OAH 10-1800-34496

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Becky Fridgen of Maltreatment Determination, Disqualification, and Revocation of Family Child Care License	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Perry M. Wilson on July 5 and 6, 2018 at the Big Stone County Courthouse in Ortonville, Minnesota. The hearing record closed at the end of the evidentiary hearing.

Joseph Glasrud, Big Stone County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department). Christopher Wills and Laura Brooks, Rajkowski Hansmeier, Ltd., appeared on behalf of Becky Fridgen (Licensee).

STATEMENT OF ISSUES

1. Should the Department's determination of maltreatment by Licensee be affirmed?

2. Should the disqualification of Licensee by the Department be affirmed?

3. Did Licensee demonstrate that she does not pose a risk of harm to the children served by her program?

4. Should the revocation by the Department of Licensee's family child care license be affirmed?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the Department has proved by a preponderance of the evidence that Licensee is responsible for maltreatment by neglect of a child pursuant to Minn. Stat. § 626.556, subd. 2 (g)(1) and Minn. Stat. § 626.556, subd. 2 (k) (2018).

The Administrative Law Judge concludes that the Department properly disqualified Licensee pursuant to Minn. Stat. § 245C.14, and Minn. Stat. § 245C.02, subd. 16.

The Administrative Law Judge concludes that Licensee did not prove by a preponderance of the evidence that that she does not pose a risk of harm to the children in her program.

The Administrative Law Judge concludes that the Department demonstrated reasonable cause for revocation of Licensee's license for her failure to comply with applicable law or rule and that Licensee failed to demonstrate by a preponderance of the evidence that she was in full compliance with applicable law and rules pursuant to Minn. Stat. § 245A.08, subd. 3(a).

The Administrative Law Judge recommends the revocation of the Licensee's family child care license be **AFFIRMED**.

Based upon the submissions of counsel and the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee has operated a family child care in her home, located in Graceville, Minnesota, for 38 years.[1] Licensee has cared for more than 200 children during this time.[2] Licensee was not the subject of any licensing action by the Department until the actions that led to this proceeding.[3]

2. On October 12, 2016, Big Stone County (County) Family Services received a report by a mandated reporter that a child in Licensee's care told the reporter that Licensee had subjected the child to physical harm and humiliation.[4] The reporter stated that the child said she wanted to attend the reporter's day care because Licensee: made her eat food after she had spit it up; sit with her legs spread open if she failed to complete eating with in a set time; dropped her from waist height when she refused to go to bed;

[1] Testimony (Test.) of Becky Fridgen.
[2] *Id.*
[3] *Id.*
[4] Ex. 9.

made her sit naked in front of other children after a toileting accident; and, covered her nose and mouth with her hand when the child refused to stop crying.[5]

3. After screening the report about Licensee's day care as possible child maltreatment, County Child Protection assigned the report for investigation to a child protection worker.[6]

4. The County formed an investigative team consisting of the child protection worker, a deputy sheriff, and a child care licensing worker.[7]

5. On October 12, 2016, the County child protection worker interviewed A.W., the child who reported that Licensee treated her inappropriately. The interview of A.W. was videotaped[8] and was observed by other members of the investigate team not in the interview room.[9] A.W.'s mother was present during the interview.[10] The child protection worker used the Corner House interview protocol, which requires the use of non-leading, nonsuggestive questions.[11]

6. During the interview, nine-year-old A.W. stated that when she was four or five years old, Licensee had treated her inappropriately by: making her eat food after she had spit it up; making her sit naked in front of other children after a toileting accident; covering her nose and mouth with her hand when she refused to stop crying; and setting a timer to limit the length of time she could eat. A.W. stated that each of these events happened once.[12]

7. A.W. stated that her older sister, H.W., who also attended Licensee's day care, had observed some of these events.[13] A.W. stated that she reported Licensee's inappropriate conduct to her mother about two years before the interview, and to the mandatory reporter who made the report to the County.[14]

8. After A.W.'s interview was complete, the child protection worker interviewed A.W.'s mother alone.[15] A.W.'s mother stated that A.W. reported that she did not like attending Licensee's day care some time before this report and she heard "bits and pieces" of the events A.W. relayed in the interview, but that the mother did not know

[5] *Id.*
[6] Test. of Stephanie Sisler.
[7] *Id.*
[8] Ex. 7.
[9] Test. of S. Sisler.
[10] Ex. 7.
[11] Test. of S. Sisler.
[12] *Id.*
[13] *Id*.
[14] *Id.*
[15] *Id.*

whether to believe A.W and did not take any action.[16] A.W.'s mother expressed regret that she did not reported A.W.'s statements before the report by the mandatory reporter.[17]

