

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

In the Matter of the Revocation of the
License of Jennie Musty to Provide
Family Child Care under Minn. Rules
parts 9502.0300 to 9502.0445

FINDINGS OF FACT,
CONCLUSIONS, RECOMMENDATION
AND MEMORANDUM

A hearing in this matter was held on June 10, 2003, before Allan W. Klein, Administrative Law Judge, in the Fillmore County Courthouse, Preston, MN.

Appearing on behalf of Fillmore County Social Services and the Department of Human Services was Assistant County Attorney Todd Pierce, 101 Fillmore Street, P.O. Box 307, Preston, MN 55965.

Appearing on behalf of the Licensee, Jennie Musty, was Mark A. Ostrem, Attorney at Law, Patterson, Ostrem & Swisher, 7 Fourth Street SE, Rochester, MN 55904.

The record closed at the end of the hearing on June 10, 2003.

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. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, 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 Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, to ascertain 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.

If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this report becomes a final decision. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the

record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed.

STATEMENT OF ISSUE

Should the family daycare license of Jennie Musty be revoked because she failed to attend SIDS training and failed to appropriately place an infant in a crib?

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

FINDINGS OF FACT

1. Jennie Musty has been a licensed childcare provider since 1996. When Musty was about 15 years old, she took training to become a certified nurse assistant, and at age 16 she began working at Chosen Valley Care Center in Chatfield. She worked there for about five years. Then she took a one year course at Rochester Technical College, studying to be a teaching assistant in a daycare. In 1996, she opened a family daycare operation in Chatfield, on the Olmstead County side, and was licensed through Olmstead County.

2. At some time in the period 1997-1999, Musty completed the 120 hours of training necessary to become an Emergency Medical Technician, and has continued the training necessary to remain in that position to the present date. This includes annual CPR refresher courses.

3. The City of Chatfield is split between Olmstead County and Fillmore County. In July of 2000, Musty moved from the Olmstead County side of Chatfield to the Fillmore County side.

4. Effective November 1, 2000, Musty was licensed by Fillmore County Social Services.

5. During the 2001 Special Session, the Minnesota Legislature adopted a requirement that license holders ensure that persons caring for infants receive training on reducing the risk of Sudden Infant Death Syndrome (hereinafter SIDS). That requirement became effective July 1, 2001.

6. On August 31, 2001, Laura Plummer Zrust, Supervisor of the licensing division of the Department of Human Services, sent a memorandum to all facilities serving children.^[1] The memorandum outlined a number of changes arising from new legislation, including the training requirement for SIDS reduction. The memo directed Licensees to contact their local Childcare Resource and Referral Agency's training coordinator regarding training sources.

7. On September 19, 2001, DHS sent out its regular monthly memorandum to County and private agency staff.^[2] Among the items included with the Memorandum

was a copy of the August 31, 2001, Memorandum to facilities serving children. This Memorandum was the first information that Louise Kleiboer, who was Musty's licensor, renewal about the new legislation requiring SIDS reduction training.

8. On October 11, 2001, DHS sent out another monthly Memorandum to County and private agency staff.^[3] This monthly Memorandum announced a November 13, 2001, due process video conference for County personnel which would highlight changes to due process requirements for licensing actions and the new SIDS training requirement. Attached to the Memorandum was a two and one-half page set of questions and answers regarding the SIDS reduction training requirement. The information provided by this document makes it clear to County licensors that DHS is taking the position that counties must tell their Licensees that back sleeping is the only permissible position allowed, regardless of what parents may desire, and that the only exception to back sleeping can occur if the provider has documentation from the child's physician that back sleeping is medically contraindicated. The material also announces that DHS has determined that current providers should receive SIDS reduction training as soon as possible, but no later than February 1, 2002.

9. On October 26, 2001, Louise Kleiboer visited the Musty daycare facility for an annual relicensing visit. Musty had two infants in her care at the time. Kleiboer did not inform Musty of the February 1, 2002 deadline for SIDS training. At the time of the relicensing visit, Fillmore County had not determined how or when it was going to provide SIDS reduction training. It was not until the November 13, 2001 video conference training that Kleiboer learned where she could obtain the necessary information to put together a training session.

10. On January 7, 2002, Kleiboer sent a Memorandum to all Fillmore County family daycare providers, license applicants, and licensed childcare centers. The Memorandum contained a large-font, all letters capitalized notice that reads "IMPORTANT – PLEASE READ IMMEDIATELY." It informed recipients of the new law requiring SIDS reduction training, and the February 1, 2002 deadline. It announced training sessions to be held in Preston on January 22, and in Mabel on January 26.^[4] The Memorandum was sent to Musty. Musty decided she would attend the January 22 training session in Preston.

