

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the License of Denise Fischer to Provide Family Child Care under Minnesota Rules, Parts 9502.0300 to 9502.0445.

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

Hearings in the above-entitled matter were held by Administrative Law Judge Steve M. Mihalchick on December 13, 14, and 19, 2000, in Alexandria, Minnesota. The record was closed on January 9, 2001, with the receipt of the last post-hearing brief.

Joel G. Paschka, Assistant Douglas County Attorney, Douglas County Courthouse, 305 8th Ave W, Alexandria, MN 56308, appeared on behalf of Douglas County Social Services ("the Local Agency" or "Douglas County") and the Minnesota Department of Human Services ("the Department"). Matthew P. Franzese, Leuthner Law Office, 1311 Broadway, Suite 2, PO Box 637, Alexandria, MN 56308 appeared on behalf of the Licensee, Denise Fischer.

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained herein. Pursuant to Minn. Stat. §14.61, the final decision of the Commissioner of Human Services 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 the Report to file exceptions and present argument to the Commissioner of Human Services. Parties should contact Commissioner Michael O'Keefe, Minnesota Department of Human Services, Human Services Building, 444 Lafayette Road, St. Paul, Minnesota 55155-3815, telephone (651) 296-2701, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues in this case are whether Licensee failed to ensure proper supervision of daycare children as required by Minn. Rules 9502.0315, subp. 29a, and 9502.0435, subp. 12; failed to obtain applicant background studies as required by Minn. Stat. § 245A.04, subd. 3(c) and Minn. Rule 9502.0375, subp. 2; and failed to comply with the limitations on numbers of children in care imposed by Minn. Rules 9502.0365 and 9502.0367; and whether Licensee's family day care license should be revoked for any such failures.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Licensee provides family daycare at her home under a license from the Department first obtained in 1986. She has been separated from her husband Ron for about five years. They are in the process of getting divorced. Licensee testified that they have been separated since he hit her and she told him to leave, but the licensing records indicate a history of domestic abuse.^[1] Licensee and Ron apparently still maintain some sort of relationship. Licensee has three children, all still living with her. They are a son, now 17, a daughter now 15, and a son now 8. Licensee's boyfriend Brian Hendershot has also lived in the home for a few years.

2. Licensee was born November 4, 1960, and is a high school graduate. She bought the home at 809 North McKay Avenue in Alexandria in 1986 with the intention of fixing it up and offering daycare. She had previously worked at a nursing home and had never done daycare. She decided to do daycare because she had been unable to find daycare for her children at the hours she needed.

3. In that area, McKay Avenue is the eastern edge of Alexandria. Licensee's home is on the east side of the street across from a junior high school on the west side. McKay Avenue experiences significant traffic compared to other residential streets in Alexandria.

4. Licensee's home is located on a large, wooded lot that extends eastward from McKay along a long driveway. The house is located on the north edge of the property, approximately 180 feet back from the street. A large driveway extends from McKay to a parking area at the end of the driveway to the south and southeast of the house. A small driveway goes north along the east side of the house back to a garage. A play area for the day care children is located to the east of the small driveway. To the east of that is a shop building and, beyond that, a go-kart track. The rear of the property extends to the south in a large area known as "the woods." There is a pole shed located there, next to the parking area.^[2] Neighbors' homes surround Licensee's property.

5. Barbara Kleinschmidt, L.S., is a daycare licensing inspector for Douglas County. Kleinschmidt began in that position on a temporary basis in November 1987.

6. In April 1989, Kleinschmidt spoke to Licensee regarding an injury to a daycare child that occurred when a temporary stairway collapsed. No correction order was issued as a result of that incident.

7. On March 13, 1991, Kleinschmidt visited Licensee in response to a complaint about Licensee being over-capacity. Licensee was within her licensed capacity on that date. Kleinschmidt informed Licensee about the importance of not exceeding that capacity.

8. On August 20, 1991, Kleinschmidt again visited Licensee in response to a complaint about Licensee being over-capacity. Licensee was over her licensed capacity on that date. Kleinschmidt again spoke to Licensee about the importance of

not exceeding her capacity. In accordance with Douglas County's existing policy, no correction order was issued.

9. In December, 1991, Kleinschmidt conducted a recheck and again found Licensee over her licensed capacity. Kleinschmidt counseled Licensee, but no correction order was issued.

10. On August 6, 1993, Kleinschmidt conducted a visit and found Licensee's sister present at the daycare supervising fifteen children. Licensee was not present at the daycare. A correction order was immediately issued for over capacity and lack of background check on a caregiver.^[3]

11. In September 1993, Kleinschmidt conducted a visit in response to a complaint regarding capacity. Licensee was within capacity on that visit. Kleinschmidt informed Licensee that if she was over capacity again that a negative licensing action would be initiated due to the prior noncompliance and correction order.

