

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

In the Matter of the Appeal by Pamela Lang
of the Order of Conditional License and
Order to Pay a Fine

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

License No. 1076367 (Family Child Care)

This matter came before Administrative Law Judge Jim Mortenson for an evidentiary hearing on April 25, 2023. The Judge convened the hearing at the Wabasha County Criminal Justice Center in Wabasha, Minnesota. The record closed on May 5, 2023, following the filing of closing arguments.

Matthew Stinson, Wabasha County Attorney, appeared on behalf of the Department of Human Services (Department). Pamela Lang (Appellant) appeared on her own behalf and without legal counsel. Lisa Thompson, Ombudsman for Family Child Care Providers, attended with Appellant, pursuant to Minn. Stat. § 245.975, subd. 2(a)(1) (2022).

The Department offered 11 exhibits, all of which were entered into the record.¹ Three witnesses testified at hearing. Of the exhibits Appellant offered into evidence, the Judge admitted 26 into the record.² Testimony was received from five witnesses: Heidi Young, Wabasha County social worker; Sylvia Kearney, Wabasha County daycare licensor; Kayla Hall, Wabasha County social services manager; Bobbi Stevens, Appellant's daycare employee; and Appellant.

STATEMENT OF THE ISSUES

1. Did the Department correctly determine that Appellant committed the four licensing violations for which she was fined as set forth in detail in the November 2, 2022, Order, pursuant to the applicable law for each violation?

2. Did the Department properly issue the Order to Pay a Fine in the amount of \$800 based on the licensing violations, pursuant to Minn. Stat. § 245A.07, subd. 3(c)(4) (2022)?

¹ Exhibits (Exs.) 3 through 13.

² Exs. 201, 202, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 219, 220, 224, 225, 226, 227, 228, 229, 232, 233, and 235.

3. Did the Department properly place Appellant's family child care license on conditional status based on the current and prior licensing violations, pursuant to Minn. Stat. § 245A.06, subd. 1 (2022), as set forth in detail in the November 2, 2022, Order?

SUMMARY OF RECOMMENDATION

The Department correctly determined that Appellant committed the licensing violations which resulted in fines totaling \$800. The Department properly issued the four fines pursuant to Minn. Stat. § 245A.07, subd. 3(c)(4)(iv). The Department properly placed Appellant's family child care license on conditional status, pursuant to Minn. Stat. § 245A.04, subd. 6 (2022). Not all the bases for the conditional license were established, and so the Commissioner should re-examine the conditions that constitute violations and the necessary corrections required. Therefore, the Judge respectfully recommends the Commissioner **AFFIRM** the Orders of Conditional License and to Pay a Fine, dated November 2, 2022, with the recommended and noted revisions.

Based upon the evidence in the hearing record, the Judge makes the following:

FINDINGS OF FACT

1. Appellant operates a family child care program from her home at 705 2nd Street Northwest, Plainview, Minnesota.³

2. As of May 2022, Appellant held a C-3 daycare license, which allowed her to care for up to 14 children and required a second adult caregiver.⁴ A C-3 license limits a program to no more than 10 children under school age and four toddlers or infants, of which no more than three may be infants.⁵

3. On May 13, 2022, Appellant was not at her home and left the child care program in the hands of three others: Bobbi Jo Sievers, caregiver; Katlin Bauer, substitute caregiver; and Kaydence Haley, helper.⁶

4. As of May 13, 2022, Bauer last completed training for sudden unexpected infant death (SUID) and abusive hearing trauma (AHT) on March 12, 2020.⁷ She had no other daycare-related training.⁸

5. Bauer did not have a background study timely completed as of May 13, 2022.⁹

³ Ex. 8; Ex. 10; Ex. 11.

⁴ Ex. 9 at 2; Testimony (Test.) of Sylvia Kearney.

⁵ Minn. R 9502.0367 (2021).

⁶ Test. of Heidi Young; Test. of Bobbi Sievers; Test. of Pamela Lang; Ex. 9; Ex. 214 at 80.

⁷ Ex. 207.; Test. of S. Kearney.

⁸ Test. of S. Kearney.

⁹ *Id.*; Ex. 206.

