OAH 80-1800-35263

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Nancy Ostergaard of the Revocation of her Family Child Care License	**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

This matter came before Administrative Law Judge LauraSue Schlatter for a hearing on October 16, 2018, in Winona, Minnesota. The record closed on October 30, 2018, upon receipt of the parties' closing briefs.

On November 30, 2018, the Administrative Law Judge became aware of several clerical errors in the November 29, 2018, Findings of Fact, Conclusions of Law, and Recommendations (Report) in this matter. This Amended Report is issued pursuant to Minn. R. 1400.8300 (2017), with amended language underlined for ease of identification.

Susan E. Cooper, Assistant Winona County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department or DHS). Christa J. Groshek, Groshek Law, appeared on behalf of Nancy Ostergaard (Appellant).

The Department offered exhibits 1 through 13, all of which were admitted into the record. Appellant offered exhibits 100 through 135, which were also admitted into the record. Exhibits 112 (November 21, 2017, report of Vicky Nauschultz), 113 (curriculum vitae of Vicky Nauschultz), 134 (recorded audio of temporary immediate suspension (TIS) hearing), and 134A (transcript of TIS hearing) were received for the limited purpose of establishing whether Appellant had a mandated reporter obligation.

Four witnesses - Jenny Losinski, Amber Jackels, Rachel Madison, and Analisa Perkins - testified for the Department. Appellant testified on her own behalf.

STATEMENT OF THE ISSUES

1. Did the Department demonstrate reasonable cause to believe that:

   a. Appellant failed to report suspected sexual abuse in the spring of 2017 and in September 2017, in violation of her responsibilities under Minn. Stat. § 626.556 (2018);

   b. Appellant provided false and misleading information to the County regarding Appellant's use of a substitute caregiver;

c. Appellant failed to provide updated enrollment records to the County when requested to do so; and

d. Appellant operated her child care outside of the hours designated on Appellant's license application.

2. If the Department established reasonable cause to believe Appellant violated child care licensing laws and rules based on any of the conduct alleged above, did Appellant establish by a preponderance of the evidence that she was in full compliance with all applicable laws and rules at all times relevant to the Order of Revocation?

3. Did the Department establish a basis for the revocation of Appellant's family child care license pursuant to Minn. Stat. § 245A.08 (2018)?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that the Department has established reasonable cause to believe that Appellant did not meet her obligation to report suspected sexual abuse in September 2017. Further, Appellant failed to demonstrate by a preponderance of the evidence that she was not obligated to report the alleged abuse in September 2017. Appellant admitted she failed to provide updated enrollment forms in a timely manner. Thus, these two violations are established.

The Administrative Law Judge also concludes that the Department failed to establish reasonable cause to believe that Appellant provided false or misleading information to the County regarding Appellant's use of a substitute provider, or that Appellant failed to provide ~~updated enrollment forms in a timely manner~~ accurate information about her operational hours. As a result, the Administrative Law Judge concludes that the Department erred when it relied on these two violations to support its decision to revoke Appellant's child care license.

Based on these conclusions, the Administrative Law Judge respectfully recommends that the Commissioner of Human Services (Commissioner) **RESCIND** the Order of Revocation dated April 17, 2018. The Administrative Law Judge further recommends that the Commissioner issue Appellant a license with conditions as outlined in the accompanying memorandum, and a impose a fine in the amount of $500 on Appellant.

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

FINDINGS OF FACT

I. Appellant's Family Child Care Background

1. Appellant continuously operated as a licensed family child care provider in her home in Winona, Minnesota since 1988. On October 4, 2017, the Department issued a temporary immediate suspension (TIS) against Appellant's license. The order was upheld on January 17, 2018, and she has not operated her child care since that date.[1] Prior to living in Winona, Appellant lived in Duluth where she provided child care in her home for 13 years.[2] Appellant loved providing child care.[3]

2. Winona County Social Services Department (County) administers family child care provider licensure for Winona County.[4]

3. Appellant holds a C-3 license, which allows her to have up to 14 children in care if two caregivers are present. When only one caregiver is present, Appellant operates under a C-2 license, permitting her to have up to 12 children in her care.[5]

4. Appellant's home is an open-concept, ranch-style home. Appellant primarily used the family room on the first floor and kitchen area for her child care. Appellant used the dining room, which has French doors, for infants' naps.[6]

5. In September 2017, Appellant had seven children regularly attending her child care: a 21-month-old, a 2-year-old, two 3-year-olds, and three school-aged children. The three school-aged children (ages ten, nine, and approximately six years old) attended only after school. In addition to the seven regular attendees, Appellant also had three "drop-in" children from the same family: a fifth grader, a kindergartner, and a three-year-old.[7]

6. Appellant submitted 16 letters of reference in support of Appellant and her husband from past child care parents and children, family members, friends, and other community members.[8] These letters describe multiple examples of superior child care

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[1] Testimony (Test.) of Nancy Ostergaard; Test. of Rachel Madison.; Exhibit (Ex.) 11.
[2] Test. of N. Ostergaard.
[3] *Id.*
[4] Test. of Jenny Losinski; Test. of R. Madison.
[5] *Id.*
[6] Test. of N. Ostergaard.
[7] Ex. 134. Prior to early September, Appellant also had two other children (ages 4 and 5) who attended her child care. When the older child started school in Fall 2017, the children moved to a new child care at the school. Appellant continued to list them on her roster as they might have attended Appellant's child care on school breaks. *Id.*
[8] *See* Ex. 114 (Letter of reference from G.S.); Ex. 115 (Letter of reference from A.B.); Ex. 116 (Letter of reference from C.S.); Ex. 117 (Letter of reference from B.S.); Ex. 118 (Letter of reference from F.R.); Ex. 119 (Letter of reference from J.C.); Ex. 120 (Letter of reference from G.R.); Ex. 121 (Letter of reference from B.M.); Ex. 122 (Letter of reference from K.S.); Ex. 123 (Letter of reference from J.P.); Ex. 124 (Letter of reference from J.R.); Ex. 125 (Letter of reference from S.J.); Ex. 126 (Letter of reference from H.S.); Ex. 127 (Letter of reference from J.O.); Ex. 128 (Letter of reference from A.T.); Ex. 129 (Letter of reference from J.O.).

that Appellant and, at times, her husband, have provided.[9] Past child care attendees stated they have continued to keep in touch with Appellant and her husband through the years.[10] One parent whose child attended Appellant's daycare until the TIS typed a four-page, single-spaced letter describing Appellant's positive child care environment, and Appellant and her husband, in great detail. The letter writer stated, "I intend to continue bringing [my child] once [Appellant's licensing matter] has been resolved and without hesitation, I would proudly continue to recommend Nancy to care for other children."[11]

