OAH 82-1800-36421

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Sherry Rand of the Order to Pay a Fine for Maltreatment Regarding her Child Foster Care License	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

This matter came before Administrative Law Judge Barbara Case for a hearing on July 16, 2020. The record closed on August 4, 2020, with the filing of the Appellant's closing statement.

So Yeon Woo-Bockman, Assistant Ramsey County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department) and Ramsey County (County). Michelle MacDonald, MacDonald Law Firm, LLC, appeared on behalf of Sherry Rand (Appellant).

STATEMENT OF THE ISSUES

1. Did the County properly determine that Appellant was responsible for maltreatment by neglect of a child under Minn. Stat. § 626.556, subds. 2(g) and 10e(e) and (f) (2020)?

2. Did the Department properly issue a $1,000 fine based on the maltreatment determination, under Minn. Stat., § 245A.07, subd. 3(c)(4) (2020)?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge finds that the Department and County have not shown by a preponderance of the evidence that Appellant committed maltreatment by neglect and respectfully recommends that the Department reverse the maltreatment determination and rescind the $1,000 fine.

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

FINDINGS OF FACT

I. Foster Placement Background

1. A.K., the foster child who was at issue in this matter,[1] was an infant when placed with Appellant on October 31, 2016, through an Emergency Relative Placement Foster Care Referral.[2] A.K.'s mother lived with Appellant for some time prior to his birth, at which Appellant was present.[3] Appellant was licensed as a foster care provider by the County on May 3, 2017.[4] Her license was renewed on May 1, 2018, and was valid until May 1, 2020.[5] The County removed A.K. from Appellant's home on April 25, 2019, at a time when Appellant understood her adoption of A.K. to be imminent.[6]

2. As of April 25, 2019, Appellant's household consisted of herself and three children: her grandchild, C.R. (born March 2011); her grandchild, B.R. (born September 2017); and the foster child, A.K. (born October 2016). A.K. was two and a half years old at the time of the investigation. Appellant intended to adopt A.K., who is the son of a good friend of Appellant's adult daughter, Emma. Emma is the mother of C.R. and B.R. and shares custody of C.R. with Appellant.[7] Appellant was called "godmother" by A.K.'s mother.[8] B.R. lived with Emma for the first six to eight months of her life.[9]

3. For the two and a half years that Appellant cared for A.K., there were no concerns raised by his guardian ad litem, Kim Lee, an employee of Ramsey County,[10] the County social worker, Kyanna Ford, or the County licensing worker, Chia Vang.[11] There also is very little evidence in the record of what support Appellant was offered by the County.

4. Matthew Sebold, a licensed independent clinical social worker employed by Wilder Foundation, provided family therapy to C.R. and visited Appellant's home approximately 80 times during the time A.K. was in the home. Mr. Sebold, a mandated reporter, never witnessed anything that he thought constituted maltreatment and was highly complimentary of Appellant's care of the children.[12]

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[1] *See* Exhibit (Ex.) 103 (Order, March 23, 2020). The Order made the Department A.K.'s guardian; therefore, although the maltreatment determination referenced both A.K. and B.R., the County's case and information focused on A.K., as it maintained almost no information about B.R.
[2] Ex. 3 (Emergency Relative Placement Foster Care Referral Form, dated Oct. 31, 2016).
[3] Testimony (Test.) of Sherry Rand.
[4] Ex. 1 (Family child foster care license, May 3, 2017).
[5] Ex. 2 (Family child foster care license, May 1, 2018).
[6] Test. of S. Rand.
[7] *Id.*
[8] Ex. 3 (Emergency Relative Placement Foster Care Referral Form, dated Oct. 31, 2016).
[9] Test. of S. Rand.
[10] Test. of Kim Lee. Ms. Lee was questioned regarding for whom she worked and was certain that her employer was Ramsey County.
[11] Test. of K. Lee; Ex. 10 (County Chronological Notes, various authors, various dates); Test. of Matthew Sebold.
[12] Test. of M. Sebold.

5. Foster care forms filled out by Appellant and the placing worker, Ghee Xiong, on or about November 1, 2016, included:[13]

a. Emergency Relative Placement Foster Care Referral Form;

b. Home Safety Checklist; and

c. Home Safety Checklist: Child Foster Care Addendum.

