

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,  
BOARD OF DENTISTRY,

Petitioner,

vs.

Case No. 13-1164PL

MIRANDA SMITH, D.D.S.,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge Lisa Shearer Nelson presided over the section 120.57(1) hearing in this case on August 1, 2013, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Adrienne C. Rodgers, Esquire  
Jack F. Wise, Esquire  
Department of Health  
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Tallahassee, Florida 32399-3265

For Respondent: Christopher C. Torres, Esquire  
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STATEMENT OF THE ISSUE

The issue to be determined in this proceeding is whether Respondent violated section 466.028(1)(x), Florida Statutes

(2011), and if so, what penalty should be imposed for the violation.

PRELIMINARY STATEMENT

On July 23, 2012, the Department of Health filed an Administrative Complaint against Respondent, Miranda Smith, D.D.S., alleging that she had violated section 466.028(1)(x), by diagnosing caries and recommending fillings for one or more of patient M.P.'s teeth, when there were no caries in the identified teeth and the treatment plan was not appropriate. On August 16, 2012, Respondent disputed the facts alleged in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On April 1, 2013, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case originally was scheduled for hearing June 26, 2013. At the request of Respondent, the matter was continued and rescheduled for August 1, 2013, and proceeded as scheduled. Prior to hearing, the parties submitted a Joint Pre-Trial Statement, which included facts for which the parties stipulated no evidence would be required at hearing. Where relevant, those facts have been incorporated into this Recommended Order.

At hearing, Petitioner presented the testimony of Edward Zapert, D.M.D., and Petitioner's Exhibits numbered 1, 3, and 6 were admitted into evidence. Petitioner's Exhibit 6 is the

deposition of Dr. Scott Wagner, and, consistent with the parties' agreement, the record was left open for the original of the deposition to be filed with the Division, and it was filed on August 7, 2013. Respondent presented the testimony of Frank Grimaldi, D.D.S., and Respondent's Exhibit 1 was admitted into evidence.

The Transcript of the hearing was filed with the Division on August 23, 2013. At the request of Respondent, the time for filing proposed recommended orders was extended to September 9, 2013, and both parties filed Proposed Recommended Orders on that day. Both submissions have been carefully considered in the preparation of this Recommended Order. All references to the Florida Statutes are to the 2011 codification unless otherwise otherwise indicated.

#### FINDINGS OF FACT

1. At all times relevant to the allegations in the Administrative Complaint, Respondent was a licensed dentist in the State of Florida, having been issued license number DN 15873.

2. Respondent's address of record is 17020 County Line Road, Spring Hill, Florida 34610.

3. At all times relevant to these proceedings, Respondent operated a dental practice known as "Smiles and Giggles Dentistry" in Spring Hill, Florida.

4. This case involves Respondent's diagnosis and treatment of a minor male, M.P., on or about April 26, 2010.

5. In order to understand the care and treatment given to M.P., some definitions relative to the practice of dentistry are in order. Dentists use different terms than laypersons to describe the sides and top of a tooth when recording issues on a patient's chart (charting) regarding the patient's teeth. For example, the occlusal surface of the tooth is the biting surface, and its abbreviation is "O." The lingual surface is the side of the tooth closest to the tongue, and is charted with an "L." The facial side of the tooth is the side next to the cheek, and is charted as "F," or as "B," for buccal. The distal part of the tooth is the part of the tooth facing the back of the mouth and is abbreviated "D," and the mesial side is the front side of the tooth, and is abbreviated "M."

6. This case involves the diagnosis of caries, or what are referred to by laymen as cavities. A caries is an area of the tooth that has mineral loss from the production of bacteria. The term "caries" can refer to a single cavity or multiple cavities.

7. An incipient caries is another term for an early lesion, usually confined to the outer layer of the tooth, or the enamel.

8. Depending on the surface of the tooth, an incipient caries can be seen upon visual inspection. If it is on the distal or mesial surface, however, it is not always possible to

see incipient caries because the decay is usually blocked by other structures.

