

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

In the Matter of the Revocation of the  
Family Child Care License of  
Kelly Fischer

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

This matter came on for Hearing before Administrative Law Judge Steve M. Mihalchick on August 21, 2003, at the Renville County Office Building, Room 313, 410 East Depue Avenue, Olivia, MN. The hearing record closed on the date of the hearing.

David J. Torgelson, Renville County Attorney, P.O. Box D, Olivia, MN 56277, appeared for the Minnesota Department of Human Services ("the Department").

Curtis L. Reese, Attorney at Law, 907 West Lincoln Avenue, P.O. Box 153, Olivia, MN 56277, appeared for Licensee Kelly Fischer.

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 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. In order to comply with this statute, 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. 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.

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.

## **STATEMENT OF ISSUES**

1. Whether Licensee failed to properly supervise children in her care on May 23, 2003, when one child was cut on the top of his head and the injury required medical treatment.
2. Whether Licensee failed to report the injury as required by rule.
3. Whether Licensee failed to properly supervise children in her care on May 27, 2003.
4. Whether Licensee exceeded her licensed capacity on May 27, 2003.
5. Whether Licensee failed to have required stairway gates or barriers in use on May 27, 2003.
6. Whether a bottle of liquor left on the bathroom sink and a bottle of laundry detergent left on the washing machine on May 27, 2003, were accessible to children in care.
7. Whether Licensee allowed children in care to handle Licensee's two dogs without supervision on May 27, 2003.
8. Whether the circumstances of any such violations and history of previous violations support revocation of Licensee's license.

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

## **FINDINGS OF FACT**

1. Licensee is a resident of Renville County and has been licensed there as a family childcare provider since 1993. She has done day care for approximately 22 ½ years. She provides childcare at her rural farm residence east of Danube, Minnesota. Three of Licensee's children, ages 21, 19, and 15, live with her.<sup>[1]</sup>
2. Licensee's home is located on U. S. Highway 71, north of Olivia, Minnesota. It is a major highway and fairly well traveled. The driveway from the highway goes up along the south side of the home. Licensee's outdoor play space is an unfenced area at the back of her house and has a swing set, riding toys, climbing toys, and balls. A bay window in the dining room faces the back and allows Licensee to observe and to hear the activities in the play area.<sup>[2]</sup>
3. Patti Hemingsen became the Renville County childcare licensing worker in 1998. On December 3, 1998, she went to Licensee's home for the regular biennial relicensing visit. Prior to such visits, Hemingsen sends the licensee a relicensing

checklist to complete and turn in at the licensing visit. The checklist requires the person completing it to make an indication that they are complying with the initial childcare rules and serves as a refresher on most of the requirements of the childcare rules.<sup>[3]</sup>

4. During the 1998 visit, Hemingsen had some concerns about the outdoor play space because it was unfenced and the house was on a busy highway. She and Licensee discussed appropriate supervision of children during outside playtime and agreed to continue with the plan that had been developed under the previous licensing worker. Under that plan, school age children could play outside with a helper present, such as Licensee's son or daughter, or Licensee could monitor their play through the dining room window. As to preschool children, Licensee was required to directly supervise their outdoor play. Hemingsen noted that she would make a visit in the spring to look at requiring the play area to be fenced, but has never imposed such a requirement.<sup>[4]</sup>

5. Hemingsen issued Licensee a letter correction order on January 28, 1999. It made Licensee's license renewal contingent on the correction of ten items. One was to "place laundry supplies up high out of the reach of children," and another was to attach a gate at the top the stairs. The letter also memorialized the agreement regarding outdoor supervision of the children. Licensee promptly noted that she had corrected each of the ten items and returned it to Hemingsen.<sup>[5]</sup>

6. On December 4, 2000, Hemingsen again went to Licensee's home for the biennial relicensing visit. Hemingsen issued a correction order requiring a gate on some other steps, and a lock ("latch") on the bathroom medicine cabinet.<sup>[6]</sup>

