

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)
FAMILY SERVICES,)
)
Petitioner,)
)
vs.) Case No. 07-5038
)
THORPE LINDSEY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On February 19, 2008, a formal administrative hearing in this case was held in Orlando, Florida, before Lawrence P. Stevenson, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: T. Shane DeBoard, Esquire
Department of Children and
Family Services
400 West Robinson Street, Suite S-1114
Orlando, Florida 32801

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue in the case is whether the registration of Thorpe Lindsay's family day care home should be revoked.

PRELIMINARY STATEMENT

By certified letter dated September 24, 2007, the Department of Children and Family Services (the "Department") notified Respondent, Thorpe Lindsey, that the registration for his family day care home was being revoked. By letter dated October 11, 2007, Respondent disputed the allegations of the September 24 revocation letter and requested a formal hearing. On November 1, 2007, the Department forwarded the request to the Division of Administrative Hearings for the scheduling and conduct of a formal hearing.

On November 29, 2007, the Department filed a "Motion to Amend Administrative Complaint"¹ that sought to bring forward additional evidence supporting the proposed revocation of Respondent's registration. Without objection, the motion was granted by Order dated December 17, 2007, and the hearing proceeded based on the Department's Amended Administrative Complaint.

On December 28, 2007, Respondent filed a letter requesting a continuance of the hearing then scheduled for January 4, 2008, on the ground that his employer would not let him take that day off. By Order dated January 2, 2008, the request was granted. The Order Granting Continuance required the parties to convene within ten days and arrive at mutually-agreeable dates for the

rescheduled hearing, then to advise the undersigned of those dates.

On January 15, 2008, the Department filed a notice of availability, setting forth the dates on which the Department was available for the hearing. The notice stated the Department had made several attempts to contact Respondent, without success. The hearing was rescheduled for February 19, 2008. Respondent filed no objection to the hearing date, nor did he contact the undersigned's office by telephone to register any objection or seek a different hearing date.

Respondent did not appear at the hearing. The Department presented the testimony of Patricia Richardson, a child care licensing specialist for the Department, and of Eric Allen, an inspector for the Early Learning Coalition. The Department's Exhibits 1 through 8 were admitted into evidence.

After the hearing, an Order to Show Cause was issued to Respondent, directing him to show cause as to why the record in this case should not be closed and a recommended order entered based on the current record. Neither Respondent nor any person purporting to represent Respondent responded to the Order to Show Cause.

No transcript of the hearing was ordered. An Order Closing Record was entered on March 3, 2008, directing the parties to

file proposed recommended orders no later than March 13, 2008. Neither party filed a proposed recommended order.

FINDINGS OF FACT

1. The Department is responsible for the registration and supervision of family day care homes, pursuant to Section 402.313, Florida Statutes (2007).

2. Respondent, Thorpe Lindsey, has been registered to operate a family day care home at 2306 Savoy Drive, Orlando, Florida, since December 18, 2006.

3. On June 27, 2007; July 13, 2007; and July 26, 2007, Respondent allowed an unscreened and unapproved substitute, Sheneka Henderson, to be alone with and supervise children in the family day care home. Respondent was not present in the home on at least two of these occasions. On all three occasions, Respondent appeared after the Department's protective investigator or child care licensing supervisor noted his absence and the presence of Ms. Henderson as the caregiver.² On July 13, 2007, Respondent was cautioned in person about the repercussions of allowing unscreened personnel to supervise children.

4. On September 14, 2007, the Department issued an Administrative Complaint against Respondent, seeking to impose a civil penalty in the amount of \$500.00 for the three instances of using an unscreened and unapproved substitute caregiver.

Respondent refused to accept service of the Department's certified letter. The copy of the Administrative Complaint sent by regular U.S. Mail was not returned to the Department, and Respondent never sought a hearing or otherwise contested the allegations of the Administrative Complaint.

5. Aside from the problem of unscreened personnel, Respondent also had a recurring problem of caring for a number of children greatly in excess of the ratios allowed by statute in his family day care home. Under any circumstances, a family day care home may provide care for no more than ten children. See § 402.302(7), Florida Statutes (2007). On June 27, 2007, the Department sent a certified letter to Respondent noting that on the previous day, the Department had received a report that Respondent was caring for between 30 and 40 children. The letter cautioned Respondent that he must immediately reduce enrollment and submit a written plan to the Department by July 10, 2007, identifying the names and birth dates of the children for whom Respondent would continue to provide care, as well as the names and birth dates of the children whom Respondent eliminated from his roster. Respondent never provided the required documentation to the Department.

