

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Maltreatment
Determination, Order to Pay a Fine, and
Order of Conditional License of the
Family Child Care License of Debra A.
Douglas¹

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

This matter came before Administrative Law Judge Steve M. Mihalchick for an evidentiary hearing on March 26, 2015, in Conference Room B of the Isanti County Family Services Division, 1700 East Rum River Drive, Cambridge, Minnesota.

Janet Reiter, Chisago County Attorney, appeared on behalf of Isanti County Family Services (County) and the Minnesota Department of Human Services (Department).² Jonathan Geffen, Arneson & Geffen, PLLC, appeared on behalf of the Licensee, Debra A. Douglas. The record closed upon adjournment of the hearing on March 26, 2015.

STATEMENT OF THE ISSUES

1. Whether the Department demonstrated by a preponderance of the evidence the Licensee committed maltreatment by neglect of three children in her care.
2. Whether the Department properly imposed a fine of \$1,000 on the Licensee based on its determination of maltreatment.
3. Whether the Department demonstrated that reasonable cause existed to believe that the Licensee failed to provide the required supervision of the three children.
4. If so, whether the Licensee has demonstrated by a preponderance of the evidence that she was in full compliance with all the rules and statutes governing her child care license.
5. Whether the Department has demonstrated that the Order of Conditional License is appropriate.

¹ At the hearing, the Administrative Law Judge amended the caption by adding the reference to "Maltreatment Determination" to be consistent with prior orders and the evidence.

² The mother of the children in Licensee's care in this matter is an employee of Isanti County Family Services. To avoid potential conflicts of interest, the maltreatment investigation was conducted by Chisago County Health and Human Services for Isanti County Family Services and the Chisago County Attorney represented Isanti County and the Department at the hearing.

SUMMARY OF CONCLUSIONS AND RECOMMENDATION

1. The Administrative Law Judge concludes that the Department failed to demonstrate by a preponderance of the evidence that the Licensee committed maltreatment by neglect as defined in Minn. Stat. § 626.556, subd. 2(f) (2014).

2. The Administrative Law Judge concludes therefore that the fine based upon the maltreatment determination should not have been imposed.

3. The Administrative Law Judge concludes that the Department has shown that reasonable cause existed for finding that the Licensee failed to provide adequate supervision of the children in violation of Minn. R. Minn. R. 9502.0315, subp. 29a; .0365 (2013). The Administrative Law Judge also concludes that the Licensee failed to show that she was in compliance with those requirements.

4. The Administrative Law Judge concludes that the violation of the supervision rules warrants the conditional license ordered by the Department.

5. Accordingly, it is recommended that the maltreatment determination be **REVERSED**, the Order to Pay a Fine be **RESCINDED**, and the Order of Conditional License be **AFFIRMED**.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Incident of May 9, 2014

1. The Licensee has been a licensed family child care provider for nine years and is licensed to care for ten children.³ She operates her daycare in her home in Cambridge, Minnesota, in Isanti County.⁴ It is also her husband's home.⁵

2. The Douglas's home is a split entry, open concept home, with an entry landing inside the front door. Stairs from the landing go to the upper level where all of the daycare is conducted. Stairs also go down from the landing to a lower level, which has a laundry room and other areas where the daycare children do not go.⁶

3. On the upper level there is a child gate at the top of the stairs coming up from the landing. As drawn on the Floor and Escape Plan for the home, to the left of the top of the stairs is Bedroom 1. That is the Douglasses' bedroom. The door to the bedroom is roughly six feet from the top of the stairs. Out from the top of the stairs is an open area with a Living Room area to the right, Dining Room and Kitchen areas to the back,

³ Testimony (Test.) of Debra Douglas; Ex. 8 at 1.

⁴ See Notice and Order for Prehearing Conference and Hearing, Attachment B.

⁵ Test. of D. Douglas and Alan Douglas.

⁶ Ex. 50. Test of D. Douglas, Jeremy Mellgren, and Jennifer Darling.

Bedroom 1 to the left, and Bedroom 2 and the Bath to the left and back.⁷ Bedroom 2 is the “kids’ room” or “play room” used by the daycare children.⁸

4. Starting at about 3:35 p.m. the afternoon of Friday, May 9, 2014, the Licensee was caring for five daycare children.

5. Two of the children present were children of the Licensee’s sister.⁹ The other three were the children of Jennifer Darling and had been attending the Licensee’s daycare for almost a year. Ms. Darling has worked for Isanti County since April 2014. She worked in Child Protection and in July 2014 became the Isanti County Child Care Licensor.¹⁰

6. On May 9, 2014, Ms. Darling’s children were a boy age 8 (B8), a girl age 3 (G3), and a girl age 1 who turned 2 on May 11, 2014 (G1). Ms. Darling lives with the children and her partner Jeremy Mellgren. He is the father of G3 and considered the father of B8 and G1.¹¹ He works construction and is usually not home in time to pick up the children, so Ms. Darling usually does it alone, usually between 5:00 p.m. and 5:30 p.m.

