

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

In Re: The Suspension of the License  
of:  
Michelle Winczewski  
650 Grospoint Avenue North  
Oakdale, MN 55128

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATIONS**

to provide Group Family Day Care  
under Minnesota Rules, Parts  
9502.0300 to 9502.0445

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson at 9:30 a.m. on March 7, 1997, at Washington County Community Social Services, 2nd Floor, Washington County Government Center, Stillwater, Minnesota 55082.

Patrick Courtney, Assistant Washington County Attorney, 14900 - 61st Street North, Stillwater, Minnesota 55082, appeared on behalf of Washington County Community Social Services (hereinafter the "County") and the Minnesota Department of Human Services (hereinafter sometimes "DHS" or "the Department"). Douglas V. Hazelton, Attorney at Law, Fourth Floor Atrium, Lumber Exchange Building, 10 South Fifth Street, Minneapolis, Minnesota 55402-1004, appeared on behalf of the Appellant, Michelle Winczewski (hereinafter the "Licensee").

The record of the proceeding closed on March 7, 1997, upon completion of the hearing.

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Human Services will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. ' 14.61 (1996), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact David

Doth, Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155-3842, to ascertain the procedure for filing exceptions or presenting argument.

### **STATEMENT OF ISSUES**

The issue to be determined in this proceeding is whether the Licensee's license to provide family day care should be revoked because the Licensee has failed to comply with the laws and rules applicable to family day care providers.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. The Licensee resides at 650 Grospoint Avenue North in the City of Oakdale, Washington County, Minnesota. From August of 1984 and continuing up to the present, the Licensee has been licensed by DHS and by the County to operate a C3 family day care facility pursuant to Minn. Rules, pts. 9502.0300 to 9502.0445.

2. The Licensee is married, with her husband being a co-licensee of their family day care program. Both the Licensee and her husband have employment outside their family day care business. The Licensee's husband normally works during daylight hours, and the Licensee's outside employment normally occurs during evening hours.

3. The Licensee and her husband have two children of their own: a son who is nine years of age and a daughter who is now six years of age but who was five years old at the time the incidents that gave rise to this action occurred. It was not uncommon for the Licensee to supervise and care for her own children, particularly her daughter, at the same time she was supervising day care children.

4. On April 29, 1996, the Licensee drove a van also occupied by four of her day care children and her own daughter to the parking lot of a beauty parlor located at 783 Radio Drive, Woodbury, Minnesota. Upon arrival, the Licensee left the van and entered the establishment to have her nails done. At the time the Licensee left the van, all five children were restrained by infant seats or seat belts; two were asleep, and the remaining three were eating their lunch. While she was inside the beauty parlor, the Licensee was seated about eight to ten feet from the van and had a clear and unobstructed view of it. The Licensee was in the beauty parlor for approximately fifteen to twenty minutes, during which time she periodically went out into the parking lot to check on the children in the van.

5. Upon leaving the beauty parlor, the Licensee was approached by an officer from the Woodbury Police Department, who investigated the incident for possible child maltreatment and made a report to the County child protection agency. (Exhibit 1)

Some time later a County child protection worker also investigated the incident. (Exhibit 2) As a result of these investigations, the County determined that no "maltreatment," within the meaning of Minn. Stat. ' 626.556 (1994) had occurred (Exhibit 6) but that by leaving children unattended in a vehicle, the Licensee had violated Minn. Rule 9502.0435, subp. 9E (1995). On the basis of the Licensee's violation of the rule, the County issued her a licensing correction order on May 31, 1996. (Exhibit 3) The Licensee did not contest the correction order and agreed not to leave children unattended again.

6. During the month of September 1996, the Licensee's husband normally arrived home from his regular, outside employment at about 4:20 p.m. Upon his arrival at the home, Licensee's husband would frequently take over the day care business while the Licensee would prepare to go to her evening job or take their own children to outside activities, such as horseback riding. On September 26, 1996, however, the Licensee's husband was scheduled to work during the evening and left their home for work at about 3:30 p.m..