6. On April 6, 2017, Appellant, the assigned social worker, and the social worker's supervisor signed the "Agreement Between Foster Parents and Placement Agency" form."[14] This form lists the responsibilities and expectations of the placing agency and the foster parent. Most of the form's provisions concern the flow of information between the parties. One provision, specifically about supervision, states that the foster parent is responsible for: "providing supervision in accordance with a child's age, needs, and the out-of-home placement plan. The foster parents must know the whereabouts of a foster child in their care."[15]

7. An Out-of-Home Placement Plan form filled out on November 1, 2018, states:

- A.K. requires intensive structure and supervision that is atypical for his age;
- A.K. requires assistance with daily care needs that is atypical for his age;
- A.K. displays difficulty in coping with stress and emotions that is atypical for his age;
- A.K. has several developmental delays, including speech and language. Receives services from early childhood special education and attends weekly therapy with a therapist at Regions Behavioral Health; and
- Appellant is committed to A.K.'s care, wishes to adopt him, understands he has delays and is engaged in services to assist him.[16]

II. Observations of the Foster Home

8. On April 6, 2018, a placement evaluation was completed by the County licensing worker, Chia Vang. This form is a self-reporting tool completed by the foster

[13] Ex. 3 and Ex. 4 (Home Safety Checklist, dated November 1, 2016).
[14] Ex. 5 (Agreement Form, April 6, 2017).
[15] *Id.* at RC000052.
[16] Ex. 106 (Out of Home Placement Plan, Nov. 1, 2018).

parent. In general, Appellant indicated that the placement was going "very well." On a list of 32 problematic behaviors, Appellant indicated that A.K. had a "learning disability" as indicated by the fact that he was "not talking" and that he was "destructive of property (tantrum)." She indicated that she was able to handle these behaviors adequately and that she was addressing the behavior by continuing to teach him.[17]

9. Appellant provided a loving home and consistent care for the three children. Appellant facilitated weekly in-home sessions from St. Paul schools to address A.K.'s lagging speech and motor skill development. Appellant also facilitated bi-weekly in-home therapy visits from Mr. Sebold,[18] therapy sessions specifically for A.K.,[19] and attended foster care classes.[20] Appellant took the children to church, extra-curricular school events, and other activities. She photographed many milestone events such as holidays. The photographs depict well-dressed, healthy looking children in the company of family members.[21]

10. The guardian ad litem for A.K., Kim Lee, holds a bachelor's degree in nursing. She was assigned to A.K. in November 2016, and met with Appellant and A.K. at least once a month from November 2016 until his removal. Ms. Lee wrote monthly reports for the County's information. She never reported anything negative regarding Appellant. Ms. Lee was not consulted before A.K. was removed from Appellant's care and learned of it two days afterwards. Ms. Lee was told by someone in the County that they believed Appellant was too old to care for A.K.[22] Ms. Lee told the court that she supported the removal from Appellant's home because she was told, after the removal, that A.K. had been left alone and locks were being used on the doors.[23]

11. A.K. was born to a mother who had been addicted to alcohol and drugs. A.K. was a fussy baby but he improved as time went on.[24] Ray'Londa Romero, the maltreatment investigator for the County, described A.K. as nonverbal and exhibiting difficult behaviors such as running from caregivers and hitting his siblings and others, including herself.[25]

12. Appellant described A.K. as loving and compassionate and also as a very busy toddler who had, shortly before his removal, eloped from the home once and

[17] Ex. 7 (Placement Evaluation, April 19, 2018).
[18] Test. of M. Sebold; Test. of S. Rand.
[19] Ex. 106 (Out of Home Placement Plan, November 1, 2018).
[20] Test. of S. Rand.
[21] Ex. 100.1 to 100.17.
[22] Test. of K. Lee.; *see also* Affidavit (Aff.) of S. Rand at Attachment B ((Letter of S. Rand, undated), Aff. dated May 16, 2019)). This letter is Appellant's recounting of what she views as the history of A.K.'s placement with her. She recalls that early in the adoption process, the adoption worker told Appellant the worker would not support A.K.'s placement with her because of her age. In response, Appellant asked one of her daughters and that daughter's husband if they would care for A.K. should anything happen to Appellant.
[23] Test. of K. Lee.
[24] *Id.*
[25] Test of S. Rand: Ex. 12 (observations of Ray'Londa Romero).

attempted to elope another time.[26] This greatly concerned Appellant and she discussed her concerns with Ms. Lee, Mr. Sebold, and others. Ms. Lee told Appellant that she should ask for help from the County because she was more likely to receive help before the adoption went through.[27]

13. Tammara Garrett, a friend of Appellant's, has lived in the same townhome complex as Appellant for over six years and knew her before A.K. joined the family. Ms. Garrett initially met Appellant at the bus stop where Appellant waited for the school bus with C.R.[28]