7. The Licensee developed a migraine headache early in the day on May 9, 2014. She had experienced migraines two or three times a year. The migraine became worse late in the afternoon.¹²

8. Texting or calling each other on their cell phones was the normal means of communicating between Ms. Darling and the Licensee regarding issues with the children. Such issues would include somebody being late or being ill.¹³ Telephone records show that at 4:20 p.m., the Licensee sent a text message to Ms. Darling’s cell phone number.¹⁴ She wrote Ms. Darling about her migraine.¹⁵ However, Ms. Darling did not receive that text or any other texts or calls that afternoon. Her cell phone had been turned off since at least 2:00 p.m., when its battery ran out.¹⁶

9. B8 had been dropped off by his school bus at the Licensee’s home about 3:35 p.m. The Licensee’s sister’s daughter had also been dropped off by that bus. The older children did projects then had snacks at the table while G1 had hers in a high chair.¹⁷ Between about 3:50 p.m. and 4:15 p.m., the Licensee’s sister picked up her children.¹⁸

⁷ Ex. 50.

⁸ Test. of B8.

⁹ Test. of D. Douglas.

¹⁰ Test. of J. Darling.

¹¹ Test. of J. Mellgren and B8; Ex. 6 at 12.

¹² Test of D. Douglas; Ex. 8 at 24.

¹³ Test of D. Douglas, J. Mellgren, and J. Darling.

¹⁴ Ex. 51.

¹⁵ Test. of D. Douglas.

¹⁶ Test. of J. Darling.

¹⁷ Ex. 7 at 10, Ex. 8 at 9.

¹⁸ Test. of D. Douglas and B8.

After all the other children were gone, B8 and his sisters played until about 4:45. B8 observed the Licensee in the kitchen making supper during that time.¹⁹

10. Shortly before 4:45 p.m., the Licensee asked B8 to clean up the toys in the area they had been playing. He did so while the Licensee moved his sisters to the living room to watch TV until they were picked up. B2 joined them there about 4:45 p.m. The Licensee turned on TPT2 so the children could watch the Arthur and the Wild Kratts children's programs there.²⁰

11. The Licensee did not get a response back to her first text to Ms. Darling. At 4:46 p.m., the Licensee sent another text message to her.²¹ Ms. Darling did not receive the text because her phone was not operating.²²

12. The Licensee's migraine continued to worsen. It caused her vision to become wavy and gave her nausea. Her eyes watered, but that may have been due in part to her allergies.²³ B8 noticed that the Licensee's eyes were watery that afternoon, which he attributed to her allergies. He gave her a hug when he saw that.²⁴ It is not clear from his testimony what time that occurred.²⁵

13. The Licensee washed the girls' clothes that afternoon because they had had spaghetti for lunch and got some of it on their clothes. Sometime after 4:45 p.m. the Licensee went to the lower level, got the clean laundry, and took it to her bedroom to fold. She remained in the bedroom for most of the late afternoon, sitting and lying on the bed because of the headache. She did not sleep during that time.²⁶ B8 noticed that the Licensee was doing laundry, but it is not clear from his testimony what time and where he made that observation.²⁷

14. After some period of watching TV, B8 noticed that he had not seen the Licensee in a while and became concerned. He got up from the couch and looked for her in the kitchen, in the bathroom, and in the kids' room. He called for her and she called back to him, asking how they were doing. He responded, "Good." Although he had looked in every room except her bedroom, B8 did not see the Licensee and testified he was not sure which room she was in. He testified that after hearing her question to him, he knew that she was nearby on the upper level of the house and was less

¹⁹ Test. of B8; Ex. 7 at 12.

²⁰ Test. of B8 and D. Douglas.

²¹ The Licensee did not testify

²² Ex. 51, Test. of D. Douglas and J. Darling.

²³ Test. of D. Douglas.

²⁴ Ex. 7 at 20.

²⁵ Test. of B8.

²⁶ Test. of D. Douglas.