7. On September 26, 1997, the Licensee's own son was scheduled to participate in horseback riding lessons at 4:00 p.m. and at a location 5 to 10 minutes away from the Licensee's home. Because her husband would be working in the evening, the Licensee made arrangements to hire A. M., a 15-year-old girl, to stay with any of the children under the Licensee's care who might not have been picked up by their parents by the time the Licensee would have to leave with her own children for the riding stable. It was then the Licensee's intention to drop her own son off at the stable and immediately return to her home to take over from A. M. the supervision of any day care children who still might be there.

8. A. M. arrived at the Licensee's residence at about 3:15 p.m. on September 26, 1996. One of the children for whom the Licensee was providing day care was a sibling of A. M. At about 3:45 p.m. A. M.'s mother arrived at the Licensee's home to pick up A. M.'s sibling. At that time the only other child on the premises for whom the Licensee was providing day care was J. D., a two and one half year-old, who was sleeping on a couch in the lower level of the Licensee's home. A. M. was aware that J. D. was on the premises and believed that the Licensee was also aware of that fact. Believing that J. D.'s parents would soon be arriving to pick up their child, A. M. asked the Licensee for permission to leave with A.M.'s mother and sibling.

9. Assuming that all the children under her care had been picked up by their parents and unaware that J. D. had not been picked up, the Licensee gave A. M. permission to leave and, shortly thereafter, left her home with her own children to drive them to the stable. At the time the Licensee left her home, J. D. was still asleep on the couch in the lower level. Before leaving, the Licensee did not check the house to see if any of the children were still present, nor did she notice J. D.'s shoes and coat near the front door.

10. On September 26, 1996, at about 4:10 p.m., J. D.'s father arrived at the Licensee's home to pick up the child. Finding no one home, the father went to a local school to pick up another child from an extended day care program. The father returned to the day care home at about 4:20 p.m. and still found no one home. The father returned again at about 5:20 p.m. and, again, found no one home. Then, looking into a window, the father saw J. D.'s shoes and coat near the door. He entered the unlocked front door and found J. D. asleep on a couch in the lower level of the home.

11. The Oakdale Police Department conducted an investigation of the events of September 26, 1996 and made a report to the County child protection agency. (Exhibit 5) Some time later a County child protection worker also investigated the incident. (Exhibit 6) As a result of these investigations, the County determined on October 8, 1996, that "maltreatment," within the meaning of Minn. Stat. ' 626.556 (1994) had, in fact, occurred (Exhibits 6 and 9).

12. By letter dated October 23, 1996 (Exhibit 8), the County recommended to the Commissioner of Human Services that the Licensee's family day care license be revoked. That recommendation was based on violation by the Licensee of certain rules applicable to licensed day care programs.

13. The discussion of the September 26, 1997, incident in the County's October 23, 1996, recommendation to the Commissioner provided, among other things, that:

On September 27, 1996, an institutional abuse report was received by Washington County Community Services which indicated that a child (DOB: 11-19-93) was left alone in [the Licensee's] home for over an hour on September 26, 1996. [The child's] father came to pick [the child] up at 4:10 PM and found no one home. He returned at 4:20 PM and found no one home. At 5:30 PM he returned once again, entered the open house, and found [the child] asleep on a couch in the basement.

14. By letter dated December 9, 1996, DHS notified the Licensee of its proposed revocation of her license to provide family day care services. Included in the list of rules, which the Licensee was alleged to have violated, was the following:

9502.0314 DEFINITIONS.

Subp. 29. Substitute. "Substitute" means an adult at least 18 years of age who assumes the responsibility of the provider as specified in part 9502.0365, subpart 5.

Additionally, the discussion of the September 26, 1997, incident in the Department's Order of Revocation included the following statement:

In addition, a 15 year old was left in charge of the children during this incident while you left the home. This is in violation of Minnesota Rules, part 9502.0315, subp. 29.

15. The County's copy of the Department's Order of Revocation (Exhibit 9) differed from the Licensee's copy of the same letter (Exhibit A). On the County's copy, Ruth Clinard, one of the County's child protection workers, had circled the phrase "while you left home" and had added a hand-written notation: "not accurate C Kelly St. John of DHS contacted on 12/16/96." On December 16, 1996, Ruth Clinard advised the Department of Licensing of the factual discrepancy, but the Department never sent the Licensee a corrected Order of Revocation.

