10-1800-12390-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Denial of the License of Lewis Campbell to Provide Family Child Care	**FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kenneth A. Nickolai on December 14, 1999, at the Office of Administrative Hearings in Minneapolis, Minnesota. Wayne G. Nelson, Attorney at Law, 5500 Wayzata Boulevard, Suite 1025, Minneapolis, Minnesota 55416, appeared on behalf of the Applicant, Lewis Campbell. Vicki Vial-Taylor, Assistant Hennepin County Attorney, 525 Portland Avenue South, 12th Floor, Minneapolis, Minnesota 55415, appeared on behalf of the Hennepin County Social Service Department (the County) and the Department of Human Services (the Department). The record closed on January 10, 2000, upon receipt of the parties' final post-hearing submissions.

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. §14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Michael O'Keefe, Commissioner, Minnesota Department of Human Services, Human Services Building, Second Floor, 444 Lafayette Road, Saint Paul, Minnesota 55155-3815, for information concerning the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue presented in this case is whether the Applicant has fully complied with the provisions of the family day care licensing statute and rules and whether the application should be approved and a license granted.

Based upon all of the proceedings herein, the Administrative Law Judge hereby makes the following:

FINDINGS OF FACT

1. The Applicant, Lewis Campbell, graduated from the University of Minnesota in 1985 with a degree in elementary education. Campbell is licensed as a teacher for prekindergarten, kindergarten, and grades one through six. He holds a Montessori primary diploma for elementary education. Campbell is currently enrolled in the master's program at Norwich University located in Vermont.

2. Applicant has worked in day care centers, nursery schools, and elementary schools continually since 1985. The only interruptions to working in these settings have been for further education. On December 20, 1997, Campbell applied for a family day care license with the Hennepin County Children and Family Services Department (the County). The County acts on behalf of the Minnesota Department of Human Services (the Department) in conducting background investigations and making recommendations regarding whether to grant licensure.

3. On September 9, 1998, Campbell completed the background study form, used by the County to assess the fitness of applicants for family day care licensure. The County conducted a background visit to Applicant's home on December 15, 1998. The only concerns raised by the County's background study related to Applicant's approach to sexual play and aggressive play between children.

4. In the background study form, Applicant responded to certain questions as follows:

> What do you think when you find two four-year-olds naked and playing "doctor"? What do you do?
> My belief is that playing doctor and other types of sexual play between preschoolers is normal and leads to healthy sexual attitudes in later life. I would therefore leave the children free to play as long as they both wanted to. However, I would be careful to get explicit parental permission for this policy at the time of enrollment.[1]

5. Based on the answers provided in the form, the County representative at the home visit asked Applicant to clarify his approach to the sexual play when such conduct is observed between children in the daycare setting. Applicant responded that such conduct was common and healthy and that he would not intervene. The representative discussed this topic for some time, attempting to determine what conduct fell under the description "sexual play" and what limits would be put on such conduct in Applicant's daycare setting. The County representative described various situations, but Applicant did not provide definitive answers as to whether he would intervene in any of the described situations. The County representative also questioned whether a child could consent to such conduct. When the representative described hypothetical situations of a child being penetrated by a pencil or oral-genital contact between children, Applicant indicated that whether he would intervene would depend upon the circumstances. The Applicant also indicated that intervention in the instance of sexual contact between children of significantly different ages would depend upon the circumstances. The

County representative described Applicant as being "willing to compromise" but unwilling to be "bossed around."[2]

6. Applicant had prepared a parent handbook and enrollment form for use in the proposed daycare. During the home visit, Applicant showed the County representative the handbook. She read the section on "Guidance and Appropriate Touch," which describes the daycare's approach toward sexual and aggressive play as follows:

> **Aggressive Play**
> We believe that attempts to repress aggressive play, such as play involving guns or war, is generally self-defeating and a violation of children's rights. We only intervene in aggressive play if, in our judgement, someone is likely to be physically or emotionally hurt.
> **Sexual Play**
> We view sexual play between consenting preschoolers as normal and appropriate. Again, we would intervene in sexual play only if someone is likely to be physically or emotionally hurt, or if a child appears to be an unwilling participant.[3]

7. After reading the foregoing language, the County representative asked Applicant why he sought to be licensed, rather than provide unlicensed daycare. Applicant responded that licensure would provide "credibility" to his daycare.

