

Before the  
Administrative Hearing Commission  
State of Missouri



DEPARTMENT OF HEALTH & SENIOR )  
SERVICES, )

Petitioner, )

vs. )

STEPHANIE WHITNEY, )

Respondent. )

No. 12-1358 DH

**DECISION**

Stephanie Whitney is subject to discipline because she allowed her 15-year-old son to be in her approved child care space with other children without direct supervision, and he inappropriately touched a four-year-old child.

**Procedure**

On July 30, 2012, the Department of Health & Senior Services (“the Department”) filed a complaint seeking to discipline Whitney. On August 1, 2012,<sup>1</sup> Whitney was personally served with a copy of the complaint and our notice of complaint/notice of hearing. On August 24, 2012, Whitney filed an answer. On January 30, 2013, we held a hearing on the complaint. Robert Brandon represented the Department. Whitney participated by telephone. The matter became ready for our decision on March 4, 2013, the date the last written argument was due.

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<sup>1</sup> The date of delivery is August 1, 2012. The certified mail receipt was not filed with us until September 28, 2012.

## **Findings of Fact**

1. Whitney's most recent family child care home license was issued on August 1, 2010, and expired on July 31, 2012. Whitney's facility ("the child care home") is located at 798 NE 5<sup>th</sup> Street, Trenton, Missouri.

2. Limitations appearing on Whitney's license are 10 children, ages birth through 12 years between the hours of 7:00 a.m. to 9:00 p.m. There are other limitations related to the number of children of a certain age.

3. Whitney provided care for more than four children during the daytime for compensation at the child care home.

4. Whitney operated a "child-care facility," as that term is defined in § 210.201.2, RSMo.

5. Whitney has been caring for children in her home for almost 27 years.

### First Incident

6. In April 2011, there was an incident involving Child A, Whitney's 15-year-old son who lived with her. It was alleged that Child A inappropriately touched another child (Child C) in the child care facility.

7. During the April 2011 incident, the Grundy County Juvenile Office got involved. Whitney made an agreement with the Grundy County Juvenile Court that Child A was not to be around children without supervision.

8. At this time, Whitney also stated that Child A had special needs. Whitney had video monitors installed in December 2011 so that she could view the children while she was not directly in the area.

### Second Incident

9. On January 27, 2012, Whitney was upstairs in the kitchen fixing snacks while the children enrolled in her child care were downstairs watching cartoons with Child A. Child A was in approved child care space with children enrolled in Whitney's day care. Neither Whitney nor any other adult was in the approved child care space with Child A or Child B (age four).

10. On January 27, 2012, on the video monitor, Whitney saw Child B sitting on Child A's lap. Whitney observed Child B poking Child A while sitting on Child A's lap. While Child B was sitting on Child A's lap, Child A touched her "privates."<sup>2</sup> Whitney did not see this and did not immediately remove Child A from the child care space.

11. Whitney was aware of Child A's prior incident and that Child A was not to be unsupervised with enrolled children.

### License Revocation

12. On or about January 31, 2012, the Department received a complaint regarding the second incident.

13. On March 22, 2012, Department staff met with Whitney for a facility review conference. Whitney signed the facility review conference form that listed the regulations she was accused of violating and set up a corrective action plan. The plan stated that disciplinary action might be taken due to the serious nature of the complaint.

14. By letter dated April 2, 2012, and sent by certified mail, the Department notified Whitney of the decision to revoke her family home license to provide child care.

### **Conclusions of Law**

The Department filed a complaint pursuant to § 210.245,<sup>3</sup> which states:

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<sup>2</sup> Revocation letter dated April 2, 2012, "Facts Regarding Revocation of the License."

<sup>3</sup> Statutory references, unless otherwise noted, are to the 2012 Supplement to the Revised Statutes of Missouri.

2. If the department of health and senior services proposes to deny, suspend, place on probation or revoke a license, the department of health and senior services shall serve upon the applicant or licensee written notice of the proposed action to be taken. The notice shall contain a statement of the type of action proposed, the basis for it, the date the action will become effective, and a statement that the applicant or licensee shall have thirty days to request in writing a hearing before the administrative hearing commission and that such request shall be made to the department of health and senior services. If no written request for a hearing is received by the department of health and senior services within thirty days of the delivery or mailing by certified mail of the notice to the applicant or licensee, the proposed discipline shall take effect on the thirty-first day after such delivery or mailing of the notice to the applicant or licensee. If the applicant or licensee makes written request for a hearing, the department of health and senior services shall file a complaint with the administrative hearing commission within ninety days of receipt of the request for a hearing.

This statute gives us jurisdiction to hear this case. The Department has the burden of proof by a preponderance of the evidence.<sup>4</sup>

#### I. Consolidation

Case No. 12-1794 DH involves a denial of renewal of Whitney's child care license under the same set of facts as in this case. On March 19, 2013, Whitney filed a motion to consolidate the two cases. On April 16, 2013, the Department filed a reply in both cases, asserting that if it prevails in this case, Case No. 12-1794 DH will be moot. By order dated April 17, 2013, this Commission<sup>5</sup> placed Case No. 12-1794 in abeyance to Case No. 12-1358 DH. We deny the motion for consolidation.

This decision affects only this case. In order to dismiss Case No. 12-1794 DH as moot, a motion must be filed in that case.

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<sup>4</sup> *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

<sup>5</sup> A different Commissioner is assigned to that case.

## II. Evidence

Much of the Department's evidence, including its facility review conference form, the revocation letter, and portions of the testimony of the Department's witnesses, is hearsay. Where no objection is made, hearsay evidence in the records can and must be considered in administrative hearings. *Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 736 (Mo. App., S.D. 2004) (citing *Dorman v. State Bd. of Regis'n for the Healing Arts*, 62 S.W.3d 446 (Mo. App., W.D. 2001)). We also base our findings of fact on facts Whitney admitted.