14. The bus stop is visible from Appellant's apartment and is on (or abuts) the townhome complex. It takes Appellant slightly less than one minute to walk to the bus stop. Appellant walked C.R. to the bus stop every day, except occasionally when Emma walked with C.R. Appellant and Ms. Garrett shared bus stop duties, with Appellant taking most of the duty because Ms. Garrett works outside of her home. Appellant typically brought all three of the children in her care to the bus stop, even in the winter. Ms. Garrett urged her to not bring B.R. and A.K. if they were sleeping because of the cold. Throughout the whole time Appellant had A.K., there were very few times she left the children to walk C.R. to the stop. Appellant always had the baby monitor with her and only left the children if they were asleep.[29] After the April 2019 maltreatment investigation by Ms. Romero, Appellant paid for another mother who lived in the complex, Kayla Murphy, to walk and wait with C.R.[30]

15. Ms. Garrett observed Appellant to be very cautious in her care of A.K. Ms. Garett, who sometimes went to Appellant's home for coffee after the school bus came, observed the baby monitor in Appellant's home.[31]

16. The chronological notes of Ms. Vang do not indicate any issues with the placement, any significant problems, or even much contact between the time of the placement and the removal of A.K.[32]

17. Matthew Sebold earned a master's degree in clinical social work from St. Thomas and St. Catherine Universities. He is employed by Wilder Foundation as a Licensed Independent Clinical Social Worker. He works at Riverview Elementary School as a school-based therapist, bi-lingual. He has been in that position since the fall of 2013, and typically has 17 families on his caseload at a time. He is a mandated reporter.[33]

18. Mr. Sebold has been doing family therapy with Appellant and the children for more than three years. He has been in the home approximately 80 times, for

[26] Test. of S. Rand.
[27] *Id.* The testimony was unclear about whether Ms. Lee's advice was that Appellant ask for help from the County, the public school personnel, or both.
[28] Test. of T. Garrett.
[29] *Id.*
[30] Tests. of S. Rand; Test. of T. Garrett; Test. of K. Murphy.
[31] Test. of T. Garrett.
[32] Ex. 10 (Chronological notes, various dates).
[33] Test. of M. Sebold.

45 minutes to an hour, since February 2017. Appellant was a consistent and cooperative participant in the therapy and Mr. Sebold never observed anything he considered to be maltreatment, abuse, or neglect. C.R. was his official client. He has known A.K. and B.R. since they were babies. He also knows Emma very well and is in communication with both Emma and Appellant. Appellant is his most consistent family therapy appointment. Appellant always prioritizes what is best for the children, including the therapy sessions. He observed Appellant to be an incredibly reliable, insightful, and stable person whom the children relied upon to keep their world together. He describes Appellant to be a dedicated and loving caregiver, spending all of her time taking care of the children. Appellant was completely open to him coming over anytime he asked. Mr. Sebold observed that Appellant was incredibly attuned to A.K.'s needs. She cared for all of the children's health, providing them with lots of fresh food. Appellant was concerned with A.K.'s speech and motor development. Mr. Siebold observed a very close bond between Appellant and the children.[34]

19. For a very brief time, Appellant used safety doorknobs to slow down A.K.'s attempts to elope. Mr. Sebold was aware about the safety doorknobs and endorsed their use. He told Appellant he had used them on both sides of doors to protect his own children. Appellant expressed concerns to him about the doorknobs and so together they viewed the website about their use. He noted it was incredibly rare that she would use them because she was always right next to A.K. Mr. Sebold also observed Appellant use the video monitor she brought to the bus stop. He confirmed that Appellant used it to avoid bringing A.K. out in the extreme cold. Mr. Sebold supported this method of Appellant devising a way to observe A.K. without bringing him outside in bad weather. He noted that the bus stop was close to the house. Mr. Sebold told Appellant he could not think of a single other way she could make the situation safer while she brought C.R. to the bus stop.[35]

20. Appellant provided a safe and consistent environment for the children and was an excellent role model.[36]

III. Maltreatment Investigation and Removal

21. After a home visit from the public school, from which Appellant had hoped to receive respite care and assistance with A.K.'s behavior, a report of maltreatment by neglect was made to child protection on April 16, 2019. The reporter stated:

> Worried about neglect for A.K. who is a foster child in the home. Foster Mom will leave young children [A.K. and B.R.] unattended for 15-20 minutes two times a day while she goes out to wait for the school bus with the older child. Also using safety doorknobs to keep child in bedroom. No monitor in bedroom and doors are shut while sleeping. Possibly leaving unattended during bath time. Also leaving A.K. with questionable caregivers while she

[34] *Id.*
[35] *Id.*
[36] *Id.*

runs errands (i.e. a man from church who wanted to get to know the children better).[37]

22. Those described as "questionable caregivers" included Appellant's long-time friend, a loan officer, who cared for the children in order to allow Appellant to attend some evening foster care parenting classes, and a fellow congregant who been recommended by Appellant's pastor to help Appellant with household chores that were too difficult for her. A few times, the man had walked the children around the townhome complex.[38]

23. The County assigned Ray'Londa Romero to investigate the report.[39] Ms. Romero has been a Child Protection worker for the past three and a half years. She has earned a master's degree in jurisprudence from Loyola School of Law.[40]