6. Bauer was not the program's designated substitute in May 2022; Jennifer Day was the designated substitute and was unavailable.¹⁰

7. Haley did not have a completed background study in May 2022.¹¹

8. Seventeen children were in the program on May 13, 2022, all under the age of ten, including four who were not enrolled and six infants and toddlers.¹² There were more children in care than usual because the local school was closed due to a power outage that began on May 12, 2022.¹³

9. On May 13, 2022, Wabasha County received a report of child maltreatment at the program and made a site visit that day.¹⁴ Three staff persons from Wabasha County Social Services and two law enforcement officers went to the day care home.¹⁵

10. Sievers had been feeding an infant who was routinely difficult to feed.¹⁶ When the child would not take a bottle, Sievers pinched the child's nose while squirting milk into its mouth.¹⁷ The child did not choke, but spit out the milk and screamed, and the incident ended.¹⁸

11. The County, as a child protection matter, determined to immediately shut down the program, prior to arriving at the home.¹⁹ The Commissioner did not issue a Temporary Immediate Suspension Order (TIS) until May 17, 2022.²⁰

12. The investigators saw there was bird feces on both levels of the house where children had access.²¹

13. The investigators made phone calls to the program children's parents to immediately pick up their children from the program.²²

¹⁰ Test. of P. Lang; Ex. 10 at 3; Ex. 11 at 10.

¹¹ Test. of S. Kearney; Ex. 12.

¹² Ex. 9; Ex. 214 at 11, 13.

¹³ Ex. 212; Ex. 214 at 83; Test. of B. Sievers.

¹⁴ Test. of H. Young; Ex. 9; Ex. 214.

¹⁵ Test. of H. Young; Test. of B. Sievers; Ex. 9.

¹⁶ Ex. 9 at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Ex. 214 at 1-2; Ex. 235; Test. of H. Young; Test. Kayla Hall. (It is not apparent what authority the County acted under to not only remove children but to shut down the program prior to the Commissioner's Order of Temporary Immediate Suspension. Young testified that it was a child protection issue; but there is no evidence of any kind of legal authority for that in this case and there was no emergency requiring all the children to be immediately removed.)

²⁰ Ex. 9.

²¹ Ex. 6; Ex. 9 at 3; Ex. 214 at 1; Test. of P. Lang.

²² Test. of H. Young; Test. of S. Kearney; Ex. 214.

14. A hearing on the TIS was held in June 2022, and the judge in that case issued his report and recommendation on July 12, 2022.²³ The judge recommended the TIS be rescinded.²⁴

15. The TIS was lifted on November 2, 2022, and the Order of Conditional License and Order to Pay a Fine – prompting this case – was issued by the Department.²⁵

16. The Department’s bases for a two-year conditional license are:

- Failure to ensure that two caregivers had background studies.
- Failure to ensure that all caregivers had training on SUID and AHT.
- Failure to ensure that all caregivers had training on CPR and first aid.
- Failure to operate within licensed capacity and distribution limits of license by having more than 14 children in care and more than four children in the infant and toddler age range.
- Failure to follow flexible eating schedules and behavior guidance methods by force feeding a toddler to the point of choking.
- Failure to follow appropriate behavior guidance methods by slapping children in the face, using time-out as part of toilet training, and making threats to children.
- Failing to ensure home was sanitary and safe by leaving bird feces on floor, railings, furniture, and plastic mats where children eat, sleep, and play.
- Failure to provide the records for six children.²⁶

17. The terms of the two-year conditional license are:

- Follow and comply with all applicable Minnesota laws.
- No variances to age distribution or capacity to be granted by the Department.
- Program to operate at an “A” level license, with a maximum capacity of 10 children.
- Notification to the County prior to enrollment of any new children, including drop-ins, and approval of new enrollments by the County prior to provision of care.
- Provide a list of all caregivers in program to the County, including dates of cleared background studies and documentation of completed training. The County must approve any new caregivers before they will be permitted to provide care.
- Obtain a County-approved mentor within 30 days of the Order and work with the mentor on behavior guidance and cleanliness.

²³ Ex. 9.

²⁴ *Id.* at 6.