11. At some point approximately a week before the January 22 training session, the Chief of Police for the City of Chatfield informed Musty (and other daycare providers in Chatfield) that a meeting would be held on the evening of January 22, regarding a Level III sex offender who would be relocating to the Chatfield area. He recommended that they attend the meeting. Musty decided that she could not attend the January 22 SIDS reduction training (which was also scheduled for that evening) and called Kleiboer to tell her she would not be coming. Kleiboer was already aware of the Chatfield meeting, and had even spoken with the Chief of Police, asking him whether the sex offender meeting could be rescheduled so that the Chatfield daycare providers could attend the SIDS training instead. The Chief of Police was unable to reschedule the sex offender meeting. Musty told Kleiboer that she was on call for ambulance duty at the time of the second meeting the morning of January 26, but that she would try to

find another EMT to cover for her. Musty was able to make arrangements with another EMT, but early in the morning of January 26, before the substitute EMT took over, Musty was paged out to an EMT call and was unable to attend the SIDS reduction meeting. Musty and Kleiboer talked the next week, and agreed that Musty could watch a videotape that had been made of one of the training sessions. They did not reach any definitive agreement about how the videotape would be made available to Musty, and there was no discussion about the February 1 deadline for Musty to view the videotape. Then there were a few sporadic communications about the videotape, but neither Musty nor Kleiboer made a concerted effort to make sure it was viewed, and the February 1 deadline passed without Musty having received the required training. As of February 1, 2002, Musty was operating under the impression that the training was required, but she was not aware that there was any particular deadline for it.

12. In late July or early August of 2002, Kleiboer attempted to notify Licensees who had not attended the January, 2002 SIDS reduction training sessions that there would be an additional training session provided on August 12. The document used for this notification is not in the record because it is no longer available, but it looks like Exhibit 3.^[5] Musty says she never got the document, and Kleiboer did not keep any list of persons who she sent it to. The Administrative Law Judge finds that Musty did not receive any notice of the August 12 training.

13. On August 22, 2002, in preparation for relicensing, Musty completed a relicensing packet and returned it to Kleiboer. There was nothing to indicate that Musty had taken SIDS training, nor was there anything in the packet that mentioned the February 1 deadline.

14. On November 1, 2002, Musty was relicensed. Kleiboer's relicensing visit did not occur until November 6, 2002. During the relicensing visit, which occurred while Musty was cooking lunch for the children and may have been distracted, there was no significant discussion about the fact that Musty had not received the required SIDS reduction training. Kleiboer does not specifically recall saying anything about the fact that Musty was out of compliance, and Musty does not recall anything being said. There was no correction order issued.

15. In late December of 2002 or early January of 2003, Musty and Kleiboer communicated because Musty wanted to have her mother available as a substitute caregiver. Musty inquired of Kleiboer about background checks and other policies concerning substitutes, and sometime around January 5 (a Sunday), 6 or 7, Kleiboer sent Musty a packet of information about getting her mother qualified as a substitute. Included in the packet of information was an announcement of additional dates for orientation meetings for family daycare providers.^[6] Kleiboer wrote at the top of the announcement "I also couldn't remember if I had sent you this for SIDS training purposes." The notice announced the dates of monthly orientation meetings which would include SIDS reduction training. The first meeting was scheduled for January 7, 2003. Musty did not receive the packet (or at least did not open it) until after the incident of January 9, 2003.

16. In the late afternoon of January 9, 2003, an infant in Musty's care died as a result of SIDS. The infant had been crabby all day, and could not get to sleep when placed on his back. In an attempt to assist him in sleeping, Musty turned him over onto his tummy, and rubbed his back until he fell asleep. She checked on him periodically during the afternoon, but at some point between checks he stopped breathing and could not be resuscitated. Musty was aware that children should be slept on their backs, but was unaware that DHS was requiring back positioning unless a written statement was available from the child's physician to the contrary.

17. The day after the incident, Kleiboer visited Musty, and it was then, for the first time, that Musty grasped the fact that the SIDS reduction training had been mandatory for almost a year. Ultimately, Musty completed the SIDS reduction training on March 6, 2003.

18. To use Musty's own words, "On January 9, 2003, my world fell apart when I lost Zachary of SIDS during his stay at my daycare."^[7] Kleiboer determined that Musty needed help in dealing with the loss, and attempted to assist her. However, Kleiboer also determined that licensing action was required. On February 4, 2003, Kleiboer dictated a letter to the Department of Human Services, recommending that Musty's license be made probationary for one year, and subject to a number of conditions. The conditions would include:

1. Musty's agreement not to accept infants for care until approval by the agency.
2. Musty's notifying the agency in writing of any new children enrolled in her daycare program.
3. Musty's completion of approved SIDS reduction training.
4. Musty's completing all required training within required time frames with special emphasis on care of infants and recovering from grief and loss, and
5. Musty's utilization of a support person to assist in recovery from the loss.