12. Around this time, Licensee changed her license classification to C-3. Under the C-3 classification, Licensee could have up to 12 children without a helper.^[4] With a helper, the C-3 classification allows up to 14 children. Within the maximums, limits are also set for the number of infants or toddlers in care.^[5]

13. On November 8, 1993, Kleinschmidt conducted another visit in response to a complaint regarding capacity. Licensee was within capacity on that visit.

14. On January 25, 1994, Kleinschmidt made an unannounced visit after receiving another capacity, improper diapering, and improper handwashing complaint. The only concern expressed at the visit was that the screen door would be left open in summer and bugs could enter. No correction order was issued.

15. Based on records Licensee kept for a County food program, Kleinschmidt determined that Licensee could be overcapacity. On June 24, 1994, Kleinschmidt wrote to Licensee to indicate that the records should indicate when the children were in care and to remind her of the capacity limits.^[6]

16. On February 14, 1994, Kleinschmidt notified Licensee that Cheryl Zuehlsdorff (who had been working as a caregiver in the daycare) had been disqualified as a result of the background study. Kleinschmidt told Licensee that background studies needed to be completed for substitute caregivers.

17. Jennifer McLaughlin, L.S., works as a daycare licensing worker for Douglas County. McLaughlin began in that position in March, 1995. McLaughlin also performed other social worker duties for Douglas County.

18. In June, 1995, Licensee inquired of the County regarding installing a swimming pool. McLaughlin passed along the standards that must be met to have a swimming pool on daycare premises. McLaughlin also informed Licensee regarding

that children age 11 and older were excluded from the count when determining compliance with the rules on capacity.

19. In December, 1995, McLaughlin received reports that John Warner was assisting Licensee in caring for children in her daycare. Warner had been subject to a background study and had been disqualified from direct contact with daycare children. McLaughlin made several unannounced home visits during this time but could not confirm the reports she received about Warner.

20. A licensing visit was made on February 22, 1996, and Licensee was within her capacity for children in her care. In talking over some of the issues regarding capacity, Licensee identified two persons as caregivers assisting her. McLaughlin noted that neither person had the forms filed for completion of background studies.

21. On September 20, 1996, McLaughlin made an unannounced visit in response to complaints received about Warner providing care, lack of supervision of daycare children, and transporting children in automobiles without proper restraints. Warner and Zuehlsdorff were both present in the daycare along with two other adults. Licensee explained that Zuehlsdorff was only there to pick up her child (who was enrolled in the daycare). McLaughlin issued a corrective order regarding Warner being disqualified from direct contact with daycare children and the failure to use restraints for the children during transportation.

22. McLaughlin received a complaint on April 16, 1997 about Licensee's Shar Pei dogs fighting with a neighbor's dog. Since no daycare children were present, the County concluded that the Sheriff's Office was the appropriate authority to investigate the matter. Licensee received a citation on May 28, 1997 for dogs running at large.

23. Licensee purchased a trampoline in 1997 for use in her daycare. McLaughlin received a complaint from a prospective daycare parent that a four-year-old had been using the trampoline at Licensee's daycare for 10 minutes with no supervision. McLaughlin visited Licensee's daycare on June 10, 1997. During the visit, McLaughlin observed a four-year-old child with a cast on each arm jumping on the trampoline. McLaughlin issued a corrective order regarding the child using the trampoline.

24. In August, 1997, a six-year-old daycare child and Licensee's son (also six years old at the time) entered the pole shed and spray painted an automobile there that was up on jacks. Licensee was not present, and was not aware of where these children were until she noticed that the door to the pole shed was open. Licensee then retrieved the children from the pole shed and wiped off the paint.

25. Three children found a pocket knife in the driveway on the daycare premises in October, 1997. A daycare child, age 4, took the knife home, where a parent discovered it and contacted the County. The parent discontinued using Licensee's daycare.

26. On October 6, 1997, Kleinschmidt received a complaint that Licensee "parties" with teenagers and allows them to stay overnight.^[7] The complaint also indicated that these teenagers were present when daycare children were in the home.^[8] In investigating this complaint, Licensee told Kleinschmidt that Josh Randt and Tim Abell were on the premises at times.^[9] Licensee indicated that she knew about both individuals having criminal records.^[10] Kleinschmidt warned Licensee about possible problems with disqualification if those individuals were coming in contact with the daycare children, since none of these individuals had background studies done.^[11]

27. Josh Randt, age 18, was frequently at Licensee's daycare prior to November, 1996. His girlfriend had two children enrolled in Licensee's daycare.^[12] Randt was also a frequent companion with Licensee's family to go-cart races. November 26, 1996 Randt came over to Licensee's house, went to the pole shed and started a small fire in the yard. When Licensee investigated, she found Randt intoxicated and called the police. Randt was arrested for disorderly conduct and was no longer allowed on the daycare premises.