24. On April 18, 2019, Ms. Romero called Appellant to inform her about the report. Appellant did not answer when Ms. Romero first called but returned the call and explained that she had missed the first call because she had fallen asleep and burned some banana bread.[41]

25. Appellant was upset that a child protection report had been filed but agreed to cooperate with the County's investigation. Ms. Romero and Appellant agreed that Ms. Romero could visit Appellant's home that same day at 4 p.m.[42] Ms. Romero was late to the appointment, and when she arrived the children were hungry, excited, and anxious to leave for a supper and dance fundraiser for C.R.'s school. Ms. Romero's investigation visit lasted approximately 20 minutes.[43]

26. When Ms. Romero arrived, she observed all three children playing together. Ms. Romero interviewed C.R., who told Ms. Romero that she felt safe with Appellant.[44]

27. Ms. Romero found Appellant to be very open, nice, remorseful, and honest.[45] Appellant told Ms. Romero that she walked C.R. to and from the bus stop twice a day because the neighborhood was not good. Appellant asked Ms. Romero if it was acceptable to leave the younger children, if they were sleeping, while she went to the bus stop. Ms. Romero explained to Appellant that she had to take the other two children with her when she took C.R. to the bus stop.[46]

28. During her investigation, Ms. Romero noted A.K. running around the house, at one point grabbing a butter knife from a drawer and running with it in his hand. A.K. hit

[37] Ex. 11 (Suspected Child Maltreatment Reporting Form, April 16, 2019); Test. of S. Rand.
[38] Test. of S. Rand.
[39] Test. of Ray'Londa Romero.
[40] *Id.*
[41] *Id.*; Ex. 12 at RC000226.
[42] *Id.*
[43] Test. of S. Rand.
[44] Test. of R. Romero; Ex. 12 (R. Romero's Chronological notes, various dates).
[45] Test. of R. Romero.
[46] *Id.*

Ms. Romero and threw objects at her. A.K. hit the other children and Appellant in order to get attention. Ms. Romero observed bruising healing near B.R.'s eye and Appellant explained that A.K. had hit B.R. When Appellant described her typical day, Ms. Romero perceived Appellant had little assistance and sounded overwhelmed by her many tasks.[47]

29. Based on Ms. Romero's observations and interview of Appellant, on May 16, 2019, the County issued a determination that Appellant had maltreated A.K. and B.R. by neglect, citing Appellant leaving A.K. and B.R. at home while she took C.R. to the school bus.[48]

IV. Procedural Facts

30. On December 16, 2016, Appellant was sent a letter inviting her to respond if she wanted to be considered as a permanent placement option for A.K.[49]

31. On March 23, 2018, Ramsey County District Court appointed the Department as A.K.'s guardian.[50]

32. On October 26, 2018, Appellant, the County, and the Department signed an Adoption Placement Agreement.[51]

33. Appellant received a letter on February 5, 2019, from A.K.'s social worker and legal guardian, Jane Pingel, giving Appellant permission to provide for A.K.'s day-to-day care.[52]

34. On March 29, 2020, Ms. Pingel received two copies of a fully executed Adoption Placement Agreement for herself and the "adopting parents." Appellant was designated as the adopting parent.[53]

35. In May 2019, the County sent Appellant its determination that Appellant was responsible for maltreatment but that child protection services were not needed. The letter stated that:

> [t]he reasons for the determination are a preponderance of the evidence that you left B.R. and A.K. unattended in your home while you took another child to the bus stop on numerous occasions, defined as neglect pursuant to Mn. Statute 626.556, subd. 2(g).[54]

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[47] *Id.*; Ex. 12.
[48] Ex. 14 (Letter, May 16, 2019).
[49] Ex. 101 (Letter from Kinship Social Worker, Dec. 16, 2020).
[50] Ex. 103 (Order, March 23, 2020).
[51] Ex. 105 (Adoption Placement Agreement, Oct. 26, 2018).
[52] Ex. 102 (Letter from Jane Pingel, Feb. 5, 2019).
[53] Ex. 104 (Letter of Paulette Lonzo, March 29, 2019).
[54] Ex. 14 (Letter of R. Romero, May 16, 2019). The County's "Child Protection Intake Assessment Narrative" (Ex. 13) lists a number of other bases for the maltreatment finding but these were not identified in the maltreatment notification to Appellant (Ex. 14), which listed solely the fact that Appellant sometimes left the two younger children when accompanying C.R. to the bus stop.

