

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Cheryl Fischer

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter came before Administrative Law Judge Eric L. Lipman upon an appeal by the Licensee, Cheryl Fischer, from an Order imposing a Temporary Immediate Suspension of her family child care license.

Grace C. Song, Assistant County Attorney, appeared on behalf of the Hennepin County Community Human Services and Public Health Department and the Minnesota Department of Human Services (Department). Stephen Keefe, Party Representative,¹ appeared on behalf of the Licensee, Cheryl Fischer.

An evidentiary hearing was held in Room 111 of the offices of the Hennepin County Community Human Services and Public Health Department on June 7, 2013. The hearing record closed on that day following the adjournment of the evidentiary hearing.

STATEMENT OF THE ISSUE

Did the Department demonstrate that reasonable cause exists to believe that the Licensee's actions pose an imminent risk of harm to the health, safety or rights of persons served by her child care program?

SUMMARY OF CONCLUSION

Because the Licensee's violations of the capacity limits and training requirements were deliberate, in the view of the Administrative Law Judge, the risk of future harm to children served by the program has not been addressed. The Administrative Law Judge concludes that the temporary suspension order should be maintained pending a final determination of the appropriate licensing sanction.

¹ Minn. R. 1400.5800 ("Parties may be represented by an attorney throughout the proceedings in a contested case, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law").

Based upon the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ms. Fischer operates a family child care out of her home in Minneapolis, Minnesota.²

2. Ms. Fischer holds DHS License Number 110997. She has provided family child care services since November 27, 1978.³

3. On March 21, 1997, an infant under Ms. Fischer's care died while sleeping in a crib.⁴

4. In the 2010-2011 time period, Ms. Fischer and her spouse divorced. As a result of those proceedings, she ceased using her married name, Abraham, and reverted to use of her maiden name, Fischer.⁵

5. Ms. Fischer is the only adult in the day care home during most day care hours.⁶

6. Under the terms of her "C-2 license," Ms. Fischer is permitted to care for a total of 12 children. Further, her license limits the provision of care to a maximum of 10 pre-school children and "no more than 2 shall be infants and toddlers" at any one time. Lastly, of the number of infants and toddlers that may be cared for at any one time, Ms. Fischer was permitted to care for a single infant.⁷

7. Ms. Fischer's child care license is scheduled to expire on July 1, 2013. As part of the licensing renewal process, County officials sent to Ms. Fischer a packet of materials for her to complete and return.⁸

8. Ms. Fischer is aware that the license renewal process includes a home inspection by a licensing social worker.⁹

9. Ordinarily, the relicensing inspection occurs during an impromptu and unscheduled visit to the day care home.¹⁰

² Exhibit E; Testimony of Cheryl Fischer.

³ Ex. D at 20.

⁴ Test. of C. Fischer; Testimony of Barbara Clifton.

⁵ Test. of C. Fischer.

⁶ *Id.*

⁷ See, Minn. R. 9502.0367 (C)(2); Ex. B at 2.

⁸ Testimony of Kimberly Leipold.

⁹ Test. of C. Fischer.

¹⁰ Test. of B. Clifton.

10. Following her receipt of the license renewal packet, Ms. Fischer telephoned her licensing social worker, Barbara Clifton, to “discuss options” for timing the upcoming home inspection. As Ms. Fischer explained to Ms. Clifton, she was considering elective surgery, and was hoping to understand how the renewal process might, potentially, be impacted by her hospitalization and recovery.¹¹

11. In reply, Ms. Clifton responded that she would be willing to accommodate Ms. Fischer’s plans by arranging a date-certain for the home visit. After a set of phone calls, the two arranged for a home inspection on Friday, May 10, 2013.¹²

Friday, May 10, 2013

12. During the home visit on May 10, Ms. Fischer detailed that her planned surgery would occur on the following Tuesday, May 14. She noted further that her day care would be closed down for the following two weeks, while she recuperated.¹³

13. As to most of the items that Ms. Clifton surveyed during the inspection, Ms. Fischer’s day care did quite well. The number of children under care was less than the limits of her license and the Licensee appeared to be in general compliance with the environment, sanitation and health standards of Minnesota Rules Part 9502.¹⁴

14. Near the end of the inspection, however, during a review of training documentation, Ms. Fischer furnished documents that had been altered. The alterations were made to suggest that Ms. Fischer had completed certain mandatory training segments when she had not, in fact, done so. Ms. Fischer furnished:

- (a) A *Certificate of Training Attendance* for 2 hours of training on features of the Child and Adult Care Food Program, entitled “Changing the Food Landscape” that had been issued to “Cheryl Abraham,” and purported to have been issued on March 10, 2012.¹⁵
- (b) A *Certificate of Training Attendance* for 2 hours of training on features of the Child and Adult Care Food Program entitled “The Magic of Healthy Living,” that had been issued to “Cheryl Fischer” on July 14, 2012.¹⁶

¹¹ Ex. D at 12; Test. of B. Clifton.