16. On September 26, 1996, the Licensee did not leave a 15-year-old in charge of the children under her care while she left the home.

17. From August of 1984 to May 31, 1996, the Licensee's family day care program had not been the subject of any correction order or any other negative action by the County or DHS.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. Under Minn. Stat. " 14.50, 245A.07, and 245A.08 (1996), the Commissioner of Human Services and the Administrative Law Judge have authority to consider the issues raised in this case, and the Commissioner of Human Services has authority to consider a negative licensing action against the Licensee's family day care license.

2. The County and the Department of Human Services have complied with all relevant, substantive and procedural requirements of statute and rule.

3. The Licensee received timely and proper notice of the hearing and of the grounds for revoking her family day care license. Although the Department's Order of Revocation and its Notice of and Order for Hearing contained some factual statements that the evidence demonstrated were incorrect, the Licensee had personal knowledge and reasonable notice of the other factual and legal bases for the negative licensing action being proposed by the Department, and she was therefore was not prejudiced by the inclusion of some allegations that were later proven to be incorrect.

4. Minn. Stat. ' 245A.07, subd. 1 (1996) provides that the commissioner may propose to revoke the license of "of a license holder who does not comply with applicable law or rule." Similarly, Minn. Rules, pt. 9502.0341, subp. 3 (1995), provides in part that "failure to comply with parts 9502.0315 to 9502.0445 or the terms of licensure is grounds for a negative licensing action," including revocation.

5. Pursuant to Minn. Stat. ' 245A.08, subd. 3 (1996), the County has the burden of proof to demonstrate that reasonable cause existed for the revocation of the Licensee's family day care license. When such a showing is made, the burden of proof shifts to the Licensee to demonstrate by a preponderance of the evidence that the Licensee has been in full compliance with the laws and rules which the Commissioner alleges were violated.

6. Minn. Rules, pt. 9502.0435, subp. 9E (1995) provides:

Subp. 9. **Transportation of Children.** When transportation is given to children in a motor vehicle other than a bus or school bus operated by a common carrier, the following provisions for their safety must be made.

\* \* \*

E. No child is permitted to remain unattended in any vehicle.

7. The Licensee violated the provisions of Minn. Rules, pt. 9502.0435, subp. 9E on April 29, 1996, by leaving four children under her care as a day care provider, as well as one child of her own, unattended in a parked van for about fifteen to twenty minutes while she received a manicure in an adjacent beauty salon.

8. The violation of rules described in paragraph 7, above, did not constitute "maltreatment" of children within the meaning of Minn. Rules, ch. 9543 (1995).

9. Minn. Rules, pt. 9502.0365, subp. 5 (1995) provides:

Subp. 5. **Supervision and use of substitutes.** A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute caregiver must be limited to a cumulative total of not more than 30 days in any 12-month period. [Emphasis supplied.]

10. On September 26, 1996, the Licensee violated Minn. Rules, part 9502.0365, subp. 5 by leaving a two and one-half year old child in her care alone and unsupervised in her residence for over an hour.

11. The violation of rules described in paragraph 10, above, did constitute "maltreatment" of a child within the meaning of Minn. Rules, ch. 9543 (1995).

12. The County demonstrated that reasonable cause existed for revoking the Licensee's family day care license under the authority of Minn. Stat. ' 245A.07, subd. 1 and , Minn. Rules, pt. 9502.0341, subp. 3.

13. The Licensee did demonstrate by a preponderance of the evidence that on September 26, 1996, she did not violate Minnesota Rules, pt. 9502.0315, subp. 29 (1995) by leaving a 15-year-old in charge of children under her care while she left her home. However, the Licensee failed to establish by a preponderance of the evidence that she was in full compliance with Minn. Rules, pt. 9502.0435, subp. 9E on April 29, 1996, and with Minn. Rules, part 9502.0365, subp. 5 on September 26, 1996.

