

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

LYNDA R. HOLMES,	:	
	:	
Petitioner,	:	Docket No.: OSAH-DECAL-CCLC-
	:	1440536-25-WOODARD
v.	:	
	:	
GEORGIA DEPARTMENT OF EARLY CARE AND LEARNING,	:	
	:	
Respondent.	:	

FINAL DECISION AND ORDER AFFIRMING EMERGENCY CLOSURE

On Friday, March 7, 2014, Bright from the Start: Georgia Department of Early Care and Learning (DECAL) issued a *Order for Intended Emergency Closure* (“Respondent’s Order”) to a family day care home operated by Lynda Holmes (“Ms. Holmes” or “Petitioner”) as “First Foundation Learning Center. Petitioner’s day care facility is located at 3801 Third Street, Garden City, Georgia 31408.

This proposed Order was issued in accordance with O.C.G.A. § 20-1A-13(c)(1)(B), and served on the day care facility at approximately 4:30 p.m. on Friday, March 7, 2014. Petitioner submitted an appeal of the proposed Order for Intended Emergency Closure which was received at Respondent’s office at 10:08 a.m. Tuesday, March 11, 2014. Petitioner’s appeal was referred for a preliminary hearing to the Office of State Administrative Hearings, where it was assigned to M. Patrick Woodard, Jr., Administrative Law Judge.

An evidentiary hearing was conducted at Richmond Hill Municipal Court in Bryan County, Georgia, on Wednesday, March 12, 2014. Petitioner was represented by John R. Strother, III, Esq., Duffy & Feemster, LLC, Savannah. Respondent was represented by Clare Michaud, Legal Services Officer, Bright from the Start: Georgia Department of Early Care and Learning, Atlanta. The evidentiary record was closed at 2:51 p.m. on Wednesday, March 12, 2014.

I. FINDINGS OF FACT

1. On Friday, February 28, 2014, a four year-old boy identified in Respondent's Order as "Child 5" was in the care of Petitioner's facility. Child 5's mother arrived at the Petitioner's facility at about 5:20 p.m. to pick him up. She was asked to meet with Ms. Holmes in her office to discuss Child 5's behavior problems.

2. When Child 5's mother entered the office, she observed Child 5 crying as he held a blue plastic and metal child-sized chair above his head. Child 5 appeared scared to lower the chair, or to set it on his head to rest. Ms. Holmes told Child 5's mother that he disobeyed by climbing up and jumping off a picnic table and playhouses in the facility's outdoor playground, and that he was being disciplined for his behavior. Ms. Holmes explained that having children raise a chair above their head was not the usual discipline method used by her facility, but was appropriate in this situation. Child 5's mother heard Ms. Holmes say that her son had held the chair over his head for "40 minutes." Child 5's mother told him to put the chair down, and Ms. Holmes told Child 5 to put the chair back in its place. Child 5 and his mother left the facility together at approximately 5:30 p.m., and Child 5 has not returned. Child 5's mother returned later to pay her outstanding bill.

3. On Monday, March 3, 2014, Child 5's mother called Respondent's office to report what she saw and heard at Petitioner's facility the previous Friday. Child 5's mother testified that it was not her intent to shut down the facility by filing a complaint. According to April Rogers, Respondent's Complaint Director in Atlanta, this incident was considered a "Category II" rules violation, as there was a threat to a child's health and safety. Respondent opened a case file and assigned the investigation to Kimberly Mitchell, a Child Care Consultant for Bright from the Start in the Southeast Georgia region. Respondent contacted Chatham County Department of Family

and Children Services to alert its Child Protective Services Unit of a possible child abuse situation at Petitioner's facility.

4. Ms. Mitchell traveled to Petitioner's facility on Wednesday, March 5, 2014¹ to investigate the complaint. The only employee on site when Ms. Mitchell arrived was Denenna Rhodes, Ms. Holmes' daughter. Ms. Mitchell found six children on site, and conducted interviews with four children. The children ranged in age from 3 ½ to 5 years. Child 5 was not present. Each child was interviewed two separate times. Ms. Mitchell testified that she has been trained in how to conduct interviews, and that she used proper interview techniques with each child.

5. According to Ms. Mitchell, each child corroborated the initial complaint by Child 5's mother that the facility disciplined or punished children by having them hold a chair over their heads.