²⁵ Order Lifting Temporary Immediate Suspension, Order of Conditional License, Order to Pay a Fine, dated Nov. 2, 2022.

²⁶ *Id.* at 2.

- Timely submit a plan to the County detailing how home will be maintained in a safe and sanitary manner, including a cleaning schedule, persons responsible for cleaning, and items to be cleaned.
- Appellant to complete six hours of County-approved training on behavior guidance and child development within 90 days of Order, in addition to annual training required by Minn. Stat. § 245A.50 (2022).
- Provide a copy of the Order or document all parents have had opportunity to review Order, in a timely manner and within five-days of a new child's admission.²⁷

18. The Department's reasons for the \$800 fine are:

- Failure to ensure that all caregivers had training on SUID and AHT (\$200).
- Failure to ensure that all caregivers had training on CPR and first aid (\$200).
- Failure to ensure that two caregivers had background studies (\$400).²⁸

19. Appellant has two prior licensing violations resulting from four complaints.²⁹ The first violation was found following a complaint on August 11, 2020.³⁰ Appellant was found in violation of Minn. R. 9502.0415, subp. 3 (2021), which requires appropriate equipment for children's activities.³¹

20. Another complaint, filed October 2, 2021, resulted in a finding that Appellant violated Minn. R. 9502.0375, subp. 1 (2021).³² That rule requires reporting of suspected abuse or neglect of a child.

21. Complaints made on December 9, 2016, and January 23, 2017, resulted in findings that the allegations did not occur.³³

22. Any finding of fact more appropriately considered a conclusion of law is adopted as such. Any material fact in the memorandum not specifically reflected in the findings of fact is hereby incorporated into the findings of fact.

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 4-5.

²⁹ Ex. 13.

³⁰ *Id.* at 2.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1. The evidence suggests a correction order was issue following the December 9, 2016, complaint. But the Department's Complaint Log states the disposition of the complaint was "DID NOT OCCUR." Moreover, the Department's witness who testified about the Complaint Log could not explain the discrepancy and could only guess.

Based upon these findings of fact, the 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.07, .08 (2022).
2. The Department fulfilled all relevant procedural requirements of law or rule. The County and the Department provided the Appellant with adequate notice of the negative licensing action and Appellant timely appealed. This matter is properly before the Judge and the Commissioner.
3. A licensed day care provider's failure to comply with applicable law may result in a conditional license.³⁴ In doing so, "the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program."³⁵
4. "The commissioner may . . . impose a fine if: (1) a license holder fails to comply fully with applicable laws or rules including but not limited to the requirements of this chapter and chapter 245C."³⁶
5. Fines are set by the legislature. \$200 is the fine "for each occurrence of a violation of law or rule governing matters of health, safety, or supervision, including but not limited to the provision of adequate staff-to-child or adult ratios, and failure to comply with background study requirements under chapter 245C."³⁷ "[O]ccurrence' means each violation identified in the commissioner's fine order."³⁸
6. The Department has the burden of demonstrating reasonable cause exists to for a conditional license or a fine against a license holder.³⁹ The Department must substantiate the allegations that the license holder failed to comply fully with applicable law or rule.⁴⁰
7. "If the commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with the laws or rules that the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules occurred."⁴¹

³⁴ Minn. Stat. § 245A.06 (2022).

³⁵ *Id.* at subd. 1(a).

³⁶ Minn. Stat. § 245A.07, subd. 3(a).

³⁷ *Id.* at subd. 3(c)(4)(iv).

³⁸ *Id.*

³⁹ Minn. Stat. § 245A.08, subd. 3(a).

⁴⁰ *Id.*

⁴¹ Minn. Stat. § 245A.08, subd. 3(a).

8. A licensed day care must initiate background studies on all people having direct contact with persons served by the daycare, prior to those persons having direct contact, and document the dates of the initiation of the study and the date the person first has direct contact with persons served.⁴²

9. The Department substantiated that Appellant violated Minn. Stat. §§ 245C.03 and .20 (2022) because Appellant did not ensure and document that two people with direct contact with children in Appellant's program had completed background studies.