8. The County sent the handbook and enrollment form to Marjorie Hogan, M.D., Staff Pediatrician of the Hennepin County Medical Center, to be reviewed regarding the aggressive play and sexual play approaches taken by Applicant. Dr. Hogan responded that daycare environments should discourage such play and that the difference between acceptable and unacceptable play can be very subjective. Dr. Hogan wrote:

> As a pediatrician, I would advocate close supervision of all children at all times and would not tolerate aggressive (physical, verbal) play / behavior or sexual contact / play / behavior at any time. Certainly any child engaging in these behaviors should be gently, but firmly redirected. I just do not feel comfortable allowing a child care provider to define what is "allowable" or "normal" aggressive or sexual behavior for young children, or determining when those behaviors become harmful or dangerous.[4]

9. On March 18, 1999, the County recommended that the Department deny the Applicant's request for licensure. The reasons cited for the recommendation were: the Applicant having a disqualification under Minn. Rule 9502.0335; Applicant not providing proper behavior guidance under Minn. Rule 9502.0395; and Applicant allowing improper activities under Minn. Rule 9502.0415.[5] The opinion from Dr. Hogan, the contents of the parent handbook, and several comments made by Applicant were cited as the factual basis for the denial.

10. On March 26, 1999, the County representative received a telephone call from Lisa Berry of the Greater Minneapolis Daycare Association (GMDCA). Ms. Berry related the contents of a telephone call from Applicant. Applicant objected to the County recommendation for denial and described his policies regarding sexual play and aggressive play. Ms. Berry responded that, in her opinion as a child psychologist, the described policies would not support healthy child development. Applicant disagreed with Ms. Berry and indicated that he would not change his policies.[6]

11. On April 16, 1999, the Department denied Applicant's request for licensure. The Notice of Denial informed Applicant of the reasons for the denial and the manner in which the decision could be appealed. The reasons given for the denial were Applicant not providing proper behavior guidance under Minn. Rule 9502.0395, and Applicant allowing improper activities under Minn. Rule 9502.0415. The Department's conclusion states:

> Hennepin County's careful evaluation of your program determined that your policies regarding sexual and aggressive play are not in the well-being of persons served by the program and are in violation of the child care rule. These policies will not help children acquire a positive self-concept and self-control or teach acceptable behavior. In addition, these policies relate to children's activities that would not be appropriate to the developmental stage and age of the children.[7]

12. On April 29, 1999, Applicant appealed the denial of licensure. On May 7, 1999, the Notice and Order for Hearing was issued in this matter.

Based upon the foregoing Findings of Fact, the Administrative Law Judge hereby makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, and 245A.08 (1998).

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of the law or rule have been fulfilled.

3. Minnesota law provides that “The commissioner [of Human Services] shall evaluate the results of the study required in subdivision 3 [the background study] and determine whether a risk of harm to the persons served by the program exists."[8]

4. The governing statute also describes the burden of proof in hearings regarding denial of an application for a family day care license. It reads as follows:

> At a hearing on denial of an application, the applicant bears the burden of proof to demonstrate by a preponderance of the evidence that the appellant has complied fully with sections 245A.01 to 245A.15 and other applicable law or rule and that the application should be approved and a license granted.[9]

5. Applicant has not demonstrated that he will operate a daycare in a fashion to protect persons served from harm through the application of his approach to sexual play and aggressive play. Such a demonstration is required before the Commissioner issues a daycare license under Minn. Stat. § 245A.04, subd. 6.

RECOMMENDATION

IT IS THEREFORE RESPECTFULLY RECOMMENDED that the Commissioner deny the family day care application of Lewis Campbell.

Dated this _____ day of February, 2000.

_____

KENNETH A. NICKOLAI
Administrative Law Judge

Reported: Tape Recorded (three tapes); not transcribed.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department's policy is that licensees must intervene when sexual play or aggressive play occurs between children in licensed daycare settings. The policy is intended to protect the well-being of children in daycare and as such is afforded significant weight in deciding whether a daycare license should be issued.

The Department relied upon Applicant's statements and descriptions of his policy toward sexual play and aggressive play in denying his request for licensure. That information indicated that Applicant would not intervene for significant periods of time should children be discovered exposing themselves to one another or touching each other. Applicant clarified that there would be no intervention so long as the children did

not appear to be distressed and the children's parents had been made aware of Applicant's approach to such play.

Regarding his responses to the County representative, at the hearing Applicant described his understanding of the questions regarding children being "naked" as being brief exposure of genitals, not children being completely undressed. At his interview by the County representative, Applicant was asked for examples of when he would intervene. When Applicant did not provide examples, the interviewer suggested when penetration occurred. Applicant recalled his response as "perhaps" he would intervene. Similar responses were given when other hypothetical situations involving sexual contact were described to Applicant.