7. Appellant also submitted numerous favorable parental evaluations from 2015 and 2017.[12]

II. Appellant's Husband

8. Appellant and her husband, Jim Ostergaard (Mr. Ostergaard), have been married since 1970 and have two grown children.[13] They reside together in their home in Winona.[14]

9. In 1993, Mr. Ostergaard was diagnosed with secondary progressive multiple sclerosis (MS).[15]

10. Mr. Ostergaard worked as an accountant for several years until his retirement in 2005. He continues to do some accounting work for private clients from his home.[16]

11. Because of MS, Mr. Ostergaard has limited mobility. He uses a walker to get around the house due to difficulty with his gait and numbness in his legs. Mr. Ostergaard also struggles with balance and getting up from a chair.[17]

12. Appellant listed Mr. Ostergaard as Appellant's designated emergency substitute caregiver on her licensing documents filed with the County licensing agency.[18]

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[9] *See* Exs. 114-117, 119-129.
[10] Exs. 116, 117.
[11] Ex. 125.
[12] *See* Exs. 103-111.
[13] *Id*.
[14] *Id*.
[15] Ex. 134.
[16] *Id*.
[17] *Id.;* Test. of N. Ostergaard.
[18] Test. of R. Madison; Ex. 2 at 3. Although Ms. Losinski testified that Appellant did not list anyone as her "substitute" on her application paperwork, Appellant indicated that she used a substitute by marking "yes" to question 6 on the Family Child Care Licensing Checklist, noted that she "seldom" used a substitute, and listed her husband as her substitute for her "emergency plan." The form does not contain a spot to list the name of a substitute. Ex. 2 at 10-11.

Based on his training, he was authorized to provide care for up to 30 hours in a 12-month period.[19] Appellant told the County Mr. Ostergaard "seldom" served as a substitute.[20]

13. Parents knew that Mr. Ostergaard occasionally provided substitute care.[21] The County received no feedback that Mr. Ostergaard was unable to care for the children.[22] At the hearing in this matter, one parent noted that Mr. Ostergaard had her child ready to go when she arrived to pick up her child on one occasion.[23] Another parent stated that Mr. Ostergaard was watching her children on two or three occasions when she arrived to pick up the children. She testified that she had no problem with Mr. Ostergaard providing substitute care.[24]

14. While Appellant was operating her child care, Mr. Ostergaard was usually working in the office in the basement. The child care children were seldom in the basement. When they did go down to the basement, Appellant went with them.[25]

III. The Twins - A.T. and L.T.

15. A.T. and L.T. were three-year-old twins who attended Appellant's child care from June 2014 to September 28, 2017.[26]

16. The twins' parents, B.T. and T.T., were married when the twins were born, but are now divorced.[27]

17. The twins primarily live with B.T. although they stay with T.T. approximately every other weekend.[28]

18. B.T. taught the twins, from the time they were very young, anatomically correct terms for female and male body parts, including the vagina and penis.[29] B.T. did this so that the twins could more accurately describe their body parts if anything were to happen to them.[30]

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[19] Test. of J. Losinski. Ms. Losinski initially noted that Mr. Ostergaard had sufficient training to serve as a substitute for 30 days. She further stated that the Department was not alleging that Mr. Ostergaard was not qualified to provide child care for up to 30 days. Instead, the Department had concerns about Mr. Ostergaard's ability to provide care due to MS, and Appellant's lack of candor regarding how often Mr. Ostergaard subbed for her. Ms. Losinski later corrected this testimony to state that Mr. Ostergaard could substitute for up to 30 hours based on his completed training. *Id.* Appellant testified that Mr. Ostergaard did have the additional training (in First Aid and CPR) required to serve as a substitute for 30 days. However, the record lacks documentation of these trainings. Test. of N. Ostergaard.
[20] Ex. 2 at 11.
[21] Test. of N. Ostergaard.
[22] Test. of R. Madison.
[23] Test. of Amber Jackels.
[24] Test. of Analisa Perkins.
[25] Test. of N. Ostergaard.
[26] Ex. 134.
[27] *Id*.
[28] *Id*
[29] *Id.*
[30] *Id*.

19. The twins attended Appellant's child care full time. Initially, the twins attended from approximately 9:00 a.m. until 5:00 p.m. In June 2017, the twins' schedule changed to approximately 10:00 a.m. to 6:15 p.m. because of a change in B.T.'s work schedule.[31]

20. The twins enjoyed being at Appellant's child care, and B.T. was pleased with the care that Appellant provided. In her July 2017 parent review of Appellant's child care, B.T. stated "[i]t's like a family."[32]

21. B.T. occasionally sought advice from Appellant on parenting issues such as potty training, biting, and hitting. Appellant also talked to B.T. when she had concerns about the twins.[33]

22. When the twins were around two-and-one-half, they began to use the words "vagina" and "penis" at Appellant's child care. Appellant had concerns that other children might learn these words and she was not sure other child care parents wanted their children using these words.

23. Prior to April 2017, the twins began using the word "vagina" in a song and danced while singing the song.[34] Appellant mentioned this to the twins' mother. B.T. told Appellant that the twins had sung the song once or twice at home and she corrected them when it happened. B.T. mentioned that the twins liked the movie, "Sing," and were substituting" shake your vagina" for "shake your booty" from a song from that movie.[35]

24. Appellant discussed concerns she had about the twins' language and behavior with her friend and mentor, Ms. Janice Rudolph.[36]

IV. Sexual Abuse Allegation in Spring 2017

25. J. was a 12-year-old boy who attended Appellant's child care after school. As part of J.'s routine, he would do homework in the kitchen next to the family room, along with other school-age children.[37]

26. At this time of day, the twins spent time in their high chairs eating snacks, or playing in the family room.[38]

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[31] *Id*.
[32] *Id*; Ex. 107.
[33] Ex. 134.
[34] Test. of N. Ostergaard.
[35] Ex. 134.
[36] Ex. 124.
[37] Test. of N. Ostergaard. At the time of the hearing, J. was 13 years old.
[38] *Id*.

27. In approximately April 2017, one of the twins told B.T. that she did not want J. to "lick my vagina." B.T. asked her daughter if that had happened but B.T. did not recall how her daughter answered the question.