¹² *Id.*

¹³ Test. of B. Clifton.

¹⁴ *Id.*

¹⁵ Ex. G.

¹⁶ Ex. H.

- (c) A photocopy of an otherwise typewritten training certificate signifying 4 hours of training in Infant and Child CPR, that had been issued to “Cheryl Abraham,” and included a handwritten issue date of August 12, 2012.¹⁷
- (d) A photocopy of an otherwise typewritten training certificate signifying 4 hours of training in First Aid that had been issued to “Cheryl Abraham,” and included a handwritten issue date of August 12, 2012.¹⁸

15. As forgeries go, these were particularly clumsy ones. A review of the documents makes clear that:

- (a) The certificate “Changing the Food Landscape” had been issued to “Cheryl Abraham” on March 10, 2011 and not March 10, 2012.
- (b) The certificate “The Magic of Healthy Living” had been issued to Ms. Fischer for 1 credit hour of instruction and not 2 credit hours.
- (c) The Infant and Child CPR training certificate had been issued at some point earlier than 2012, and not with a handwritten date.
- (d) The First Aid training certificate had been issued at some point earlier than 2012, and not with a handwritten issue date.¹⁹

16. Recalling that the entity “Resources for Child Caring” had changed its company name to “Think Small” in early 2012, months before the purported issuance dates on two of the altered certificates,²⁰ Ms. Clifton insisted upon an opportunity to inspect the original certificates.²¹

17. When faced with this demand, Ms. Fischer conceded that she had altered the training certificates.²²

18. Likewise problematic, the Sudden Infant Death Syndrome (SIDS) training for Ms. Fischer’s substitute caregiver, LaVonne Ribbe, had lapsed. Minn. Stat.

¹⁷ Ex. I.

¹⁸ Ex. J.

¹⁹ Exs. G, H, I and J. At the evidentiary hearing, Ms. Clifton credibly testified that the course “Changing the Food Landscape” was not offered at any time after 2011 – and therefore the purported March 10, 2012 training did not occur. Likewise important, March 10, 2012, was a Saturday, raising further doubts that the course occurred as described by Ms. Fischer.

²⁰ Exs. I and J.

²¹ Test. of B. Clifton; see generally, “Name change can be game changer for nonprofits,” *Minneapolis Star Tribune* (February 23, 2012).

²² Test. of C. Fischer.

§ 245A.50, subd. 5 requires that day care providers complete this training, at a minimum, once every five years. Ms. Ribbe's last training session was outside of this period.²³

19. After the conclusion of the inspection visit, Ms. Clifton determined that Ms. Fischer's SIDS and Shaken Baby Syndrome training had lapsed in May of 2012. This training was not renewed until February of 2013 – leaving a nine-month gap.²⁴

Thursday, May 16, 2013

20. Ms. Clifton was concerned that Ms. Fischer would continue day care operations, during the latter's scheduled convalescence, by using Ms. Ribbe as a substitute caregiver. This prospect was worrisome to Ms. Clifton, because, as of the date of the May 10 inspection visit, Ms. Ribbe's SIDS training had lapsed.

21. At just after 7:00 a.m., on Thursday, May 16, Ms. Clifton surveyed Ms. Fischer's day care home from a parked car, at a distance "three houses north" of Ms. Fischer's day care home. She noted that several parents, some with infants in car seats, were arriving at the home and leaving their children under care. At approximately 7:45 a.m., Ms. Clifton followed a group of parents and children to Ms. Fischer's door and into the day care home.²⁵

22. During this second, impromptu inspection, Ms. Clifton discovered that Ms. Fischer was running her day care operations and was not recovering from surgery. Further, Ms. Fischer had more young children under care than is permitted by her C-2 license. On that day, Ms. Fischer had two infants and two toddlers (in addition to three pre-school children) under care.²⁶

23. On this morning, three young children were in highchairs in Ms. Fischer's kitchen and an infant child was seated, strapped in a car seat.²⁷

24. Based upon Ms. Clifton's surveillance notes, it is clear that the infant remained in the car seat for approximately 30 minutes after first arriving at the Fischer day care.²⁸

25. Ms. Clifton inquired whether the children that she noted on the first floor of the day care home were the only ones under care. Ms. Fischer explained that a young boy, Connor, was playing in the basement. As Ms. Clifton went to see the boy, making her way to the basement, Ms. Fischer followed behind; and for a time left the three

²³ Minn. Stat. § 245A.50, subd. 5; Test. of B. Clifton.

