

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

In the Matter of the Family Child Care
License of Amy Gillen

FINDINGS OF FACT,
CONCLUSIONS,
AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Beverly Jones Heydinger at 10:00 a.m. on January 15, 2003, at the Administrative Conference Room, Scott County Government Center, 200 Fourth Avenue West, Shakopee, MN 55379. Jeanne Andersen, Assistant Scott County Attorney, Scott County Government Center JC340, 200 Fourth Avenue West, Shakopee, MN 55379-1220, appeared on behalf of the Department of Human Services. Steve L. Bergeson, Attorney at Law, 1275 Ramsey St., Ste. 300, Shakopee, MN 55379, appeared on behalf of Amy Gillen, the Licensee. The hearing concluded on January 15, 2003; there were no subsequent submissions.

NOTICE

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 and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61 (2002), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

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. 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 the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

Has the Licensee repeatedly failed to adequately supervise the children within her care?

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

FINDINGS OF FACT

1. The Licensee, Amy Gillen, has a license to provide family child care at her home at 6108 West 143rd Street, Savage, MN. She has been licensed since 1995.

2. On July 2, 2001, the Licensee was issued a correction order for failure to adequately supervise children in her care while at a park on a field trip on June 22, 2001. The Licensee requested reconsideration of the correction order, which was denied.^[1]

3. For six years, the Licensee has employed her sister, Penny Eischens, to assist her with child care. On July 8, 2002, Ms. Eischens took six children in child care, including two of the Licensee's own children, to the Apple Valley Water Park. Three other adults went along and had other children in their care. Because another child was ill, the Licensee remained at home until the parents of the sick child came for the child, and then she also went to the water park.^[2]

4. The water park had several swimming areas. Ms. Eischens and two other adults were standing in the shallow end of the pool, in water up to approximately Ms. Eischen's thighs. A buoy line separated the shallow end from the deeper end. A lifeguard was patrolling the shallow area from a point behind where Ms. Eischens was standing. At least three other lifeguards were patrolling the pool. The children in Ms. Eischens' care were playing on a small slide and the water surrounding it, and were at all times within 10 to 15 feet of her. She repeatedly counted the children to be sure that she kept track of all six while they were in the water. The six children ranged in age from 3 – 5, including J.K., who was four years old.^[3]

5. Some children, including ones in Ms. Eischens' care, were warned by the lifeguard not to go down the slide head first. Ms. Eischens turned to face the slide and to reinforce to the children in her care that they should obey the lifeguard's direction. She resumed her count of the children, and could locate only five. She immediately counted again, and could spot only five children. At the same time, the lifeguards whistled for the pool to be emptied, and a child was pulled from the shallow end of the pool. The child had first been spotted floating in the water, not by the lifeguard patrolling the shallow end of the pool, but by another lifeguard posted in the deep end. Ms. Eischens attempted to determine if the child was J. K., the child she was missing, but she was not allowed to approach the lifeguards.^[4] The Licensee arrived at the water park just as J.K. was taken from the pool.^[5]

6. J.K. was unconscious when taken from the pool. A lifeguard administered rescue breathing, the child spit up water and began to cry. The child was taken by ambulance to Children's Hospital in Saint Paul, accompanied by the Licensee. The child remained in the hospital for a few days and was initially on a ventilator. He has fully recovered and remains in the Licensee's care.^[6]

7. The Licensee immediately notified the parents of all children in her care of what had happened at the water park, both orally and in writing.^[7] She also immediately

notified Scott County child care licensing. Her report of the incident at the water park was consistent with the information in the police report.^[8]

8. Apart from the correction order issued on July 2, 2001, the Licensee has had no violations of the licensing rules that involve the health or safety of the children. She has had a few minor violations involving paperwork.^[9]

9. The Apple Valley Police and Scott County Child Protection determined that the pool incident was an accident and did not recommend any further action.^[10]

10. On July 12, 2002, Scott County Licensing staff recommended to the Department of Human Services that the Licensee receive a conditional license, and be fined. The conditions would prohibit field trips and require the Licensee to develop a supervision plan for field trips after the conditional license expired.^[11] The Department disagreed with Scott County's recommendation. On October 1, 2002, the Department issued an order of revocation.^[12] The Licensee appealed the proposed revocation.^[13]

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

CONCLUSIONS

1. The Commissioner and the Administrative Law Judge have jurisdiction to consider revocation of the Licensee's license to provide family day care.^[14]

2. The Department and Scott County Social Services have complied with all substantive and procedural requirements.

3. The Department has the burden of demonstrating reasonable cause for taking action against the Licensee. If reasonable cause exists, the burden shifts to the licensee to demonstrate by a preponderance of the evidence that the license holder was in full compliance with the laws or rules alleged to be violated.^[15]

4. The Department's rules require that a caregiver adequately supervise the children in her care. " '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."^[16]

5. The Department has demonstrated that it had reasonable cause to take action against the Licensee.

6. The Licensee has shown by a preponderance of the evidence that there was adequate supervision of the children in her care at the Apple Valley Water Park on July 8, 2002.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Human Services not revoke Ms. Gillen's child care license, and that the Protective Order signed on November 15, 2002 remain in effect.