28. B.T. was very concerned about what her daughter said, and discussed it with Appellant that same day. Appellant told B.T. that J. could not have done what the child alleged.[39] B.T. and Appellant discussed the child care routine and lack of opportunity for the alleged incident to have occurred. J. was never alone with the twins in the bathroom or other parts of the home. He would occasionally play with the twins in the family room on the first floor.[40]

29. B.T. did not believe her daughter's statement. Neither B.T. nor Appellant reported this allegation to law enforcement or Child Protection Services.[41]

30. Following the alleged incident, the twins' behavior did not change toward J. or the child care. The twins continued to say that they did not want to go home at pick-up time.[42]

31. J. left Appellant's child care about two weeks to a month after the twins made the allegation.[43]

V. Appellant's Child Care License Renewal Process July-September 2017

32. Current licensing requirements for obtaining a family child care license include: an application, a possible fire marshal inspection, an orientation meeting, CPR, first aid and sudden infant unexpected death (SUID) training, a "supervising for safety" course, and a yearly licensing visit. The County issues each family child care license for two years but providers receive a relicensing visit from a licensor each year.[44]

33. On June 30, 2017, the County sent Appellant a letter and forms packet for Appellant's license renewal.[45] Appellant's license was due for renewal on October 1, 2017.[46] The County requested that Appellant return the paperwork by July 17, 2017, which was quite a bit further in advance than in previous years.[47]

34. Appellant received the following renewal paperwork from the County: Family Systems Licensing application, Family Child Care Licensing Checklist,[48] Release

[39] Ex. 134.
[40] Test. of N. Ostergaard.
[41] *Id*.
[42] *Id*.
[43] Test. of R. Madison; Test. of N. Ostergaard; Ex. 134.
[44] Test. of J. Losinski.
[45] Ex. 1.
[46] *Id*.
[47] Ex. 1; Test. of N. Ostergaard.
[48] The Family Child Care Licensing Checklist was previously called a Monitoring Application. Test. of R. Madison.

of Information for Background Studies, and a Release of Information for Juveniles, which did not apply to Appellant's child care. [49]

35. Appellant completed the licensing application the same way she had in the past. She listed her core hours of operation but also indicated that she would provide care earlier or later if needed. She provided care during these additional hours for the flexibility and convenience of parents who had varied work schedules.[50]

36. The licensing application requests program information such as program location, license history, information on the controlling agent and household members, the days and hours of operation, along with an agreement the licensee must sign regarding following all rules and requirements of family child care licensing.[51]

37. The County also requested enrollment information for children at Appellant's child care. The enrollment information form asks for each child's name, date of birth, age group, enrollment date, parental contact information, and the child's days and hours of attendance. For children no longer in care, the form asks for the enrollment end date.[52] The County uses this information to determine if licensees have properly enrolled children in care, to send out parent evaluations, and to help evaluate whether licensees are complying with the rules regarding provider to child ratios and license capacity.[53]

38. The County received Appellant's application materials on July 19, 2017. Appellant included a completed enrollment form with the other materials. Appellant did not update her enrollment form between July and September 2017.[54]

39. Appellant's application initially failed to include Appellant's own personal information as a household member of Appellant's household and lacked a completed worker's compensation form. Appellant provided the County both of these pieces of information during the relicensing process.[55]

40. Rachel Madison, a Winona County licensing social worker, conducted the in-home relicensing visit. This was Ms. Madison's first licensing case.[56]

41. Ms. Madison arrived at Appellant's home around 9:00 a.m. on September 7, 2017. Appellant and her husband were both present, although Mr. Ostergaard went to the living room and watched television during the visit. Ms. Madison did not speak with

[49] Ex. 1; Test. of R. Madison.
[50] Test. of N. Ostergaard; Ex. 2 at 5.
[51] Test. of J. Losinski; Ex. 1.
[52] Test. of J. Losinski.
[53] *Id.*; Test. of R. Madison.
[54] Test. of J. Losinski.
[55] *Id*.
[56] Test. of R. Madison.

Mr. Ostergaard, but she could easily have done so, since he was in a neighboring room where she could see and hear him.[57]

42. One child was asleep in another room when Ms. Madison arrived. Additional children arrived later in the morning.[58]

43. During the visit, Ms. Madison conducted a walkthrough of Appellant's home and reviewed Appellant's files and records, including children's files, Appellant's training records, and "pack and play" crib inspection forms.[59]

44. Appellant listed her hours of operation as 7 a.m. to 5:30 p.m. on her application, but noted that she provided care "earlier or later if needed," Monday through Friday, and provided care "upon request" on Saturdays and "time as needed" on Sundays.[60] Ms. Madison did not discuss these hours with Appellant at the relicensing visit. She did not ask Appellant what she meant when she said she provided care "earlier or later if needed," "upon request," or "[] as needed." Ms. Madison had the sense that Appellant worked "a lot of hours" to accommodate parents but did not have concerns about the number of hours Appellant provided child care at the time.[61]

45. Ms. Madison also reviewed with Appellant the enrollment form Appellant submitted with her application. All of the names on Appellant's enrollment record indicated "C" for current. Ms. Madison did not ask Appellant why she did not list "P" or "past" for any children on the form.[62]

46. Prior to the relicensing visit, Ms. Madison reviewed the hours of care Appellant had listed in her application materials for each enrolled child. Based on Appellant's application responses, it was apparent that some of the children attended Appellant's child care outside of Appellant's "core hours," or had no specific hours listed at all. Ms. Madison did not have concerns about the listed hours at the time she recommended relicensure.[63]

47. Appellant did not have "medication permission" forms on file for the application of sunscreen, although she did have different forms on file. The forms Appellant had were "permission to administer" forms that parents completed to permit Appellant to apply sunscreen. Appellant did not provide these forms to Ms. Madison because Ms. Madison requested "medication" forms. Appellant believed the medication forms were for medications like cough syrup. Ms. Madison did not ask Appellant for her "permission to administer" sunscreen forms. Appellant had signed "permission to

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[57] *Id*.
[58] *Id*.
[59] *Id.*
[60] Ex. 2 at 5.
[61] Test. of R. Madison.
[62] *Id.*
[63] *Id.*

administer" forms from all of her child care parents.[64] Ms. Madison provided Appellant with a template form for future use.[65]

48. Ms. Madison found that Appellant's "pack and play" monthly inspection and annual recheck forms were incomplete.[66] Appellant told Ms. Madison she had completed the required checks but had forgotten to document them. Appellant completed and backdated the required forms during the relicensing visit.[67]

49. Ms. Madison asked Appellant how often Mr. Ostergaard served as a substitute caregiver. When asked if he subbed for more than 30 days in a 12-month period, Appellant stated it was "much less than that." Ms. Madison did not ask Appellant to provide documentation on how often Appellant used Mr. Ostergaard. Ms. Madison also did not ask what Appellant meant when she wrote "seldom" in response to the question on her application regarding the frequency with which Mr. Ostergaard served as a substitute caregiver.[68]

50. Following the visit, Ms. Madison asked Appellant to provide further information on her attendance at certain trainings, sent Appellant a template for the medication form, and informed Appellant that she needed to test her smoke alarms.[69]

51. Ms. Madison considered these minor infractions and recommended that Appellant's license be renewed. The renewal became effective October 1, 2017.[70] Ms. Madison noted three items in a correction order accompanying her relicensing recommendation: lack of documentation of monthly "pack and play" inspections from October 2015 to December 2015; lack of documentation for annual recall checks for "pack and plays" or cribs in 2016 and 2017; and lack of "medical permission" forms on file for any children.[71]

52. Appellant subsequently corrected all of the items on the correction order.[72]

VI. Sexual Abuse Allegation in September 2017

53. On Thursday, September 28, 2017, B.T. picked up the twins from Appellant's child care around 6:15 p.m.[73]

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[64] Test. of N. Ostergaard.
[65] Test. of R. Madison.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id.*; Ex. 3.
[71] Ex. 3.
[72] Test. of R. Madison.
[73] Ex. 134.