14. Under Minn. Stat. ' 245A.07, subd. 1 (1996), "[w]hen applying sanctions authorized under this section, 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," and under Minn. Rules, part 9543.1060, subp. 2 (1995), "[t]he commissioner shall consider the following information before issuing a negative licensing action:

- A. the laws or rules that have been violated;
- B. the nature and severity of each violation;
- C. whether the violation is recurring or nonrecurring;
- D. the effect of the violation on persons served by the program;
- E. an evaluation of the risk of harm to persons served by the program;
- F. any evaluations of the program by persons served or their families;
- G. relevant facts, conditions, and circumstances concerning the operation of the program; and
- H. any aggravating or mitigating factors related to the violation."

15. After considering and weighing the factors described in paragraph 14, above, Minn. Rules, pt. 9543.1060, subp. 4 (1995) requires the Commissioner to "revoke a license when continued operation of the program is not in the best interests of persons served by the program and would pose an unacceptable risk of harm to persons served by the program."

16. Upon consideration of all the factors set forth in Minn. Stat. ' 245A.07, subd. 1 and in Minn. Rules, pt. 9543.1060, subp. 2, the Administrative Law Judge concludes that continued operation of the Licensee's licensed family day care program is not in the best interests of persons served by the program and would pose an unacceptable risk of harm to persons served by the program.

17. Any Conclusion more properly termed a Finding of Fact, and any Finding of Fact more properly termed a Conclusion is hereby expressly adopted as such.

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

### **RECOMMENDATION**

IT IS THE RECOMMENDATION of the Administrative Law Judge that the revocation of the family day care license of Michelle Winczewski be affirmed.

Dated this \_\_\_\_\_ day of March 1997.

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BRUCE H. JOHNSON  
Administrative Law Judge

### NOTICE

Pursuant to Minn. Stat. ' 14.62, subd. 1 (1996), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded; No Transcript Prepared.

### MEMORANDUM

This proceeding was initiated by a Notice of and Order for Hearing dated December 30, 1996, issued by the Minnesota Department of Human Services pursuant to the Commissioner's authority under Minn. Stat. " 245A.01 to 245A.16 (1996). The Notice scheduled the hearing in this matter for 9:30 a.m. on March 7, 1997, at the Washington County Government Center, Stillwater, Minnesota. The purpose of the hearing was to hear the Licensee's appeal of an Order revoking her license to provide family day care. The County presented evidence that the Licensee committed two violations of applicable rules during the period from April 29, 1996, through September 26, 1996, as well as one violation of Minn. Stat. ' 626.556 (1996). With some qualifications that are noted below, that evidence was essentially uncontroverted. The Licensee's objections to the proposed licensing action related primarily to some alleged procedural defects in the Department's order of revocation and to the severity of the sanction that was imposed.

#### 1. Errors in the Order of Revocation

A threshold issue concerns certain errors of law and fact that the Licensee contends were made in the Department's Order of Revocation of December 9, 1996,

and that were later incorporated by reference into the Notice of and Order for Hearing. In both those documents the following statement was made:

In addition, a 15 year old was left in charge of the children during this incident while you left the home. This is in violation of Minnesota Rules, part 9502.0315, subp. 29.

Earlier in those documents the Department cites and quotes Minnesota Rules, pt. 9502.0315, subp. 29 (1995) as one of the legal bases for revoking the Licensee's family day care license. That rule provides:

9502.0314 DEFINITIONS.

Subp. 29. Substitute. "Substitute" means an adult at least 18 years of age who assumes the responsibility of the provider as specified in part 9502.0365, subpart 5.

The County's own investigations found and the evidence clearly established that although the Licensee may have formed an intent to allow a person under the age of 18 to assume responsibility as a child care provider on September 26, 1996, it was an intent that was never consummated. No child was ever left under the sole supervision of a person under the age of 18 on that day. The Licensee argues that the presence of these errors of fact and law deprived her of reasonable notice of the charges which she was being called upon to face, that those errors have vitiated this entire proceeding and have impaired her right to procedural due process of law, and that this proceeding should therefore be dismissed.