9. Gross caries are large cavities that have taken away a large amount of tooth structure, and can also usually be seen on visual inspection. A "pit and fissure" caries is usually confined to the occlusal, facial, or lingual sides of the tooth, and consists of a groove, or pit, in the tooth.

10. Interproximal caries are cavities between the teeth where the teeth touch. They are the most difficult to see upon visual inspection, but are relatively easy to detect on X ray.

11. Diagnosing caries is a multi-step process. First, a dentist conducts a visual examination of the patient, which may include a tactile examination of the teeth. The visual examination is then compared to X rays of the teeth.

12. Experts for both Petitioner and Respondent agree with the American Dental Association (ADA) and the Food and Drug Administration (FDA) statement that an individualized radiographic examination should consist of posterior bitewings with panoramic examination, or posterior bitewings and selected periapical images, and that a full mouth intraoral examination is preferred when the patient has clinical evidence of generalized oral disease or a history of dental treatment. Both agreed that this statement represents the minimum standard of care when diagnosing and treating interproximal cavities.

13. Bitewing X rays are X rays taken in the posterior of the mouth, and can be molar bite-wings or pre-molar bitewings. The film or sensor is placed inside the mouth, and the X ray machine is placed next to the head, on the cheek next to the teeth where the film was placed. These X rays would be considered intraoral X rays.

14. Some panoramic machines are also equipped to take bitewing X rays. Panoramic X rays are considered to be extra-oral images because nothing is placed in the mouth. Here, the patient steps into the machine, bites on something in order to hold his or her head in position, and then the X ray beam and the sensor rotate around the patient's head in a complete 360-degree circle to obtain an image.

15. Because intraoral X rays are placed right next to the teeth inside the patient's mouth, the image only passes through the cheek, gums, and bone. With a panoramic X ray, the receptor is outside the mouth, and the X ray emitter has to go completely through the opposite side of the skull and then come through to the outside of the mouth to receive the image. As a result, the panoramic X ray can have a lot of superimposition of structures in the mouth.

16. According to Respondent's patient records for M.P., when she examined him on April 26, 2010, she performed a

comprehensive oral evaluation and took a panoramic X ray, two extraoral films, and four bitewing X rays.

17. Respondent diagnosed M.P. with caries on the distal and occlusal surfaces of tooth number 20; caries on the distal and occlusal surfaces of tooth number 28; caries on the mesial, occlusal, and distal surfaces of tooth number 29; caries on the occlusal and lingual surfaces of tooth number 14; and caries on the occlusal and lingual surfaces of tooth number 15. Teeth numbers 20, 28, and 29 were diagnosed with interproximal decay.

18. Dr. Smith's records did not indicate what diagnostic methods she used to diagnose the caries. The account history reflects that comprehensive oral evaluation was conducted but no note history was provided.

19. Respondent's proposed treatment plan for M.P. listed amalgam restorations for two surfaces for teeth 20 and 28; amalgam restoration of three surfaces for tooth 29; resin-based composite restoration for teeth 14 and 15; sealant for teeth 2, 3, 18, 19, 30, and 31; and resin-based restoration of one surface for tooth 9.

20. G.P., M.P.'s guardian,<sup>1/</sup> was apparently displeased with the amount of restorative work Respondent proposed. He did not return to Respondent's office for his next scheduled appointment. Instead, G.P. took M.P. back to W. Scott Wagner, D.D.S., in

Jacksonville Beach, who had treated M.P. for approximately eight years before he saw Respondent.

21. Dr. Wagner examined M.P. on May 17, 2010. He took X rays of M.P.'s teeth, which included four bitewing X rays, and performed a clinical examination. In his view, there was one suspicious area on the distal of tooth number 20, but it was not all the way through the dentin. Dr. Wagner decided that, in light of M.P.'s history, he recommended monitoring the tooth and having M.P. engage in better flossing and brushing with the goal of remineralizing the tooth. He did not see any evidence of interproximal caries other than tooth 20, and did not believe that the area on the distal of tooth 20 was worth treating.

