

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BEST FAMILY DAY CARE HOME,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 09-3515  
  )  
DEPARTMENT OF CHILDREN AND            )  
FAMILY SERVICES,                        )  
  )  
      Respondent.                         )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held on September 15, 2009, by video teleconference at sites in Lakeland and Tallahassee, Florida, before Administrative Law Judge Carolyn S. Holifield of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:   Jeremy Best  
                          (Husband of Marcela Best)  
                          4062 State Road 60 East  
                          Bartow, Florida 33830

For Respondent:   Stacy N. Robinson, Esquire  
                          Department of Children and  
                          Family Services  
                          4720 Old Highway 37  
                          Lakeland, Florida 33813

STATEMENT OF THE ISSUE

The issue is whether Petitioner's application for licensure to operate a family day care home should be denied.

PRELIMINARY STATEMENT

By certified letter dated May 8, 2009, Respondent, Department of Children and Family Services ("Department"), notified Marcela Best, owner of Petitioner, Best Family Day Care Home (collectively referred to as "Petitioner"), that the Department proposed denying her application for licensure to operate a family day care home. The letter alleged the following grounds for the denial: (1) a documented verified abuse/neglect report; (2) the alarm on a door leading to the swimming pool was not working in violation of Florida Administrative Code Rule 65C-20.010(1)(i)<sup>1</sup>; the swimming pool was unsanitary in violation of Florida Administrative Code Rule 65C-20.010(1)(j); and the local criminal history of a member of Petitioner's household had not been provided to the Department. An Investigative Summary of the abuse/neglect report was attached to the denial letter.

Petitioner challenged the Department's decision and requested an administrative hearing. The Department forwarded the matter to the Division of Administrative Hearings on June 22, 2009, for assignment of an Administrative Law Judge to conduct the hearing.

At hearing, Petitioner testified on her own behalf and presented the testimony of her husband, Jeremy Best. Petitioner offered no exhibits into evidence. The Department presented the

testimony of four witnesses: (1) Patricia Step, a family safety counselor; (2) Terri Lynne Reinhardt, a child protective investigator; (3) Vickie Richmond, a family safety counselor; and (4) Sheila Nobles, circuit administrator for child care licensing. The Department's Exhibits A through M were received into evidence. Pursuant to Subsections 39.202(2)(a) and (j), Florida Statutes (2009),<sup>2</sup> abuse/neglect reports are confidential. Accordingly, the abuse/neglect report admitted into evidence as Exhibit L<sup>3</sup> is sealed.

Prior to the evidentiary part of the hearing, the Department requested that the undersigned take official recognition of the Department's Operating Procedure CFOP 175-28 ("CFOP 175-28"). That request was denied pending presentation of competent evidence regarding that operating procedure.<sup>4</sup>

The one-volume Transcript was filed on October 5, 2009. At the conclusion of the hearing, the parties were given ten days from the date the Transcript was filed to submit proposed recommended orders. The parties timely filed their Proposed Recommended Orders which have been considered in preparation of this Recommended Order.

#### FINDINGS OF FACT

1. On June 6, 2008, Petitioner applied for a license to operate a family day care home in Bartow, Florida.

2. As part of the licensure process, the Department is required to conduct an inspection of the home where Petitioner's proposed family day care would be operated. The inspections are conducted by the Department's family safety counselors.

3. Patricia Step was the family safety counselor initially responsible for conducting the licensure inspection of Petitioner's home.

4. On February 20, 2009, prior to conducting the actual inspection, Ms. Step completed a preliminary walk-through of Petitioner's home. The purpose of the walk-through was to advise Petitioner of areas of her home and property that were not in compliance with required standards and needed to be corrected or addressed prior to the licensure inspection.

5. After completing the initial walk-through, Ms. Step listed the areas that needed to be corrected or addressed prior to the licensure inspection in preliminary review notes, which she gave to Petitioner. Those areas were as follows: (1) a fence at least four feet high was needed around the playground area in the backyard; (2) the alarm on one of the two doors in the master bedroom, specifically, the master bathroom door leading to the pool, needed to be repaired; (3) the screen door needed to be locked from the inside so that a child playing outside could not access the swimming pool<sup>5</sup>; and (4) locks needed to be placed on kitchen cabinets containing cleaning supplies

and other harmful items, and knives needed to be placed in upper cabinets.

6. On February 27, 2009, a week after the initial walk-through, Ms. Step conducted a licensure inspection of Petitioner's home. This date was mutually agreed upon by Petitioner and Ms. Step on February 20, 2009, after Petitioner indicated that she could have the four areas of non-compliance corrected or addressed in a week. During the licensure inspection, Ms. Step determined that Petitioner had addressed and/or corrected three of the four items listed in the preliminary review. The one item that had not been addressed was the "pool alarm on the [master bathroom] door" leading to the swimming pool.