9. During the interview, A.W.'s mother showed the County child protection worker a video she found on her child's iPad.[18] The video was taken some years before at Licensee's home during day care hours.[19] It shows Licensee sitting in a chair working on her computer. Two small children (both appearing to be between twelve and eighteen months old) are sitting in infant seats on either side of her.[20] During the video Licensee said a child's name and hit the child on the head hard enough to visibly move the child's head.[21] The child does not cry or react to this contact, other than to stop squirming in the chair.[22] Licensee did not respond to a question by another child asking why she had called out the small child's name and hit her on the head.[23]

10. In the evening of October 12, 2016, the investigators interviewed A.W.'s siblings H.W. and R.W.[24] Both children stated that Licensee was not mean to them and that they had no concerns about Licensee.[25]

11. During the interview, H.W. said that she had heard a rumor that Licensee had put a pill in the cereal of another child in her care and that the child had become ill.[26]

12. On October 13, 2016, the investigators visited Licensee's child care facility.[27] The investigators explained the reason for their visit and Licensee admitted them to her home.[28] There were four children in Licensee's care at the time of the visit.[29] Licensee showed the investigators her home and they found no unsafe conditions or practices.[30]

13. In the evening of October 13, 2016, a deputy sheriff returned to Licensee's home to interview her for purposes of the investigation.[31] The interview was recorded,[32] and a transcript of the interview was prepared.[33] The deputy sheriff asked Licensee about

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[16] Ex. 1 at 10.
[17] *Id*. at 14.
[18] *Id*. at 11.
[19] Ex.7.
[20] *Id.*
[21] *Id.*
[22] *Id*.
[23] *Id.*
[24] Ex.10 at 8.
[25] *Id.*
[26] *Id.*
[27] Ex. 10 at 3.
[28] *Id.*
[29] *Id*. at 4.
[30] *Id.*
[31] Test. of Mark Brown.
[32] Ex. 7.
[33] Ex.2 at 5.

each incident A.W. related in her interview.[34] Licensee denied that any of the incidents related by A.W. occurred.[35]

14. During the interview, Licensee was asked about the allegation that she placed a pill in the cereal of a child and that the child had become ill.[36] Licensee denied that the incident occurred as stated by the deputy.[37] Licensee explained that in about 2015 a child in her care discovered one pill of a prescription medication she was taking on the counter of Licensee's home.[38] The child took this pill to school with her where the child was discovered by school authorities showing the pill to other children.[39] Licensee denied that she placed the pill in the child's cereal.[40] The child did not ingest the pill.[41]

15. During the interview, the deputy sheriff showed Licensee the iPad video taken in her home some years before.[42] Licensee stated that she "tapped" the child as shown on the video, but never hurt the child or any other child in her care.[43]

16. Investigators contacted the parents of four children in Licensee's care by telephone.[44] None of these parents expressed concerns about Licensee's treatment of their children.[45]

17. On October 13, 2016, the County child protection worker spoke on the telephone with the mother of A.N., a child in Licensee's care. A.N.'s mother stated that A.N. told her that Licensee forced him to eat food and that Licensee placed him in the basement with the lights out when he did not eat his lunch.[46]

18. After scheduling difficulties, A.N. was interviewed by the County child protection worker on December 1, 2016.[47] A.N.'s mother was present for the interview, which was videotaped.[48] A transcript of the interview was also prepared.[49]

19. During the interview, A.N. was very active physically and unable to sit still.[50] He moved around the interview room, sliding on furniture and looking under it, while

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Id. at 5-6; Test. of B. Fridgen.
[40] *Id.*
[41] Test. of S. Sisler.
[42] Ex. 2 at 10-11.
[43] *Id.*
[44] Ex. 10 at 8-9.
[45] *Id.*
[46] *Id.* at 9.
[47] *Id.*
[48] Ex. 7.
[49] Ex. 6.
[50] Ex. 7.

answering questions.[51] A.N.'s mother had to tell him his age, four years old, because A.N. was unsure.[52] A.N. stated that Licensee sent him to the basement and turned off the lights "one time" when he failed to eat his lunch.[53] He said he was in the basement a "long long long time."[54] A.N. said this occurred when he was three years old.[55] A.N. said that he did not tell his mother about Licensee putting him in the basement because he was picked up by his grandparents that day.[56]

20. A.N.'s mother wrote a letter stating that Licensee provides a caring, safe and clean day care home.[57]

21. Licensee denies that she committed any of the acts described by A.W. and A.N.[58] Licensee stated that she has never had a child in her care who refused to eat the food she prepared.[59]

22. Licensee's day care home is always clean.[60] The food Licensee serves to the children in her care is homemade and fresh.[61] Licensee allows the children in her care to select the food she serves them.[62] The children in Licensee's care like the food she serves them because they are able to select what they will eat.[63]

23. Four parents with children in Licensee's care testified that she is an excellent day care provider.[64] Each of these parents testified that they have no concerns about the manner in which Licensee conducts her daycare.[65]