54. During the regular bedtime routine that evening, A.T. told her mother, “Papa Jim didn’t do the sex to me.”[74]

55. B.T. asked both twins questions about this statement and through the course of the conversation, which lasted approximately ten minutes, the twins told B.T. that “Papa Jim” had touched their vaginas. B.T. asked the twins where Appellant was when “Papa Jim” touched them. A.T. and L.T. said that Appellant was at the doctor at the time.[75]

56. The twins could not identify a specific timeframe for the alleged incident. B.T. was not sure if the alleged incident happened more than once.[76]

57. On Friday, September 29, 2017, Appellant received a call from B.T., who stated that the twins had told her that “Papa Jim” had touched their vaginas.[77]

58. B.T. decided not to bring the twins to Appellant’s child care that day because she was concerned about the twins’ safety.[78]

59. Appellant told B.T. that she was certain that Mr. Ostergaard had not touched A.T. and L.T. inappropriately. B.T. said she was going to discuss the incident with the twins again over the weekend.[79]

60. On Sunday, October 1, 2017, Appellant and B.T. spoke again about the allegation. This time, some of the information B.T. received from the twins changed. The twins told B.T. that Mr. Ostergaard touched one, but not both of them. After the Sunday discussion, Appellant did not report the allegations because she felt she did not have a reason to believe the allegations were true. Appellant did not think B.T. planned to report the twins’ allegations. However, B.T., a mandated reporter, decided to make a report to the County.[80]

61. Appellant did not report the twins’ allegations regarding Mr. Ostergaard because she did not find them credible based on Mr. Ostergaard’s lack of opportunity to commit the alleged acts and his limited mobility.[81]

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[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id.;* Test. of N. Ostergaard.
[78] *Id*.
[79] *Id.*
[80] *Id.;* Test. of R. Madison.
[81] Test. of N. Ostergaard.

VII. County Investigation into September 2017 Sexual Abuse Allegation

62. On October 2, 2017, Winona County Community Services received a child protection report from B.T. regarding the twins. The report alleged sexual abuse of the twins by Mr. Ostergaard.[82]

63. A team of county social workers screened the report the day it came in.[83]

64. The County assigned Brian Stamschror as the child protection investigator and Ms. Madison as the licensing investigator.[84] Ms. Madison worked with Mr. Stamschror to coordinate scheduling of forensic interviews with the twins.[85]

65. On October 4, 2017, following the twins' forensic interviews, the County recommended a TIS of Appellant's license.[86]

66. Upon issuance of the TIS order, the County believed it was required to notify all parents of current and past enrollees in the child care program of the TIS.[87] Ms. Madison attempted to reach all of the parents on Appellant's most recent enrollment list from the relicensing paperwork by telephone. She also sent letters.[88]

67. On October 5, 2017, Ms. Madison called and left a voicemail for Appellant requesting further information about parents of current and former enrolled children. She sent Appellant an email that same day, and sent Appellant a letter by certified mail on October 6, 2017. Through these communications, Ms. Madison told Appellant she needed updated enrollment records in order to notify all parents of Appellant's TIS.[89]

68. Appellant did not respond to Ms. Madison's requests. Ms. Madison's email did not receive a "bounce back." Appellant did not pick up the certified letter.[90]

69. Because Ms. Madison did not receive a response from Appellant, she began contacting the food program and child care assistance in order to learn more about the children enrolled in Appellant's child care program.[91]

70. Through this research, Ms. Madison learned of nine children who had attended Appellant's child care, but whom Appellant had not listed on the original enrollment form Appellant provided at relicensing. Of those nine, Ms. Madison learned

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[82] Ex. 10 at 2; Ex. 134.
[83] Test. of R. Madison.
[84] *Id.*
[85] *Id.*
[86] *Id*.
[87] Minn. R. 9502.0341, subp. 10 (2017); Test. of R. Madison. The rule requires that parents of children in care be notified. It does not address parents of children who were previously enrolled, but no longer in care.
[88] Test. of R. Madison.
[89] *Id.*
[90] *Id.*
[91] *Id*.

that seven had stopped attending Appellant's child care prior to Ms. Madison's relicensing visit.[92]

71. Ms. Madison is not sure how often the food program updates their records, although she believes it is monthly. She is unsure of how often a child care operator is required to update their enrollment information with the food program.[93]

VIII. TIS Recommendation and Hearing

72. On October 4, 2017, the County recommended that the Department order the TIS of Appellant's license. The Department issued the TIS on October 4, 2017, and Appellant timely appealed.[94]

73. After the TIS was first issued by the County, Appellant told some parents that she and her husband were sick and could not provide care.[95]

74. If the TIS had not been affirmed, Appellant would have been able to resume child care operations within a few weeks.[96]

75. When a license holder is issued a TIS, the license holder is required to post the TIS notification in a conspicuous place at the child care. Appellant was not obliged to inform parents of the TIS over the phone.[97]

76. Ms. Madison never visited Appellant's home to determine whether Appellant posted the notification.[98] However, neither the County nor the Department alleged that Appellant continued to operate her child care program once the TIS was issued.

77. On December 1, 2017, an Administrative Law Judge conducted a TIS hearing, with closing arguments subsequently conducted on December 5, 2017, by telephone.[99]

78. On December 19, 2017, the Administrative Law Judge issued an order affirming the TIS.[100]

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[92] *Id.*
[93] *Id.*
[94] Notice of Hearing at 2.
[95] Test. of A. Perkins; Test. of R. Madison.
[96] *Id*.
[97] *Id.*
[98] *Id*.
[99] *In re the Appeal by Nancy Ostergaard of the Order for Temporary Immediate Suspension*, No. 68-1801-34758, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION (Minn. Office Admin. Hearings Dec. 19, 2017).
[100] *Id.*

79. On January 17, 2018, the Commissioner affirmed the TIS.[101]

IX. March 14, 2018, Interview

80. Mr. Stamschror and Ms. Madison interviewed Appellant on March 14, 2018, in connection with the investigation of the alleged maltreatment against Mr. Ostergaard. Mr. Stamschror conducted the majority of the questioning.[102]