6. The Early Learning Coalition of Orange County is a public/private partnership established to ensure that children enter school ready to learn. In coordination with the

Department, the Early Learning Coalition provides health and safety inspections for anyone receiving school readiness funding. Because Respondent received such funding, Eric Allen, an inspector for the Early Learning Coalition, made regular visits to the family day care home.

7. On July 6, 2007, Mr. Allen made a routine visit to Respondent's home and found several violations, including a ratio violation, the presence of unscreened volunteers caring for children, chemicals under kitchen and bathroom sinks without door locks on the cabinets, and uncapped electrical outlets. On July 9, 2007, the Early Learning Coalition sent a letter to Respondent outlining the violations and requiring their correction pending a re-inspection of the family day care home.

8. On July 20, 2007, Mr. Allen conducted a routine visit to Respondent's home and again found the home to be out of ratio. On July 26, 2007, the Early Learning Coalition sent a letter, signed by Donna J. Williams, director of quality services, to Respondent that stated the following, in relevant part:

This letter will clear up any confusion as to the number of children you are legally allowed to care for. As a family home provider, six (6) is the maximum number of children under the age of five you are allowed to have in care at one time. If an infant is present, the maximum number of children allowable at one time is five (5). I am enclosing the state ratio chart so you

may be clear on the number and age of children you are legally allowed to have in your care at one time.

Since this falls under our Non-compliance Policy, you are hereby on notice that if there is any other incident where you are found in non-compliance with any Level I violation, the parents of school readiness funded children will be contacted and given the opportunity to transfer as you will be ineligible to receive school readiness funds for a period of one year.

9. On September 7, 2007, at approximately 3:45 p.m., Mr. Allen again visited Respondent's registered family day care home. Mr. Allen found a note on the front door stating, "We are on a field trip," with contact information for parents at the bottom. Mr. Allen noted that the contact numbers on the note did not match the contact information on file at the Early Learning Coalition. He also noted that all of the windows of the house were covered with blinds or cardboard.

10. Mr. Allen testified that he had made several prior attempts to visit the home in recent days, but that on each occasion was met with a note claiming the children were out on a "field trip." He was about to walk away from the house when he heard a baby crying inside. He rang the doorbell and knocked on the door but received no response. He called out to whomever was inside the house, "This is Eric from the Early Learning Coalition. I can hear a baby crying. You need to open the door or you are violating your provider agreement and you are in

danger of being de-funded." There was still no response from inside the house. Mr. Allen walked around to the back door. He knocked on the window of the rear childcare area and repeated his warning.

11. After several minutes, a car pulled up to the home. A woman got out of the car and approached the front door. Mr. Allen asked if she was there to pick up a child, and she answered affirmatively. She rang the doorbell but no one answered. Mr. Allen offered to call the contact number, but the woman just turned and drove away.

12. Mr. Allen called the Early Learning Coalition's office and asked the administrative assistant to verify and call the contact number for Respondent's home. When the assistant called the number, a woman who identified herself as Respondent's sister answered and stated that the children were out on a field trip.

13. Mr. Allen then called the contact number and asked Respondent's sister where the children were. She stated they were on a field trip to Pizza Hut. Mr. Allen told her he could hear a baby crying inside and that if the door was not opened he would call the police. Respondent's sister hung up the phone.

14. Just as Mr. Allen's phone conversation concluded, approximately 25 minutes after he first arrived at the house, the woman in the car returned. As the woman walked up to the

front door, the door was opened by Toshiba Lindsey, another of Respondent's sisters, who was holding a baby she said was her son. Mr. Allen showed Ms. Lindsey his identification and asked her why he had been left outside trying to get someone to open the door for nearly a half hour. Ms. Lindsey claimed to have been sleeping and not to have heard the knocking.