36. Appellant timely requested reconsideration and, on June 13, 2019, the County affirmed its finding of maltreatment.[55]

37. On June 26, 2019, Appellant appealed the determination of maltreatment.[56]

38. On July 29, 2019, the County recommended to the Department that "the child foster care license of [Appellant] be issued a fine based on the failure to comply with . . . Minnesota Rules and/or Statutes governing the operation of a licensed child foster care home."[57] The County recommended a $1,000 fine and alleged that Appellant had violated:

a. Minn. R. 2960.3010, subp. 5, Basic Services, by failing to provide safety and supervision;

b. Minn. R. 2960.3010, subp. 38, Seclusion, meaning confining someone in a locked room; and

c. The foster care agreement requiring foster parents to "provide supervision in accordance with a child's age and needs.[58]

39. On September 5, 2019 the Department issued Appellant an order to pay a fine for maltreatment.[59]

40. On September 15, 2019, Appellant appealed the order to pay a fine.[60]

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

CONCLUSIONS OF LAW

1. The Commissioner of Human Services (Commissioner) and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, .08, .085, 245C.28, and 626.556 (2020).

2. Appellant received due, proper, and timely notice of the allegations against her, and of the time and place of the hearing.

3. The Department has complied with all procedural requirements of rule and law.

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[55] Ex. 15 (Letter of Alex Cleveland, June 13, 2019).
[56] Ex. 16 (Letter, June 26, 2019).
[57] Ex. 17 (Letter of Jim Lund, July 29, 1029). The letter is somewhat unclear because it begins stating that it is recommending a fine based on the failure to comply with the listed rules and statutes governing the operation of a foster home, but the first, and only fully, quoted statutes actually pertain to the County's responsibilities and standards.
[58] *Id.*
[59] Ex. 18 (Order to pay fine for maltreatment, Sept. 5, 2019).
[60] Ex. 19 (Letter, Sept. 15, 2019).

4. The requests for reconsideration and appeals by Appellant of the 2019 Maltreatment Determination and the fine were timely. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

5. Pursuant to Minn. Stat §§ 245A.08, subd. 2a(a), 245A.085, 245C.28, and 626.556, subd. 10i(f), this is a consolidated contested case hearing on the 2019 Maltreatment Determination and the fine.

I. Maltreatment of Minors and Resulting Fine

6. The Maltreatment of Minors Act, Minn. Stat. § 626.556 (2020), defines **"**maltreatment" to include neglect.

7. "Neglect" is defined in Minn. Stat. § 626.556, subd. 2(g) in relevant part, as:

> 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 . . . .

8. The County's maltreatment determination did not identify the form of neglect for which it found Appellant responsible.[61] The summary of the specific reasons for the determination states:

> [T]he reasons for the determinations are a preponderance of evidence that [Appellant] left [B.R.] and [A.K.] unattended in your home while you took another child to the bus stop on numerous occasions, defined as neglect pursuant to MN Statute 626.556 Subd. 2 (g).[62] The only indication in the record of which specific subdivision the County is alleging is Appellant's attorney stating in the closing brief that when pressed the Agency attorney told appellant it was subdivision 2(g)(3).[63]

9. The Department bears the burden of proving, by a preponderance of the evidence, that Appellant is responsible for maltreatment of a child by neglect, as alleged in the maltreatment determination.

10. A "preponderance of the evidence" means that the ultimate facts must be established by a greater weight of the evidence.[64] "It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is true than . . . not true."[65] In other words, if it is more likely than not that the facts support the County's allegations, then the County has met its burden. In contrast, if the evidence

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[61] *See* Ex. 14. The notice to Appellant lists only Minn. Stat. § 626.556, subd. 2(g) and fails to specify which clause of 2(g) was being applied.
[62] Ex. 14.
[63] Appellant's Closing Memorandum at 8.
[64] 4 Minnesota Practice, CIV JIG 14.15 (2020).
[65] *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

casting doubt on the County's allegations is stronger and more persuasive, then the County has failed to meet its burden. Under this standard, the County maintains the ultimate burden of persuasion to prove that maltreatment occurred.

11. The County has not established by a preponderance of the evidence that Appellant failed to provide for necessary supervision or child care arrangements appropriate for A.K. and B.R. It was appropriate for Appellant to leave them sleeping rather than take them out into the cold while she accompanied C.R. to her bus stop, because they were left for a very short duration, during which they were observable on a baby video monitor and Appellant remained in close proximity.

12. Without the finding of maltreatment, there is no basis for the Department to levy a fine against Appellant.

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

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner reverse the maltreatment determination and RESCIND the order to pay a fine.