81. Appellant discussed how often she used Mr. Ostergaard as a substitute caregiver. She described Mr. Ostergaard's overall functioning, and explained that his MS affects his balance. He uses a cane or walker, or holds onto furniture when walking around the home. Although he can use his hands, he sometimes struggles with tasks like carrying dishes.[103]

82. At the interview, Appellant said she used Mr. Ostergaard as a substitute twice in September 2017.[104]

83. When asked about the April and September 2017 sexual abuse allegations, Appellant told Mr. Stamschror and Ms. Madison that she did not report them because she did not believe the incidents happened.[105]

84. As part of her relicensing application, Appellant was required to list all the children who came to her home for child care. Ms. Madison presented Appellant with a list of nine additional names of children listed as enrolled in Appellant's child care based on Ms. Madison's research. Appellant told Ms. Madison that she thought she had initially listed all children enrolled in her care and that these additional names must be "drop ins" or infrequent.[106]

85. Appellant did not use "check in/check out" sheets to determine when children attended her child care.[107] Because Appellant accepted "drop ins" and provided flexible hours, Appellant believed she faced more challenges in reporting all children in her care than a child care provider with set hours and limited enrollment.[108]

86. During the interview, Mr. Stamschror and Ms. Madison stated that they had 45 days to complete their investigations. While Mr. Stamschror and Ms. Madison meant that they were up against their deadline already, Appellant misunderstood them and thought they had an additional 45 days to complete their investigation.[109]

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[101] Notice of Hearing at 2.
[102] Test. of R. Madison.
[103] *Id*.
[104] *Id*; Test. of N. Ostergaard.
[105] Test. of R. Madison.
[106] *Id*.
[107] *Id*.
[108] *Id.*
[109] *Id*.

X. Subsequent County Actions in March and April 2018

87. On March 21, 2018, Ms. Madison sent Appellant an email re-requesting updated enrollment forms, including information on the children Appellant had not included on the initial enrollment forms.[110]

88. Ms. Madison continued to research Appellant's enrollment records.[111]

89. On April 3, 2018, after Winona County determined that maltreatment by Mr. Ostergaard was not substantiated, Ms. Madison emailed a recommendation regarding Appellant's child care license to Tim Hennessey, a Department child care licensor. Ms. Madison recommended a conditional license with 20 conditions.[112]

90. Before sending Mr. Hennessey the email recommending a conditional license, Ms. Madison told Mr. Hennessey she wanted to recommend revoking Appellant's license because she was uncomfortable with the allegations against Mr. Ostergaard.[113] Mr. Hennessey discouraged Ms. Madison from recommending revocation, because he did not think it was justified.[114]

91. On April 4, 2018, Mr. Hennessey contacted Ms. Madison after receiving her recommendation for a conditional license. He noted Ms. Madison's multiple concerns. He felt that revocation might be more appropriate than he had originally thought. Mr. Hennessey asked Ms. Madison to prepare a timeline of her investigation and a summary of her concerns to support a recommendation of revocation.[115] Ms. Madison prepared the requested timeline and summary.[116]

92. Throughout the investigation and into mid-April 2018, Ms. Madison and Mr. Stamschror discussed the greater burden of proof needed for a maltreatment determination compared to a negative licensing action.[117]

93. On April 16, 2018, Winona County Community Services notified Mr. Ostergaard and Appellant that the County had closed its investigation and determined no maltreatment occurred.[118]

94. On April 17, 2018, the Department issued an Order of Revocation against Appellant's child care license.[119] The Order of Revocation stated that maltreatment had

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[110] *Id*.
[111] *Id*.
[112] Ex. 10. Ms. Madison's letter to DHS is dated April 2, 2018, but it was attached to an email and sent to Mr. Hennessey on April 3, 2018. Test. of R. Madison.
[113] Test. of R. Madison.
[114] *Id*.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] Ex. 132.
[119] Ex. 11.

not been determined following the allegations of sexual abuse. The bases for the revocation, as stated in the April 17, 2018, Order of Revocation, were:

- Failure to report suspected sexual abuse of children in September 2017;
- Failure to report suspected sexual abuse in the spring of 2017;
- Provision of false or misleading information when stating children were left in the care of a substitute caregiver only two times in September 2017;
- Failure to provide updated enrollment records as requested by the County during the licensing investigation; and
- Operation of the family child care outside the hours of care listed on the 2017 family child care re-licensing application.

The Order of Revocation characterized these violations as serious and chronic.[120]

95. On April 18, 2018, Ms. Madison received Appellant's updated enrollment form. Ms. Madison never provided this document to DHS and did not inform DHS that she received it because she had requested this document several times over the course of a number of months, and the Department had already issued the revocation.[121]

96. Ms. Madison admitted that although the sexual abuse allegation was unsubstantiated, she still had concerns about whether the alleged incident could have occurred, and this concern factored into her decision to request revocation of Appellant's license. Ms. Madison listed it in her summary of concerns to DHS. However, the Order of Revocation did not include this as a basis for the revocation.[122]

97. The Order of Revocation is also not based on Mr. Ostergaard's alleged physical inability to care for the children, although Ms. Madison indicated she was concerned about his physical functioning when she recommended revocation. Ms. Madison never requested documentation from Mr. Ostergaard regarding his medical condition and limitations. Nor did Ms. Madison ask him how many hours he worked as a substitute caregiver.[123]

98. Appellant timely appealed the Order of Revocation.[124]

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[120] *Id.* at 3-4.
[121] Ex. 135
[122] Test. of R. Madison. Ex. 11.
[123] *Id*.
[124] Ex. 12.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 245A.08 (2018).

2. The Department has complied with all substantive and procedural requirements of law and rule and this matter is properly before the Administrative Law Judge and the Commissioner.

3. The Commissioner may suspend or revoke a license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule.[125]

4. The Commissioner may also revoke a license if a licensee knowingly withholds relevant information or gives false or misleading information to the Commissioner in connection with a license application, in connection with a background study, during an investigation, or regarding compliance with applicable laws and rules.[126]

5. Before revoking a license, Minn. Stat. § 245A.04, subd. 6 (2018) requires that the Commissioner "consider the facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, [and] available consumer evaluations of the program . . . ."[127]

6. In this proceeding, the Department must demonstrate reasonable cause exists to revoke Appellant's license by substantiating its allegations.[128] At a hearing on a licensing sanction, the Department may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that Appellant failed to comply fully with applicable law or rule. If the Department meets its burden, the burden of proof shifts to Appellant to show by a preponderance of the evidence that she was in full compliance with the laws or rules that the Department alleges she violated at the time the alleged violations occurred.[129]

7. The Maltreatment of Minors Act requires "a person who knows or has reason to believe a child is being . . . sexually abused, . . . or has been . . . sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, agency responsible for assessing or investigating the report . . . [if

[125] Minn. Stat. § 245A.07, subd. 1(a), subd. 3(a)(1) (2018).
[126] Minn. Stat. § 245A.07, subd. 3(a)(3) (2018).
[127] Minn. Stat. § 245A.04, subd. 6.
[128] Minn. Stat. § 245A.08, subd. 3(a).
[129] *Id.*

the person is . . . (1) a professional or professional delegate who is engaged in the practice of . . . child care . . . ."[130]

8. The Department failed to establish reasonable cause to believe that Appellant had reason to believe, in the spring of 2017, that B.T.'s daughters were being, or had been, sexually abused within the preceding three years.