15. Mr. Allen entered the home and started down the hallway, but Ms. Lindsey forbade him from entering one of the rooms. Mr. Allen could hear a child crying inside the room. He demanded to know whose child was behind the door. Ms. Lindsey denied there was anyone in the room.

16. For several minutes, Mr. Allen attempted to convince Ms. Lindsey to open the door, but she continued to say that she could not open it. Mr. Allen told her to call Respondent, who was not in the house. Mr. Allen spoke to Respondent and told him that he would call the police if Ms. Lindsey did not open the door. Respondent hung up on him.

17. Mr. Allen called 911 and requested an officer to come to the house and open the door. A moment later, the door to the room opened and another woman, Sheneka Henderson, emerged with 13 children. Neither Ms. Lindsey nor Ms. Henderson had been background screened or trained to act as caregivers. Mr. Allen recorded the names and ages of the children, then left the home.

Respondent never showed up at the house while Mr. Allen was there.

18. On September 10, 2007, the Early Learning Coalition sent Respondent a letter notifying him that he would be ineligible to receive school readiness funds for a period of one year, based on Respondent's repeated violations of mandatory state ratio requirements.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

20. The Department has the burden of establishing the grounds for revocation of the Respondent's licensure by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Coke v. Department of Children & Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998). In this case, the burden has been met.

21. At all times material to this case, Respondent was a provider of child care, pursuant to Section 402.302, Florida Statutes (2007), which provides the following relevant definition:

(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.

22. Section 402.310, Florida Statutes (2007), provides in relevant part as follows:

402.310 Disciplinary actions; hearings upon denial, suspension, or revocation of license or registration; administrative fines.--

(1)(a) The department or local licensing agency may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder:

* * *

3. Deny, suspend, or revoke a license or registration.

(b) In determining the appropriate disciplinary action to be taken for a violation as provided in paragraph (a), the following factors shall be considered:

1. 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, the severity of the actual or potential harm, and the extent to which the provisions of ss. 402.301-402.319 have been violated.

2. Actions taken by the licensee or registrant to correct the violation or to remedy complaints.

3. Any previous violations of the licensee or registrant.

(c) The department shall adopt rules to:

1. Establish the grounds under which the department may deny, suspend, or revoke a license or registration or place a licensee or registrant on probation status for violations of ss. 402.301-402.319.

2. Establish a uniform system of procedures to impose disciplinary sanctions for violations of ss. 402.301-402.319. The uniform system of procedures must provide for the consistent application of disciplinary actions across districts and a progressively increasing level of penalties from predisciplinary actions, such as efforts to assist licensees or registrants to correct the statutory or regulatory violations, and to severe disciplinary sanctions for actions that jeopardize the health and safety of children, such as for

the deliberate misuse of medications. The department shall implement this subparagraph on January 1, 2007, and the implementation is not contingent upon a specific appropriation.

(d) The disciplinary sanctions set forth in this section apply to licensed child care facilities, licensed large family child care homes, and licensed or registered family day care homes.

23. Subsection 402.313, Florida Statutes (2007), provides in pertinent part:

(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 child care program.

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

1. The name and address of the home.
2. The name of the operator.
3. The number of children served.
4. 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.

5. Proof of screening and background checks.

6. Proof of successful completion of the 30-hour training course, as evidenced by passage of a competency examination, which shall include:

a. State and local rules and regulations that govern child care.

b. Health, safety, and nutrition.

c. Identifying and reporting child abuse and neglect.

d. Child development, including typical and atypical language development; and cognitive, motor, social, and self-help skills development.

e. Observation of developmental behaviors, including using a checklist or other similar observation tools and techniques to determine a child's developmental level.

f. Specialized areas, including early literacy and language development of children from birth to 5 years of age, as determined by the department, for owner-operators of family day care homes.

* * *

(3) 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. . . .

24. Florida Administrative Code Chapter 65C-20 provides standards for family day care homes. Florida Administrative Code Rule 65C-20.009 provides, in relevant part:

(2) Personnel.

(a) Operator. The family day care home license shall be issued in the name of the operator who must be at least 18 years of age and a resident of the family home. In the event of rental or leased property, the operator shall be the individual who occupies the residence. The operator of a family day care home may not work outside of the home during the hours the family day care home is operating.