²⁷ Test. of B8.

concerned than he had been. He went back to the couch in the living room and resumed watching TV with his sisters.²⁸ B8 did not check on the Licensee again.²⁹

15. The Licensee expected Ms. Darling to arrive by 5:30 p.m., as she usually did. Around 5:15 p.m., the Licensee got the three children ready to be picked up by having B8 and G3 take their footwear and projects down to the landing and return to the upper level to watch TV and by changing G1's diaper. She also took the children's folded laundry from her bedroom down to the landing.³⁰

16. The Licensee then returned to her bedroom and sat on her bed massaging her temples because of the migraine headache she was experiencing. She could hear the children in the living room. She laid back, not intending to sleep.³¹ But she eventually blacked out or passed out. That would have been at about 5:20 p.m. or later. She remained unconscious lying on the bed until she was awakened by Ms. Darling and Mr. Mellgren about 5:40 p.m.³² During that 15 to 20 minutes the Licensee was unconscious, not able to see or hear the children, and not able to care for them.

17. On May 9, 2014, Mr. Mellgren got home from work early and went with Ms. Darling to pick up the children. They arrived at the Licensee's home about 5:30 p.m.³³

18. As the couple arrived at the house, the Licensee's two beagles inside the house began howling, as they always do when someone approaches the house. The couple walked in because the door had been unlocked for them, as normal. The dogs continued howling. The children came out of the living room area and to the gate to greet them. B8 could open the gate and did so, and the children went down to the landing, where Ms. Darling and Mr. Mellgren helped the girls into their shoes and jackets. Mr. Mellgren began howling along with the dogs.³⁴

19. Ms. Darling noticed that the Licensee had not come to the gate as she normally did and asked the children where she was. B8 said he did not know and put on his own boots or shoes and jacket. Ms. Darling told Mr. Mellgren and the dogs to "knock it off" and called for the Licensee, who did not respond.³⁵

20. Mr. Mellgren took B8 and G3 out to their SUV. Ms. Darling remained on the landing with G1 calling for the Licensee for a while and then took G1 out to the vehicle. When all the children were buckled in, the couple went back in the house to find the Licensee. They called for her from the landing and got no response. The dogs had quieted down somewhat by then. Mr. Mellgren went upstairs to look for the Licensee. He

²⁸ Test. of B8.

²⁹ Test. of B8 and J. Mellgren.

³⁰ Test. of D. Douglas; Ex. 8 at 10.

³¹ Test. of D. Douglas; Ex. 8 at 8.

³² Test. of D. Douglas; Ex. 8 at 2.

³³ Test. of J. Mellgren and B8.

³⁴ Test. of J. Mellgren and J. Darling; Ex. 6 at 12 – 13.

³⁵ Test. of J. Mellgren and J. Darling.

saw her through the open door of Bedroom 1, lying on the bed near the bottom with her head toward the head of the bed, looking passed out.³⁶

21. Mr. Mellgren did not go in the room. Instead, he went back out to the child gate and asked Ms. Darling to go look at the Licensee. Mr. Mellgren went down to the landing, closing the gate behind him. By the time Ms. Darling got up the steps from the landing and was fumbling with the child gate, about 5:40 p.m., the Licensee came out of Bedroom 1 and to the area of the child gate. She had recovered about the time Mr. Mellgren was outside her door. The Licensee had not heard and remembered nothing about the dogs howling, Ms. Darling and Mr. Mellgren taking the children outside, or them calling for her. She was very confused about what had happened while she was unconscious. Her eyes were red and watery. To Mr. Mellgren she appeared “jumbled up and disoriented,” especially when he told her they had just picked up the kids. The Licensee told Ms. Darling that she had called her. Ms. Darling looked at her own phone and told the Licensee that the Licensee could not have because her phone was off. The Licensee told Ms. Darling that she had a migraine. Ms. Darling responded, “Well, sleep it off and we’ll talk later,” knowing that she would be reporting the incident to the Isanti County Child Care Licensor.³⁷

22. When Mr. Douglas arrived home about 5:55 p.m., he observed that the Licensee seemed unusually tired and that her eyes were watery, consistent with a migraine headache she told him she had. When he asked about her day, she reported that Ms. Darling appeared to be angry with her, but that she did not know why.³⁸

County Investigation and Maltreatment Determination

23. On Tuesday, May 13, 2014, Isanti County received a report regarding the May 9, 2014, incident. Because Ms. Darling was one of the parents involved in the incident, as well as a Child Protection employee of Isanti County, the report was referred to Chisago County Human Services to conduct a Conflict of Interest Child Protection Investigation.³⁹ Chisago County initiated the Child Protection Intake Summary on May 13, 2014. The Intake Summary described the allegations as Neglect (not medical neglect), Inadequate supervision.⁴⁰

24. Chisago County’s Child Protection Assessment/Investigation was conducted by Karlene Smith, who had been a Child Protection Investigator since 2007, and became a Child Protection Supervisor during the investigation on May 24, 2014.⁴¹

25. Ms. Smith contacted Joyce Wallace from Isanti County Daycare Licensing to accompany her on the investigation because it appeared to involve a licensing issue as well. On May 16, 2014, Ms. Smith and Ms. Wallace interviewed Ms. Darling,

³⁶ Test. of J. Mellgren and J. Darling; Ex. 6 at 12–13.