7. The alarm on the master bathroom door was part of Brinks' alarm system that included all the other doors in the house which led outside or to the pool area. Petitioner and her husband had this "high tech" alarm system installed after the April 23, 2006, incident discussed below. The alarm system could be programmed to allow each interior door to cause either the alarm to sound or a "chiming sound" when anyone opened the interior door to exit the house. At the time of the inspection, all the interior doors leading to the pool were programmed so that when the alarm system was turned on, the alarm would sound if anyone opened those doors.<sup>6</sup> Except for the master bathroom

door, the alarm on all the other doors leading to the pool were working properly.

8. Ms. Step recorded the results of the February 27, 2009, inspection on the Department's Inspection Checklist form ("Inspection Checklist"). Of the 38 areas listed on the Inspection Checklist, Ms. Step indicated that Petitioner's application and/or home were non-compliant in two areas-- background screening and swimming pools. In the area of background screening, Ms. Step noted that there was no local criminal background check on file for Carlos Granados, Petitioner's cousin who was temporarily living in Petitioner's household. In the area of swimming pools, Ms. Step noted two areas of non-compliance: (1) the swimming pool at Petitioner's home was not properly maintained; and (2) the "pool alarm" was inoperable.

9. Although the Inspection Checklist noted that the "pool alarm" was inoperable, Ms. Step never told Petitioner that a "pool alarm" needed to be in the swimming pool. Rather, Ms. Step spoke to Petitioner only about the need to repair the alarm on the master bathroom door that led to the pool.<sup>7</sup> Based on Ms. Step's statements to Petitioner about the "alarm" and her preliminary review notes, both Ms. Step and Petitioner understood the reference to "pool alarm" on the Inspection Checklist to mean the alarm on the master bathroom door.

10. The Inspection Checklist completed on February 27, 2009, specified that the "due date" to correct the non-compliant areas was April 3, 2009.

11. After completing the licensure inspection on February 27, 2009, Ms. Step intended to return to Petitioner's home to determine if the non-compliant areas had been brought into compliance. However, Ms. Step never returned to Petitioner's home. Instead, Vicki Richmond, a family safety counselor, followed up on Petitioner's progress in addressing the non-compliant areas<sup>8</sup> while she was at Petitioner's home conducting a complaint investigation.<sup>9</sup>

12. On March 13, 2009, nine months after Petitioner submitted her licensure application, Ms. Richmond conducted a Central Abuse Hotline search on Petitioner and her husband as part of the application review process. The Department is required to search the records of the Central Abuse Hotline for reports of abuse, neglect, or abandonment. This search provides information as to whether Petitioner's name appears in those records, and, if so, whether there were "verified" indicators of maltreatment of children. Both Petitioner and her husband consented to this search.

13. The Central Abuse Hotline search revealed a verified report for inadequate supervision by Petitioner and her husband and some indicators of maltreatment, asphyxiation. The report

involved an incident that occurred on April 23, 2006, in which Petitioner and her husband's then three-year-old daughter almost drowned.

14. On or about March 13, 2009, Ms. Richmond notified Ms. Step of the report and advised her that the verified findings needed to be addressed prior to proceeding with the license.

15. On March 20, 2009, while driving across Highway 60 in the Bartow area, Ms. Richmond saw a sign with the name of Petitioner's prospective family day care home and her address and telephone number. Concerned that the sign did not include a license number, Ms. Richmond contacted the licensing office to verify whether Petitioner's home was a licensed family day care home. She was advised that Petitioner's licensure application was "pending" and had not been approved. Ms. Richmond then called Ms. Step to check the status of Petitioner's licensure application. During that conversation, Ms. Step reminded Ms. Richmond that this was the applicant for whom she (Richmond) had recently done the Central Abuse Hotline search.

16. On March 23, 2009, as part of the complaint investigation about Petitioner's sign, Ms. Richmond made an unannounced visit to Petitioner's home. Ms. Richmond advised Petitioner that it was illegal for her to post a sign advertising her home as a family day care home before it was



licensed. In response, Petitioner informed Ms. Richmond that after the February 27, 2009, licensure inspection, she (Petitioner) had been told that she could put a sign up and start a waiting list of people interested in day care services. After hearing Petitioner's explanation, Ms. Richmond then told Petitioner that "if" she put up a sign prior to licensure, the sign had to "at least" include in bold letters, "License Pending."

