occurred the night before D.B. was brought to her home. Ms. Davis cited Petitioner for one license violation, leaving her day care children alone with her teenage daughter.

14. Ted Leighton investigated an Abuse Hotline Report filed on December 19, 2003. Mr. Leighton did not testify but his written report was introduced into evidence without objection. Respondent argued in its post-hearing submittal that information Mr. Leighton received from his interviews with four minor children, his review of reports from medical personnel and health care providers, and his conclusion that "it was

'probably' on December 15 or 16, 2003, D.B. was injured at the family day care home accidentally by another child when the Petitioner was not present," as fact. Respondent's argument is not based on facts, but upon uncorroborated hearsay, assumptions and conjectures of Mr. Leighton. For those reasons Respondent's argument is rejected.

15. In support of Mr. Leighton's conclusions, Respondent cited the testimony of Nurse Sherman. Nurse Sherman concluded that D.B.'s injuries were "very serious and 'could have' been life threatening, 'could have' happened accidentally 'if' another child jumped off a bed, landing on D.B., while D.B. was laying on the floor with a hard object under his head." The intended purpose of Nurse Sherman's testimony was twofold: to demonstrate the severity of D.B.'s injury and the location D.B.'s injury was sustained. The inference drawn by Respondent was that a lack of supervision was the primary cause of the injury. This argument is likewise not based upon facts found in the evidence of record. Nurse Sherman's conclusions are but an extension of Mr. Leighton's assumptions and conjectures. This argument is likewise rejected.

16. D.B.'s mother recalled one occasion when D.B. had fallen out of her bed at home. She testified that her older daughter told her that while playing with D.B., he had fallen from his bed to the floor on more than one occasion at home.

She speculated that D.B. could have been injured at home or by her three-year-old son, who when playing with D.B. had struck him on his head with a plastic toy bat. L.B. testified further that she and Petitioner are related and that her three children have been continuously in Petitioner's family day care home since Petitioner has been qualified as a provider. She was certain that Petitioner did not and would not injure her children. She testified that D.B. "could have" suffered the injury to his head when he was in the care and custody of his father over the weekend. Of the several possibilities of the date, time, place, and in whose custody D.B. may have been when the injury occurred, the mother was not certain.

17. The inconclusive and conflicting evidence regarding D.B.'s whereabouts and the identification of the person or persons who had custody of D.B. when his injury occurred is, as it must be, resolved in favor of Petitioner. Respondent failed to prove by clear and convincing evidence that D.B. was injured when in the care, custody, and control of Petitioner while in the family day care home as alleged in its notice of registration revocation dated January 30, 2004.

Caregivers supervision and Over capacity

18. Respondent demonstrated that as of June 13, 2002, neither Petitioner's 15-year-old daughter nor any other person present on the days of inspection who was serving as a caregiver

was properly trained. By evidence of record, Respondent demonstrated that Petitioner was over capacity, based on the child-to-child caregiver ratio on or about June 2, 2001. With knowledge of the one occasion of over capacity by Petitioner, Respondent approved Petitioner's re-registration application on June 23, 2002, effective through June 30, 2003, and permitted Petitioner to provide care for up to ten children. The approved re-registration increased Petitioner's child care capacity. Respondent's January 30, 2004, letter did not allege an over capacity violation, and no other pleading filed by Respondent contained information from which Petitioner could have been so informed of the over capacity allegation.

19. Respondent failed to prove that D.B. sustained his head injuries while in Petitioner's family day care home.

20. Respondent has shown that Petitioner did on one occasion leave children in the care of a person or persons, including Petitioner's 15-year-old daughter, who were not trained, certified, or qualified as substitute caregiver(s).

21. There is no evidence of record that Petitioner's violation of child-to-child caregiver ratio demonstrated either gross misconduct and/or willful violation of the minimum child care standards within the meaning of the statutes and rules charged. The evidence demonstrated that Petitioner did not fully understand the child-to-child caregiver ratio

differentiations by age groups. Petitioner's lack of understanding does not absolve her of the obligation to know all rules and regulations. It does, however, provide a reasonable inference that the out-of-ratio situation was not an intentional act on behalf of Petitioner.