What the Licensee fails to consider is that two other violations of law or rule were properly alleged in the Order of Revocation and in the Notice of and Order for Hearing and were also established by the evidence presented at the hearing. Minn. Rules, pt. 9502.0435, subp. 9E (1995), which is cited in the Order of Revocation, provides:

Subp. 9. **Transportation of Children.** When transportation is given to children in a motor vehicle other than a bus or school bus operated by a common carrier, the following provisions for their safety must be made.

\* \* \*

E. No child is permitted to remain unattended in any vehicle.

The Department made specific allegations, and the County proved, that on April 29, 1996, the Licensee violated Minn. Rules, pt. 9502.0435, subp. 9E by permitting four day care children, as well as a child of her own, to remain unattended in her van for some periods of time while she was having her nails done. Although the Licensee argues against a strict interpretation of the term "unattended," she did not dispute the

underlying facts. Furthermore, Minn. Rules, pt. 9502.0365, subp. 5 (1995), which is also cited in the Order of Revocation, provides:

Subp. 5. **Supervision and use of substitutes.** A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute caregiver must be limited to a cumulative total of no more than 30 days in any 12-month period. [Emphasis supplied.]

The Department also made specific allegations, and the County proved, that on September 26, 1996, the Licensee violated Minn. Rules, pt. 9502.0365, subp. 5 by leaving a toddler in her home completely unsupervised for a period of over an hour. The Licensee also did not dispute the facts underlying that violation.

In effect, the Order of Revocation and the Notice alleged yet a third violation C that on September 26, 1996, the Licensee violated Minn. Rules, pt. 9502.0315, subp. 29 and pt. 9502.0365, subp. 5 (1995) by entrusting the children under her care to the supervision of a 15-year-old. The evidence simply failed to prove that the alleged third violation actually occurred. Failure to prove one of three alleged violations does not vitiate a proceeding where two other alleged violations have been clearly established by uncontroverted evidence. The Licensee had personal knowledge of the events of September 26, 1996, which form much of the basis for this licensing action. The fact that she successfully objected to one of the three charges indicates that she had adequate notice and a meaningful opportunity to present her objections.<sup>[1]</sup>

## **2. Severity of the Negative Action**

With the exception of arguing the interpretation of the definitions of some operative legal terms, such as “unattended,” the Licensee did not really contest that violations of applicable laws or rules occurred on April 29, 1996, and on September 26, 1996. Minn. Stat. ' 245A.07, subd. 1 (1996) provides:

### **245A.07 Sanctions.**

Subdivision 1. **Sanctions available.** In addition to ordering forfeiture of fines, the commissioner may propose to suspend, revoke, or make probationary the license or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, 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.

Moreover, Minn. Rules, pt. 9543.1060, subp. 2 (1995) deals with the factors that should be taken into account when deciding whether to issue a negative licensing action and provides guidance for determining which kind of sanction to impose:

Subp. 2. **Information to be considered before imposing a negative licensing action.** The commissioner shall consider the following information before issuing a negative licensing action:

- A. the laws or rules that have been violated;
- B. the nature and severity of each violation;
- C. whether the violation is recurring or non recurring;
- D. the effect of the violation on persons served by the program;
- E. an evaluation of the risk of harm to persons served by the program;
- F. any evaluations of the program by persons served or their families;
- G. relevant facts, conditions, and circumstances concerning the operation of the program; and
- H. any aggravating or mitigating factors related to the violation.

Both Minn. Rules, pt. 9502.0435, subp. 9E and Minn. Rules, pt. 9502.0365, subp. 5 express in law the practical necessity that providers of family day care services be constantly vigilant in their supervision of the children under their care. Those rules reflect an extremely important public policy and are aimed directly at preventing death or serious injury to young children, who are not fully able to appreciate the potential dangers into which their senses of curiosity can lead them. In short, the rules that were violated were very important and serious ones.