28. Tim Abell, age 21, began frequenting Licensee's daycare in 1997. Based on information she had received, McLaughlin believed that Abell was in contact with daycare children while at Licensee's home.^[13] In August, 1997, McLaughlin received information that Abell had been arrested on an outstanding warrant while at the daycare residence.^[14] One daycare parent indicated that Abell was present in the morning when her child was dropped off, and present when she returned in the afternoon to pick her child up.^[15] McLaughlin had provided the background study forms regarding Abell for Licensee to return. Since Licensee had not done so, McLaughlin checked the publicly available criminal conviction records on her own initiative. McLaughlin found that Abell had criminal convictions that disqualified him from transporting daycare children.^[16]

29. E.D., age 17, met Licensee's son at school. E.D. frequently worked on go-karts usually at Licensee's ex-husband's shop in town. E.D. stayed overnight at Licensee's house on a frequent but irregular basis. The number of times E.D. stayed overnight was sufficient to cause others to believe that E.D. was living at the Licensee's home. E.D. was frequently in direct contact with daycare children. Licensee allowed E.D. to use her van and provide rides for her children.

30. Between Fall 1997 and December 1997, E.D. sexually molested a juvenile at Licensee's house. When Licensee discovered the misconduct, she filed a police report in January, 1998. E.D. began driving by the house and parking his car at the end of the driveway. Licensee also began receiving harassing hang up telephone calls. Licensee obtained a restraining order against E.D. to prevent future contact. Licensee maintained that E.D. violated the restraining order.

31. McLaughlin interviewed E.D. on January 6, 1998, and he indicated that Licensee had allowed E.D. to drive the daycare children on trips. E.D. also indicated that he helped with the daycare children, especially when daycare parents were present.^[17]

32. McLaughlin received a report from school officials that, while investigating a truancy report in early January, the officials found Licensee still in bed at 10:00 a.m. and the daycare children being supervised by Licensee's son and daughter.^[18] Two other unidentified adults were present.

33. McLaughlin interviewed Licensee's daughter on January 23, 1998. She indicated that Abell would be "moving out of their home soon."^[19]

34. McLaughlin interviewed a daycare parent on February 12, 1998. That parent described the daycare premises as a "zoo" when she arrives to drop off her child.^[20] That parent also indicated she would have to wake up Licensee to let her know that the child was being dropped off. That parent also indicated that many of Licensee's friends have spent the night and are present when her child is being dropped off at 6:30 a.m.^[21]

35. On February 24, 1998, McLaughlin received a complaint about Licensee's dogs from a neighbor.^[22] Licensee's dogs had attacked the neighbor's dog. The neighbor was concerned that daycare children could be hurt in the event that such an incident were to reoccur.

36. In early 1998, Licensee's family took a trip to Florida. Abell accompanied the family. Abell and Licensee's son argued. From that point onward, Licensee indicated that Abell was no longer welcome on the daycare premises. McLaughlin received reports that Abell had circulated a flyer announcing the opening of an automobile repair shop at Licensee's home.^[23] McLaughlin was told by Licensee's daughter that "no one lived at her home anymore but family members."^[24]

37. A correction order was issued to Licensee in April, 1998 addressing the problems with supervision, including the trampoline incidents, the knife incident, transportation of daycare children by an unlicensed driver (E.D.), the spray painting in the pole shed, and a few other issues.^[25]

38. In March, 1999, neighbors filed a police complaint regarding loud engines and driving conduct in Licensee's driveway. Licensee posted a five mile-per-hour speed limit sign and barred persons who violated that limit from using the driveway.

39. In April, 1999, Abell was arrested for the burglary of businesses in the Alexandria area.^[26]

40. On June 17, 1999, McLaughlin conducted a site visit responding to a series of allegations regarding Licensee's daycare. Upon her arrival, one of Licensee's dogs approached McLaughlin and exhibited aggressive behavior. Daycare children and the dog were outside at the same time. Licensee was not present to control the dog at that time. Fifteen children were present at Licensee's daycare. While on the premises, McLaughlin observed an electric weed trimmer, laying near the garage. Licensee's trampoline was being used by eight children ranging in age from 9 months old to 11 years old. A 10-year-old child was holding the 9-month-old child. Some children were sitting and reading, others were jumping. No direct supervision was being provided and

no helper was present. Licensee was over capacity at this time by 3 school-age children. While McLaughlin was talking to Licensee along the side of the house, an eleven-year-old boy began operating the weed trimmer around the corner. Licensee intervened at that time to stop him from using the weed trimmer.