10. Appellant did not show she was in full compliance with Minn. Stat. §§ 245C.03 and .20.

11. "License holders, second adult caregivers, and substitutes must comply with the training requirements in" Minn. Stat. § 245A.50.⁴³ Before caring for children, and subsequently every two years "second adult caregivers and substitutes must be trained in pediatric first aid."⁴⁴ These individuals must also "be trained in pediatric cardiopulmonary resuscitation (CPR), including CPR techniques for infants and children, and in the treatment of obstructed airways," "on reducing the risk of sudden unexpected infant death," and on "reducing the risk of abusive head trauma from shaking infants and young children."⁴⁵

12. The Department substantiated that Appellant failed to ensure a substitute caregiver complied with Minn. Stat. § 245A.50 because she was not timely trained in pediatric first aid, pediatric CPR, SUID, and AHT.

13. Appellant did not show she was in full compliance with Minn. Stat § 245A.50.

14. A Group Family Day Care level 3 license (C3) sets the capacity of the day care program to 14 children to two adult caregivers.⁴⁶ The total number of children permitted under school age is 10. "Of the total children under school age, a combined total of no more than 4 shall be infants and toddlers. Of this total, no more than 3 shall be infants."⁴⁷

15. The Department substantiated that Appellant exceeded the capacity of her C3 license on May 13, 2022.

16. Appellant did not show she was in full compliance with Minn. R. 9502.0367 on May 13, 2022.

⁴² Minn. Stat. §§ 245C.03, subds. 1, 1a; .20, subd. 1 (2022).

⁴³ Minn. Stat. § 245A.50, subd. 1(a).

⁴⁴ *Id.* at subd. 3(a).

⁴⁵ *Id.* at subds. 4(a), 5(a).

⁴⁶ Minn. R. 9502.0367.

⁴⁷ *Id.*

17. “Flexible feeding schedules must be provided for infants and toddlers, and the infant or toddler's usual diet and feeding schedule must be followed.”⁴⁸

18. “Caregivers shall give each child guidance which helps the child acquire a positive self-concept, self-control, and teaches acceptable behavior.”⁴⁹ Corporal punishment and threatening children is prohibited.⁵⁰ “No child shall be punished for toileting accidents.”⁵¹

19. The Department substantiated that Appellant violated Minn. R. 9502.0445 (2021) because a caregiver in Appellant’s program force-fed a child on May 13, 2022.

20. Appellant did not show she was in full compliance with Minn. R. 9502.0445.

21. There were several allegations made against Appellant concerning behavioral guidance. These allegations were not substantiated, and the Department did not show Appellant violated Minn. R. 9502.0395 (2021) with regard to discipline or toilet training.

22. Birds may be in a day care home “if the birds are clear of chlamydia psittaci” and “play areas are free of animal excrement not confined to pet cages.”⁵²

23. The Department substantiated that Appellant violated Minn. R. 9502.0435, subp. 12 (2021), because excrement from Appellant’s birds was on the floor and accessible to children playing on the first floor on May 13, 2022.

24. Appellant did not show she was in full compliance with Minn. R. 9502.0435 (2021) on May 13, 2022.

25. The Department demonstrated reasonable cause for, and therefore the Commissioner has the authority to issue, the conditional license, except for the conditions that 1) Appellant obtain a County-approved mentor and work with the mentor on behavior guidance, and 2) complete six hours of County-approved training on behavior guidance and child development. To impose these conditions would be arbitrary and capricious because the allegations that Appellant or program staff did not comply with behavior guidance requirements was unsubstantiated.

26. The Commissioner has the authority to fine Appellant \$400 based on Appellant’s failure to initiate and document a timely background study for Bauer and Haley. These two failures were two occurrences because they concerned the background studies for two different people.

⁴⁸ Minn. R. 9502.0445, subp. 3(C) (2021).

⁴⁹ Minn. R. 9502.0395, subp 1 (2021).

⁵⁰ *Id.* at subp. 2(A) (2021).

⁵¹ *Id.* at subp. 3(A) (2021).

⁵² Minn. R. 9502.0435, subp 12(E) (2021).