Weed and Seed Support Group in the Fort Myers Area

22. Petitioner presented the testimony of Susan B. Davis, a family child care specialist employed by the Weed and Seed Support Group of the Fort Myers area. The purpose and organizational goal of this federally funded agency is identification of economically disadvantaged persons who are interested in becoming day care providers in their homes in their respective communities. The methodology of the agency is to first assist those persons identified with acquiring required training and certification. Second, the agency assists the trained candidate(s) with the application process through Respondent.

23. According to Ms. Davis, the federal grant overall objective is twofold: first, to seek, find, and train family day care home providers in the community and second, to provide a source of employment and income to the provider's family. As a direct result of this community service, other families within the economically disadvantaged community will have local and affordable family child care service within their respective

communities. By accomplishing the identification and training of community child care providers, employed and unemployed parents in need of day care in the various Fort Myers communities will be the beneficiaries of the available family day care home, thereby enabling some parents to become employed and enhancing employment opportunities for employed parents. The Weed and Seed Support Group of the Fort Myers area offers free help and support to self-employed child care providers.

24. In 2001, Ms. Davis identified and assisted Petitioner in becoming a qualified child care provider. Ms. Davis assisted Petitioner in acquiring her 30 hours of training to become a qualified child care provider. She introduced Petitioner and others to the rules and regulations of Respondent pertaining to child care providers. Thereafter, she would visit with Petitioner and others to whom she rendered assistance only as her time and scheduling permitted. Ms. Davis' last visit with Petitioner occurred sometime before Christmas of 2003. Though she had no knowledge of the injury suffered by D.B., she offered to render assistance and additional training, including assisting Petitioner in acquiring a functional understanding of Respondent's rules, regulations, proper maintenance of required records, and correct completion of required reports and forms, that would enable Petitioner to continue her self-employment

status as a qualified child care provider offering daily child care services within her community.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003).

26. The Legislative intent in Section 402.301, Florida Statutes (2003), is to protect the health, safety, and well being and to promote the emotional and intellectual development and care of children of the state. This legislative responsibility is imposed upon Respondent.

27. Respondent has the burden to prove by clear and convincing evidence the grounds for revocation of Respondent's family day care home license. See Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932, 935 (Fla. 1996); Coke v. Department of Children and Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998); Accord Marcia Edwards Family Day Care Home v. Department of Children and Family Services, Case No. 02-3784 (DOAH February 5, 2003), adopted in toto, DCF Case No. 03-086-FO (March 4, 2003); Department of Children and Family Services v. Dorothy Dempsey Family Day Care Home, Case No. 02-1435 (DOAH August 7, 2002), adopted in toto, DCF Case No. 02-305-FO (November 27, 2002).

28. The clear and convincing evidence standard has been described as follows:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Judge Davey, 645 So. 2d 398, 404 (Fla. 1994), (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)) (internal brackets omitted). Accord Westinghouse Electric Corporation, Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous.").

Violations of the Licensing Statutes and Rules of the Florida Administrative Code

29. Subsection 402.310(1)(a), Florida Statutes (2003), provides that Petitioner may "deny, suspend, or revoke a license . . . for the violation of any provision of ss. 402.301-402.319 or rules adopted thereunder."

30. The rules adopted by Petitioner to implement Sections 402.301 through 402.319, Florida Statutes (2003), are codified in Florida Administrative Code Rule Chapter 65C-20.

31. The statutory child care standards have been codified in Florida Administrative Code Rule Chapter 65C-22, specifically Florida Administrative Code Rule 65C-22.001(4), that outline the pertinent requirements as follows:

> (4) Ratios.
> (a) The staff-to-children ratio, established in Section 402.305(4), F.S., is based on primary responsibility for the direct supervision of children and applies at all times when children are in care.
> (b) Mixed Age Groups.
> 1. In groups of mixed age ranges, where children under 1 year of age are included, one staff member shall be responsible for no more than 4 children of any age group.
> 2. In groups of mixed age ranges, where children 1 year of age but under 2 years of age are included, one staff member shall be responsible for no more than 6 children of any age group.

32. Subsections 402.302(1) and (7), Florida Statutes (2003), provide in pertinent part:

> (1) "Child care" means the care, protection, and supervision of a child, for a period of less than 24 hours a day on a regular basis, which supplements parental care, enrichment, and health supervision for the child, in accordance with his or her individual needs, and, for which a payment, fee, or grant is made for care.