³⁷ Test. of J. Darling.

³⁸ Test. of A. Douglas.

³⁹ Ex. 2.

⁴⁰ Ex. 1.

⁴¹ Test. of K. Smith; Ex. 1.

Mr. Mellgren, B8, and the Licensee. The interviews were recorded⁴² and transcribed.⁴³ The transcripts were faxed to Isanti County Family Services. In conjunction with Isanti County Family Services, Chisago County Health and Human Services made a decision to make a determination of maltreatment, but that the maltreatment was not serious or recurring. That assessment was made on June 20, 2014.⁴⁴

26. By a letter dated June 20, 2014, Ms. Smith, then Interim Child Protection Supervisor with Chisago County Health and Human Services, informed the Licensee that Chisago County Health and Human Services had found maltreatment by neglect for which the Licensee was responsible.⁴⁵ The letter stated the reasons for the determinations as follows:

Based upon a preponderance of evidence regarding the supervision of [B8, G3, and G1]. The evidence includes interviews with the parents of the children, [B8] and yourself. [B8] specifically stated he didn't remember seeing you for about ½ of the TV show Arthur and all of Wildcrats (sic). This would be about 45 minutes during which you were unaccounted for. You stated that the children were down by the door all ready for their parents to pick them up but this was not confirmed by either [B8] or his mom. [B8] specifically reported thinking you were in the bathroom as that is where you go to take emergency phone calls.

Neglect for supervision is defined by MN Statute 626.556, subd. 2(f)(3): Failure to provide for necessary supervision or child care arrangements occurs (sic) when a child is unable to provide for their owns basic needs or safety, or the basic needs or safety of another child in their care.

MN Child Protection Screening Guidelines state children age 7 and under should not [be] left alone for any period of time and children under age 11 should not provide child care. Given the fact [B8] reports your whereabouts were unknown for approximately 45 minutes this left the girls unsupervised and with an older child who had not yet reached the age of 11 provided for their care.⁴⁶

27. Ms. Smith testified that the Licensee committed "maltreatment-neglect-for lack of supervision" because she did lie down, at least momentarily, and that for a significant period of time B8, G3, and G1 were unsupervised. She also testified that the amount of time they were unsupervised was not important. Further, she did not find the Licensee's health condition, her migraine headache, to mitigate or be a defense to failure to supervise.⁴⁷

⁴² Ex. 9.

⁴³ Exs. 6, 7, and 8.

⁴⁴ Ex. 3.

⁴⁵ Ex. 4; Test. of K. Smith.

⁴⁶ Ex. 4.

⁴⁷ Test. of K. Smith.

28. Ms. Wallace, the Isanti County Licenser, issued a Correction Order to the Licensee on June 24, 2014. The Licensee signed and returned the Correction Order on June 27, 2014, noting, "Parents will be required to knock on the door for pickup and drop off of children. Doors upstairs will be open if I am in another room. Video surveillance may be added soon as well."⁴⁸

29. In a July 18, 2014, letter signed by Ms. Wallace, Isanti County Family Services recommended that the family child care license of the Licensee be placed on Conditional Status for two years and that appropriate fines be imposed due to violation of Minn. R. 9502.0315, subp. 29a, which is the definition of supervision for licensing.⁴⁹ The letter stated that Ms. Smith and Ms. Wallace had conducted a joint child protection and licensing complaint investigation. The letter stated that it had been determined that maltreatment, neglect of the three siblings, had occurred and that it had also been determined that a licensing violation occurred:

specifically that [the Licensee] was not within sight or hearing of two toddlers at all times nor capable of intervening to protect the children, and was not available for assistance and care of the school age child. It appears that for a period of approximately 45 minutes she was unaccounted for, per the letter prepare by Ms. Smith.