17. On March 23, 2009, immediately after addressing the "sign" issue, Ms. Richmond conducted an unannounced or inspection walk-through of Petitioner's home and discussed issues with Petitioner that Ms. Richmond believed were of concern to the Department. During the walk-through, Petitioner advised Ms. Richmond that the "door alarm" had not yet been repaired. Among the issues Ms. Richmond raised and discussed with Petitioner were: (1) the need to install either a pool alarm or portable pool barriers; (2) the pool was not clean and was only partially filled with water; (3) the spa in the backyard needed a cover; (4) the local criminal background check for Petitioner's cousin had not been received.

18. Ms. Richmond described to Petitioner and her husband two options related to the swimming pool--the "portable pool barriers" and a "pool alarm." In describing the "pool alarm," Ms. Richmond indicated that it was a device that was placed in

the pool. She further explained that with this type of "pool alarm," if a child fell in the swimming pool, the alarm would sound.

19. Although the alarm on the master bathroom door was not working on March 23, 2009, Petitioner's husband was making efforts to get the door alarm repaired. However, that day, Ms. Richmond told Petitioner and her husband that even if the alarm on the master bathroom door was repaired, they still needed to have an alarm in the pool. In response to this directive, Petitioner agreed that they would install a "pool alarm" in the swimming pool.

20. After completing the March 23, 2009, walk-through, Ms. Richmond informed Petitioner that the items she had discussed needed to be corrected prior to a license being granted. However, no written documentation was provided to Petitioner regarding the areas of non-compliance discussed during the walk-through or inspection.

21. Ms. Richmond returned to Petitioner's home on March 27, 2009, for her second unannounced visit, which was described as a follow-up to her "complaint investigation." Once there, Ms. Richmond observed that the sign advertising the family day care home was still displayed. However, Petitioner's husband came home while Ms. Richmond was there and immediately took down the sign.

22. During the March 27, 2009, unannounced complaint investigation visit, Petitioner told Ms. Richmond that the alarm on the master bathroom door was not working. About that time, Petitioner's husband arrived and told Ms. Richmond that he had purchased a pool alarm and even showed her the alarm. The "pool alarm" was purchased in response to Ms. Richmond's directive during the March 23, 2009, walk-through but had not been put in the pool, because the pool had not yet been cleaned.<sup>10</sup>

23. At the end of the March 27, 2009, unannounced visit, Ms. Richmond talked to Petitioner and her husband about the verified abuse/neglect report regarding the April 23, 2006, incident in which their daughter almost drowned. The findings in the report were "verified" for inadequate supervision by Petitioner and her husband. Given the implications of the abuse/neglect report, Ms. Richmond explained that although Petitioner needed to address the areas of non-compliance, the most pressing and immediate concern was the abuse/neglect report.

24. Petitioner's husband testified credibly that during the conversation described in paragraph 23, Ms. Richmond told him and Petitioner that because of the abuse/neglect report, there was "no way" Petitioner would get a family day care home license. Based on that comment, Petitioner and her husband

reasonably believed that Petitioner's application would be denied because of the abuse/neglect report.

25. On March 27, 2009, after being told about the abuse/neglect report and the ramifications of that report, Petitioner and her husband "stopped moving forward" on the areas of non-compliance related to the swimming pool (i.e., cleaning the pool and installing the pool alarm).<sup>11</sup>

26. Believing the abuse/neglect report would result in denial of her licensure application, Petitioner and her husband began to focus on issues related to the report. They were also concerned and had questions about the Department's licensing process as it related to the abuse/neglect report.

27. Ms. Richmond's third visit to Petitioner's home was on April 7, 2009. The sole purpose of that visit was to answer the "real" questions that Petitioner and her husband had about the abuse/neglect report and the licensing process. Ms. Richmond answered their questions as best she could, but recommended that they schedule an appointment with the licensing supervisor at the licensing office.<sup>12</sup> That same day, Petitioner and her husband scheduled a meeting and met with Sheila Nobles, administrator and supervisor for child care licensing, to discuss, ask questions about, and review the abuse/neglect report.

28. On April 8, 2009, Ms. Richmond finalized her "report" on the complaint investigation regarding the sign. Ms. Richmond's notes in the "comment" section of the pre-printed "Notice to Cease and Desist" form described the events of March 20, 23 and 27, 2009, as they related to the sign issue.<sup>13</sup>

#### Decision to Deny Application

29. As the family safety counselor responsible for reviewing Petitioner's application and conducting the licensure inspections, Ms. Step recommended to Ms. Nobles that Petitioner's license be denied. Ms. Step's recommendation was based on the verbal reports provided to her by Ms. Richmond, which indicated that the areas of non-compliance on the Inspection Checklist had not been corrected.