With regard to the April 29, 1996, violation, one of the County's child protection workers, who was in an excellent position to assess the situation and to whose judgment the county officials who testified were willing to defer, determined that "maltreatment" within the meaning of Minn. Stat. ' 626.556 (1996) had not occurred. Implicit in the finding of an absence of maltreatment was a finding that the children in the van were not "imminently and seriously endanger[ed]."<sup>[2]</sup> In other words, the County concluded that the first violation was not of a serious nature. By way of contrast, Ruth Clinard, another of the County's child protection workers, determined that the September 26, 1996, violation did constitute "maltreatment." Implicit in her conclusion was a finding that the physical and mental health of the child, J. D., was imminently and seriously endangered. This comports with common sense. Given the normal mobility and curiosity of two and one half year old preschoolers, the dangers inherent in leaving them alone in a house, much less one with an unlocked door, are readily apparent. The documentary evidence and testimony established that J. D. was alone in the Licensee's house for about an hour and twenty minutes. Fortuitously, the child was tired, apparently remained asleep on a couch in the lower level of the house, and suffered no serious injury as a result of the incident. But the fact that no serious harm occurred does not lessen the seriousness and severity of the violation. There was a very significant risk of a more unfortunate outcome.

But perhaps more germane to the appropriateness of the proposed sanction is the fact that the Licensee did not merely violate licensing rules, there was also a

determination by the County that she also violated the Maltreatment of Minors Act, Minn. Stat. ' 626.556 (1996). The preamble to that Act in subd. 1, as well as the legislative history, both indicate an intent on the part of the legislature that neglect and maltreatment of children are to be regarded as extremely serious matters and that prevention of such neglect and maltreatment be among the state's highest priorities. The County's justifiable finding of maltreatment in connection with the September 26, 1996, incident elevated significantly the level of seriousness and severity that must be accorded to that violation.

As to the effect of the violations on persons served by the program, the violation of April 29, 1996, seemed to have had little impact. On the other hand, the evidence established that the child J. D. had some awareness of having been left alone and displayed some psychological after-effects. Moreover, J. D.'s parents experienced a complete loss of confidence in the Licensee's day care program and withdrew their child from it. On the other hand, after being apprised of the incidents that gave rise to this proceeding, parents of at least two other children under the Licensee's care expressed confidence in her future ability to provide appropriate day care services.

In terms of mitigating factors, prior to April 29, 1996, the Licensee had provided family day care services to hundreds of children over a period of nearly twelve years without receiving so much as a single correction order. In other words, prior to these incidents the Licensee had demonstrated a consistent appreciation of the need for licensing rules to protect the health and safety of the children under her care and a willingness to take licensing rules seriously and to abide by them. By way of further mitigation, the Licensee has been exceptionally honest and forthright in her dealings with licensing agencies, this tribunal, and the parents of children under her care. At the hearing she admitted an unconsummated intent to violate another licensing rule on September 26, 1996, by allowing a 15-year-old to supervise some of the children under the Licensee's care while she ran a family errand.<sup>[3]</sup> There was also evidence that the Licensee has been voluntarily notifying both existing and prospective day care parents of the incidents that formed the basis for this licensing action. (Exhibits B and C)

The County suggests that the violation on September 26, 1996, was a recurrence of the violation that occurred on April 29, 1996. Though both related to supervision of children under the Licensee's care, the Licensee argues that there were some material differences. The Licensee argues that April violation resulted from a conscious and intentional decision but was also based upon the Licensee's good faith belief that the children were not "unattended" within the meaning of the rules. On the other hand, the Licensee admits that a child was "unattended" in the September incident but argues that the violation was caused by a completely inadvertent and unintentional miscommunication.

Focusing on whether the two violations were so directly related to each other as to be characterized as "recurrent" misses an essential point. Regardless of whether or not the violations can fairly be characterized as recurrent, they show a troubling pattern of recent inattention to the importance of proper supervision. The evidence at the

hearing, including the Licensee's own testimony, suggests that her life has become increasingly busy, with commitments not only to her day care program but also to an evening job and to the outside activities of her own children, as they grow older. An inference can be drawn from the evidence that it was the Licensee's inability to reconcile these multiple commitments that placed pressure on her to evade and bend the licensing rules. It was this kind of bending of the rules that resulted in the Licensee's leaving of children under her care unattended in a van on April 29th, in her unconsummated intent on September 26th to use an underage caregiver while she ran personal errands, and in the events which resulted in the child J. D. being left alone for over an hour on September 26th.