24. Licensee also provided letters from five parents of children in her care stating that she is an excellent provider.[66]

25. Licensee now places her prescription medication in a safe so that the children in her care cannot obtain access to it.[67]

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[51] *Id.*
[52] *Id*.
[53] Ex. 6 at 3.
[54] *Id.*
[55] *Id*. at 4.
[56] *Id*. at 6.
[57] Ex. 104.
[58] Test. of B. Fridgen.
[59] *Id.*
[60] Test. of Stephanie Sherod.
[61] *Id.*
[62] Test. of B. Fridgen.
[63] *Id.*
[64] Test. of Elizabeth Haugen; Test. of Carla Gilsdorf; Test of Meghan O'Neill; Test. of Michael O'Neill.
[65] *Id*.
[66] Exs. 100 to 104.
[67] Test. of B. Fridgen; ex. 109.

26. By letter dated January 11, 2017, the County notified Licensee that it determined she committed serious maltreatment by allowing a child in her care to access her prescription drugs and by unreasonably interfering with the breathing of a child in her care.[68] The County also advised Licensee that its investigation revealed that she may have violated Minnesota statutes and rules by: striking a child on the head, putting a child in a dark basement, shoving food into a child's mouth, using a timer during meal times, and, punishing a child following a toileting accident.[69] The County reported these findings to the Department.[70]

27. By letter dated January 17, 2017, the County advised Licensee that the maltreatment finding was one of reoccurring maltreatment, not serious maltreatment.[71]

28. On June 2, 2017, The Department issued an order revoking Licensee's child care license, based on the County's finding of maltreatment.[72]

29. On December 20, 2017, the Department issued an amended order revoking Licensee's day care license.[73] The amended revocation order added findings that Licensee violated the child care behavioral guidance rules by subjecting children to corporal punishment: by striking a child on the head, force feeding and punishing a child for not eating fast enough, placing a child in the basement with the lights off, and, punishing a child for a toileting accident.[74]

30. Licensee timely appealed the order of license revocation and the maltreatment determination.[75]

Based on the findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services (Commissioner) are authorized to consider an appeal of maltreatment determinations, revocation and disqualification pursuant to Minn. Stat. §§ 245A.08, subd. 2a(a), 626.556, subd.10i(f) and 14.50.

2. Licensee received due, proper and timely notice of the basis for the agency's decision, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge

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[68] Ex. 3.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See* Notice and Order for Hearing, filed July 6, 2017.
[73] *See* Ex.1, Amended Notice and Order for Hearing, filed January 4, 2018.
[74] *Id.*
[75] *Id*.

3. The Administrative Law Judge concludes that the Department has proved by a preponderance of the evidence that Licensee is responsible for maltreatment by neglect of a child pursuant to Minn. Stat. § 626.556, subd. 2 (g)(1) and Minn. Stat. § 626.556, subd. 2 (k) (2018).

4. Minnesota Statutes section 626.556, subdivision 2(g)(1) defines neglect as:

> 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. . . .

5. The Department proved by a preponderance of the evidence that Licensee committed abuse by neglect of a child, as defined in Minnesota Statutes section 626.556, subd. 2(g)(1) when she permitted a child in her care to have access to her prescription medication.

6. The Department proved by a preponderance of the evidence that Licensee committed abuse by neglect of a child, as defined in Minnesota Statutes section 626.556, subd. 2(g)(1) when she covered the nose and mouth of a crying child.

7. Minnesota Statutes section 245C.02, subd. 16 defines recurring maltreatment as: “more than one incident of maltreatment for which there is a preponderance of evidence that the maltreatment occurred and that the subject was responsible for the maltreatment.”

8. The Department proved by a preponderance of the evidence that Licensee committed recurring maltreatment because she committed two instances of maltreatment.

9. Licensee failed to prove by a preponderance of the evidence that she does not pose a risk of serious harm to the children in her program pursuant to Minn. Stat. § 245C.22, subd. 4.

10. Minn. R. 9592.0395 provides, in part, that:

> A. No child shall be subject to corporal punishment or emotional abuse. "Corporal punishment" means the nonaccidental infliction of physical pain on a child by a caregiver. Corporal punishment includes, but is not limited to, rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, pinching, hitting, and spanking. "Emotional abuse" means the infliction of verbal or psychological abuse on a child by a caregiver. Emotional abuse includes, but is not limited to, name calling, ostracism, shaming, derogatory remarks about the child or child's family, and threats which threaten, humiliate, or frighten the child.

B. Food, light, warmth, clothing, and medical care shall not be withheld from the child. . . .

C. The separation of a child from a group to guide behavior must be appropriate to the age of the child and circumstances requiring the separation. . . .