Finally, the letter recommended that the Licensee's license be placed on conditional status with the following conditions:

[The Licensee] will comply with all applicable rules and statutes; [the Licensee] will not be granted any variances during the period of the conditional license; [the Licensee] will submit a detailed, written plan to this agency as to how she will provide adequate supervision to all children in care at all times, including what action she will take if she should feel ill while caring for children; and [the Licensee] will participate in additional training related to safety and supervision of children. This agency believes that a conditional license and fine is most appropriate in this case as this provider does not have prior licensing violations nor have there been any previous reports of maltreatment received.⁵⁰

30. The Licensee requested reconsideration of the maltreatment determination. In a letter of August 4, 2014, Elizabeth Dodge, Social Services Director of Chisago County Health and Human Services, informed the Licensee that it was denying the request for reconsideration. The letter stated, in part:

Under Minnesota Statutes, section 626.556, subdivision 2, neglect is defined as:

⁴⁸ See Ex. 10. The Correction Order is not in evidence, but there is no dispute that it was issued and responded to as reported in Ex. 10.

⁴⁹ Ex. 10.

⁵⁰ Ex. 10.

Neglect means “the failure by a person [responsible] for a child’s care to supply a child with necessary food, clothing, shelter, health, medical, or other care required for the child’s physical or mental health when reasonably able to do so.

Further definition in M.S. 626.556, subd. 2(f)(3) states; Failure to provide for necessary supervision or child care arrangements occurs (sic) when a child is unable to provide for their own basic needs or safety or the basic needs or safety of another [child] in their care.⁵¹

31. On August 27, 2014, after learning of the denial of the request for reconsideration, Ms. Wallace sent an Amended Letter to the Department noting that development and confirming that it was continuing to recommend a Conditional License and appropriate fine as stated in her letter of August 27, 2014.⁵²

Sanctions Issued by the Department

32. On October 3, 2014, the Department issued a combined Order to Pay a Fine and Order of Conditional License.⁵³ The Order to Pay a Fine portion stated that under Minn. Stat. § 245A.07, subd. 3 (2014), the Commissioner of Human Services (Commissioner) may fine license holders \$1,000 for each determination of maltreatment of a child under Minn. Stat. § 626.556 (2014).⁵⁴

33. The reason stated for the fine was the June 20, 2014, determination of Chisago County Health and Human Services that found the Licensee responsible for maltreatment of children. It further stated:

You did not request a fair hearing, therefore pursuant to Minnesota Statutes, section 245C.29, the maltreatment determination is now conclusive.⁵⁵

34. The Order of Conditional License portion cited the authority in Minn. Stat. § 246A.06 (2014), to issue corrections orders and conditional licenses. It quoted Minn. Stat. § 626.556, subd. 2(f)(2), (3) defining “Neglect.” It quoted Minn. R. 9502.0365 that requires that children in care be supervised by a caregiver and Minn. R. 9502.0315, subp. 29a, that defines “supervision.” It cited the maltreatment determination, denial of reconsideration, and the correction order issued by Chisago and Isanti Counties. It concluded:

Due to the serious nature of the above violations; because you were found responsible for maltreatment of children in your care, because you failed to provide required supervision to children in care; and, in order to protect the health, safety, and rights of persons receiving services in DHS-licensed

⁵¹ Ex. 5.

⁵² Ex. 11.

⁵³ Ex. 12. *Also* Ex. B to the NOTICE AND ORDER FOR PRE-HEARING CONFERENCE AND HEARING dated November 17, 2014, in this matter.

⁵⁴ *Id.*

⁵⁵ *Id.*

programs, your license to provide family child care is placed on conditional status for a period of two years.⁵⁶

35. The Order of Conditional License imposes the following conditions on the Licensee's license for a period of two years: (1) the Licensee must comply with all Minnesota rules and laws; (2) no variances to age distribution or capacity will be granted during the conditional period; (3) the Licensee must submit and comply with a detailed, written plan for safety and supervision of children in her care including supervision practices indoors and outdoors and how you will provide the required supervision if she becomes ill during child care hours submitted and approved by Isanti County; (4) the Licensee must obtain at least six hours of additional training in the areas of safety and supervision of children approved by Isanti County with attendance documented to Isanti County; and (5) the Licensee must provide a copy of the Order of Conditional License to parents of existing and new children in her care and provide signed documentation to Isanti County.⁵⁷

36. Finally, the Order stated that Ms. Douglas had a right to appeal the terms of the Order by submitting a written appeal to P.O. Box 64242 – the post office box set aside by the Department for the Family Systems Unit.⁵⁸