* * *

> (7) "Family day care home" means an occupied residence in which child care is regularly provided for children from at least two unrelated families and which receives a payment, fee, or grant for any of the children receiving care, whether or not operated for profit. A family day care home shall be allowed to provide care for one of the following groups of children, which shall include those children under 13 years of age who are related to the caregiver.
> (a) A maximum of four children from birth to 12 months of age.
> (b) A maximum of three children from birth to 12 months of age, and other children for a maximum total of six children.
> (c) A maximum of six preschool children if all are older than 12 months of age.
> (d) A maximum of 10 children if no more than 5 are preschool age and, of those 5, no more than 2 are under 12 months of age.

33. The specific statutory provisions of Subsection 402.313(1)(a)4., Florida Statutes (2003), determined to have been violated by Petitioner, provides as follows:

> Proof of a written plan to provide at least one other competent adult to be available to substitute for the operator in an emergency. This plan shall include the name, address, and telephone number of the designated substitute.

34. So considered, the substantial and competent record shows as follows: D.B. was injured. Respondent failed to demonstrate by clear and convincing evidence the following facts: the date D.B. was injured, the location D.B. received his injury, and the person(s) under whose supervision and in whose care was D.B. at the time his injury occurred. The reliable

evidence is ambiguous and, thus, contrary to the Department's conclusions that D.B. was injured while in Petitioner's family day care facility, under the supervision, and in the care and control of Petitioner.

35. The record evidence is clear and convincing that Petitioner left children at her family day care home during her absence from the premises under the supervision, care, and control of an unqualified substitute caregiver.

36. The record evidence is clear and convincing that Respondent's January 30, 2004, notice of license revocation letter, resulting from inspections following a December 22, 2003, complaint, did not allege that "a history of prior violations," such as a violation of Subsection 402.305(4), Florida Statutes (2003), was included as the basis for the licensure revocation. Thus, such violation cannot form the basis for discipline in the instant proceeding. See Cortill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996).

Appropriate Disciplinary Action for Violations

37. The appropriate disciplinary action for supervision violations is consideration of the statutory factors delineated in Subsection 402.310(1)(b), Florida Statutes (2003). Those factors are the severity of the violation, including the probability that death or serious harm to the health or safety of any person will result or has resulted, actions (if any)

taken by Petitioner to correct the violation, and any previous violations. The evidence did not demonstrate that Petitioner's leaving the children in the care of her 15-year-old daughter resulted in death or serious harm to the children in her care.

38. The second factor involves actions taken by Petitioner to correct proven violation. Petitioner's 15-year-old daughter is no longer left to care for children when and if Petitioner is absent from the premises.

39. The third factor deals with "previous violations." Respondent has not cited Petitioner for any previous violations.

40. Respondent alleged but did not prove that D.B. was injured while at the family day care home. Respondent alleged but did not prove that Petitioner did not provide adequate care and supervision for the child, D.B., while entrusted in her care at the family day care home.

41. In consideration of the foregone and in keeping with the Legislative intent to protect the health, safety, and well being and to promote the emotional and intellectual development and care of children of the state, the appropriate penalty in this case would be to first, vacate and set aside the revocation of Petitioner's license; second, impose a $250.00 fine on Petitioner; and third, issue Petitioner a six-month provisional license. The provisional license would require Respondent to conduct monthly inspections to ensure that Petitioner and the

facility's caregiver staff are complying with applicable rules, regulations, and statues.

RECOMMENDATION

Based upon the foregoing Finding of Facts and Conclusions of Law, it is

RECOMMENDED that the Department of Children and Family Services enter a final order:

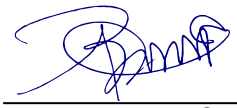
1. Finding that Petitioner left children at her family day care home during her absence from the premises under the supervision, care, and control of unqualified substitute caregivers; and

2. Imposing on Petitioner a fine in the amount of $250.00; and, upon payment thereof,

3. Set aside and vacate revocation of Petitioner's family day care home license/registration; and

4. Issue to Petitioner a six-month provisional license.

DONE AND ENTERED this 20th day of September 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of September, 2004.

ENDNOTE

1/ This child of five years in age was questioned in private by the undersigned, and it was determined that the child was not competent to testify because of his inability to remember specifics of the matters of concern.

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.