41. On July 20, 1999 the County received a complaint that a child in Licensee's daycare had been bitten by one of her dogs.^[27] The eight-year-old child had a bruise on the shoulder and the skin had been broken. The child identified the dog as "Jake," which was one of the dogs at Licensee's daycare. Licensee had not informed the County that a child had been bitten. McLaughlin contacted Licensee and told her of the injury to the child. Licensee indicated that this was the first she had heard of that injury.^[28] Licensee had put a band-aid on the child's elbow because that was the injury he complained of.

42. While investigating the dog bite, McLaughlin was told by daycare children that they would be dropped off while Licensee was still sleeping.^[29] On some occasions Licensee would go back to sleep after the children arrived. The children indicated that other adults were present at the daycare premises on weekdays.^[30]

43. On August 27, 1999, a daycare parent dropped off a one-year old child and that child's older sibling at Licensee's daycare. That night, the daycare parent noticed marks consistent with child bites, one on the child's wrist and the other on the child's back. The daycare parent reported the incident. McLaughlin investigated the report on August 28, 1999 and concluded that the injuries had occurred at Licensee's daycare. McLaughlin concluded that the lack of a response by Licensee at the time of the bite constituted a lack of supervision and issued a corrective order. During this visit, McLaughlin saw "Rocky" (one of the Shar Pei dogs) running loose in yard of daycare premises. Licensee had told McLaughlin that the daycare operation had been changed to prevent contact between the dogs and the daycare children.

44. On August 30, 1999, McLaughlin informed Licensee that the only way that the continued presence of the dogs would be permitted would be if they were kenneled the entire time that daycare children were present.^[31]

45. On September 16, 1999, McLaughlin made an unannounced visit to Licensee's daycare. As McLaughlin arrived, a four-year-old daycare child approached the automobile. Licensee was not within sight of the driveway and was not in a position to prevent the four-year-old child from entering the driveway. After attempting for a few minutes to determine how many children were in care, a substantial number of school age children arrived. Licensee was alone providing care. For the brief period of time prior to the arrival of the school age children, Licensee was over capacity by one child. After the arrival of the school age children (and not counting two children who were being picked up by a parent), Licensee had seventeen children in care. Due to the level of disorder, McLaughlin concluded that she could not discuss any of the issues that had prompted the visit and decided to return the next day. Licensee contacted another caregiver to provide assistance. Licensee indicated that several of the daycare parents had not arrived to pick up their children again.^[32]

46. McLaughlin returned on September 17, 1999 and discussed the previous day's capacity problem with Licensee. At that time, Licensee asserted that another adult, Brian Hendershot, had been assisting her and that this cured the capacity problem. McLaughlin noted that Hendershot was working on a vehicle at the pole shed when she arrived and Hendershot had not been present in the daycare premises to assist in caring for the children present. McLaughlin also noted that, even with a second adult, Licensee would have been overcapacity by two children. Licensee blamed other daycare parents for the overcapacity situation and maintained that there was nothing she could do about the overcapacity problem.^[33] At that time, McLaughlin indicated that the County would seek revocation of Licensee's daycare license.

47. On September 20, 1999, McLaughlin received a report that Licensee's dogs were in a neighbor's yard during daycare hours. The neighbor was concerned because she also operates a daycare in her home and the dogs growled at her when she attempted to remove them from her property.^[34]

48. On September 21, 1999, Douglas County recommended to the Department that Licensee's family daycare license be revoked.^[35] Additional information was provided to the Department in letters of September 22, 1999, and April 10, 2000.^[36]

49. Licensee appealed the revocation of her family daycare license by letter dated February 8, 2000. The Department issued a Notice of and Order for Hearing in this matter on February 25, 2000, which was subsequently served on the Licensee.

50. On February 24, 2000, two of Licensee's daycare children, ages 6 and 4, were discovered two blocks away from the Licensee's daycare. A Douglas County Sheriff's Deputy returned the children to Licensee's daycare. The Licensee indicated that the children had been sent outside to look for one of Licensee's dogs, but she did not demonstrate any awareness that the children had been missing from the daycare for some time.^[37]

51. In April, 2000, Licensee allowed a juvenile, M.V., to stay at her house. M.V. was older than 13 years-of-age. M.V. had been having problems at home and stayed at a number of homes for several months. While not exclusively residing at Licensee's, M.V. was present frequently enough to be regularly seen by daycare parents. M.V. was in direct contact with daycare children. In a juvenile proceeding, M.V. testified that he had been staying at Licensee's home for the previous two months. The judge in that proceeding ordered M.V. to visit Licensee's premises only when accompanied by a parent.

52. The Department issued an Order of Revocation on May 10, 2000, indicating that Licensee's family day care license was revoked for violating the rules governing supervision, background studies, and capacity.^[38] The Order also informed Licensee of her right to a contested case hearing as required by Minn. Stat. § 245A.07.