30. Prior to making a decision about Petitioner's application, Ms. Nobles reviewed the application file, the abuse/neglect report, the Inspection Checklist and the preliminary review notes. Ms. Nobles testified that she considered the "five different inspections"<sup>14</sup> of Petitioner's home and property by the two licensing counselors, the areas of non-compliance that had not been corrected, and the abuse/neglect report with a "verified" finding of inadequate supervision.

The Central Abuse Hotline Report

31. Applicants seeking licensure to operate a family day care home are required to undergo a Level II screening. That screening included a check to determine if the applicant had a report in the Central Abuse Hotline.

32. Due to concern for the safety of children, the Department is authorized to deny a family day care home license if the applicant has a verified abuse/neglect report.

33. Because of its concern about the safety of children in Petitioner's care, the Department alleges that the abuse/neglect report revealed during a Central Abuse Hotline search is ground for denying Petitioner's license. As it relates to the abuse/neglect report, the denial letter states in relevant part:

The Department has documented a verified abuse neglect report whereby your then 3-year-old daughter was not supervised correctly on June 21, 2006.[sic]<sup>[15]</sup> These actions allowed your child to wonder [sic] outside the family swimming pool were [sic] she was found after an undetermined time under water and not breathing. During the investigation it was determined that the lock to get access [presumably to the pool] had been broken for a few days.

34. The abuse/neglect report was initiated when a call was received by the Central Abuse Hotline on April 23, 2006. According to the intake-report, an incident occurred at Petitioner's and her husband's home in which their then three-year-old daughter ("child") almost drowned.

35. Jermaine Turner, a child protective investigator ("CPI"), was assigned to investigate the incident. As the investigator, CPI Turner was responsible for making contact with the family of the child and other appropriate individuals.

36. During the investigation, CPI Turner worked under the supervision and direction of Terry Lynn Reinhardt, a child protective supervisor. As CPI Turner's supervisor, Ms. Reinhardt had contact with CPI Turner and gave him directives related to follow-up activities on case-related matters.

37. The abuse/neglect report includes a summary of notes which purport to summarize interviews CPI Turner conducted with Petitioner and her husband on May 18, 2006, about a month after the subject incident. Petitioner's husband recalled that this interview was conducted by telephone.

38. Ms. Reinhardt testified that CPI Turner interviewed the child's parents and also made telephone contact with them to follow-up on an issue involving a "broken door."

39. Ms. Reinhardt was not present at the interviews that CPI Turner conducted with Petitioner and her husband. Thus, she had no first-hand knowledge of what, if anything, they said to CPI Turner. Rather, Ms. Reinhardt relied on CPI Turner's verbal reports to her and the notes and summaries in the abuse/neglect report attributed to him.

40. CPI Turner did not testify at this proceeding. Moreover, no competent evidence was presented regarding any entries (i.e., notes, comments, and/or interview summaries) in the abuse/neglect report attributed to CPI Turner.

41. The case was closed on June 21, 2006, and the findings and conclusions in the matter were summarized in a two-page document titled, Investigative Summary.

42. The Investigative Summary includes an "updated" note dated June 6, 2006, that provided: "The child . . . was left to watch cartoons; however, she was found face down in a swimming pool. The lock to get access from the pool to the house had been broke [sic] for approximately two day [sic]. They stated they planned to fix the lock but never got around to it."

43. No evidence was presented as to who made the "updated" note or the source of the information in that note.

44. After the investigation was complete, Ms. Reinhardt concluded that there were "some indicators" of maltreatment, asphyxiation, and verified findings of inadequate supervision as to both parents. In reaching that conclusion, Ms. Reinhardt relied on information provided by Mr. Turner and then applied the Department's CFOP 175-28 in reaching those conclusions.

45. Florida Administrative Code Rule 65C-30.001(6) incorporates by reference the "Allegation Matrix" set forth in the Department's CFOP 175-28. Pursuant to that rule, the



"Allegation Matrix" is a document that defines specific types of abuse, neglect or abandonment; guides staff in determining whether abuse, neglect or abandonment has occurred; and assists in ensuring that all factors are considered when assessing each type of maltreatment.

46. The Department's CFOP 175-28 was not offered into evidence during this proceeding.

47. Based on the conclusion reached by Ms. Reinhardt, the abuse/neglect report was closed on June 21, 2006, with the finding of some indicators of maltreatment, asphyxiation, and verified findings of inadequate supervision. Notwithstanding those findings, the Investigative Summary reflects that there was no prior history of abuse or neglect and no criminal history. Moreover, the Investigative Summary indicated that no intervention services were needed, no placement outside the home was required, and no judicial action was required. Finally, Petitioner and her husband were not given any safety plan to implement.