22. Dr. Wagner also recommended and applied preventative resin restorations for several teeth, using a flowable composite. Use of a flowable composite is considered a filling because only a dentist, as opposed to a dental assistant, can perform the procedure, but is in the nature of a sealant. Dr. Wagner prefers a flowable composite over a traditional sealant because he believes that the material in a sealant is not strong enough.

23. M.P. did not return to Dr. Wagner's office after May 17, 2010.

24. The Department presented the expert testimony of Edward R. Zapert, D.M.D., to give his opinion as to whether Respondent deviated from the minimum standards of performance in



diagnosis and treatment of M.P. Dr. Zapert is a dentist licensed in Florida since 1983, having been issued license number DN 9761. He is employed by the Department of Health in Leon County and his practice focuses primarily on Medicaid-eligible children. He treats all types of dental problems, from children with near-perfect teeth to those with complex and advanced problems. Dr. Zapert is a faculty member for the University of Florida and is a member of the Florida Dental Association, the American Dental Association, and the Leon County Dental Association. He received his dental education at the University of Connecticut.

25. Dr. Zapert reviewed Dr. Smith's dental records as well as the X rays obtained by her. He also reviewed the X rays and the deposition of the subsequent treating dentist, Dr. Wagner. The records reviewed are the type of records upon which he would customarily rely for forming an opinion regarding the standard of care and were sufficient for him to form such an opinion.

26. Dr. Zapert did not believe that the X rays of teeth numbers 20, 28, and 29 indicated any interproximal decay, and Respondent's records did not have any written notations on the X rays. While the number of X rays taken was adequate, the X rays were, in Dr. Zapert's view, not of high quality. Dr. Zapert opined that Dr. Smith's diagnosis and recommended treatment of interproximal caries was below minimum standards

because the X rays did not indicate the existence of interproximal decay for these three teeth.

27. Dr. Zapert recognized that Dr. Smith did not actually fill the teeth identified in the treatment plan because M.P. never returned for his follow-up appointment. He also acknowledged that in theory, it was possible that Dr. Smith could change her treatment plan before executing it. However, these factors did not change his view that a dentist should be absolutely certain that there is decay before filling a tooth, and that the X rays for teeth 20, 28, and 29 showed no evidence of interproximal decay. Dr. Zapert also reviewed the X rays taken by Dr. Wagner, and concluded that they also showed no evidence of interproximal decay.

28. Respondent presented the testimony of Frank Grimaldi, D.D.S. Dr. Grimaldi is a dentist licensed in the state of California who has practiced dentistry since 1981. He graduated first in his class from the dental school at University of California, San Francisco, where he served on the faculty since 1983. Dr. Grimaldi was the director of the general practice residency program, was a full clinical professor in addition to having a private dental practice, and retired after 31 years at the university last year. He continues to practice dentistry in private practice, and still teaches at the university on a limited basis.

29. Dr. Grimaldi reviewed the complete patient records of M.P. from both Dr. Smith and Dr. Wagner, and has formed an opinion as to whether Dr. Smith deviated from the standard of care. In Dr. Grimaldi's opinion, she did not.

30. Dr. Grimaldi opined that Dr. Smith met the standard of care in the methods she used in her evaluation, in that it was appropriate to collect a patient history, take bitewing X rays, make a clinical examination, and form a treatment plan.

Dr. Grimaldi believes that an X ray exam alone does not provide a full picture of what is going on in a patient's mouth. He charts everything that is suspicious that he sees when examining a patient, and ultimately does not always treat everything that is observed or charted. Accordingly, to Dr. Grimaldi, a treatment plan may be modified right up to the point of time the dentist executes the treatment.