9. The Department established reasonable cause to believe that, in September 2017, Appellant had reason to believe that B.T.'s daughters were being, or had been, sexually abused within the preceding three years but that Appellant failed to make a report as required by Minn. Stat. § 626.556, subd. 3.

10. Appellant failed to prove by a preponderance of the evidence that, in September 2017, she had no reason to believe that B.T.'s daughters were being, or had been, sexually abused within the preceding three years, or that Appellant made the reports required by Minn. Stat. § 626.556, subd. 3.

11. The Department failed to present evidence to establish reasonable cause to believe that Appellant provided false or misleading information when she stated that children were left in the care of a substitute caregiver two times in September of 2017.

12. The Department failed to present evidence to establish reasonable cause to believe that Appellant provided false or misleading information regarding the hours she provided child care when she completed her 2017 relicensing application, or that she operated outside of the hours she indicated she would operate on her relicensing application.

13. The Appellant conceded that she failed to provide updated enrollment records in a timely manner, as requested by the County during the licensing investigation.

14. When applying sanctions, the Commissioner must 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.[131]

15. The Department has not shown reasonable cause exists for revocation of Appellant's family child care license.

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

RECOMMENDATION

The Department has not shown reasonable cause for the revocation of Appellant's family child care license. Therefore, the Administrative Law Judge respectfully

[130] Minn. Stat. § 626.556, subd. 3; Minn. R. 9502.0375, subp. 1 (2017). "Immediately" is defined "as soon as possible but in no event longer than 24 hours." Minn. Stat. § 626.556, subd. 3(e).
[131] Minn. Stat. § 245A.07, subd. 1(a).

recommends that the Commissioner **RESCIND** the Order of Revocation, and impose a Conditional License and Fine on Appellant's family child care license.

Dated: December 3, 2018

LAURASUE SCHLATTER
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 (2018), 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 64254, St. Paul, MN 55164-0254, (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 (2018). 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 (2018), 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

I. Introduction and Burdens of Proof

The Department relies on four main grounds to revoke Appellant's family child care license. First, the Department asserts Appellant failed to report suspected sexual abuse in violation of mandated reporter requirements on two occasions. Second, the

Department argues that Appellant provided false or misleading information to the County regarding Appellant's use of a substitute provider. Third, the Department states that Appellant failed to provide updated enrollment forms in a timely manner. Fourth, the Department asserts that Appellant operated outside of the hours designated in her license application.

The Department had the burden to show reasonable cause to believe that Appellant violated the applicable laws and rules for each of these grounds to support the revocation. For each violation for which the Department demonstrated reasonable cause, the burden shifted to Appellant to demonstrate that she was in full compliance with the applicable laws and rules at the times the Department said she violated them.

For the reasons discussed below, the Administrative Law Judge concludes that the Department established reasonable cause to believe that Appellant did not meet her obligations under the Maltreatment of Minors Act when she chose not to immediately report the twins' allegations of abuse in September 2017. Appellant failed to demonstrate by a preponderance of the evidence that she did not have an obligation to report the alleged abuse in September 2017. Appellant admitted she failed to provide the updated enrollment forms in a timely manner. Thus, these two violations are established.

However, the Administrative Law Judge finds that the Department failed to demonstrate Appellant provided false or misleading information to the County regarding Appellant's use of a substitute provider, or that Appellant failed to provide accurate information about her operational hours ~~updated enrollment forms in a timely manner~~. Therefore, the Administrative Law Judge concludes that the Department erred when it relied on these two violations to support its decision to revoke Appellant's child care license.

II. Appellant's Failure to Report the September 2017 Allegations of Sexual Abuse Violated the Mandated Reporter Requirements

A.T. and L.T., who were approximately three, and three-and-a-half, at the relevant times, told Appellant, their child care provider, that in the spring of 2017, another daycare child, and in the fall of 2017, Appellant's husband, had engaged in sexual activity with them. B.T., the twins' mother, reported and discussed the first allegations with Appellant. Both B.T. and Appellant felt there was not a reason to believe the twins had been abused and did not report the first allegations to the County. B.T. reported and discussed the second allegations involving Appellants husband with Appellant. Again, Appellant did not believe there was reason to believe the twins had been abused and did not report the second allegations to the County. B.T. did report the second allegations to the County. The Administrative Law Judge concludes that Appellant's decision to not report the first incident did not amount to a violation of her responsibilities as a mandated reporter, but that her failure to report the second incident was a violation of those responsibilities.

A. Alleged Abuse in Spring 2017

In April 2017, A.T. and L.T. alleged J., a 12-year-old boy who attended Appellant's day care, had sexually abused them.[132] Even before they made the allegations against J., the twins had used frequent explicit language and demonstrated behaviors, with their "shake the vagina" dance and song. Appellant found the twins' behaviors and language unusual and concerning enough to raise the matter with B.T. and with Appellant's friend and mentor, Ms. Rudolph. Nonetheless, after Appellant discussed the allegation with B.T., neither of them reported the allegation although they were both mandated reporters.[133]

In the spring of 2017, Appellant felt certain that J. had not sexually abused the twins. She knew that she had not left J. alone with the girls, and the girls' mother shared her assessment of the allegations. Thus, Appellant's decision not to report the alleged abuse by J. in the spring of 2017 was not a violation of her responsibilities under Minn. Stat. § 626.556, subd. 3.

B. Alleged Abuse by Appellant's Husband in September 2017

The specific articulable facts applicable to the twins' situation changed, once they made an additional allegation that they were being sexually abused. Regardless of who the twins claimed had committed the abuse, the facts were that Appellant had twin sisters in her care who used frequent explicit language, acted out in ways that she found unusual and concerning for their age, and had twice reported being sexually abused. Appellant does not dispute any of these facts. She argues that, because she did not have reason to believe Mr. Ostergaard sexually abused the twins, she had no obligation to report the girls' allegations. Under the circumstances, the Administrative Law Judge finds that Appellant had an obligation to report the allegations and to let the investigative process move forward, for the protection of the children.