Dated: November 3, 2020

BARBARA J. CASE
Administrative Law Judge

Reported: Digitally Recorded
No Transcript Prepared

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), 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 (2020). 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 (2020), 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. Background

Appellant had three children in her care: A.K., her two-and-a-half-year-old foster child; C.R., her eight-year-old granddaughter; and B.R., her one-and-a-half-year-old granddaughter. A.K. has been in Appellant's care since his birth. C.R., of whom she shared custody with C.R.'s mother, was usually in her care. B.R., of whom she had no legal rights, was intermittently in her care.[66]

When A.K. turned one, Appellant was instructed by the County that he had to have his own room. He had a bedroom with a toddler bed on the same floor as Appellant. B.R. slept in a crib in Appellant's room. C.R. also slept in Appellant's room because she was afraid to sleep alone.[67] When A.K. was moved to his own room, Appellant bought a video baby monitor with which to watch him. She kept the monitor in her room or with her when, for example, she went to the bus stop with C.R.[68]

A.K., although a sweet child in many respects, had special needs and behaviors which made him a challenge to manage. He was nonverbal such that Appellant communicated with him by using sign language and by "knowing what he wanted."[69] He also was extremely active and had, just prior to the investigation at issue in this matter, eloped from the house. On that occasion, while Appellant was in the bathroom, A.K. left though the townhome's front door and was retrieved in the parking lot by a neighbor.[70] In response, Appellant, as was typical for her, consulted a number of other trusted adults about how to keep A.K. safe. Her adult daughter, a special education teacher, recommended and purchased doorknob covers.[71] Mr. Sebold, a clinical social worker

[66] Test. of S. Rand.
[67] *Id.*
[68] Ex. 107 (photograph of baby monitor); Test. of S. Rand; Test. of M. Sebold.
[69] Ex. 21 (Affidavit of S. Rand, May 16, 2019).
[70] Test. of S. Rand. The home is two-story townhome described as having its main floor, including the front door, on the second floor and the third floor as having a bathroom and the bedrooms.
[71] Test. of S. Rand; Ex. 108 (Photograph of doorknob cover package). The covers only slowed A.K. down as he was still able to open the doors with the covers on them.

working with the family, endorsed the use of the doorknob covers as a method for keeping A.K. where he would be safe (and away from where he would not be safe).[72]

Appellant was faced with a dilemma. Her neighborhood is not safe for 8-year-old C.R. to walk to, or wait for, her school bus alone. At the same time, in freezing cold weather or when the younger children were ill, Appellant did not think it wise to bring them to the bus stop. Another mother with whom Appellant sometimes shared bus stop duties worked outside her home and so more often relied on Appellant to be at the bus stop than vice versa. It was that mother who encouraged Appellant to leave the younger children asleep rather than, as had been Appellant's practice, bundling them up and bringing them to the bus stop, especially when they were ill or in inclement weather.[73] Though the bus stop was less than a one-minute walk from her front door, Appellant estimated that she could be waiting there, on average, 15 minutes.[74]

Mr. Sebold is a clinical licensed social worker who was in the home more than 80 times over the almost 3 years A.K. was with Appellant. Mr. Sebold described Appellant as an incredibly loving, caring, involved, and diligent caregiver who was the center of A.K.'s world. Mr. Sebold advised Appellant that using the baby monitor when taking C.R. to the bus stop was the best of the available options. If the younger children were awake, Appellant always took them with her because A.K. would never have tolerated being left behind as he loved the school bus and seeing the neighbors.[75]

II. Credibility of Major Witnesses

Appellant was a credible witness as well as a guileless reporter of her own concerns and actions. She freely admitted to those she saw as authorities and experts, including Mr. Sebold, Ms. Lee, and the early-childhood home based school staff, that she was struggling with caring for the two younger children and was seeking help. During the hearing, her testimony was consistent with the affidavit and letter she had presented to the district court. Furthermore, her testimony was consistent with Mr. Sebold's and Ms. Garrett's testimony.

Ms. Lee is not assessed in this credibility determination because she testified very little about the events at issue and none of her contemporaneous reports to the County were offered into evidence.

Ms. Garett was a credible witness as established by the fact that, though asked the same question multiple times by both counsel, her recounting of what occurred was consistent. She testified in a forthright and unhesitating manner that demonstrated assuredness and clarity regarding events.[76] Mr. Sebold was similarly credible as demonstrated by his assuredness and clarity regarding events and the consistency of his testimony both with itself and with the events as testified to by others. Both Ms. Garett

[72] Test. of M. Sebold; Test. of S. Rand.
[73] Test. of T. Garrett.
[74] Ex. 21 (Aff. of S. Rand, May 16, 2019).
[75] Test. of S. Rand.
[76] Test. T. Garett.

and Mr. Sebold had numerous, weekly or bi-weekly, first-hand experiences with Appellant over several years. The clarity of their testimony coupled with the number, length and nearness of their observations of Appellant and her family give their testimony great weight.