²⁴ Minn. Stat. § 245A.50, subd. 4; Test. of B. Clifton; Test. of K. Leipold; Test. C. Fischer.

²⁵ Ex. B at 1; Test. of B. Clifton.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

children in the highchairs unattended in the kitchen. As the two women descended the stairs, Ms. Clifton asked Ms. Fischer about Connor's age. Ms. Fischer replied that Connor was five years old.²⁹

26. When asked by Ms. Clifton how old he was, Connor stated that he was three years old.³⁰

27. Later that morning, Ms. Fischer placed an infant boy, Brady, into a crib. While in the crib, the infant spit up some food, soiling the bed sheet. In the process of changing the sheet, the Licensee placed the boy face-down, on his stomach, on the crib mattress. While Ms. Fischer obtained a new sheet from another room, and attended to the other children in her care, Brady was face-down in the crib for a period of approximately five minutes. Ms. Clifton called to Ms. Fischer, noting that the baby was falling asleep and should not be permitted to sleep in that position, wearing a hooded sweatshirt, on an unadorned mattress. Ms. Fischer responded by placing a sheet on the mattress, removing Brady's sweatshirt and placing the infant face up in the crib.³¹

28. On the same day, Hennepin County Quality Assurance Specialist Kimberly Leipold wrote to the Department and urged it to issue an Order of Temporary Immediate Suspension. In her recommendation, Ms. Leipold asserted that violations of safe sleeping practice, the practice of keeping children in car seats and the falsification of training documents combined to create an imminent risk of harm to the children served by the program.³²

29. The Department issued an Order of Temporary Immediate Suspension later the same day.³³

30. Ms. Fischer timely appealed the Order.³⁴

31. At the evidentiary hearing, Ms. Fischer acknowledged that she knew that she was over the capacity limitations of her license on May 16; that she knowingly exceeded the limits of her license so as to provide care for a family that needed these services; and that she had planned to exceed these same limits for another nine days after May 16, when her misconduct was discovered by County licensing officials.³⁵

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

²⁹ Ex. B at 1; Test. of B. Clifton.

³⁰ *Id.*

³¹ Test. of B. Clifton.

³² Ex. A.

³³ Ex. E.

³⁴ Ex. F.

³⁵ Test. of C. Fischer.

CONCLUSIONS OF LAW

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

2. The County and the Department have complied with all of the substantive and procedural requirements of law and rule.

3. The Commissioner of Human Services shall impose a temporary immediate suspension of a child care license “[i]f the license holder’s actions or failure to comply with applicable law or rule . . . pose an imminent risk of harm to the health, safety, or rights of persons served by the program.”³⁶

4. A temporary immediate suspension shall “remain in effect pending the Commissioner’s final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension” if the Commissioner demonstrates “that reasonable cause exists to believe that the license holder’s actions or failure to comply with applicable law or rule poses . . . an imminent risk of harm to the health, safety, or rights of persons served by the program.”³⁷

5. The Department demonstrated reasonable cause for the temporary immediate suspension order by showing a deliberate plan by the Licensee to evade the capacity limits of her family child care license and the inappropriate supervision practices that followed having too many very young children under care.

6. The Department has demonstrated reasonable cause to believe that, following the imposition of the suspension Order, Ms. Fischer has yet to address and resolve all of the features of her child care operation that create an imminent risk of harm.

7. Ms. Fischer did not establish that, at the relevant times, she was in full compliance with applicable statutes and rules.

Based upon the Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

³⁶ Minn. Stat. § 245A.07, subd. (2).

³⁷ Minn. Stat. § 245A.07, subd. (2a) (a).

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner of Human Services AFFIRM the Order for Temporary Immediate Suspension of Cheryl Fischer's license to provide family child care.

Dated: June 19, 2013

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally recorded.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue her final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64941, St. Paul MN 55164, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

Under 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

I. Regulatory Standards

Minn. Stat. § 245A.07, subds. 2 and 2a, establish the standard of proof that must be met to sustain a temporary immediate suspension order. The statute reads in pertinent part:

If the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program, the commissioner shall act immediately to temporarily suspend the license.

The scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the commissioner's final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension. The burden of proof in expedited hearings under this subdivision shall be limited to the commissioner's demonstration that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses, or if the actions of other individuals or conditions in the program poses an imminent risk of harm to the health, safety, or rights of persons served by the program. "Reasonable cause" means there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.

These are modest standards. They are intended to assure that children are protected until there can be a more complete evaluation process, a more detailed hearing and a final determination.