Dated this 28th day of January, 2003.

S/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Tape-recorded (4 tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1 (2002), the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The County and the Department have a duty to exercise reasonable care and judgment in determining who is qualified to provide adequate care and supervision to children in family child care. It is a difficult responsibility because neither the County nor the Department can be on the premises at all times to evaluate or monitor the caregiver. Parents who place their children in care assume that the County will take reasonable steps to review and monitor licensed child care so that they can have confidence that their children will be safe and adequately supervised. The goal of the Department's rules is to set standards that will assure to the degree possible that children are in a safe environment. Nonetheless, accidents do happen, and that is apparently what occurred on July 8, 2002 to J.K. while in the care of the Licensee.

Given the facts presented here, Licensee has demonstrated that she provided adequate supervision at the water park. Ms. Eischens was an experienced caretaker who had taken responsibility for the six children in her care. She took them to an area specifically designed for young children, and had gone into the water with the children. At no time was she more than 10 to 15 feet away from the children. She was in a shallow-water area that was roped off to prevent children from moving to deep water. Also, a lifeguard was on duty, patrolling the shallow end of the pool where Ms. Eischens was with the children. Ms. Eischens kept a constant count of the children in her care. Although in fact the supervision was not sufficient to prevent the accident, it is difficult to state that any caregiver with children at a pool could have done more than Ms. Eischens did to supervise them. She did not leave the children in the pool unattended. She did not take them to an unsafe area, or one without lifeguards on duty. She continuously counted the children to be sure that they were not missing. It is unfortunate that Ms. Eischens lost sight of one child, and that he inhaled water and had to be taken from the pool and revived. This is a very serious incident, but not the result of inadequate

supervision. Ms. Eischens was in the pool closely supervising the children at the time the accident occurred. It is neither reasonable nor realistic to interpret the rule to guarantee the safety of the child.

Disciplinary action for the first violation has been taken; absent a second violation, it is inappropriate to take further discipline. The children served by this child care provider are not at greater risk than children in any other child care setting.

Although not determinative of the licensing issue, other reviewing professionals, including Scott County Child Protection, concluded that the incident was an accident and did not require further action. The Scott County workers who were the most familiar with the Licensee's record and had interviewed the individuals involved did not recommend revocation. The Department's decision to revoke was based solely on the written materials submitted, and without hearing the testimony of Ms. Eischens, the Licensee, or the parent of the child who was injured.

Several parents, including the parent of the child involved in the near-drowning, testified on behalf of the Licensee. The Licensee informed all of them, orally and in writing, about the pool incident. Each of them remained confident in the Licensee's care, her level of supervision, the structure of her program, and her skill with children. Many had children in the Licensee's care for several years. None had any reservations about the safety of their children. All the parents were willing to allow the Licensee to take their children on future field trips, including, with the exception of the parent of the child involved in the pool incident, a field trip to a pool or water park. The parent of the child involved was not certain she or her child would be comfortable returning to a water park.

It is reassuring that the parents support the Licensee, but their testimony was given little weight. The issue is not whether she is a good person in whom the parents have confidence, but whether there was inadequate supervision on one occasion. None of the parents who testified were present at the time of the pool incident.

The Department's decision was based both on the pool incident and the prior correction order for inadequate supervision. However, action at this time is dependent on a finding that the Licensee failed to provide adequate supervision at the water park, and the facts do not support such a finding. Without a second instance of inadequate supervision, revocation is inappropriate.

BJH

^[1] Ex. 6.

^[2] Test. of Amy Gillen.

^[3] Test. of Penny Eischens.

^[4] Test. of P. Eischens.

^[5] Test. of P. Eishens and A. Gillen.

^[6] Ex. 9; Test. of A. Gillen.

^[7] Test. of A. Gillen; Mary Kleve, Bridget John, Sandi Broome, Glenda Ellingson, Suzanne Schultz, Marlene (Molly) Ferderer, Jill Burg, Mark Zenner, Kristin Burggraaff, Douglas Burggraaff, Nancy Ecker, and Alan Tschida.

^[8] Test. of Laurie Wolf; Exs. 8, 9.

- [\[9\]](#) Test. of L. Wolf.
- [\[10\]](#) Exs. 9, 11; Test. of L. Wolf.
- [\[11\]](#) Ex. 12.
- [\[12\]](#) Ex. 1.
- [\[13\]](#) Ex. 7, memo to file dated 10/07/02.
- [\[14\]](#) Minn. Stat. §§ 245A.07, subd. 1; 245A.08; 14.50 (2002).
- [\[15\]](#) Minn. Stat. § 245A.08, subd. 3.
- [\[16\]](#) Minn. R. 9502.0315, subp. 29a.