Subsequent Proceedings

37. The Licensee then obtained new counsel. By way of a letter dated October 9, 2014, the new counsel submitted a request for contested case proceedings and sent the letter to the Family Systems Unit's post office box. The appeal letter sought an opportunity to contest the maltreatment determination and the licensing sanction. On October 17, 2014, the Department issued a Notice and Order for Prehearing Conference and Hearing. The Order set a prehearing conference for November 6, 2014, before Administrative Law Judge Eric Lipman.⁵⁹

38. At the prehearing conference, the Licensee asserted by motion that there had been a timely appeal of the maltreatment determination. The Department asserted that such an appeal has never been sent to the proper office – namely, the Department's Fair Hearing Unit. A hearing was held December 18, 2014, to address the factual issues involved. On January 27, 2015, Judge Lipman issued an Order granting the Licensee's motion and setting this case for further proceedings to be scheduled before him.⁶⁰ On February 13, 2015, the hearing was set for March 26, 2015.⁶¹

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 5.

⁵⁹ Notice and Order for Prehearing Conference and Hearing, OAH Docket No. 8-1800-31936 (October 17, 2014).

⁶⁰ Order on Motion for Partial Summary Disposition (Second Prehearing Order), OAH Docket No. 8-1800-31936 (January 27, 2015).

⁶¹ THIRD PREHEARING ORDER, OAH Docket No. 8-1800-31936 (February 13, 2015).

39. Due to scheduling conflicts that subsequently arose, on March 16, 2015, the Chief Administrative Law Judge reassigned this matter to the undersigned Administrative Law Judge. The hearing was held March 26, 2015.

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

CONCLUSIONS OF LAW

1. The Commissioner and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50; 245A.08, subd. 2a (2014).

2. This is a consolidated contested case hearing regarding the Licensee's appeals of the maltreatment determination, fine, and conditional license.⁶²

3. The Department has the burden of proving by a preponderance of the evidence that the Licensee committed maltreatment of a minor by neglect.⁶³ The definition of "neglect" for these purposes is that provided in Minn. Stat. § 626.556, subd. 2(f),⁶⁴ which states, in relevant part:

(f) "Neglect" means the commission or omission of any of the acts specified under clauses (1) to (9), other than by accidental means:

(1) failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter, health, medical, or other care required for the child's physical or mental health when reasonably able to do so;

(2) failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health when reasonably able to do so, including a growth delay, which may be referred to as a failure to thrive, that has been diagnosed by a physician and is due to parental neglect;

(3) failure to provide for necessary supervision or child care arrangements appropriate for a child after considering factors as the child's age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child's own basic needs or safety, or the basic needs or safety of another child in their care;

4. The Department did not prove by a preponderance of the evidence that the Licensee was reasonably able to supply the children with necessary supervision or other

⁶² Minn. Stat. § 245A.08, subd. 2a.

⁶³ Minn. Stat. §§ 256.045, subd. 3b; 626.556, subd. 10e (2014); Minn. R. 1400.7300, subp. 5 (2013).

⁶⁴ See, Minn. Stat. § 626.556, subd. 10e(f)(2).

care, or was reasonably able to protect the children from conditions that seriously endangered them, on February 9, 2014, or that any such failure by the Licensee was not accidental. The preponderance of the evidence demonstrated that she was not reasonably able to do so for several minutes. Thus, the Department did not prove that maltreatment by neglect as defined in Minn. Stat. § 626.556, subd. 2(f)(1), (2), occurred.

5. The Department did not prove by a preponderance of the evidence that any failure by the Licensee to provide for necessary supervision or child care arrangements appropriate for a child was not accidental. Thus, the Department did not prove that maltreatment by neglect as defined in Minn. Stat. § 626.556, subd. 2(f)(3), occurred.

6. In sum, the Department did not prove that maltreatment by neglect for which the Licensee was responsible occurred on May 9, 2014, and the determination of maltreatment should be reversed.

7. The statute governing family child care providers specifies that license holders “shall forfeit \$1,000 for each determination of maltreatment of a child . . . for which the license holder is determined responsible” under Minn. Stat. § 626.556.⁶⁵

8. Because the Department failed to demonstrate that the Licensee was responsible for maltreatment on May 9, 2014, the Department has failed to demonstrate a legal basis for imposing the associated \$1,000 fine. The fine should be rescinded.