27. The Commissioner has the authority to fine Appellant at least \$200 for the failure to ensure and document that Bauer had the required training under Minn. Stat. § 245A.50. The Commissioner is advised to consider whether Bauer's lack of training constitutes one occurrence of a violation of Minn. Stat. § 245A.50 and therefore a single \$200 fine, or three occurrences and therefore three \$200 fines, based on the substantiated violations of Minn. Stat. § 245A.50, subs. 3, 4, and 5. In the view of the Judge, the Commissioner has the authority, under Minn. Stat. § 245A.07, to impose one, two, three, or no fines, based on her determination about the nature, chronicity, or severity of the violation(s) of law and the effect of the violation(s) on the health, safety, or rights of the children in the program.

Based upon the foregoing findings of fact and conclusions of law, the Judge makes the following:

RECOMMENDATION

The Commissioner should **AFFIRM** the conditional license without the two requirements that Appellant work with a mentor on undergo excess training on behavior guidance and child development. The Commissioner should also affirm the \$200 fine for failing to ensure Bauer had a timely and documented background study and the \$200 fine for failing to ensure Haley had a timely and documented background study. Depending on the Commissioner's view of the nature, chronicity, or severity of the training violations on the health, safety, or rights of the children in Appellant's program, and whether there were one or more violations under Minn. Stat. § 245A.50, the Commissioner may decline to issue any fine, or may issue up to three \$200 fines.

Dated: July 21, 2023.



JIM MORTENSON
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2022), 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, Senior General Counsel, Department of Human Services, 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 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 (2022). In order to comply with this statute, the Commissioner must then return the record to the Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2022), the Commissioner is required to serve her final decision upon each party and the Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Background Study

The Department fined Appellant \$400 for two violations of Minn. Stat. § 245C.03, subd. 1. On May 13, 2022, when county staff visited Appellant's day care, two individuals working with children there did not have current background studies.

The Commissioner is required to conduct background studies on individuals who have direct contact with children in a licensed day care program.⁵³ "Individuals and organizations that are required . . . to have or initiate background studies" must ensure the background studies are completed by the Commissioner.⁵⁴ The day care must "document the date the program initiates a background study . . . and the date the subject of the study first has direct contact with persons served by the program."⁵⁵ If a day care fails to initiate or have record of a necessary background study, the Commissioner may fine the license holder "\$200 for each occurrence of a violation of law or rule" because background studies are designed to protect health and safety.⁵⁶

Appellant argues that because the Department issued her a license while one of the caregivers – Haley - was listed as a caregiver and did not have a background study,

⁵³ Minn. Stat. § 245C.03, subd. 1(a)(3).

⁵⁴ *Id.* at subd. 1a.

⁵⁵ Minn. Stat. § 245C.20, subd. 1.

⁵⁶ Minn. Stat. § 245A.07, subd. 3(c)(4)(iv).

Appellant cannot now be found out of compliance with the background study requirement. This argument is without merit. It is not the agency's duty to complete background studies before issuing a license. The program or person to be licensed must initiate the background study with the Commissioner. Importantly, the program must keep records of when the study was initiated and when the individual requiring the study first had direct contact with the children served. Appellant did not have this for the Department during its investigation, nor did she otherwise show that she, her program, or Haley and Bauer had studies initiated and when they had first contact with the children in the program.

Appellant also argues that it was the agency's failure, not hers, to ensure the background study on Bauer was completed. This argument, too, is without merit. Appellant had the responsibility to ensure Bauer's study was completed. Under Minn. Stat. § 245C.20:

Except when background studies are initiated through the commissioner's online system, if a licensed program has not received a response from the commissioner under section [245C.17](#) within 45 days of initiation of the background study request, the licensed program must contact the human services licensing division to inquire about the status of the study. If a license holder initiates a background study under the commissioner's online system, but the background study subject's name does not appear in the list of active or recent studies initiated by that license holder, the license holder must either contact the human services licensing division or resubmit the background study information online for that individual.⁵⁷

The Department demonstrated reasonable cause for finding a violation because it had no record of a current background study for Bauer in May 2022. Appellant did not demonstrate she complied at that time, or that she otherwise took action required for Bauer's background study under Minn. Stat. § 245C.20.