Ms. Romero also testified in a credible manner and carefully testified primarily from her case notes, which were created in proximity to the time of her investigation. She was forthright in admitting when she did not recall something because it occurred over a year before and her notes did not reflect an answer. However, Ms. Romero's testimony carries less weight regarding Appellant's care for several reasons. First, Ms. Romero met with Appellant just one time for twenty minutes, an insignificant time relative to the weight and ramifications of her investigation. In fact, Ms. Romero testified to her limited experience with Appellant's household. Second, the meeting was rushed because it was at the end of her work week and she was running late. The family was anxious to leave for a school supper and dance fundraiser and the children were hungry and ready to leave. A.K. was acting up, and while that was demonstrative of the pressures facing Appellant, it also was distracting.

As an example of erroneous assumptions that she drew, likely due to the hectic interview, Ms. Romero assumed there was no baby monitor when she did not observe one in the room with a crib. However, the baby monitor was in A.K.'s room, the room with a toddler bed. Additionally, although the County protocol is that interviews should be recorded, this interview was not recorded. Additionally, the maltreatment law directs that information relevant to an investigation must be requested, and this information may include interviews with other persons who may have knowledge regarding the care of the child.[77] The investigative report would have benefited from collateral interviews with Mr. Sebold and Ms. Lee, both professionals who had been routinely in the home during the entirety of A.K.'s placement.

III. Maltreatment Determination

The County removed A.K. from Appellant's home after learning that she sometimes had left the two younger children, ages one and two, at home while she walked eight-year-old C.R. to the bus stop. The bus stop was at the corner of the street in front of her townhouse and just one minute away if she was moving slowly. Appellant only left the younger children in the house if they were sleeping. A.K. would not have permitted her to go without him when he was awake. Appellant brought a video baby monitor with her to the bus stop on days when she did not bring the younger children with her. They did not wake up on these occasions.[78] After Ms. Romero informed Appellant that the County did not want her to ever leave the children alone, she arranged to have someone else accompany C.R. to the bus stop. If that person was unable to accompany C.R., Appellant took all the children to the bus stop, as directed by Ms. Romero.[79]

[77] Minn. Stat. 626.556, subd. 10(i)(1).
[78] Test. S. Rand. That the children did not awake on these occasions is credible because these times also coincided with the children having been up with illnesses and being given medicine in the night.
[79] *Id*.

The County's maltreatment determination, as stated in writing to Appellant, was:

> Based on a preponderance of the evidence, we determined that maltreatment occurred, for which [Appellant] was responsible, but that child protective services are not needed. The reasons for the determinations [sic] are a preponderance of the evidence that you left [B.R.] and [A.K.] unattended in your home while you took another child to the bus stop on numerous occasions, defined as neglect pursuant to Mn. Statute 626.556 Subd. 2(g).[80]

When asked for greater specificity,[81] the County pointed to Minn. Stat. § 626.556, subd. 2(g)(3):

> the failure to provide for necessary supervision or child care arrangements appropriate for a child 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.

The County had other concerns about Appellant's care of the children, but those were not the basis for the maltreatment determination.

IV. Issue and Parties' Arguments

The sole issue in this matter is whether Appellant committed maltreatment by neglect when she took C.R. to the bus stop and left the two children inside the home alone. It should be noted that the County's investigation and case understandably focused on A.K. who, though cared for by Appellant, was the County's responsibility. Perhaps for that reason there were few facts presented about B.R. Not one witness was asked whether the baby monitor, which was in A.K.'s room, made it possible for Appellant to hear both children. This is a relevant fact and the County had the burden to produce it.

While other concerns and ameliorating facts were raised, the County's position is that even one incident of leaving young children home alone constitutes neglect. Whether the children were sleeping is not a factor from the County's perspective. Appellant was convincing when she said that it would not have been possible to leave the house without A.K. were he awake. Whether she had a baby monitor was also not a relevant factor for the County. The County suggests that because Ms. Romero did not observe the monitor, it was not present. More convincing than Appellant's offering the monitor into evidence was the testimony of Mr. Sebold and Ms. Garrett that Appellant used the monitor. Both observed, and discussed with Appellant, the children, their care, and the home many times over a period of years. They observed the baby monitor and discussed its use with Appellant. Ms. Romero, in her short visit, missed the monitor.

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[80] Ex. 14 (Letter to S. Rand, May 16, 2019).
[81] Appellant's closing at 8. No official notice to Appellant contains this specificity.