31. Based upon his review of the X rays of both Dr. Smith and Dr. Wagner, which he believed to be of "adequate" quality, Dr. Grimaldi testified that there was incipient interproximal decay on teeth 20, 28, and 29, and believes a diagnosis of interproximal decay for all three teeth would have been appropriate and within the standard of care. With respect to the individual teeth, Dr. Grimaldi stated that he saw "clear darkness in the area toward what we call the distal of number 29," with respect to tooth 20, "at the distal of number 20 . . . it shows

clearly darkness, although not as clear as 29, on its distal surface," and with respect to tooth 28, "it has a hint of some darkness at the distal surface but not as much as the other two." (Transcript at 120-122).

32. Dr. Grimaldi was consistent in his characterization of the condition of the three teeth, although he referred at least once to the X rays as showing a "strong hint of demineralization on the distal of 29, and the distal of 20, less so on the distal of 28." He acknowledged the difference in his opinion and Dr. Zapert's saying there is going to be variability among practitioners caused by factors such as training and experience, access at the time, lighting, the fatigue level of the practitioner, and communication with staff while charting. He emphasized that the X rays are only part of the diagnostic process, and clinical examination of the patient is also important.

33. In short, the patient in this case was seen by two dentists and his X rays reviewed by four. With respect to tooth 20, Dr. Zapert found no evidence of interproximal decay, Dr. Wagner saw one suspicious area on the distal surface of tooth 20 that should be monitored but not treated; Dr. Grimaldi saw a "strong hint" of demineralization where tooth 20 touches tooth 19, and Dr. Smith diagnosed interproximal decay and recommended an amalgam filling.

34. With respect to tooth 28, Drs. Zapert and Wagner saw no evidence of interproximal decay, Dr. Grimaldi felt that there was a suggestion of interproximal decay, although not as clear as the other teeth at issue, and Dr. Smith diagnosed interproximal decay and recommended amalgam fillings.

35. With respect to tooth 29, Drs. Zapert and Wagner saw no evidence of interproximal decay, Dr. Grimaldi felt that was clear evidence of interproximal decay (it being, in his opinion, the worst of the three), and Dr. Smith diagnosed interproximal decay and recommended amalgam fillings.

#### CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2013).

37. This is a proceeding to take disciplinary action against Respondent's license to practice as a dentist. Because of the penal nature of these proceedings, the Department has the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

38. Moreover, in disciplinary proceedings, the statutes and rules for which a violation is alleged must be strictly construed in favor of Respondent. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988).

39. Respondent is charged with violating section 466.028(1)(x), which provides in pertinent part:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

\* \* \*

(x) Being guilty of incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including, but not limited to, the undertaking of diagnosis and treatment for which the dentist is not qualified by training or experience or being guilty of dental malpractice. . . .

40. The Administrative Complaint specifically alleged that Respondent failed to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, and therefore violated section 466.028(1)(x), by the following conduct:

a) The Respondent diagnosed caries in Patient M.P.'s teeth, one or more of which was an inappropriate diagnosis, as the condition of Patient M.P.'s mouth did not warrant said diagnosis; and/or

b) The Respondent treatment planned fillings for Patient M.P.'s teeth, one or more of which was inappropriate, as the condition of Patient M.P.'s mouth did not warrant said treatment.

41. The Department failed to prove the allegations by clear and convincing evidence.

42. This is a case where the burden of proof determines the outcome. The applicable burden requires the Department to prove its case by clear and convincing evidence, an admittedly rigorous standard. However, the evidence presented shows that two different professionals examined this young man's teeth and came to different conclusions. Two additional highly respected and credible professionals reviewed the X rays of both dentists and came to different conclusions. Even assuming there was decay present, there is no consensus among those who opined that caries existed regarding which tooth was the most problematic. Under

these circumstances, there is not clear and convincing evidence of a misdiagnosis.

43. Dr. Grimaldi explained the variations in opinion by stating it is possible to have differing opinions among practitioners, based on a variety of factors. This case clearly illustrates that premise.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Dentistry enter a Final Order dismissing the Administrative Complaint.

DONE AND ENTERED this 21st day of October, 2013, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of October, 2013.

ENDNOTE

<sup>1/</sup> It is unclear from the record whether G.P. was M.P.'s father or grandfather.



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.