There were two background study violations, one concerning Bauer and one concerning Haley. Therefore, the Commissioner has authority to issue a \$200 fine for each violation.

II. Training

The Department fined Appellant \$200 for a violation of Minn. Stat. § 245A.50, subd. 5, and another \$200 for violations of subdivisions 3 and 4 of the same statute. Minn. Stat. § 245A.50, subd. 5 was violated, according to the Department, because caregiver Bauer did not have current training for SUID and AHT. Subdivisions 3 and 4 of that statute were violated, according to the Department, because Bauer did not have current training on pediatric first aid and CPR.⁵⁸

⁵⁷ Minn. Stat. § 245C.20, subd. 1.

⁵⁸ The legal requirements are set forth in conclusion 11, above, and are not repeated here.

Appellant argues that Bauer's training was good until Appellant's license expired. But that is not the law. Minn. Stat. § 245A.50 requires training every two years. Bauer's SUID and AHT training expired in March 2022. Moreover, there is no record she ever had the required first aid and CPR training.

The Department fined Appellant \$200 for the failure to ensure Bauer had current SUID and AHT training under subdivision 5. This is within the Commissioner's authority under Minn. Stat. § 245A.07, subd. 3(c)(4)(iv). The Department fined Appellant another \$200 for the failures to ensure Bauer had current training for CPR under subdivision 4, and first aid under subdivision 5. It is unclear why the Department did not either fine Appellant a single \$200 for all the violations of Minn. Stat. § 245A.50, or fine her for each violation of the statute – once for each subdivision, for a total of \$600. In any event, this is within the Commissioner's authority. The Judge respectfully recommends that if the combined \$400 fine is maintained, the Commissioner explain the incongruity.

III. Capacity

The parties agree that Appellant's day care was over capacity on May 13, 2022. The Department did not establish this is always the case, or that it happened more than once, but it did not need to. The law includes no exception for the capacity requirements. This violation was addressed through the conditional license which is within the Commissioner's authority under Minn. Stat. § 245A.06.

IV. Behavior Guidance and Force Feeding

The Department made several allegations regarding improper behavior guidance and seeks to impose the sanctions through the conditional license to address these claims. The Department did not establish that any of the claimed behavior guidance issues occurred. They were merely unsubstantiated allegations. Thus, there should be no finding that Appellant violated behavior guidance rules and such claims should be removed from any order.

The Department did establish that the force-feeding of an infant occurred. This was initially established at the hearing on the Order for Temporary Immediate Suspension in the summer of 2022. Appellant did not provide sufficient evidence to contradict the claim and the judge's finding following the TIS hearing. Thus, the Commissioner has authority to address flexible feeding as part of the conditional license pursuant to Minn. Stat. § 245A.06, subd. 1, and Minn. R. 9502.0445.

V. Sanitation

Finally, the Department claimed Appellant violated sanitation requirements when bird feces was found throughout the home on May 13, 2022. The law specifically prohibits bird feces from being accessible to children in play areas.⁵⁹ The evidence only demonstrates the condition occurred on May 13, 2022, when Appellant was out, and other

⁵⁹ Minn. R. 9502.0435, subp 12(E).

caregivers were operating the program. Again, there is no exception to the rule. The presence of bird feces that was accessible to children was established at the TIS hearing and again in the present matter. It was observed by the public staff who entered the home, and Appellant argued that it was present because the caregivers were outside with the children, and that she does not let the home get that way when she is there. And there are photographs of the condition.

The fact that children were not playing with or near the bird feces at the time of the on-site visit is irrelevant. There was no closed gate to the upstairs area of the home where most of the problem existed. While the children were, for the most part, outdoors when the investigation began at the program, it is reasonable any of them could have entered the house at some point and come upstairs where the feces was most evidence. The caregivers on hand while Appellant was away simply did not ensure spaces where there was bird poop was either clean or inaccessible to children. And while the evidence only establishes that the condition occurred on May 13, 2022, and no other times, again, the law does not include an exception. The Commissioner is advised to take this into consideration when she considers the nature, severity, and chronicity of the problem and ensure conditions are appropriately set.

J. R. M.