Based upon the foregoing facts the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§14.50 and 245A.08.

2. The Notice of Hearing is proper in all respects and the Local Agency and the Department have complied with all substantive and procedural requirements of law and rule.

3. Minn. Rule 9502.0315, subp. 29a, defines "supervision" as:

"Supervision" means a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child. For the school age child, it means a caregiver being available for assistance and care so that the child's health and safety is protected.

4. Licensee failed to meet the requirement that a caregiver supervise the children in her daycare within the meaning of Minn. Rule 9502.0315, subp. 29a. Licensee's failure to meet this requirement was frequent and continued despite repeated efforts at correction.

5. Minn. Rule 9502.0367 C(1) establishes the capacity limitation for Licensee's daycare on June 17, 1999 and September 16, 1999, as ten children, with no more than three of those children being infants and toddlers.

6. Licensee consistently failed to abide by the capacity limitations of Minn. Rule 9502.0367 by exceeding the allowable number of children in her care.

7. Licensee failed to comply with the requirements of Minn. Rule 9502.0335, subp. 6.D, governing background checks of persons who have direct contact with children in the daycare.

8. When a licensee does not comply with the rules governing daycare licensure, Minn. Stat. § 245A.07 authorizes sanctions as follows:

Subdivision 1. **Sanctions available.** In addition to ordering forfeiture of fines, the commissioner may propose to suspend, revoke, or make conditional 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

9. The nature and severity of Licensee's violation of the disciplinary rules and the impact on the health, safety, and rights of children in the program support the imposition of sanctions against Licensee's license to provide family day care.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby respectfully recommended that the sanctions be taken against the family day care license of Denise Fischer due to her numerous violations of the rules governing family daycare.

Dated this 20th day of February, 2001.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. §14.62, subd. 1, the Agency is required to serve a copy of its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded, 12 tapes.

MEMORANDUM

Capacity

Licensee describes her situation as being "barely over capacity" on three occasions.^[39] The County indicates that overcapacity has been a problem with Licensee on an ongoing basis from 1991.^[40] The County noted that, during visits, Licensee had a difficult time identifying how many children she had in care at that particular moment.^[41] Licensee also expressed confusion as to the ages of children in her care and when children no longer counted toward capacity.

The capacity standards of Minn. Rule 9502.0367 are clear. Licensee was overcapacity on June 17, 1999 and September 16, 1999. Contrary to Licensee's assertion, having seventeen children in the care of a single caregiver is far over capacity. Numerous reasons have been advanced to explain these violations. Licensee argues that she did not intend to be over capacity and therefore no violation should be found. None of these explanations indicate that Licensee has a commitment to maintaining ongoing compliance with the requirements of the rule. The only effective measures taken by Licensee to eliminate the overcapacity problem were put in place after the County sought revocation of her license. License sanctions are appropriate for these violations.

Supervision

The County maintains that Licensee violated the supervision standards required of children in daycare by paying insufficient attention to daycare children outside on the premises, allowing dogs in the same area as daycare children without a caregiver being present, and not noticing that a child had been bitten (by another child). A number of specific instances were cited as particular violations. These are the driveway incident, the pole shed incident, the weed trimmer incident, the pocket knife incident, the wandering incident, and a number of events surrounding the trampoline.

Supervision for infants, toddlers, and preschoolers requires a caregiver to be within "sight or hearing."^[42] The supervision standard for school age children is more flexible, since these children are self-directed to a greater extent and can look after themselves to a greater degree. The rule standard for school age children is that a caregiver be "available for assistance and care so that the child's health and safety is protected."^[43] Thus, for school age children, the standard will vary with the situation.

In the driveway incident, a four-year old approached the County social worker as she was driving up to the daycare premises. There was no caregiver within sight or hearing of this child. With the amount of traffic using the driveway and the severity of the potential harm, adequate supervision requires some means of keeping preschool children out of the driveway. The driveway incident is a demonstrated violation of the supervision requirement.

In August, 1997 a six-year-old daycare child entered the pole shed on the daycare premises with Licensee's son, also six years old at the time. While there, they spray-painted portions of an automobile that was in the pole shed, up on jacks. There was no adult within sight or hearing of these children while the spray-painting was going on.^[44] If a caregiver had been present, allowing children to use spray paint clearly fails to meet the supervision standard.^[45] The pole shed incident is a demonstrated violation of the supervision requirement.

The County social worker noted that an electric weed trimmer was plugged in and lying in the yard when she visited on June 17, 1999. While attempting to determine how many children were in care, an eleven-year-old child turned the weed trimmer on. While Licensee was within hearing of the weed trimmer, the mere presence of such equipment outside of the control of an adult constitutes a failure to adequately supervise.^[46] While the child operating the weed trimmer was eleven years of age, and therefore not a daycare child, the daycare children who were present were exposed to the hazard. The weed trimmer incident is a demonstrated violation of the supervision requirement.