Indeed, this risk of harm analysis has been likened to the burden to establish probable cause in a criminal proceeding.³⁸ The analysis begins with a presumption of innocence and requires the admission of probative evidence to overcome that presumption. At a minimum, an order of temporary immediate suspension must be supported by some substantial evidence of "imminent harm."³⁹

While the term "imminent harm" is not defined in either statute or rules, the Commissioner has defined the term "imminent danger" in the Family Day Care and Foster Care rules. This definition is instructive. "Imminent danger" includes circumstances in which a child is threatened with immediate and present neglect that is likely to result in serious physical injury.⁴⁰

The Administrative Law Judge must also determine if the evidence shows that the license holder's actions, at the time of the hearing, continue to pose an imminent risk of harm. This determination is made so as to inform the Commissioner as to whether the suspension should continue pending final determination of any appropriate licensing sanction.⁴¹

II. Analysis

³⁸ Compare, e.g., *State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976).

³⁹ See generally, Minn. Stat. § 14.69 (e) (2006); *In the Matter of the Temporary Immediate Suspension of the License of Laura Ellingson to Provide Family Child Care*, OAH Docket No. 3-1800-15905-2 (2004) (http://mn.gov/oah/multimedia/pdf/180015905_rt.pdf).

⁴⁰ See, Minn. R. 9543.0020 (11).

⁴¹ See, *In the Matter of the Temporary Immediate Suspension of the License of Sandra Julkowski*, OAH Docket No. 15-1800-21321-2 (2010) (http://mn.gov/oah/multimedia/pdf/180021321_rt_bjh.pdf).

In the view of the Administrative Law Judge, the Department has shouldered its burden to show, by specific articulable facts, reasonable cause to believe that Ms. Fischer's day care program presents imminent risks of harm to the health, safety or rights of persons served by the program.

The record details that Ms. Fischer had not kept current with required safety training and that she had deliberately set about to run her day care operation at levels beyond that which were permitted by her license. Likewise clear from the record is that Ms. Fischer worked to hide both of these facts – by altering her training certificates, and then confecting a story about a surgery and lengthy recuperation, so as to avoid an inspection by licensing authorities.

As Ms. Fischer testified:

I know that I am over my limit; I knew that immediately because one of the children was not supposed to be there. But her mother was sick, and I was trying to help her out. I was going out of town and I was trying to be.... I mean, it happens. If you talk to any of your providers, we try to help our families out.... It was a temporary situation, the [A family] was only going be there nine more days and they were done. [The children's father] was going to be home the whole summer with his children. And the [B family]; she's a teacher and was going to be home. It was a temporary situation and it was going to be resolved. And then I was losing them, and two other pre-schoolers. It is hard to keep a business running.... You overlap occasionally. It is part of the thing. You feel bad, but you are trying to help people; you are trying to help families out....⁴²

The problem, of course, is that while forging training credentials and operating beyond the capacity limits may "keep a business running," this conduct is unlawful and improper. The training requirements and the capacity limits combine to assure that there is adequate supervision of children under care; and that should catastrophe strike, a well-trained care-giver will be able to make the right response.

Ms. Fischer argues that her regulatory missteps – whether as to the missed training, breach of the capacity limits or inappropriate responses with infants – at most, should result in correction orders. She argues that a suspension order is an extreme, business-busting response from the Department.

And there is something to her claim. It might be that another provider, who inadvertently broke the capacity limits or safe-sleeping rules during a re-licensing visit, would not have received an Order of Temporary Immediate Suspension.

⁴² Test. of C. Fischer.

Here, however, the circumstances are different. Ms. Fischer understood what she was doing while she engaged in the misconduct. She knew that she was over her licensed capacity and planned to maintain that situation for another nine days. She was aware that she had not obtained the required safety training and furnished falsified certificates. She knew that a re-licensing visit meant increased scrutiny of her operations, and so she conjured up stories to evade detection of the rule violations.

Thus, with someone who inadvertently violated the rules, a proper response might be additional training or staff, and the resumption of operations, while the Commissioner considered an appropriate “final licensing sanction.” Here, however, there is not a good set of interim safeguards for someone who knowingly broke the capacity rules in order to receive extra pay. Because these violations were deliberate, the ALJ cannot confidently predict what conditions would prevail at the day care if Ms. Fischer is permitted to resume operations. If, as the Licensee argued, taking on too many clients is merely something “that happens” and is often necessary in order “to keep a business running,” the potential harm to children served by the program is continuing, foreseeable and very real.

This is not to say, however, that the suspension of Ms. Fischer’s day care license has not had devastating impacts for her clients or her finances. Those impacts are beyond dispute. Yet, the question here is whether Ms. Fischer has addressed and resolved all of the features of her day care operation which create an imminent risk of harm. In the view of the Administrative Law Judge, she has not.

The temporary suspension order should be maintained pending a final determination of the appropriate licensing sanction.

E. L. L.