48. The April 23, 2006, incident was also investigated by the Polk County Sheriff's Office ("Sheriff's Office"). That investigation included at least two or three detectives and/or officers taking and tape recording sworn statements from Petitioner, her husband, and her father-in-law. All of these

sworn statements were "in-person" interviews taken within 24 hours of the incident.

49. Petitioner's husband testified credibly that the written summaries of the sworn statements taken by the Sheriff's Office detectives, particularly that of Detective Wharton, accurately reflect not only the substance of the interviews, but also what actually occurred on April 23, 2006.

50. Petitioner's husband testified credibly about the facts related to the April 23, 2006, incident and the accuracy of written summaries of the tape-recorded sworn statements taken by detectives as set forth below in paragraphs 51 through 60.

51. On April 23, 2006, Petitioner was in the family pool with her then three-year-old daughter. While Petitioner and her daughter were in the pool, Petitioner's husband and his father arrived at the house. Petitioner then went into the house to prepare dinner and her husband stayed at the pool with the child. Shortly thereafter, Petitioner's husband removed the child from the pool, took off the floatation device the child was wearing while in the pool, took her into the house, and then closed and locked the bottom lock of the door. Once in the house, Mr. Best put on a movie for his daughter in her bedroom and then told his wife that the child was in the room watching a movie. The child left the bedroom and went to the kitchen where her mother was preparing dinner. For some time, the child went

back and forth between the kitchen, playing near her mother and/or "helping" her mother, and the living room where she (the child) was sitting on the floor watching cartoons on television.

52. The kitchen and living room were adjacent rooms with a large opening between them which allowed a person in one room to see into the other room.

53. When Mr. Best and his daughter went into the house, his father (the child's grandfather) was taking a shower. A few minutes later, after taking his shower and getting dressed, the child's paternal grandfather got out his new video camera and went to the kitchen/living room area to videotape his granddaughter while she was playing. He videotaped her playing for several minutes and then went to the bedroom to put away the video camera.

54. It took the child's grandfather about two or three minutes to put away his video camera and return to the kitchen area. When the grandfather returned to the kitchen/living room area, he asked Petitioner where the child was. Believing the child was in the living room, Petitioner told her father-in-law that the child was in the living room looking at television. Petitioner then went into the living room to look for the child and discovered she was not there. Petitioner then immediately went outside to the patio and saw the child laying face down in

the pool. Petitioner screamed for help, jumped in the pool and lifted the child from the water.

55. Petitioner's husband was close enough to the kitchen/living room area that he heard the exchange between his father and Petitioner about the child's whereabouts and Petitioner's subsequent scream. Within a few seconds, Petitioner's husband ran from the house, jumped in the pool, removed his daughter from the pool, and placed her on the pool deck.

56. Once the child was on the pool deck, the child's father and her grandfather immediately began administering CPR while Petitioner called 911. They continued performing CPR on the child until the emergency medical services and the fire department arrived on the scene.

57. Both parents reported to detectives investigating the incident that the child knew how to open and unlock doors.

58. Based on the facts established at or near the time of the incident, it was concluded that the child slipped out of the house and went undetected for about two or three minutes.

59. Petitioner and her husband described the child's "slipping out of the house" as unusual and something she had never done prior to April 23, 2006. Until that day, the child had never gone off on her own and had been fearful of and never gotten into the swimming pool at that house. (Petitioner and

her family had moved to this house only two or three months before the incident.)

60. Based on its investigation, which included sworn statements by Petitioner, her husband, and her father-in-law, the Sheriff's Office concluded that the April 23, 2006, incident was an accident.

61. The Department does not disagree with the conclusion reached by the Sheriff's Office (i.e., the April 23, 2006, incident was an accident). Nevertheless, according to Ms. Reinhardt, irrespective of whether the incident was an accident or done on purpose, the Department still found "verified" indicators of inadequate supervision, because the child got out of the house and into the pool and almost drowned.

62. The factual allegations in the report upon which the Department relied were not established by competent and substantial evidence. In absence of such evidence, the Department's verified finding of inadequate supervision has not been proven.

63. The record in this case is devoid of any evidence to establish the Department's finding of any indicators of maltreatment. Therefore, the Department's findings that there were "some" indicators of maltreatment has not been proven.

Alarm on the Master Bathroom Door

64. The Department alleges that during the applicable time period, the swimming pool at Petitioner's home did not comply with the requirements in Florida Administrative Code Rule 65C-20.010(1)(i). That rule requires that swimming pools at least one-foot-deep have either a barrier at least four-feet-high around the pool, separating the pool from the house, or a pool alarm that is operable at all times when children are in their care.