In November, 1997, three of the daycare children found a pocket knife in the driveway on the daycare premises.^[47] One of the daycare children, age 4, took the pocket knife home. The Licensee first became aware of this when the County worker informed her that the pocket knife had been found on her premises. There are no facts in the record surrounding this event to indicate that the Licensee should have been aware of the children's discovery. The children did not announce their discovery, and one child took the pocket knife with him. This is not a showing that no caregiver was

sufficiently available to protect the children's' health and safety. To hold that these circumstances constitute such a violation would change the standard to being within sight of the child at all times. That is not the standard required in the rule. The pocket knife incident does not constitute a violation of the supervision requirement.

On February 24, 2000, two of the daycare children, ages 6 and 4, were discovered two blocks away from the Licensee's daycare. A Deputy Sheriff returned the children to Licensee's daycare. Upon the arrival of the first Deputy, Licensee did not demonstrate any knowledge that the children were gone. At the hearing, Licensee asserted that the children were not in care during that time. This assertion is not credible and not supported by any other credible evidence in the record.^[48] No caregiver was in any position to protect the health or safety of those children. The wandering incident is a demonstrated violation of the supervision requirement.

A number of incidents were identified relating to Licensee's trampoline that are alleged to be violations of the supervision requirement. A trampoline is a piece of equipment that cannot be used by daycare children without being under the immediate observation of a caregiver. Even when direct supervision is being provided, insisting on correct use of the equipment is part of providing appropriate supervision. On June 10, 1997, Licensee allowed a four-year-old child with a cast on each arm to use the trampoline and Licensee was not present. Even if she had been there, proper supervision would have required not allowing a child with broken arms to use a trampoline. On June 17, 1999, eight children were on the trampoline at the same time. Although Licensee had adopted some policies regarding the safe use of the trampoline, allowing that many children on the trampoline violated those policies. Even with direct oversight, eight children on a trampoline is not proper supervision. The trampoline incidents are demonstrated violations of the supervision requirement.

Where pets are in the proximity of daycare children, Minn. Rule 9502.0435, subp. 12 B., requires that "children handle animals only with supervision." The County asserts that Licensee's dogs have been demonstrated to be dangerous and that further restrictions should have been imposed by Licensee. The County had every opportunity to investigate the incidents cited and impose further restrictions. Such restrictions were discussed but not imposed. The dog was outside with daycare children on June 17, 1999 without Licensee being present. Similarly, the biting incident on July 20, 1999 occurred when one of the dogs was in the yard with two daycare children and no caregiver. All of the incidents discussed above, with the exception of the pocket knife incident, are demonstrated violations of the supervision requirement.

Duration of Violations

Licensee argues that allegations prior to 1999 should not be considered, since the County has not attempted to revoke her daycare license until 2000.^[49] Licensee also asserts that the alleged violations are not chronic within the meaning of Minn. Stat. § 245A.07, subd. 1.^[50]

The issue of numerous violations over time has arisen before in daycare licensure matters. Where a number of violations, each relatively minor, demonstrates an ongoing inability to comply with the rules governing daycare, the violations can be considered in determining whether discipline is appropriate and what sanction should be applied. In this matter, the violations are severe. The severity of the violations supports their inclusion in assessing discipline and sanctions.

Licensee maintains that the violations are not chronic, since no one problem was of long duration.^[51] To make this assertion, Licensee relies upon the characterization of each violation as being the distinct event observed by the County social worker.^[52] The record in this matter shows a very large number of complaints from daycare parents regarding the capacity limits being violated. Numerous visits dating back to 1991 from the County workers showed Licensee over her limit. The records maintained by Licensee show that her daycare was likely to be overcapacity on a daily basis. Chronicity of violations, as used in Minn. Stat. § 245A.07, subd. 1, means whether the violation was an isolated event or an ongoing problem. In this matter, Licensee's overcapacity problem was an ongoing problem. The same analysis applies to the lack of supervision provided to daycare children. In both areas, Licensee's violations were both serious and chronic.

Background Studies

The County alleges that "a variety of individuals" were in contact with daycare children on a regular basis with no background study having been performed. Licensee maintains that these persons were either present in the home in prior years or they were not actually living in the home. Licensee asserts that these persons are not required to obtain background studies.