7. On December 10, 2002, or January 29, 2003, or perhaps both days, Hemingsen went to Licensee's home for the biennial relicensing visit.<sup>[7]</sup> Based upon violations she noted, Hemingsen issued a correction order on January 30, 2003, for having no gate to the upstairs steps with toddlers present, having personal care products in the bathroom accessible to children under the sink and on a cabinet, and for having and laundry supplies accessible to children. Licensee corrected most of the items immediately and all of them within nine days. Licensee returned the form on February 9, 2003, saying she had corrected all the items.<sup>[8]</sup>

8. Licensee has two boxer dogs.<sup>[9]</sup> In February, 2003, one of the dogs jumped up on a girl and inadvertently scratched her face while doing so. The child's mother testified at the hearing that she was aware of the scratch and that it was a minor scratch that required no treatment and that she had no problem with the dogs at the daycare and thought her children benefited from their presence.<sup>[10]</sup>

9. On May 23, 2003, in the late afternoon, all of the children played outside, supervised by Licensee. Shortly after 3:30 p.m., Licensee observed M.K., a two-year old boy, get hit by a swing in the play area. Licensee went to the boy, who was calm and not crying, and checked him over for injuries. She found none. At approximately 4:00 p.m., Licensee went into the house briefly to retrieve a child's diaper bag; she continued to observe the children through the dining room window. While Licensee was

inside, M.K.'s father arrived to pick up his son, and as he placed the boy in a car seat, he noticed blood on the top of M.K.'s head. The father asked Licensee how his son had been injured and she stated that, while she had seen him hit by the swing, she did not know how the boy had sustained the head injury. M.K. remained calm and still did not cry. Licensee suggested that M.K. be seen by a doctor and personally phoned the clinic to alert them that M.K. would be arriving shortly. Licensee asked the father to phone her with an update.<sup>[11]</sup>

10. M.K.'s head injury required three staples. The boy's parents did not call Licensee with an update on M.K.'s medical condition. Licensee did not notify the County of M.K.'s injury because she did not consider it a serious injury.<sup>[12]</sup>

11. On May 27, 2003, Renville County received a report from M.K.'s mother regarding the injury on May 23, 2003. Renville County Child Protection also received a report and conducted an investigation as required by law.<sup>[13]</sup> By letter of July 7, 2003, Renville County Child Protection determined that neglect had not occurred and that child protective services were not needed.<sup>[14]</sup> The determination noted that while Licensee failed to provide direct supervision of the minor children for an unknown length of time while she went inside to pick up a diaper bag, she did not intentionally neglect the children, but rather exhibited an error in judgment. Child Protection recommended that she contact the licensing agency and review all the requirements of her daycare license and comply with them.<sup>[15]</sup>

12. After receiving the telephone call on May 27, 2003, Hemingsen paid an unannounced home visit to Licensee's residence at approximately 3:50 p.m. that same day.<sup>[16]</sup> When she arrived, a girl, two to three years of age, approached her car and greeted her. Hemingsen observed the yard and counted eight children, mostly preschoolers, and two dogs. Licensee was not outside. Hemingsen went to the door and was greeted almost immediately by Licensee, who was holding an infant and had two toddlers with her.<sup>[17]</sup>

13. Hemingsen entered Licensee's house and asked for the names of the children in attendance. There were 14 at that time, including two the toddlers and infant. Hemingsen had arrived at Licensee's daycare shortly after three children had been dropped off there. On that date, Nicole Neuman, who has children ages four and two and one-half with Licensee, was late picking up her children. She normally does so between 3:30 and 3:45 p.m. However, she works at Subway in Olivia and on that day she had to stay late at Subway because a bus load of people arrived and her boss would not let her go until 4:45 p.m. Therefore, she did not arrive at Licensee's until about 5:00 p.m. There have been a few other instances when Subway did not allow her to leave at her regular time. They also do not allow her to call Licensee because the phone is to be used only for business purposes.

14. During the May 27, 2003, visit Hemingsen observed a bottle of liquor sitting near the edge of the bathroom vanity, within a child's reach. Licensee stated that her daughter had been using the alcohol as a treatment for a cold sore and immediately put the alcohol out of reach. In the laundry room, Hemingsen observed a bottle of liquid

detergent within reach of children. It was on the top of the washing machine, which Licensee felt was out of reach of at least the younger children who might get into it. Hemingsen also observed that the stairway gates were not closed. Licensee had previously installed gates on the stairways going up and down as required, but they were not closed at the time. She explained that they were not closed at the time because all of the older children were already outside and she was in the process of taking the three younger ones out when Hemingsen arrived.