65. There was conflicting and inconsistent information provided to Petitioner as to whether a "pool alarm" that floats in the swimming pool was required instead of a door alarm, which is also apparently referred to as a pool alarm. Despite any confusion that may have been caused by the different representations made to Petitioner, it is undisputed that the preliminary review notes and the Inspection Checklist clearly indicate that Petitioner was required to repair the alarm on the master bathroom door which led to the pool. It appears that Florida Administrative Code Rule 65C-20.010(1)(i) refers to door alarms as pool alarms.

66. Petitioner's husband testified credibly that he attempted to have the door repaired by service personnel of the alarm company that installed the alarm system, but has been unsuccessful in doing so. In light of these futile attempts,

Petitioner's husband purchased a battery-operated door. However, it is unknown when the battery-operated door was purchased, whether it has been installed, and, if so, how it works.

67. The alarm on the door of the master bathroom had not been repaired by the April 3, 2009, "due date" or any time thereafter, nor had any acceptable alternatives been installed.

Maintenance of the Swimming Pool

68. The Department alleges that the swimming pool at Petitioner's home was not clean and maintained as required by Florida Administrative Code Rule 65C-20.010(1)(j). That Rule requires that if a family day care home uses a swimming pool, it shall be maintained by using chlorine and other suitable chemicals.

69. Petitioner acknowledges that, at all times relevant hereto, the swimming pool at her home was not clean and properly maintained.

70. Some time after the denial letter was issued, Petitioner's swimming pool was emptied, a full-processed cleaning was completed, and the pool was filled with water. However, a leak in a light in the pool was discovered. In order to repair that leak, the pool had to be emptied. At the time of this proceeding, the leak was being repaired. Once the leak is

fixed, the pool can be filled with water and the "pool alarm" that floats in the pool can be installed.

Local Law Enforcement Background Check

71. The application process requires that each person living in the home that will serve as the family day care home have a background screening. Such background screening includes a check by the Federal Bureau of Investigation ("FBI"), the Florida Department of Law Enforcement (FDLE"), and a local criminal history check.

72. In February 2009, Petitioner's cousin, Carlos Granados, was living with Petitioner and her husband. Accordingly, Mr. Granados was required to have a local criminal history check, and a copy of that criminal history check was to be provided to the Department.

73. Petitioner testified credibly that she submitted all the documents for completion of Mr. Granados' background checks and could not explain why the Department did not receive the local criminal history check for Mr. Granados.<sup>16</sup>

74. The evidence established that Mr. Granados no longer lives in Petitioner's home. Therefore, the Department does not need, and is not required to have, a local criminal history check for him.



CONCLUSIONS OF LAW

75. 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.

76. The Department is the state agency charged with licensure of child care facilities. § 402.305, Fla. Stat.

77. Subsection 402.310(1)(a), Florida Statutes, provides that the Department may "deny, suspend, or revoke . . . for violation of any provision of ss. 402.301-402.319 or rules adapted thereunder."

78. The rules adopted by the Department to implement Sections 402.301 through 402.319, Florida Statutes, are codified in Florida Administrative Code Rule Chapter 65C-20.

79. The Department shall issue a new license "upon being satisfied that all standards required by ss. 402-301-402.319 have been met." § 402.308(3)(d), Fla. Stat.

80. The May 8, 2009, denial letter cites the following statutes and rules which Petitioner allegedly violated: Florida Administrative Code Rule 65C-20.010(1)(i) (relating to barriers around swimming pools and pool alarms); Florida Administrative Code Rule 65C-20.0101(j) (relating to maintenance of swimming pools); and Subsection 402.305(2), Florida Statutes (relating to screening requirements for child care personnel). With respect to that allegation, the Department cites Subsection 402.26(3),

Florida Statutes (relating to the legislative intent to develop a regulatory framework for child care that facilitates the "safe physical . . . development of the child"); and Section 402.301, Florida Statutes (relating to the legislative intent to protect the health, safety, and well-being of children in child care facilities).

81. In an application proceeding such as this, the Department has the burden to prove the specific acts or violations which it alleges are grounds for the denial by a preponderance of evidence. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

82. Lastly, the Department's proposed denial is based on an alleged "verified abuse neglect report."

83. Florida Administrative Code Rule 65C-20.010(1)(i) provides in pertinent part:

(i) All in-ground swimming pools and above-ground swimming pools more than one (1) foot deep shall have either a fence or barrier on all four sides, at a minimum of four (4) feet in height, separating the home from the swimming pool, or a pool alarm that is operable at all times when children are in care. . . .