Applicant argues that he did provide examples of appropriate sexual play, but that the County representative did not "listen objectively."[10] The County representative's questions were directed toward obtaining objective responses to hypothetical situations being viewed subjectively by Applicant. The repeated response that intervention would depend on other factors is insufficient demonstration of the judgment and understanding of the Department's policies toward protecting children in licensed daycare from harm. The Department is entitled to know, should Applicant be issued a daycare license, how he would respond to specific situations involving children in his care.

The response of Applicant to each of the hypothetical situations described by the County representative was that intervention would depend upon the circumstances. The County is entitled to conclude that where one child is engaging in penetration or oral-genital contact with another, the need for intervention does not depend upon any other circumstances and that failure to intervene at that point would create a risk of harm to the children. Applicant's failure to acknowledge the immediate need to intervene provides an adequate basis for denial of Applicant's request for daycare licensure.

Applicant indicated that he only encountered three instances of sexual play throughout all of his time working in the daycare setting. The infrequency of the conduct is not determinative, however. The mere fact of requiring behavioral adjustments when such incidents occur can have the effect of reducing the number of such incidents. Conversely, if Applicant has no general approach to discouraging such behavior, similar incidents may occur much more frequently. Whether frequent or infrequent, the County has a reasonable basis to conclude that the behavior has the potential for harm to children and an applicant's approach to the behavior is properly the subject of scrutiny.

At the hearing in this matter, the Applicant relied on the testimony of Susan Revell Phipps-Yonas, Ph.D. to support his position that he should be given a day care license. When Phipps-Yonas interviewed Applicant, she found some of Applicant's answers vague regarding intervention in sexual play. She understood from Applicant that his description of "consent" was intended to mean that neither child was engaging in conduct through the coercion of another child. Regarding the "playing doctor" hypothetical, Applicant described to Phipps-Yonas, a situation of children perhaps

exposing themselves to each other. Applicant indicated that such play would not be allowed to continue for long periods of time and would not include any penetration or oral-genital contact.[11] Based on her interview of Applicant, Phipps-Yonas concluded that he was capable of assessing whether sexual play or aggressive play was likely to result in harm to a child and that Applicant would intervene if the situation warranted. Phipps-Yonas opined that some sexual play, constrained within narrow boundaries, could be part of appropriate child development. She also disagreed with the conclusion of Dr. Marjorie Hogan who had advised Hennepin County that this type of play should not be tolerated in a day care.

In carrying out its responsibilities to assess the fitness of persons for licensure, the Department has chosen to follow certain approaches regarding appropriate behavior and methods of behavior modification. Persons can reasonably disagree as to appropriate responses to sexuality displayed by young children. The Department, however, can reasonably insist on its approach being followed by persons seeking licensure as daycare providers. For example, persons could disagree over the propriety of corporal punishment, but the Department has expressly forbidden the use of such behavior modification by licensees.[12] The Department can properly deny licensure to applicants who disagree with its position, when the actions of the person seeking licensure are not compliant with the Department's approach and those actions raise the potential for harm to children. The Department has concluded that sexual play and aggressive play are behaviors likely to cause harm to children and that intervention is required of licensees upon observing such behaviors.

The Applicant maintained at the hearing that he could operate his daycare in accordance with the Department's approach to sexual play and aggressive play. However, Applicant's preferred approach to sexual and aggressive play is more permissive than the approach chosen by the Department. The Administrative Law Judge credits the prehearing statements of the Applicant regarding his beliefs and approach to these issues. Since the Department cannot directly oversee Applicant's daycare to ensure compliance, denial of the application is an appropriate response to legitimate questions of future performance, especially given the potential harm to children.

The Administrative Law Judge is not convinced that the Applicant would conform to the required policies on sexual and aggressive play in light of the depth of Applicant's convictions as to the correctness of his policies limiting intervention when children are engaged in sexual or aggressive play.

K.A.N.

---

[1] Exhibit 5, Bates No. 000039.
[2] Exhibit A-5, Bates No. 000070.
[3] Exhibit 3, Bates No. 000018.
[4] Exhibit A-6, Bates No. 000011.

[5] Exhibit A-7.
[6] Exhibit A-9, Bates No. 000005.
[7] Exhibit A-10, Bates No. 000002.
[8] Minn. Stat. §245A.04, subd. 6 (1998).
[9] Minn. Stat. §245A.08, subd. 3(b) (1998).
[10] Applicant Brief, at 5.
[11] These limitations stand in contrast to the Applicant's description of his approach in both the background study and in-home interview. In the background study Applicant placed no time limits on the conduct between children. In the in-home interview, Applicant indicated that intervention where penetration or oral-genital conduct occurs would depend upon circumstances.
[12] Minn. Rule 9502.0395, subp. 2.A.