C. Analysis

The Department ultimately determined that the alleged maltreatment by Mr. Ostergaard did not occur.[134] However, the underlying question of whether maltreatment occurred is not at issue in this case. What is at issue is whether Appellant failed to comply with her obligation to report suspected maltreatment as required under Minn. Stat. § 626.556, subd. 3. The Department alleges that Appellant was required as a mandated reporter to report two allegations of sexual abuse at her child care, but did not do so. Appellant argues that at no time did she know or have reason to believe that the abuse of A.T. or L.T. had occurred, and therefore, she was not required to report either set of allegations.

The Minnesota Court of Appeals has explained that the Act's phrase "knows or has reason to believe" sets forth "both a subjective and an objective standard for

[132] Test. of N. Ostergaard; Test. of R. Madison; Ex. 134.
[133] Test. of N. Ostergaard; Ex. 134.
[134] Ex. 132.

mandatory reporting . . ."[135] and that "'knows' is subjective; 'reason to believe' is objective."[136] Citing the Minnesota Supreme Court, the court explains that:

> The supreme court highlighted the different between the subjective "know" and the objective "reason to believe" standards, stating "a professional is free to include in a report that although the report is mandated because the reporter has 'reason to believe' that a child has been abused, the reporter does not hold a personal belief that the child has been . . . abused."[137]

In other words, Appellant's personal belief that the alleged sexual abuse did not occur "is irrelevant [if Appellant has] specific, articulable facts presented to [her]" that would lead a reasonable person to believe that the children were abused.[138] The focus of the requirement at Minn. Stat. § 626.556, subd. 3 is not whether a child has been abused by a particular person whom the child may have accused, but whether the mandated reporter has "reason to believe" that the child has been abused. Thus, in a circumstance where a young child might be confused or afraid to identify her abuser, a mandated reporter who has reason to believe that the child is being or has been abused, based on the child's behavior or things the child has said, has an obligation to report the abuse.

This is not necessarily an obvious conclusion, especially to a child care provider who is convinced that the alleged abuse is not occurring in her home. The specific articulable facts available to Appellant did not amount to proof that the twins were being abused by anyone. That was never demonstrated. Nonetheless, the Maltreatment of Minors Act exists to protect children. Appellant should have erred on the side of protecting them. Her concern for her husband may have clouded her judgement in this case. Because it was a close judgement call, the Administrative Law Judge respectfully recommends that Appellant's child care license should not be revoked based on her failure to report in this instance.

III. Appellant Did Not Provide False and Misleading Information to the County on Appellant's Use of a Substitute Caregiver

The Department asserts that Appellant provided false or misleading information to the County regarding her use of Mr. Ostergaard as an emergency substitute caregiver.[139] In support of this assertion, the Department points to Appellant's inconsistent statements on how often Mr. Ostergaard provided care, along with testimony from parents who saw Mr. Ostergaard care for their children.[140]

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[135] *In re Parents in Community Action, Inc. (PICA) Regarding the Order to Forfeit a Fine*, No. A13-0631, 2013 WL 6839877 at *4 (Minn. Ct. App. Dec. 30, 2013).
[136] *Id.* (referencing *State v. Grover*, 437 N.W. 60, 62 (Minn. 1989).
[137] *Id.* (citing *Grover*, 437 N.W.2d at 64).
[138] *See id.* at 5 (citing portion of ALJ decision in underlying case).
[139] Dept. Closing Argument at 6. As discussed below, there is no evidence that Mr. Ostergaard provided care for more than 30 hours per year. Thus, he was acting as an emergency substitute caregiver, not a substitute caregiver.
[140] *Id.*

The witnesses offered by the Department proved, at most, four times between November 2016 and October 2017 that Mr. Ostergaard was the caregiver who was present when children of two parents were picked up.[141] Other than Appellant's own testimony regarding her use of Mr. Ostergaard as a substitute caregiver, the Department offered no evidence to show that Mr. Ostergaard was used more than "seldom," which is the term Appellant used to describe how often Mr. Ostergaard substituted for her. The Department presented no evidence to show that Mr. Ostergaard provided care for hours during any of the days, or more than briefly and occasionally.

Appellant argues that she did not deliberately mislead the County regarding her use of Mr. Ostergaard as a substitute.[142] She asserts that the County asked her different questions involving different timeframes.[143] At the TIS hearing, Appellant stated Mr. Ostergaard provided substitute care on three or four occasions in the last year so that she could attend appointments or run errands.[144] However, the TIS hearing focused on alleged events that occurred in September 2017. The discrepancies between Appellant's testimony at the TIS hearing and her later statements on this topic are understandable given the focus of the TIS hearing. By her own admission, Appellant did not keep written records of substitute care hours. There is no statutory rule or requirement for a licensee to keep such records.

There was a discussion at the hearing regarding whether Mr. Ostergaard was qualified to be a substitute caregiver for 30 days per year, or an emergency substitute for 30 hours per year. While Appellant claimed Mr. Ostergaard had the training required to qualify as a 30-day per year substitute caregiver, she failed to produce any documents in support of her claim. Nonetheless, the Department neither claimed nor proved that Appellant violated the substitute caregiver rule by having an unqualified caregiver provide substitute care. The Department itself acknowledged that "the licensing investigator was unable to determine whether the licensing regulation regarding the use of a substitute caregiver was violated . . . ."[145]

The basis for the revocation was that Appellant provided false or misleading information regarding her use of Mr. Ostergaard as a caregiver. However, the Department failed to demonstrate reasonable cause to believe that Appellant provided false or misleading information regarding her use of Mr. Ostergaard as a caregiver. Therefore, the Administrative Law Judge respectfully recommends that Appellant's child care license should not be revoked based on her provision of false or misleading information regarding her use of Mr. Ostergaard as an emergency substitute caregiver.

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[141] Test. of A. Jackels; Test. of A. Perkins.
[142] Appellant's Closing Argument at 3.
[143] *Id.*
[144] Ex. 134.
[145] Dept. Closing Argument at 6.

IV. Appellant Did Not Operate Outside of the Hours Indicated on Her License Application By Providing Drop-In Care on an As-Needed Basis

The Department alleges Appellant operated her family child care program beyond the hours listed in her application as part of her September 2017 relicensing.[146] Appellant disputes the allegation and asserts that she provided accurate information to the County about her hours of operation.[147]

Appellant indicated on her relicensing paperwork that she had core hours of operation Monday through Friday from 7:00 a.m. to 5:30 p.m., but noted in parentheses "earlier or later if needed."[148] On Saturdays, Appellant listed that she provided care "on request," and on Sundays, Appellant provided "time as needed."[149] Appellant explained that she had core hours but based on individual parent needs, some children attended her care outside of those hours.[150] At the relicensing visit in September 2017, Appellant and Ms. Madison reviewed this information along with Appellant's enrollment record, which showed some children attending Appellant's child care outside of Appellant's core hours.[151] Ms. Madison did not ask Appellant about the hours of operation listed in her application materials.[152]

The Department presented no evidence to support its allegation that Appellant operated beyond the hours listed in her relicensing application. On the contrary, Appellant's evidence demonstrated that she was transparent about her hours of operation. Having reviewed Appellant's application materials, Ms. Madison relicensed Appellant following the September 2017 visit. The Administrative Law Judge finds that the Department has not substantiated the allegation that Appellant operated her family child care outside of designated hours, and cannot rely on that allegation as a basis for revoking her child care license.