19. Kleiboer submitted her recommendation to the Department on February 10, after receiving a signed agreement from Musty that she would not accept infants without county approval.^[8]

20. Discussions were had between the Department and the County, and on March 17, Kleiboer sent a letter to the Department indicating that the County had decided to concur with the Department's recommendation that the license be revoked.^[9]

21. On March 25, 2003, the Department issued its Order of Revocation to Musty.^[10] The Order cites two grounds for the revocation. First, failing to comply with

the required SIDS reduction training, and, secondly, failure to follow recommended and appropriate developmental protocol in sleeping an infant.

22. On April 2, 2003, Musty sent an appeal letter to the Commissioner of Human Services, asking that her license be made probationary, rather than revoked.

23. On April 9, 2003, the Commissioner issued a Notice of and Order for Hearing, setting a hearing for June 4. By agreement of the parties, the hearing was continued to June 10.

24. Most, if not all of the parents of Musty's current daycare children submitted letters in support of continuing her operation.^[11] Some of the letters make explicit reference to the SIDS death, but argue that Musty's EMT and CNA training allow her to provide a safer daycare setting than a more traditionally trained provider. Some of the parents have had children with Musty for several years, and the letters set out their positive feelings and support for Musty.

25. Musty has never received a correction order, nor has there been any negative action taken against her license prior to this proceeding. She has always been current with her training (other than the SIDS reduction training).

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

CONCLUSIONS

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

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

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

4. Minn. Stat. § 245A.144 requires license holders such as Musty to ensure that persons assisting in the care of infants receive training on reducing the risk of Sudden Infant Death Syndrome. That statute became effective on July 1, 2001, but the Department allowed persons additional time until February 1, 2002, to comply. By failing to complete the training until March 6, 2003, Musty was in violation of the statute.

5. Minn. Rules, part 9502.0415, subp. 1(B) requires that daycare activities provide for the physical, intellectual, emotional and social development of the child. The environment must facilitate the implementation of the activities. Activities must be appropriate to the developmental stage and age of the child. The rule says nothing about how a child shall be placed in a crib to sleep, nor can the plain language of the rule be reasonably stretched to cover that action. Musty did not violate the rule when

she placed the child in the crib on its stomach. The Department has not cited, nor has the Administrative Law Judge located, any other rule which would apply to that situation.

6. Minn. Stat. § 245A.07, subd. 1 allows the Commissioner to suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules. That section further requires that the Commissioner 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.”

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner take disciplinary action against the family daycare license of Jennie Musty.

Dated this 11th day of July 2003.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

Reported: Tape Recorded,
Six Tapes

MEMORANDUM

All parties agree that the SIDS death was a tragedy. The Legislature recognized that SIDS deaths can be reduced (but not totally avoided) if persons caring for infants receive appropriate training. It therefore determined to require that all persons in licensed facilities who are caring for infants must receive appropriate training. Musty did not receive that training, and thus violated the statute.

In addition to charging Musty with violating the statute, the Department also charged Musty with violating a rule which requires age-appropriate activities at the licensed facility. The Administrative Law Judge does not believe that either the plain wording, nor any reasonable interpretation of that rule covers the actions which occurred in this case. If the Department wishes to enforce a requirement that babies be

placed on their backs unless the provider has documentation from a physician that a back position is medically contraindicated, then it should adopt a rule that clearly imposes that requirement. To try to enforce it under the rubric of age-appropriate daycare activities does not provide notice to licensors or licensees and is not reasonable.

The County and Musty had initially negotiated a penalty less severe than revocation. However, Department staff disagreed, and ultimately the County agreed to support the Department staff's proposed revocation. Either penalty is within the realm of reason, given the nature of the violation and the increased risk to the child that flowed from the lack of training. The County's initial recommendation is certainly not inappropriate, nor is the final recommendation.

A.W.K.

^[1] Ex. 1, Musty testified that she did not receive that Memorandum, but the Administrative Law Judge finds it more likely than not that she did receive it, but did not pay much attention to it.

^[2] Ex. 6.

^[3] Ex. 5.

^[4] Ex. 2.

^[5] Ex. 3, announces training sessions between January and July of 2003. Kleiboer used the August 12, 2002 word processing document as the basis for Exhibit 3, by deleting the 2002 material and inserting 2003 material. She did not save a copy of the 2002 document before making those changes, and thus it is unavailable, even in her computer system.

^[6] Ex. 3.

^[7] Ex. 11.

^[8] Ex. 9.

^[9] Letter of March 17 is attached to Ex. 9.

^[10] Ex. 10.

^[11] Ex. 8, The Administrative Law Judge does not have available to him a complete list of all of the children in Musty's care, and thus he cannot be sure whether there are letters from all of the parents, but if not all, certainly most of them have stated their support for Musty and their belief that their children are safe in her care.