84. The Department established that Petitioner was in violation of Florida Administrative Code Rule 65C-20.010(1)(i), because as of the date of this proceeding, Petitioner admitted that the alarm or the master bathroom door had not been

repaired. Although Petitioner has made attempts to have the pool alarm repaired or to install a battery-operated door or door alarm as an acceptable alternative, the door alarm is still inoperable and no satisfactory alternative has been installed.

85. Florida Administrative Code Rule 65C-20.010(1)(j) provides in pertinent part:

(j) If a family day care home uses a swimming pool, it shall be maintained by using chlorine or other suitable chemicals. . . .

86. The evidence established that as of the date of this proceeding, Petitioner's swimming pool had been cleaned, but was still in disrepair and not maintained as required by Florida Administrative Code Rule 65C-20.010(1)(j).

87. Florida Administrative Code Rule 65C-20.008(3) provides:

(3) A submitted CF-FSP Form 5133 will not be considered complete until the licensing authority receives proof of background screening clearance on the operator of the family day care home, substitutes, and on all other household members who are subject to background screening pursuant to Section 402.313(3), F.S. . . .

(a) Initial Screening includes all of the following:

1. Level 2 screening, which includes at a minimum Federal Bureau of Investigation (FBI), Florida Department of Law Enforcement (FDLE), and local criminal records checks. For the purpose of issuing a license, any out-of-state criminal offense, which if

committed in Florida would constitute a disqualifying felony offense, shall be treated as a disqualifying felony offense for licensing and screening purposes under this rule. . . .

88. It is undisputed that Mr. Granados is no longer a member of Petitioner's household. Therefore, the screening provisions are not applicable to him.

89. In light of the foregoing determination, the Department failed to establish a violation of Florida Administrative Code Rule 65C-20.008(3).

90. Subsection 39.201(6), Florida Statutes, provides that information in the Central Abuse Hotline and the Department's automated abuse information system "may be used by the [D]epartment as part of the licensure or registration process pursuant to ss. 402.301 through 402.319."

91. The Department proposed to deny Petitioner's license because of a verified finding of inadequate supervision as to Petitioner and her husband. According to the letter, "[t]hese actions allowed the child to wander outside to the family pool where she was found after an undetermined amount of time under water and not breathing. During the investigation, it was determined that the lock to get access [presumably to the pool] had been broken for a few days."

92. Where, as in this case, an abuse report is ground for a challenged administrative action, Subsection 39.202(2)(j),

Florida Statutes, allows the Division of Administrative Hearings to have access to the subject abuse report. However, that statutory provision does not authorize or mandate the Administrative Law Judge to treat such abuse reports as competent evidence (evidence that is sufficient in itself to support findings of fact). See Smith v. Department of Children and Family Services, Case No. 02-0401 (DOAH July 24, 2002)(Final Order October 16, 2002); 2002 Fla. Div. Adm. Hear. Lexis 974.

93. The Department's denial letter and the testimony it presented in this proceeding makes it clear that the Department's proposed decision is based on the "verified abuse neglect" report and the investigation which is part of the abuse report. Therefore, to prevail, the Department must prove the factual allegations<sup>17</sup> in the abuse/neglect report, upon which it relies, by a preponderance of evidence. The Department must then show that those facts, if proven, are a reasonable basis for its verified finding. In this case, the Department has failed to meet that burden.

94. The abuse/neglect report was the only evidence presented to establish the factual allegations that resulted in the "verified findings" of inadequate supervision. Even though the abuse/neglect report included written entries attributable to several individuals, none of those individuals, including the

CPI assigned to investigate the case, testified at this proceeding.

95. The only Department witness who testified about the abuse/neglect report was the supervisor of the person assigned to investigate the report. Here, the record established that the supervisor had no personal knowledge of the incident, did not interview Petitioner, her husband, or her father-in-law. Moreover, that supervisor never went to Petitioner's home to view and inspect the property in connection with the investigation. In determining that the report should be closed with a verified finding of inadequate supervision, the Department witness relied solely on information communicated to her by the investigator assigned to the case.

96. The abuse/neglect report, including the written entries which are the substance of the Department's factual allegations, is hearsay. See § 90.803(1), Fla. Stat.

97. Pursuant to Subsection 120.57(1)(c), Florida Statutes, "hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over the objections in a civil action." In this case, no competent evidence was presented regarding the factual allegations in the abuse report and upon which the Department relied in its denial letter. Thus, the abuse report did not supplement or explain

other evidence and cannot be the basis of a finding in this proceeding.