The general requirement of background studies for persons in a variety of programs, including daycare, is found in Minn. Stat. § 245A.04, subd. 3(c). The pertinent portion of that statute extends the background study requirement to:

- (1) the applicant;
- (2) persons over the age of 13 living in the household where the licensed program will be provided;
- (3) current employees or contractors of the applicant who will have direct contact with persons served by the facility, agency, or program;
- (4) volunteers or student volunteers who have direct contact with persons served by the program to provide program services, if the contact is not directly supervised by the individuals listed in clause (1) or (3); and
- (5) any person who, as an individual or as a member of an organization, exclusively offers, provides, or arranges for personal care assistant services under the medical assistance program as authorized under sections 256B.04, subdivision 16, and 256B.0625, subdivision 19a.^[53]

Minn. Stat. § 245A.04, subd. 3(g) sets out the further obligations of licensees, including day care license holders, as follows:

(g) An applicant's or license holder's failure or refusal to cooperate with the commissioner is reasonable cause to disqualify a subject, deny a license application or immediately suspend, suspend, or revoke a license. Failure or refusal of an individual to cooperate with the study is just cause for denying or terminating employment of the individual if the individual's failure or refusal to cooperate could cause the applicant's application to be denied or the license holder's license to be immediately suspended, suspended, or revoked.

Minn. Rule 9502.0335, subd. 6, imposes additional standards for daycare licenses that include:

Disqualification factors. An applicant or provider shall not be issued a license or the license shall be revoked, not renewed, or suspended if the applicant, provider, or **any other person** living in the day care residence or **present during the hours children are in care**, or working with children:

* * *

- C. Refuses to give written consent for the disclosure of criminal history records as specified in Minnesota Statutes, section 245A.04, subdivision 3.
- D. Has a disqualification under part 9543.3070.

In this matter, Licensee had a number of persons, all over the age of 13, who were present on the daycare premises during daycare hours and who had direct contact with daycare children. These persons were not there for brief visits or the occasional overnight stay. They were constant companions in the household and often assisted in providing care to daycare children. There were several instances of these persons transporting daycare children to activities away from the daycare without supervision. Where services were being provided to daycare children, background studies are required by Minn. Stat. § 245A.04, subd. 3(c), since those persons fall into the category of volunteer providing services outside of another caregiver's supervision. Even for the persons present who did not provide services, background studies were required under Minn. Rule 9502.0335, subd. 6, since they were present on the daycare premises during the hours children were in care.^[54]

The presence of two persons, Tim Abell and M.V., went beyond the presence of the others in the daycare household. For both of these persons, the daycare premises was their residence.^[55] This status lasted for a sufficient time to require Licensee to have background studies conducted under Minn. Stat. § 245A.04, subd. 3(c), that requires studies of persons over thirteen years of age residing in the home.

One other person, John Warner, had a background study done and was disqualified from direct contact with daycare children.^[56] Despite the disqualification,

Licensee allowed this person to remain on the daycare premises during daycare hours. He also provided transport to some daycare children away from the daycare without supervision. These are all violations of the background study statute and rules.

One additional person was identified as present on the daycare premises and needing a background study. That person is a juvenile, R.S., who had perpetrated a sexual assault. The County introduced no direct evidence that R.S. had come in contact with daycare children. The County had received a report of a parent that R.S. had been on the premises. Licensee indicated that R.S. had been on the premises with his mother. This evidence is insufficient to support a finding that R.S. had sufficient contact with daycare children to require a background study.

The Licensee argues that she has not had anyone (except M.V.) on the daycare premises in contact with daycare children since March 1998 without a background study.^[57] This time is several months after Licensee had discovered that one of the persons who had been on the daycare premises and had been in contact with daycare children had sexually molested a juvenile in her home. It is impossible to say whether the improper conduct would have been prevented by Licensee having a background study done on the perpetrator. But complying with the background study requirements would have excluded the perpetrator from contact with the daycare children. This is the purpose of the background study requirement and this situation shows the continued need for vigorous enforcement of that requirement.

Despite this demonstration of the benefits of background studies, Licensee allowed another person to live in her home without such a study being performed. This person was in contact with daycare children and should not have been. The imposition of sanctions against Licensee for noncompliance with the background study statute and rules is fully justified.

Miscellaneous Complaints

Throughout the record are references to complaints received by the County regarding other conduct, some by the Licensee, some by teenagers present on the daycare premises. Much of the conduct complained of occurred off of the premises. Some of the conduct occurred at hours when there were no daycare children present. Since Licensee socialized frequently with the same families whose children she cared for, there is a natural blurring of the reporting of conduct perceived to be improper. This report, with few exceptions, is confined to times when Licensee was operating her daycare.^[58] The recommendation in this report is based solely on the manner in which Licensee operated her daycare.