15. Hemingsen issued a correction order on May 28, 2003, citing Licensee for lack of supervision of the dogs, failure to keep alcohol out of reach of children, failure to notify the County of the serious injury to M.K., exceeding the 12-child and infant/toddler limits, lack of supervision of preschoolers in accordance with her supervision plan, failure to keep laundry detergent out of reach of children, and failure to close the gates to the stairways.<sup>[18]</sup>

16. By letter dated May 28, 2003, Hemingsen recommended immediate suspension of Licensee's license to the Department based upon the health and safety concerns that had been ongoing issues in Licensee's home as noted in the correction order dated May 28, 2003.<sup>[19]</sup>

17. On June 3, 2003, the Department issued Licensee an Order of Revocation, citing the violations set forth in the correction order dated May 28, 2003, and two previous correction orders. The letter informed her of her right to appeal and her right to a contested case hearing.

18. Four of Licensee's child care parents who that have used her services for several years testified at the hearing to her loving, caring, and responsible nature as a childcare provider.<sup>[20]</sup> Four additional sets of parents wrote letters of support, all testifying to the exceptional level of care she provides.

19. Licensee appealed the revocation of the license. The Department issued a Notice of and Order for Hearing on July 11, 2003, setting the hearing to take place on August 21, 2003.

## CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Minn. R. 9502.0425, subp. 2, provides, in relevant part:

Subp. 2. **Outdoor play space.** There must be an outdoor play space of at least 50 square feet per child in attendance, adjacent to the residence, for regular use, or a park, playground, or play space within

1,500 feet of the residence. On-site supervision must be provided by a caregiver for children of less than school age when play space is not adjacent to the residence. Enclosure may be required by the agency to provide protection from rail, traffic, water, or machinery hazard. The area must be free of litter, rubbish, toxic materials, water hazards, machinery, unlocked vehicles, human or animal wastes, and sewage contaminants.

The childcare rules also require that children in care be supervised by a caregiver.<sup>[21]</sup> Supervision of a child less than school age is requires the caregiver to be within sight or hearing at all times and capable of intervening and protecting the health and safety of the child. Supervision of a school age child requires that the caregiver be available to protect the health and safety of the child.<sup>[22]</sup>

4. On May 27, 2003, Licensee was inside the house with two toddlers and an infant, and perhaps other children, when the License Worker arrived. She was not outside with the eight children who were in the outside play area and some of whom were less than school age. Thus, at that point, she was in violation of the requirement for providing direct supervision of children less than school age. This is the only documented incident of failure to supervise in Licensee's record. Contrary to assertions in the Order of Revocation, Licensee had observed the injury to M.K. occur, but had not noted the injury to his head. She had been inside only briefly to get a diaper bag when M.K.'s father arrived to pick him up. All the parents testifying at the hearing reported that they had always observed Licensee to be with the younger children when they were outside. In addition, the Order of Revocation states that outdoor supervision had been addressed many times with Licensee and she had been reminded to supervise the children when they are playing outside. That statement implies that there had been some previous violation of the requirement. In fact, there had been a plan developed for supervision of the outdoor play space because of the nearby highway, not because of any violation, and that plan was simply reviewed at each biennial relicensing.

5. Minn. R. 9502.0375, subp. 2. D. requires providers to inform the county social services immediately after the occurrence of any serious injury or death of a child within the daycare residence and defines a serious injury as one that is treated by a physician.

6. Licensee failed to inform the agency of M.K.'s injury as required by the rule. Licensee's explanation that she did not realize that the rule defined serious injury as one requiring treatment by a doctor is not credible. That requirement is made clear on the checklist that she signed every other year in question number 8 on page 8 of the form. Technically, she may not have known that the child was actually "treated by a physician," but she had called the clinic to say he was coming.

7. Under Licensee's license, Licensee may care for up to 12 children; no more than two may be infants or toddlers and no more than one may be an infant.<sup>[23]</sup> Licensee violated this provision on May 27, 2003, from approximately 3:45 p.m. to 5:00 p.m. when she had 14 children in care. It was not intentional, but late parents are a common phenomenon and the provider must control the situation.