98. Even if the Department proved the material factual allegation, it failed to establish by competent evidence its assertion that the "verified" finding of inadequate supervision was required by the Department policy. The Department contends that application of CFOP 175-28, and the Allegation Matrix included therein, i.e., mandated this "verified finding." Nevertheless, the Department did not produce a copy of that document at this proceeding. Hence, even if the factual allegations had been proven, no determination could be made as to whether the operating procedure was properly applied.

99. With regard to the abuse/neglect report, the Department failed to prove the allegations upon which its proposed denial of licensure is predicated. Therefore, the "verified abuse neglect report" is not a proper basis to deny Petitioner's application for licensure as a family day care home operator.

100. Because Petitioner has not complied with the standards in Florida Administrative Code Rule 65C-20.010(1)(i) and (j), the Department should deny her license to operate a family day care home. However, the Department's denial for the aforementioned grounds does not preclude Petitioner from applying for a license in the future.

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Children and Family Services, enter a final order: (1) finding that Petitioner, Best Family Day Care Home, failed to meet the standards in Florida Administrative Code Rule 65C-20.010(1)(i) and (j); and (2) denying Petitioner's application for a family day care home on those grounds.

DONE AND ENTERED this 9th day of February, 2010, in Tallahassee, Leon County, Florida.

*Carolyn S. Holifield*

---

CAROLYN S. HOLIFIELD  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of February, 2010.

ENDNOTES

<sup>1/</sup> At the hearing, the Department advised that the denial letter mistakenly cites Florida Administrative Code Rule 65C-22.010(1) as the rule setting forth the requirements for swimming pools and noted that the correct rule is Florida Administrative Code Rule 65C-20.010(1).



<sup>2/</sup> All statutory references are to Florida Statutes (2009), unless otherwise noted.

<sup>3/</sup> Exhibit L consists of the Intake Report, the Investigative Summaries and Investigation Report, and includes pages 114 through 142.

<sup>4/</sup> Lynne Reinhardt testified about CFPO 175-28, but a copy of the procedure was not offered into evidence.

<sup>5/</sup> Ms. Step testified that Petitioner's husband corrected this problem during the February 20, 2009, walk-through.

<sup>6/</sup> At the time of the inspections, the alarm system was working; however, Petitioner and her husband did not have the service that automatically notified law enforcement or other appropriate officials each time the alarm went off.

<sup>7/</sup> The February 20, 2009, preliminary review references only "alarms on [a] door to [the] swimming pool." Also see paragraph 5 of the Findings of Fact.

<sup>8/</sup> Ms. Richmond learned of these concerns from her supervisor and/or Ms. Step prior to going to Petitioner's home.

<sup>9/</sup> Ms. Richmond's primary job responsibilities were monitoring child care facilities with the primary emphasis on handling complaints.

<sup>10/</sup> According to the February 27, 2009, Inspection Checklist, the non-compliance issue with the pool (i.e., cleaned and properly maintained) was to be corrected by April 3, 2009.

<sup>11/</sup> Petitioner and her husband considered the swimming pool concerns as "minor" compared to the concern about the "verified" report. The reason was that they could easily resolve the former issue, but could do nothing to change the "verified" report.

<sup>12/</sup> One of the reasons for this recommendation was that the verified abuse/neglect report was available at that office and could be reviewed by Petitioner and her husband.

<sup>13/</sup> The Notice to Cease and Desist form indicates that Petitioner "was visited on March 23, 2009[,] and found to be providing child care services without a license or proper registration." That statement is inconsistent with other

information on the form which expressly notes that there were "0" children in her care.

<sup>14/</sup> There was no evidence presented that an "inspection" or walk-through was conducted during the fifth visit (on April 7, 2009) to Petitioner's home.

<sup>15/</sup> This is the date the abuse/neglect report was closed. The day of the incident was April 23, 2006.

<sup>16/</sup> The Department received the FBI and FDLE fingerprint results in or about early February 2009. Both reports indicated that nothing was found to disqualify Mr. Granados from working in a family day care home (or in this case, living in a family day care home).

<sup>17/</sup> Those factual allegations include the following: (1) the child was found in the water after an "undetermined amount of time"; the "lock to get access" had been broken for a "few days."

COPIES FURNISHED:

Gregory Venz, Agency Clerk  
Department of Children and  
Family Services  
Building 2, Room 204B  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700

John J. Copelan, General Counsel  
Department of Children and  
Family Services  
Building 2, Room 204  
1317 Winewood Boulevard  
Tallahassee, Florida 32399-0700

Stacy N. Robinson, Esquire  
Department of Children and  
Family Services  
4720 Old Highway 37  
Lakeland, Florida 33813

Jeremy Best  
Marcela Best  
Best Family Day Care Home  
4062 State Road 60 East  
Bartow, Florida 33830

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.