(b) Substitutes. There shall be a written plan to provide at least one (1) other competent adult, who must be at least 18 years of age, to be available as a substitute for the operator on a temporary or emergency basis. This plan shall include the name, address and telephone number of the designated substitute. Substitutes may not work over 40 hours per month on average during a 12 month period in any single home for which they have been identified as the designated substitute.

(c) No person shall be an operator, substitute or employee in a family day care home while using or under the influence of narcotics, alcohol, or other drugs that impair an individual's ability to provide supervision and safe child care.

(3) Staff Training.

(a) Prior to licensure and prior to caring for children, all family day care home

operators and substitutes who work 40 hours or more per month on average during a 12 month period must:

1. Successfully complete the Department of Children and Family Services' 30 clock-hour Family Child Care Home training, as evidenced by successful completion of a competency based examination(s) offered by the Department of Children and Family Services or its designated representative with a weighted score of 70 or better. Family day care home operators who successfully completed the mandatory 30 clock-hour Family Child Care Home training prior to January 1, 2004, are not required to fulfill the competency examination requirement. Beginning July 1, 2006, the 30 clock-hour Family Child Care Home training will be replaced by five (5) individual training courses which total 30 clock-hours of training: Family Child Care Home Rules and Regulations; Health, Safety and Nutrition; Identifying and Reporting Child Abuse and Neglect; Child Growth and Development; and Behavioral Observation and Screening.

* * *

(b) Family day care home substitutes who work less than 40 hours a month on average during a 12 month period shall complete the Department of Children and Family Services' 3-clock-hour Fundamentals of Child Care training prior to caring for children, as documented on the Department of Children and Family Services' CF-FSP Form 5267 and the Department of Children and Family Services' child care training transcript.

* * *

(5) Supervision.

(a) At all times, which includes when the children are napping or sleeping, the

operator shall remain responsible for the supervision of the children in care and capable of responding to emergencies and the needs of the children. While children are napping or sleeping in bedrooms, the bedroom doors must remain open. 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. . . .

25. The facts found above establish that Respondent repeatedly violated Florida Administrative Code Rule 65C-20.009(5), as well as the very definition of "family day care home," by failing to be present in the home during its hours of operation to directly supervise the children in his care. The facts establish that Respondent repeatedly violated Subsection 402.302(7), Florida Statutes, by caring for many more children than the statute allows. The facts establish that Respondent repeatedly violated Subsection 402.313(1)(a) and (3), Florida Statutes, by using caregivers who had not received screening or background checks. The facts establish that Respondent violated Florida Administrative Code Rule 65C-20.009(3) by using caregivers who had not received even the minimal training required of substitutes who work less than 40 hours per months on average during a 12 month period.

26. Subsection 402.310(1)(a)3., Florida Statutes (2006), provides that revocation of registration is within the range of disciplinary penalties, which may be imposed for a violation of

statute and rule. Subsection 402.310(1)(b), Florida Statutes (2006), provides that in determining the appropriate penalty, the severity of the violation, including the probability of serious harm, must be considered. In this case, Respondent repeatedly absented himself from the home and used unscreened, untrained persons to care for a number of children grossly in excess of the number allowed by statute, a situation rife with potential harm to the children in question. Further, Respondent continued to operate in this fashion after repeated warnings and even the imposition of a civil penalty of \$500.00. Respondent took no action to remedy the situation, thus providing no ground for mitigation of the penalty sought by the Department.

RECOMMENDATION

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

RECOMMENDED that the Department of Children and Family Services enter a final order revoking the registration of Thorpe Lindsey to operate a family day care home.

DONE AND ENTERED this 10th day of April, 2008, in
Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of April, 2008.

ENDNOTES

^{1/} On September 14, 2007, the Department attempted to serve Mr. Lindsey with an Administrative Complaint seeking to impose on him a civil penalty of \$500.00. He refused service and never requested a hearing on the Administrative Complaint, which was not forwarded to the Division of Administrative Hearings. The fact that there was an existing Administrative Complaint against Respondent apparently led the Department to style its pleading as a "Motion to Amend Administrative Complaint" despite the fact that no administrative complaint was actually before this tribunal.

^{2/} The Department had reason to believe, though it could not affirmatively prove, that Respondent was working an outside job during the family day care home's hours of operation.

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.