9. The Department has the burden of demonstrating reasonable cause for imposing conditions on the Licensee’s family child care license. If reasonable cause exists, the burden shifts to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with the laws or rules alleged to have been violated.⁶⁶

10. The Department’s rules governing child care providers require that a caregiver adequately supervise the children in care.⁶⁷ “‘Supervision’ means a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child.”⁶⁸

11. The Department has shown a reasonable basis for finding inadequate supervision by the Licensee under the daycare rules. The evidence gathered in the joint investigation showed that she was unconscious for several minutes. During that time she could not see or hear of the children and was not capable of intervening to protect their health and safety, as required by Minn. R. 9502.0315, subp. 29a; .0365. Licensee failed to demonstrate by a preponderance of the evidence that she was in full compliance with those rules.

⁶⁵ Minn. Stat. § 245A.07, subd. 3(c)(4).

⁶⁶ Minn. Stat. § 245A.08, subd. 3 (2014).

⁶⁷ Minn. R. 9502.0365, subp. 5.

⁶⁸ Minn. R. 9502.0315, subp. 29a.

12. While the Licensee's failure to supervise was the unintentional result of a medical condition, in order to protect the health and safety of daycare children, it is appropriate to require that the issues surrounding the incident be addressed by the Licensee. The Order of Conditional License does that in an appropriate manner. It should be affirmed.

13. The reasons for these Conclusions are further discussed in the attached Memorandum, which is incorporated into these Conclusions by reference.

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

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED:

That the Commissioner of Human Services **REVERSE** the maltreatment determination; **RESCIND** the Order to Pay a Fine; and **AFFIRM** the Order of Conditional License issued to the Licensee Debra Douglas.

Dated: April 28, 2015

s/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

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. Under Minn. Stat. § 14.61 (2014), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64998, St. Paul, MN 55164, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2014), the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Description of the May 9, 2014 Incident

There are errors in the County's and Department's factual summaries of the incident. The most significant are based on B8's answers to two questions. B8 answered, "I don't know," when his mother asked him where the Licensee was as he was going down the steps and getting his shoes on to go home. This was told to Ms. Smith when she interviewed Ms. Darling. When Ms. Smith asked B8 during his interview if he knew where the Licensee was when he finished cleaning up the playroom and went in to watch TV, B8 answered, "No."⁶⁹ Both of B8's answers were correct in his precise way of responding. When he finished picking up the playthings, he went to the living room area to watch TV. Because the Licensee had recently asked him to pick up the area, he knew that the Licensee was nearby even though he did not know exactly where at that precise moment. Likewise, when he told his mother "I don't know," he was heading down the stairs to go home and he knew that the Licensee was not at the top of the stairs. He knew she was nearby. So his answer was correct to his way of thinking.

⁶⁹ Ex. 7 at 13.

Ms. Smith did not ask B8 about the 45 minutes between those points.⁷⁰ She was not aware that he had investigated and talked to the Licensee at some point between 5:00 p.m. and 5:30 p.m. She did not accept the Licensee's description of the incident and felt that the length of time the Licensee might have been "sleeping" was not important. The County's finding that the Licensee was "unaccounted for" while the children were watching TV from 4:45 p.m. to 5:30 p.m. was not supported by the evidence.

What the evidence showed is that the Licensee was not responsive from the time that Ms. Darling and Mr. Mellgren arrived, and the dogs started howling, at 5:30 p.m., until the Licensee came out of her bedroom at 5:40. Everyone testified that the dogs are very loud and they were at the top of the stairs just feet from the bedroom door. The Licensee sincerely believes that the dogs were not barking because she does not remember hearing them. But they were barking, so she must have been unconscious during that period. She most likely had passed out a few minutes earlier, about 5:20 p.m.

The Maltreatment Determination

The Department has the burden of proving by a preponderance of the evidence that the Licensee committed maltreatment of a minor by neglect.⁷¹ The definition of "neglect" for these purposes is that provided in Minn. Stat. § 626.556, subd. 2(f),⁷² which states, in relevant part:

(f) "Neglect" means the commission or omission of any of the acts specified under clauses (1) to (9), **other than by accidental means**:

(1) failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter, health, medical, or other care required for the child's physical or mental health **when reasonably able to do so**;

(2) failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health **when reasonably able to do so**, including a growth delay, which may be referred to as a failure to thrive, that has been diagnosed by a physician and is due to parental neglect;

(3) failure to **provide for necessary supervision or child care arrangements** appropriate for a child after considering factors as the child's age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child's own basic needs or safety, or the basic needs or safety of another child in their care; (Emphasis added.)

⁷⁰ Ex. 7 at 13-20.

⁷¹ Minn. Stat. §§ 256.045, subd. 3b; 626.556, subd. 10e; Minn. R. 1400.7300, subp. 5.