6. Ms. Mitchell learned from the children that the facility employed another unusual type of discipline. The children told Ms. Mitchell that Ms. Rhodes (who they call "Ms. Neena") would scare them if they misbehaved by wearing one of two Halloween masks. The children described a red mask as "James," and a white mask as "Janice." The red mask was produced at the preliminary hearing, and appears to be a bright red caricature of a "devil". The white mask was not found during the investigation, and therefore not shown to the court at the hearing. The children told Ms. Mitchell that they were told not to tell anyone that they were made to hold a chair over their head, or about "James" and "Janice."

¹ There is some inconsistency in the hearing record as to whether Ms. Mitchell conducted her interviews at the facility on March 4 or March 5, and whether Detective Talley conducted her forensic interview of Child 5 on March 5 or March 6. The administrative law finds any such inconsistency to be inconsequential, but it appears from the totality of the evidence that Mitchell's interviews were on March 5 and Talley's interview was on March 6.

7. The children told Ms. Mitchell that when they were punished by “James” or “Janice,” they were taken to the office and the door was closed behind them. “James” or “Janice” would then be brought out. All four children told Ms. Mitchell that “James” spoke to them in a scary voice. All four said that “James” would bring out a “knife” (a toy knife with a grey body and two black, serrated blades) or a “play spider” (a black rubber or plastic toy). The children stated that “James” put the toy knife to the neck of two children.

8. Ms. Mitchell questioned Ms. Rhodes about “James” and “Janice”. Although Ms. Rhodes initially denied these Halloween masks were in the facility, Ms. Mitchell actually found the “James” mask on top of a file cabinet in the office. Ms. Mitchell also found the toy spider, and the toy knife allegedly wielded by “James.”

9. Ms. Mitchell digitally recorded each interview she conducted with the four children on March 5, 2014, but did not bring the original or a copy of the recordings to the hearing. Respondent’s attorney represented to the court that the digital recordings would be preserved, and made available to Petitioner’s counsel.

10. Respondent was not required by law to obtain permission from a child’s parent prior to the interviews conducted by Ms. Mitchell on March 5, nor was any parent notified beforehand. However, permission was sought from the parents of each child for an additional forensic investigation to be conducted by Detective Corporal Lindsey Talley of the Garden City Police Department. The parents of all four children interviewed by Ms. Mitchell expressly forbade Detective Talley from interviewing their child.

11. Child 5’s mother gave written permission for Detective Talley to interview her son. The interview was conducted at Coastal Children’s Advocacy Center in Savannah on March 6, 2014.

Detective Talley holds a forensic interviewing certificate, and has performed forensic interviews with children both under and over age five. Detective Talley testified that she used proper interviewing techniques with Child 5, which included refraining from asking leading or suggestive questions.²

12. Detective Talley testified that Child 5 told her that he was punished at Petitioner's facility by having to hold a chair above his head. This corroborated the observations made by his mother on February 28, 2014. Child 5 also described how he was punished by "James" and "Janice," and that he had a nightmare the previous evening about a "Red Monster" and a "White Monster." Child 5's mother was unaware of "James" or "Janice" until a telephone call from Ms. Mitchell prior to the forensic interview with Detective Talley. Child 5's mother then asked Child 5 if he knew "James" or "Janice," to which he replied that he did.

13. Detective Talley prepared an audio and video record of her interview with Child 5. Unfortunately, a technical problem with the equipment at Coastal Children's Advocacy Center prevented that record from being available to the court or Petitioner's counsel during the preliminary hearing on March 12, 2014. Detective Talley stated that the staff at Coastal Child Advocacy Center might be able to recover the recording, but that was impossible to accomplish that task prior to the hearing due to the short time period between the interview date and the hearing.

14. Based on the findings by Ms. Mitchell and Detective Talley, Respondent concluded that emergency closure of Petitioner's facility was warranted because children's safety or welfare is in imminent danger.

² Prior to the hearing, Respondent filed a *Notice Pursuant to O.C.G.A. 24-8-820* that it would introduce out of court statements from a child under 16. Child 5 was present at court, but Petitioner specifically waived his testimony.

15. Petitioner denied all allegations regarding the discipline of children by making them hold a chair over their head, or that anyone at her facility disciplined or punished a child by using scary Halloween masks, a toy knife, and a toy spider. Petitioner cooperated fully with the investigation by Respondent and the local police department. In fact, she helped Ms. Mitchell locate several items among the toys and props used in the facility's Halloween festivities. Petitioner testified that the only procedure she uses to discipline children is "Time-Out." Petitioner specifically denied the charge by Child 5's mother that she made Child 5 hold a chair over his head at any time, let alone for 40 minutes.