Conclusion

Licensee operated her daycare in violation of the capacity restrictions on a frequent basis. Despite repeated warnings, Licensee did not adjust the operation of the daycare to prevent further violations. Similarly, Licensee failed to comply with the background study requirements and failed to exclude persons with disqualifications from

being in contact with daycare children. This noncompliance continued even after a child had been harmed by a person who could have been excluded from premises, had a background study been done. Licensee frequently failed to comply with the supervision requirements of 9502.0315, subp. 29a, and daycare children were put at risk on a number of occasions by this noncompliance. Sanctions against her license to operate a daycare would be appropriate even if only the violations in any one of the three areas were present. The nature of the sanction should reflect the nature and seriousness of the violations in all three areas.

S.M.M.

^[1] See, e.g., Ex. 11 entry for May 28, 1999.

^[2] Ex. 62.

^[3] Ex. 22.

^[4] Minn. Rule 9502.0367 C(3). See Ex. 59.

^[5] *Id.*

^[6] Ex. 25.

^[7] Exs. 41 and 42.

^[8] *Id.*

^[9] Ex. 43.

^[10] *Id.*

^[11] *Id.*

^[12] Randt was not related to either child.

^[13] Ex. 34.

^[14] Ex. 11.

^[15] Ex. 43.

^[16] Ex. 11.

^[17] Ex. 43.

^[18] Ex. 11.

^[19] Ex. 10.

^[20] Ex. 43.

^[21] *Id.*

^[22] Ex. 11.

^[23] Ex. 43, at 26.

^[24] Ex. 43, at 26.

^[25] Ex. 11.

^[26] Ex. 50.

^[27] Ex. 16.

^[28] Ex. 16.

^[29] Ex. 16.

^[30] *Id.*

^[31] Ex. 11.

^[32] Ex. 11.

^[33] Ex. 11.

^[34] Ex. 11.

^[35] Exs. 3 and 4.

^[36] Exs. 1 and 2.

^[37] Ex. 58.

^[38] Ex. 56.

^[39] Licensee Brief, at 7.

^[40] County Brief, at 23.

^[41] *Id.* at 25.

^[42] Minn. Rule 9502.0315, subp. 29a.

^[43] *Id.*

^[44] At the hearing, Licensee testified that she accompanied the children into the pole shed. That testimony is not credible and is contradicted by Licensee's own statements to the County social worker made at the time of investigation. Exhibit 11.

^[45] Minn. Rule 9502.0435, subps. 4 and 6, require that substances such as spray paint be "inaccessible" or the use of such substances "be supervised." Neither standard was met in the situation described by Licensee.

^[46] Minn. Rule 9502.0435, subp. 6, requires that "The use of potentially hazardous materials and tools must be supervised."

^[47] The pocket knife is relatively small and black in color. The pocket knife would not necessarily be obvious to casual observation, unlike an electric weed trimmer.

^[48] Licensee's hearing testimony was as follows: The two children involved had been picked up from daycare by a parent and the three of them returned for craft supplies, with the children waiting in the car. The parent then noted that the children had left the car and discussed what to do with Licensee. That parent then went looking for the children and the Deputy Sheriff arrived soon after with the children.

In assessing this testimony, it is important to note that no portion of this explanation was made to the Douglas County Deputy Sheriff who returned the children to Licensee's daycare. Licensee's description at that time was that "the two girls were supposed to go to the neighbor's residence to locate the [Licensee's] dog. ... Fischer also stated that she could see the neighbors [*sic*] door from her residence, and when she did not see the girls arrive, she was going to call the neighbor." Ex. 58. Licensee's explanation to the Deputy makes no mention of the children having been picked up by a parent and suggests that Licensee was "supervising" the children by keeping their destination under observation. The conflicts between the two versions of the event preclude finding Licensee's hearing testimony to be credible.

^[49] Licensee Brief, at 2-3.

^[50] Licensee Brief, at 5.

^[51] Licensee Brief, at 5.

^[52] *Id.*

^[53] Minn. Stat. § 245A.04, subd. 3(c).

^[54] The differing standards for who must have a background study between the statute and rule do not constitute a conflict. Minn. Stat. § 245A.04 governs a variety of programs and sets forth the generic requirements for background studies in those programs. Minn. Rule 9502.0335, subd. 6, governs the specific standards for daycare licensure. The rule addresses concerns that are not necessarily present in all programs.

^[55] Licensee maintained that Abell was present only for dropping off the children of the ex-wife of Licensee's brother, for daycare. On a few other occasions Licensee maintained that he was present for picking up Licensee's son to go to go-cart racing on Friday evenings. The record demonstrates that Abell was present for much more time than Licensee maintains.

^[56] This background study and disqualification were conducted before the repeal of Minn. Rule 9502.3070, but the effect is the same. Warner was disqualified from direct contact with daycare children.

^[57] Licensee Brief, at 3.

^[58] One of the few exceptions was the arrest of Randt, which should have demonstrated to Licensee the need for background studies of the persons who were in direct contact with daycare children.