⁷² See, Minn. Stat. § 626.556, subd. 10e(f)(2).

In its maltreatment determination and denial of reconsideration,⁷³ Isanti County determined that clauses (1) and (3) applied, although it misquoted clause (3). In the Order to Pay a Fine and Order of Conditional License,⁷⁴ the Department determined that clauses (2) and (3) applied in this case.

Clause (1) is the most applicable provision because it addresses a failure by a person responsible for a child's care, such as a child care provider, to supply that child with necessary and required cares. Clause (1) does not include the term "supervision," but by its ordinary meaning "supervision" would be considered a required care referred to by clause (1). Arguably, clause (2) may also apply in this case because it addresses a failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health.

The Department and the County did not prove by a preponderance of the evidence that the Licensee was reasonably able to supply the children with necessary supervision or other care, or was reasonably able to protect the children from conditions that seriously endangered them, on February 9, 2014, or that any such failure by the Licensee was not accidental. The Department quoted, but did not address the "**reasonably able to do so**" language in clauses (1) and (2) of the statute. It did not address the "**other than by accidental means**" provision that applies to all types of neglect. The Child Protection investigator's view that the Licensee's health condition was not a defense to and did not mitigate the determination of maltreatment by neglect⁷⁵ is inconsistent with these statutory provisions. The preponderance of the evidence was that the Licensee was not able to provide care because her intense migraine headache had caused her to pass out for a matter of a few or several minutes. Nor is there a preponderance of the evidence that she intended to fall asleep. On the contrary, the preponderance of the evidence supports the position that the Licensee did not intend to sleep. Her loss of consciousness was accidental. Thus, the Department did not prove that the Licensee was responsible for maltreatment by neglect as defined in clauses (1) or (2).

Minn. Stat. § 626.556, subd. 2(f)(3), required the Licensee to **provide for** necessary supervision or child care arrangements appropriate for the children when she could not provide the necessary supervision or child care. The Department showed that the Licensee failed to supervise the children for several minutes, but, again, it did not address the "**other than by accidental means**" provision that applies to all types of neglect, including clause (3). There was not a preponderance of the evidence that she intended to fall asleep. On the contrary, the preponderance of the evidence supports the position that the Licensee did not intend to sleep. When her migraine started to worsen, she sent Ms. Darling text messages, not knowing Ms. Darling's phone was turned off. She got the children to watch TV near her for the last 15 to 30 minutes before she expected them to be picked up so that she could monitor them while resting. She struggled against falling asleep. Her loss of consciousness was accidental. Thus, the

⁷³ Exs. 4 and 5.

⁷⁴ Ex. 12.

⁷⁵ Test. of K. Smith.

Department also did not prove that the Licensee was responsible for maltreatment by neglect as defined in clause (3).

In sum, the Licensee was not responsible for maltreatment on May 9, 2014, and the determination of maltreatment should be reversed.

The Order of Conditional License

Pursuant to Minn. Stat. § 245A.06, the Department has the authority to issue either a conditional license or a correction order when the Commissioner:

finds that the applicant or license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program When issuing a conditional license, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.⁷⁶

In this case, the Order of Conditional License was based on both the determinations of maltreatment by neglect and the failure to provide adequate supervision under the daycare rules. Given that the Administrative Law Judge has determined that the Department failed to demonstrate maltreatment by neglect, the propriety of the correction order must be re-examined in light of the daycare rule violation.

The Order of Conditional License imposes the following conditions on the Licensee's license for a period of two years: (1) the Licensee must comply with all Minnesota rules and laws; (2) no variances to age distribution or capacity will be granted during the conditional period; (3) the Licensee must submit and comply with a detailed, written plan for safety and supervision of children in her care including supervision practices indoors and outdoors and how she will provide the required supervision if she becomes ill during child care hours, which must be submitted and approved by Isanti County; (4) the Licensee must obtain at least six hours of additional training in the areas of safety and supervision of children approved by Isanti County with attendance documented to Isanti County; and (5) the Licensee must provide a copy of the Order of Conditional License to parents of existing and new children in her care and provide signed documentation to Isanti County.

Here, the Licensee's failure to provide supervision of the children was not an intentional violation and did not result in any harm to children in her care. But it easily could have if something had happened during the several minutes she was unconscious. To protect those children the Licensee should be required to develop plans and methods to address such situations better and to recognize when they are developing. The training and planning required by the Conditional License should assist the Licensee greatly in doing so. It is reasonable and appropriate and should be affirmed.

⁷⁶ Minn. Stat. § 245A.06, subd. 1.

S. M. M.