The ultimate test of whether revocation of a family day care license is warranted is stated in Minn. Rules, pt. 9543.1060, subp. 4, which provides in part:

Subp. 4. **Revocation of License.** The commissioner shall revoke a license when continued operation of the program is not in the best interests of persons served by the program and would pose an unacceptable risk of harm to persons served by the program. [Emphasis supplied.]

As long as there exists an underlying pressure on the Licensee to attempt to reconcile the sometimes irreconcilable demands of her multiple personal commitments, there will be temptation for her to bend one licensing rule or another. As long as this state-of-affairs continues, the interests of the Licensee's day care clients will not be well-served, and there will continue to be an unacceptable risk of harm to the children served by the program.

There are a number of mitigating factors favoring the Licensee that make this a particularly difficult case. But Minn. Rules, pt. 9543.1060, subp. 4C (1995) specifically makes substantiated neglect and maltreatment appropriate grounds for revocation of a family day care license. A formal determination of maltreatment under the Maltreatment of Minors Act, Minn. Stat ' 626.556 (1996) creates an extremely heavy burden to overcome when arguing for a less severe sanction. In the absence of some efficacious and enforceable method of assuring that the Licensee is not likely again to regard violation or evasion of the rules as a possible solution to the problem of multiple personal commitments, the Commissioner's decision to revoke the Licensee's license to provide family day care is not unreasonable and should be affirmed.<sup>[4]</sup>

B. H. J.

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<sup>[1]</sup> Even if the Administrative Law Judge were to find that the entire proceeding has been vitiated by the errors contained in the Order of Revocation and were to recommend dismissal, presumably the Department would issue a corrected order and reinstitute these proceedings. In argument, counsel for the Licensee conceded that the interests of justice would not necessarily be well-served by a delay in completing these proceedings.

<sup>[2]</sup> For purposes of child care licensure, Minn. Rules, pt. 9543.0020, subp. 14 (1995) defines “maltreatment” as having “the meaning given it in Minnesota Statutes, section 626.556, subdivision 10e.” That provision of law, in turn, describes “maltreatment” as “neglect, physical abuse, or sexual abuse by a parent, guardian, or individual functioning within the family unit as a person responsible for the child’s care.” Minn. Stat. § 626.556, subd. 2(c) goes on to define “neglect” as “failure to protect a child from conditions or actions which imminently and seriously endanger the child’s physical or mental health when reasonably able to do so . . . .”

<sup>[3]</sup> There was evidence in a police report (Exhibit 5) that the Licensee had left A. M. alone to watch the children under the Licensee’s care on a couple of occasions in August or early September. But it was the testimony of the County’s licensing social worker that those allegations were neither investigated nor substantiated by the County and played no role in the decision to recommend revocation of the Licensee’s day care license. Since counsel for neither party raised the issue with the Licensee during her testimony at the hearing, the Administrative Law Judge considers that portion of Exhibit 9 irrelevant to this proceeding.

<sup>[4]</sup> Minn. Rules, pt. 9543.1060, subp. 5 (1995) allows the commissioner to suspend rather than revoke a license where the factors listed in subpart 2 of that rule indicate, among other things, that suspension “would not pose a risk of harm to persons served by the program.” It is possible that there may be some conditions that could be imposed on the Licensee’s license which could reduce the risk of future harm to an acceptable level. Counsel for the Licensee briefly suggested some possibilities in final argument. But in the absence of a record relating to potential licensing conditions, which includes some discussion of their potential efficacy and the views of local licensing officials who are in the best position to assess the worth of any such conditions, an administrative law judge is in a poor position to recommend an alternative sanction that would allow continuation of the program while eliminating any appreciable risk of future harm to persons served by the program. Whether the Commissioner believes that he would be in a position to consider alternative sanctions that would be both efficacious and enforceable when he reviews this report and makes his final decision is a matter for his judgment and discretion.