## III. Cause for Discipline

Section 210.221<sup>6</sup> states:

1. The department of health shall have the following powers and duties:

(1) After inspection, to grant licenses to persons to operate child-care facilities if satisfied as to the good character and intent of the applicant and that such applicant is qualified and equipped to render care or service conducive to the welfare of children, and to renew the same when expired. No license shall be granted for a term exceeding two years. Each license shall specify the kind of child-care services the licensee is authorized to perform, the number of children that can be received or maintained, and their ages and sex;

(2) To inspect the conditions of the homes and other places in which the applicant operates a child-care facility, inspect their books and records, premises and children being served, examine their officers and agents, deny, suspend, place on probation or revoke the license of such persons as fail to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the department of health. The director may also revoke or suspend a license when the licensee fails to renew or surrenders the license;

(3) To promulgate and issue rules and regulations the department deems necessary or proper in order to establish standards of service and care to be rendered by such licensees to children. No rule or regulation promulgated by the division shall in any manner restrict or interfere with any religious instruction, philosophies or

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<sup>6</sup> RSMo 2000.

ministries provided by the facility and shall not apply to facilities operated by religious organizations which are not required to be licensed; and

(4) To determine what records shall be kept by such persons and the form thereof, and the methods to be used in keeping such records, and to require reports to be made to the department at regular intervals.

The Department argues that Whitney violated the following regulations.

#### A. Good Character

Regulation 19 CSR 30-61.105(1)(D) states:

Caregivers shall be of good character and intent and shall be qualified to provide care conducive to the welfare of children.

Good moral character is honesty, fairness, and respect for the law and the rights of others.<sup>7</sup>

Whitney allowed her 15-year-old son to be in her approved child care space with other children without direct supervision, and he inappropriately touched another child. Whitney was aware of the potential for this act because it had occurred before. Whitney testified that she has been caring for children in her home for almost 27 years and that she loves children. She argues that her son was responding to being “poked” by the other two children.<sup>8</sup>

We do not believe that the first instance is evidence of Whitney’s lack of good character or lack of qualifications to provide care to children. Allowing it to happen a second time is unacceptable and does provide evidence that Whitney is not qualified to provide care conducive to the welfare of children. We find that she is not qualified to do so.

Whitney violated 19 CSR 30-61.105(1)(D).

#### B. Individual Requiring Extensive Care

Regulation 19 CSR 30-61.115(3) states:

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<sup>7</sup> *Hernandez v. State Bd. of Regis’n for Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo. App., W.D. 1997).

<sup>8</sup> Tr. at 13.

If an individual(s) requiring extensive care due to illness or handicapping conditions is present in the home during the hours of child care, another adult shall be available in the home on a full-time basis who shall be responsible for caring for the individual(s) requiring extensive care.

The Department provided little evidence of Child A's physical or mental condition or the level of care he requires. Whitney testified:

I do not feel that my son needs extensive care due to him having ADHD, Tourette's syndrome, anxiety disorder or OCD. He makes most of his decisions on his own. Some of them may not always be right ones, but he's only human.

He's a very, very good kid. His teachers at school and at church will tell you that he's a very well liked young man and gets along well with others. He just doesn't like to be touched or bothered. Sometimes and if you do something to him he just does it back.<sup>9]</sup>

The Department appears to rely on an admission made by Whitney during the investigation of the first incident that Child A was diagnosed as having special needs and that he should be closely supervised. While, as noted below, we are willing to find that Child A poses a threat based on his actions, there is insufficient evidence to link the acts with an illness or handicapping condition requiring extensive care. Child A should not have been left unsupervised with other children. That appears clear from the agreement with the Grundy County Court, and from the fact that failure to adhere to this condition resulted in a second incident. But, without further proof, we cannot take the leap to state that Child A's physical or mental condition required another adult to be available in the home on a full-time basis.

The Department failed to prove that Whitney violated 19 CSR 30-61.115(3).

### C. Threat to Children

Regulation 19 CSR 30-61.115(5) states:

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<sup>9</sup> Tr. at 7.

Any household member or any person present at the home during hours in which child care is provided shall not present a threat to the health, safety or welfare of the children.

Child A inappropriately touched two young children. He presented a threat to the health, safety and welfare of the children in Whitney's care. Whitney violated this regulation.

#### D. Competent Adult Supervision

Regulation 19 CSR 30-61.175(1)(A)1 states:

Child care providers shall not leave any child without competent adult supervision.

Whitney argues that she was only a few feet from the children and was watching them on the video monitor. But she was on another floor of the house – upstairs in the kitchen when the children were downstairs with Child A. No other adult was supervising Child A and the other children. Whitney admitted that she did not see the inappropriate touching in the second incident and did not immediately remove Child A from the child care space. She did not provide competent adult supervision.

Whitney violated 19 CSR 30-61.175(1)(A)1.

#### E. Direct Contact

Regulation 19 CSR 30-61.175(1)(A)3 states:

Caregivers shall provide frequent, direct contact so children are not routinely left unobserved on the premises.

Although Whitney was observing the children on the video monitor, the contact was not direct enough for Whitney to be able to protect those children. She admitted that she did not see the inappropriate touching in the second incident and did not immediately remove Child A from the child care space. We find that Whitney did not provide sufficient direct contact and that she violated this regulation.

## Summary

Whitney is subject to discipline under § 210.221.1(2) for violating Department regulations.

SO ORDERED on July 2, 2013.

\s\ Nimrod T. Chapel, Jr.  
NIMROD T. CHAPEL, JR.  
Commissioner