16. Petitioner testified that she told Child 5's mother on several occasions that Child 5 had behavior problems that needed to be corrected. She told Child 5's mother that unless his behavior improved, she would consider suspending him for two days. Failure to show better behavior could lead her to terminate Child 5 from day care. Petitioner testified that Child 5's mother had a history of slow payments on the day care bill. On February 28, 2014, Child 5's mother requested an extension of the deadline to pay her bill, which at that time was about two weeks' overdue. Petitioner agreed to accept payment on the following Monday, and to waive any late fees. Petitioner testified that Child 5's mother did not return to pay her bill until late in the week of the investigation.

17. Ms. Rhodes testified that she never used the masks, admittedly known as "James" and "Janice", to scare or punish any child. The masks were only brought out during Halloween season, and that the children knew the masks to be "brother" and "sister." Ms. Rhodes stated that she only uses "Time-Out" as a method of discipline. Ms. Rhodes acknowledged that if the facility is closed, she will lose her source of income.

18. Another employee, Samantha Joseph, testified that the facility only uses “Time-Out” to discipline children. She has never observed a child punished by having to hold a chair above his or her head, nor has she observed “James” or “Janice” used to punish a child. If the facility is closed, Ms. Joseph will lose her source of income.

19. Three parents testified on Petitioner’s behalf. Parent 1 has a three year old son enrolled at Petitioner’s facility.

Parent 1 testified that he never personally observed or heard from others of any inappropriate activity going on. Parent 1’s child was not reluctant to attend the facility, and has not expressed fear of Ms. Neena or Ms. Holmes. When Parent 1 asked his son about “James” and “Janice,” he did not appear frightened. Parent 1 refused to consent to Detective Talley’s forensic interview. Parent 1 did not want the child to be interviewed due to his age, and due to a belief that Petitioner has done nothing wrong.

Parent 2 has a four year old son enrolled at the facility. Parent 2 was pleased with the care the child received, and was not aware of any issues with the discipline methods used by the facility. Parent 2’s child said that he was scared by the police cars at the facility during the investigation, but otherwise the child did not express fear of going to day care. Initially, Parent 2 consented to the forensic interview with Detective Talley, but later withdrew consent after learning that the child had already been interviewed by Ms. Mitchell.

Parent 3’s son has attended Petitioner’s facility since he was five months old. Parent 3 testified that Petitioner’s facility is “the only day care I really trust.” Parent 3 is not aware of the facility disciplining children except by “Time-Out.” Parent 3 had to “force” the child to go to day care during the week the investigation was conducted. Parent 3 refused to allow the child to be interviewed by Detective Talley. Parent 3 expressed that it would be difficult to obtain day care if Petitioner’s facility was closed.

II. CONCLUSIONS OF LAW

1. Provider operates a family day home which is regulated by Bright from the Start, Georgia Department of Early Care and Learning. See O.C.G.A. Section 20-1A-2.

2. O.C.G.A. 20-1A-13(c)(1) states as follows:

The commissioner [of the Department of Early Care and Learning] may issue an order providing notice of intended emergency closure of an early care and education program:

(A) Upon the death of a minor at such program, unless such death was medically anticipated or no serious rule violations related to the death by the program were determined by the department; or

(B) Where a child's safety or welfare is in imminent danger.

3. Respondent has brought an *Order for Intended Emergency Closure* of Petitioner's licensed family day care home based on its determination that a child's safety or welfare is in imminent danger. The burden of proof regarding this intended action rests on Respondent. OSAH Rule 616-1-2-.07. The standard of proof in this matter is by a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

4. Respondent enforces the Rules for Family Day Care Homes found in Chapter 290-2-3 et seq., Georgia Comprehensive Rules and Regulations (hereafter "FDCH Rules"). Rules governing the Health, Safety, and Discipline of children in a Family Day Care Home are contained in FDCH Rule 290-2-3-.11. Disciplinary rules for FDCH providers are listed as follows:

Rule 290-2-3-.11 (3) Discipline. Disciplinary actions used to correct a child's behavior, guidance techniques and any activities in which the children participate or observe at the home shall not be detrimental to the physical or mental health of any child.