The County does not argue that any harm befell the children and correctly states that harm (or the lack of harm) is not dispositive on the question of whether maltreatment occurred.[82] The County's position is that leaving alone a one-year-old and a two-year-old with speech delays, difficulties regulating emotions, and breakout attempts, is maltreatment by neglect.[83] The County doubts that Appellant had a baby monitor because the maltreatment investigator did not see one and Appellant did not raise the fact that she used it. However, the County argues, even if Appellant used a monitor, Appellant's arrangements for the younger children on the occasions when she left them to go to the bus stop were insufficient in light of their needs and vulnerabilities and so constituted maltreatment by neglect.[84] The County argues that Appellant needed to be in her residence and on her property in order to be able to timely intervene in the event of a fire or other event.[85]

Appellant does not dispute that she went to the bus stop and left the children home but disputes the County's belief that this act constitutes neglect under the Maltreatment of Minors Act (Act).[86] Appellant argues that the County's application of the Act constitutes a strict liability analysis which is not what the Act requires. She argues that "[s]uch an interpretation would make every caregiver who left a child alone in a home, and stepped outside, with or without a monitor, liable for maltreatment, regardless of the particulars of their supervision plan or the incident."[87] The County's position makes every parent who has ever had a child out of sight and hearing liable for maltreatment by neglect.[88] Appellant argues that she made an appropriate plan to provide for supervision considering the required factors such as age, mental ability, physical condition, and length of her absence.[89] The plan was to leave the children only if they were sleeping, to use the monitor, and to be able to return within one minute if they woke up.[90]

V. Analysis

The Act applies to all caregivers in Minnesota - foster parents and parents alike. Therefore, to conclude that Appellant committed maltreatment by neglect, one must necessarily conclude that the Minnesota Legislature intends for any parent in Minnesota who makes the decision to leave a sleeping baby or toddler alone while they are outside of their house, or elsewhere in their house, but out of sight and hearing of the baby, to be committing maltreatment. Presumably the Act does not lay down hard and fast rules as there are in the child care licensing rules in order to allow care givers to formulate plans that are reasonable considering myriad circumstances and changing factors.

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[82] Department's Closing at 12.
[83] *Id.* at 13.
[84] *Id.*
[85] *Id.* at 11.
[86] Appellant's Closing at 11-12.
[87] *Id.* at 9.
[88] *Id.*
[89] *Id.* at 8-9.
[90] *Id.* at 8.

The Minnesota Supreme Court states that to determine if maltreatment has occurred three elements must be interpreted: (1) the effect of "provide for"; (2) what "necessary supervision" entails; and (3) what it means for supervision to be "appropriate for a child" under the listed factors.[91] Importantly, the Court also cautions importing standards from other statutes and rules when defining these terms.[92]

Regarding element one, the Court states that " . . . to provide for" supervision means "to make and execute a plan for supervision."[93] There is no dispute that Appellant formulated a plan which, she believed, best allowed her to meet the children's sometimes competing needs. Appellant consistently relied upon those she recognized as authorities for advice, so when the County did not approve of the supervision plan made by Appellant, she immediately changed her plan to conform to the County's standard.

Regarding element 2, the Court, using the dictionary definition of supervision and its synonyms, determined that supervision means "watchful oversight."[94] The overwhelming weight of the evidence shows that Appellant had a baby monitor with her when she left the children sleeping and that she was very close to the house such that she could return home in under a minute. It is unimaginable that parents throughout the state do not leave sleeping children activities less important than keeping another child safe, with or without a baby monitor. They run to get the mail, put a load of laundry in the basement, go to the car to retrieve something, and do numerous other activities while babies are sleeping. If Appellant committed maltreatment in this case, then those examples must constitute maltreatment as well.

Regarding element 3, there is no dispute that A.K. had special needs because of his inability to self-regulate and his underdeveloped communication skills. B.R. required the typical cautious care required for any infant. However, the greater weight of the evidence supports the conclusion that Appellant, for whom the children's' care was central, considered all those needs in making her plan and, for the reasons noted in relation to element 2, her decision does not seem ill-considered or incautious. Moreover, it was a decision supported by the professional most familiar with the children, Mr. Sebold.

VI. Conclusion

Appellant admitted that she was overwhelmed caring for three children without much assistance and she sought help from the professionals in her life. She was aware of the difficulties and limitations confronting her and formulated her plans in response to them. She may have violated the foster care agreement or foster care licensing rules but there is no evidence that she was ever cited for such violations. The County may have had reason to offer additional assistance to Appellant or to determine that it did not support her as a permanent placement. Under the foster care licensing rules, it may have had a basis for removing A.K. from his foster home. To Appellant, the County cited only the leaving of the children as the basis for the maltreatment finding. In the County's letter

[91] *In the Matter of Restorff*, 932 N.W.2d 12, 19.
[92] *Id*. at 20.
[93] *Id* at 19.
[94] *Id.* at 20.

to the Department, it cited licensing definitions, for seclusion and for "basic services" and the licensing agreement.[95] However, these standards and they were not the basis of the maltreatment determination. For the reasons discussed above, the Administrative Law Judge respectfully concludes that Appellant did not commit maltreatment and recommends that the maltreatment determination and the fine be rescinded.

B. J. C.

[95] Ex. 17.