V. Appellant Failed to Timely Provide Updated Enrollment Information

At the evidentiary hearing, Appellant, through counsel, admitted that Appellant failed to provide updated enrollment forms to the County when requested. Appellant did eventually provide the requested information, but, due to an apparent misunderstanding, by the time she provided it, the Department had already made its decision to issue the Order of Revocation. While a licensee is required to provide records on request by the Department or County, no rule requires a licensee to provide enrollment records of children who no longer attend the licensee's child care with the relicensing application. Therefore, the Appellant's initial failure to provide such records is neither surprising nor blameworthy.

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[146] Order of Revocation at 4.
[147] Appellant's Closing Argument at 5.
[148] Ex. 2.
[149] Id.
[150] Test. of N. Ostergaard.
[151] *Id.*; Test. of R. Madison.
[152] Test of R. Madison.

With the exception of Appellant's failure to provide updated enrollment information following the County's TIS recommendation, the Department has not shown that Appellant withheld relevant information regarding operation of her child care program.

VI. Nature, Chronicity, and Severity of Violation

In determining the appropriate sanction in a licensing matter, the Commissioner must consider the nature, chronicity, or severity of the violation and the effect of the violation on children in Appellant's day care.[153] The severity of the sanction imposed must reflect the seriousness of the violation.[154] In this case, the Department has demonstrated two violations of statute or rule: Appellant's failure to make a report pursuant to Minn. Stat. § 626.556, subd. 3 in September 2017; and Appellant's failure to timely provide updated forms with information about children who were no longer attending her child care program.

The nature of the failure to timely produce the records of children no longer attending Appellant's child care is of some concern, but is not a serious violation. The Licensor found the information through other channels and there was no evidence of negative reports obtained through the contacts with former child care families. Appellant's assertions that she did not receive the initial requests are supported by the fact that there is no evidence that obtaining records from Appellant has been a problem for the County in the past. It is difficult to imagine why she would have willfully withheld the information during a time that she knew her license was being scrutinized. The extent of the delay in providing the records is of concern, but if Appellant did not receive the requests initially, it is understandable.

The nature of the failure to make the report is serious. However, as discussed above, this was not an instance where it was as clear as it might be that Appellant had reason to believe the children were being, or had been, abused. On the other hand, the Administrative Law Judge is very mindful that Appellant likely tried to protect her husband rather than place the safety of the children first. This violation occurred only once, maltreatment was not substantiated, and another person made the report, so an investigation did occur.

At the hearing in this matter, the Licensor admitted that the licensing violations cited by the County were pretexts because, once maltreatment was not substantiated, there was no other way to go about revoking the Appellant's license, and the Licensor simply was not comfortable with Mr. Ostergaard. The Administrative Law Judge is very troubled by this approach. The allegations against Mr. Ostergaard were not substantiated. The licensing violations, none of which appeared to be a problem before the allegations against Mr. Ostergaard arose, should not be used as a substitute to revoke Appellant's license. Appellant provided child care for 43 years, with no evidence of problems, before the unsubstantiated allegations against her husband were made. She loves her work and is passionate about serving families. Even the witnesses called by the County had no

[153] Minn. Stat. § 245A.07, subd. 1(a).
[154] *In re Revocation of the Family Child Care License of Burke*, 666 N.W.2d 724, 728 (Minn. Ct. App. 2003).

harsh words for her. There are many letters supporting her. In view of this, the Administrative Law Judge respectfully recommends that the Commissioner not revoke the Appellant's license, but impose a less harsh sanction.

VII. Suggested Sanctions

The Administrative Law Judge concludes that, while the nature, chronicity, severity, and effect of the violations here do not warrant revocation, they do warrant sanctions. Therefore, the Administrative Law Judge respectfully recommends that the Commissioner impose a fine for Appellant's failure to report the alleged sexual abuse, and a conditional license to address documentation concerns, as well as concerns the County has raised about Mr. Ostergaard's fitness to provide care.

The Administrative Law Judge respectfully recommends that the Commissioner impose a fine of $500, based on the failure to report pursuant to Minn. Stat. § 626.556, subd. 3. This is a significant fine, and speaks to the seriousness of the violation of the statute.

In addition, the County's April 2, 2018, letter to the Department recommended a two-year conditional license.[155] The letter enumerated a number of recommended conditions. Given that there was no evidence that Appellant tried to hide the nature and extent of the care she provided outside of her core hours, or that she ever exceeded capacity with the number of children in her care, the Administrative Law Judge does not recommend any conditions related to limiting Appellant's ability to provide care outside of her core hours. The County raised concerns about Mr. Ostergaard's physical ability to act as an emergency or substitute caregiver, and Appellant's testimony regarding his abilities was contradictory – on one hand stating he was fully capable of caring for children, while simultaneously saying he was incapable of raising himself out of his chair sufficiently to expose himself to the twins. Therefore, addressing the question of who will be the substitute or emergency caregiver would be appropriate in a conditional license.

In addition, given the issue with Appellant's slow response to requests for enrollment information, requiring Appellant to provide the County with accurate monthly enrollment lists would not be unreasonable, as would requiring check-in and check-out sheets to help monitor times children are in care. Based on all these considerations, the Administration Law Judge respectfully recommends that, should the Commissioner choose, it would be appropriate to make Appellant's license conditional, based on conditions 1-8, 11-14, and 20, as listed in the Ms. Madison's letter of April 2, 2018.

VIII. Conclusion

The Department failed to carry its burden of showing there was reasonable cause to believe its allegations that Appellant was less than candid about her operational hours, or provided false and misleading information regarding use of a substitute caregiver. The remaining bases for the license revocation are the Department's demonstration that

[155] Ex. 10.

Appellant failed to report alleged sexual abuse, and Appellant's admission that she was very slow to respond to a request for enrollment records. The Administrative Law Judge notes that the mandated reporter law is designed to require reporting even where the reporter disbelieves the report in order to allow objective and trained professionals to assess the allegations, and cautions Appellant to err on the side of disclosure with her licensor. Nevertheless, the Administrative Law Judge respectfully recommends that the nature, chronicity, and severity of the substantiated allegations in this matter do not warrant license revocation, but rather support a conditional license as described in Section VII, above, along with a fine of $500.

L. S.