(a) A provider or a home's employees shall not:

1. Physically or sexually abuse a child, or engage in or permit others to engage in sexually overt conduct in the presence of any child enrolled in the home; or

2. Inflict corporal/physical punishment upon a child; or

3. Shake, jerk, pinch or handle roughly a child; or

4. Verbally abuse or humiliate a child which includes, but is not limited to, the use of threats, profanity, or belittling remarks about a child or his family; or
5. Isolate a child in a dark room, closet, or unsupervised area; or
6. Use mechanical or physical restraints or devices to discipline children; or
7. Use medication to discipline a child or to control children's behavior without written medical authorization issued by a licensed professional and given with the parent's or guardian's written consent.
8. Discipline a child by restricting unreasonably a child from going to the bathroom; or by punishing toileting accidents; or by force feeding a child; or by not feeding a child regularly scheduled meals and/or snacks; or by forcing or withholding naps; or by allowing children to discipline or humiliate other children; or by confining a child for disciplinary purposes to a swing, high chair, infant carrier, walker or jump seat.
9. Commit any criminal act, as defined under Georgia law which is set forth in O.C.G.A. Sec. 16-1-1 et seq., in the presence of any child enrolled in the home.

5. The administrative law judge concludes that a preponderance of the credible evidence presented at the hearing shows Petitioner's family day care home violated Rule 290-2-3-.11(3)(a)(2) by physically abusing Child 5, and Rule 290-2-3-.11(3)(a)(8) by inflicting corporal punishment on Child 5. Petitioner required Child 5 to stand with a chair over his head as a disciplinary tool. Although it is highly unlikely, if not impossible, that a four- year old boy could hold a chair above his head for 40 minutes, as Child 5's mother testified she was told by Ms. Holmes, Child 5's mother personally observed her son holding the chair over his head and crying. She also testified that his legs were weak following this incident, which shows he suffered physical distress as a result of inappropriate discipline. Child 5's mother had issues with Petitioner over the late payment of her bill and her child's behavioral problems, but the court does not conclude that these issues lessen her veracity.

6. The administrative law judge does not conclude, however, that a preponderance of the credible evidence shows the facility disciplined or punished children by using the two Halloween masks known as "James" and "Janice," or a toy knife or toy spider. The evidence regarding how

these objects were used as disciplinary tools comes solely from the statements made by children 3 ½ to 5 years of age. Both Ms. Mitchell and Detective Talley testified that they used appropriate interviewing techniques to ensure the children were properly questioned, but the audio of Ms. Mitchell's interviews and the audio / video of Detective Talley's forensic interview that might prove these interviews were properly conducted were not available at the preliminary hearing. By contrast, Child 5's mother is an adult eyewitness to inappropriate discipline of a child. She was present at the hearing and subject to examination by Petitioner's counsel and the court regarding what she saw and heard.

7. A preponderance of the credible evidence shows that Petitioner placed the health and safety and/or welfare of a child in imminent danger by using prohibited corporal punishment, in violation of the above-referenced rules.

8. Upon a finding that the children's safety or welfare is in imminent danger, a child care learning center shall be closed for a period of not more than twenty-one (21) days. See O.C.G.A. Section 20-1A-13(c)(2)(3).

9. Upon closure of an early care and education program, the center shall be required to immediately notify the parent and guardian of each child enrolled in the program of such closure. See O.C.G.A. Section 20-1A-13(2)(3).

10. If the Department issues a revocation notice to the Petitioner during the twenty-one (21) day closure period, the Petitioner's program shall remain closed until the appeal decision is issued. See O.C.G.A. Section 20-1A-13(c)(2)(3).

III. ORDER

IT IS HEREBY ORDERED THAT the Department's Order for Intended Emergency Closure is **AFFIRMED**. Petitioner's center shall be closed for a period of twenty-one (21) days, effective upon signature of this order on March 14, 2014. The Petitioner shall remain closed through Friday, April 4, 2014, unless the Department issues a Notice of Revocation within the twenty-one (21) day closure period. If such revocation notice is issued by Department, the Petitioner's center shall remain closed until an appeal decision, if sought, is issued.

IT IS HEREBY ORDERED THAT the Petitioner shall immediately notify all parents of children enrolled at the center of this emergency closure.

SO ORDERED, this 14th day of March, 2014.

M. PATRICK WOODARD, JR.
Administrative Law Judge
Office of State Administrative Hearings
State of Georgia