D. A child separated from the group must be placed in an area or separate room that is well-lighted, free from hazards, ventilated, and open to the view of caregivers. . . .

E. No child shall be placed in a locked room to separate the child from the group.

11. The Department has demonstrated reasonable cause that License violated Minn. R. 9502.0395 by placing a child in an unlighted basement as punishment for failing to eat food; placing a child naked in front of other children as punishment for a toileting accident; by forcing a child to eat food that the child had spit up; striking a child on the head for squirming in a chair.

12. The Department has demonstrated reasonable cause for revocation of Licensee's family child care license by showing that Licensee failed to fully comply with applicable law or rule pursuant to Minn. Stat. § 245A.07, subd. 3(a).

13. Licensee failed to show by a preponderance of the evidence that she was in full compliance with those laws and rules the Department alleges were violated, at the time the Department alleges the violations of law or rule occurred pursuant to Minn. Stat. § 245A.08, subd. 3(a).

14. These Conclusions are reached for the reasons set forth in the attached memorandum, which is hereby incorporated in these conclusions by reference.

Based upon the foregoing conclusions, and for the reasons set forth in the accompanying memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

1. That the Department's determination that Licensee committed maltreatment by neglect be **AFFIRMED**.

2. That the Department's determination that Licensee committed recurring maltreatment be **AFFIRMED**.

3. That the Department's disqualification of Licensee be **AFFIRMED**.

4. That the Department's revocation of Licensee's Family Child Care license be **AFFIRMED**.

Dated: August 6, 2018

PERRY M. WILSON
Administrative Law Judge

Digitally Recorded; No Transcript Prepared.

NOTICE

This Report is a recommendation, not a final decision. 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 ten 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 ten working days to issue her final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, P.O. Box 64998, 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

The questions whether Licensee committed maltreatment and broke the rules governing the discipline of day care children turn on the credibility of a nine-year-old and a four-year-old. To complicate the credibility issue, the nine-year-old related events that occurred when she was four or five and the four-year-old related events that occurred when he was three. There is no contemporaneous corroboration for either statement. Licensee testified that none of these events occurred.

In addition to the children's statements, an iPad video is in evidence showing Licensee hit the side of the head of a very young child to correct the child's squirmy behavior. There is no apparent reason for Licensee's need to correct this child's behavior. Licensee did not attempt to provide an explanation, but argued that the video showed a very minor tap on the head, which is not deserving of any discipline.

Licensee argues that the statements of the two children should not be credited. She provided testimony indicating that A.W. did not want to attend her day care because her older sisters were no longer going to attend. Licensee also notes that A.W.'s mother was not sure whether to believe A.W. In addition, Licensee argues that A.W. should not be believed because the alleged events occurred four years before her report.

The Administrative Law Judge credits the statement of A.W. She made her statement in language that is appropriate for her age. She described the events at Licensee's child care with specific detail that leads to a conclusion that she is telling the truth. The delay in reporting is a concern, as is the failure of A.W.'s sisters to corroborate her report. On the whole, the Administrative Law Judge finds that the video recording of the interview of A.W. is compelling and sufficient to overcome the concerns raised by Licensee.

The video of the interview of the four-year-old A.N. showed a child who could not sit still. He was moving around the room, sliding on furniture and looking under it while answering questions. Nonetheless, the Administrative Law Judge finds that this statement is credible. Considering the age of the child and the fact that he was in unfamiliar surroundings, his behavior is not surprising. He told an understandable and consistent account of being placed in a dark basement by Licensee when he failed to finish his lunch.

The statements of A.W. and A.N. are also consistent with each other because both describe inappropriate discipline of a day care child for failing to eat food in the matter Licensee required. In one case, a child was required to eat food she had spit out and in the other case a child was locked in a dark basement for failing to eat his food quickly enough. The common element is Licensee's discipline for failure to eat food in the manner she required.

Licensee did not dispute that one of the children in her care obtained access to a pill of her prescription medication and took it to school with her. Licensee has addressed this violation by placing her medication in her locked safe. This endangered the child's physical well-being and constitutes maltreatment under Minn. Stat. § 626.556, subd. 2 (g)(1).

On the other side of the scale is Licensee's 38 year record of providing day care. Licensee is well regarded in the area and is well regarded by a person with expertise in the field. In addition, the testimony and letters from parents with children in Licensee's care show that she is liked and trusted by people who send their children to her day care every day. While important, these facts do not negate the credible testimony of the two children and the video on the Ipad. Licensee's history and the endorsements of parents with children in her care do not provide direct evidence that she did not treat the children as they have stated.

The Administrative Law Judge is persuaded by the statements of the two children and the iPad video that Licensee has committed maltreatment by neglect and has violated the rules governing discipline of day care children. For these reasons, the Administrative

Law Judge determined to recommend that the maltreatment determination and license revocation be affirmed.

P. M. W.