8. All stairways must have gates or barriers in place when children between the ages of 6 and 18 months are in care.<sup>[24]</sup> Licensee had installed gates on the stairways as directed on previous correction orders. However, on May 27, 2003, those gates were open during daycare hours when children were in care. Thus, there was a violation of the rule. Licensee's excuse that all the children were outside or with her about to go outside is not particularly credible. The License Worker counted eight children outside and there were 14 present that day. Licensee had the infant and two toddlers with her, but there were apparently three other children somewhere. Perhaps they were also inside. More importantly, the gates should have been closed for when the children returned to the house after playing outside.

9. Toxic substances such as medicines, chemicals, detergents, and alcoholic beverages must be inaccessible to children.<sup>[25]</sup> The liquor on the sink and the detergent on the washer were both accessible to children on May 27, 2003. This violation had been noted several times previously.

10. As to household pets, children may handle animals only with supervision.<sup>[26]</sup> On May 27, 2003, eight children were outside with the dogs while Licensee was still inside the house at the time the License Worker arrived. Thus, Licensee was in violation of this rule.

11. Minn. Stat. § 245A.07 provides that the Commissioner may suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of the license holder who does not comply with the applicable law or rule. It also provides that the Commissioner must consider the nature, chronicity, and severity of the violation and the effect of the violation on the health, safety, or rights of persons served by the program. Under Minn. Stat. § 245A.07, subd. 2, the Commissioner may immediately temporarily suspend the license if the license holder's actions or failure to comply with applicable law or rule imposes an imminent risk of harm to the health, safety, or rights of persons served by the program.

12. The nature, chronicity, and severity of Licensee's violations, and the effect of the violations on the health and safety of the children in care in this case require a significant sanction. However, they were not as severe as stated in the Order of Revocation. The failure to supervise was not as serious or chronic as described in the Order of Revocation. There is only one documented incident of failure to supervise and the testimony of the parents testifying that Licensee provides excellent supervision was very believable. The overcapacity, failure to report a serious injury, and household pet violations were first-time violations. The failure to have closed gates on the stairways was a repeated, though somewhat different violation, as was the accessibility of the liquor bottle and the laundry detergent.

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

## RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Human Services take disciplinary action against the license of Kelly Fisher.

Dated: September 23, 2003

s/Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

## NOTICE

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

Reported: Tape recorded (2 tapes). No transcript prepared.

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<sup>[1]</sup> Testimony of Kelly Fischer.

<sup>[2]</sup> Testimony of Kelly Fisher and Patty Hemingsen

<sup>[3]</sup> Testimony of Patti Hemingsen; Exs. 1-3.

<sup>[4]</sup> Testimony of Patti Hemingsen and Kelly Fischer; Exs. 1-4.

<sup>[5]</sup> Ex. 4.

<sup>[6]</sup> Testimony of Patti Hemingsen; Ex. 2.

<sup>[7]</sup> Licensee completed the checklist on December 10, 2003, and Hemingsen testified that was the date of the relicensing visit. However, the Correction Order of January 30, 2003, says the violations were documented on January 29, 2003.

<sup>[8]</sup> Testimony of Patti Hemingsen; Exs. 1 and 14.

<sup>[9]</sup> See, Exs. 5 and 6.

<sup>[10]</sup> Testimony of Pam Kjersten.

<sup>[11]</sup> Testimony of Kelly Fischer.

<sup>[12]</sup> Testimony of Kelly Fischer. The injury occurred on the Friday before Memorial Day. That weekend, Licensee took her own children camping and did not call M.K.'s family to inquire as to the severity of the injury.

<sup>[13]</sup> Minn. Stat. § 626.556, subd. 10.

<sup>[14]</sup> Ex. 7. Under Minn. Stat. § 626.556, subd. 2(c), "neglect" includes "failure to provide adequate supervision."

<sup>[15]</sup> Ex. 7.

<sup>[16]</sup> Testimony of Patti Hemingsen.

<sup>[17]</sup> Testimony of Patti Hemingsen and Kelly Fisher.

<sup>[18]</sup> Ex. 15.

<sup>[19]</sup> Ex. 16.

<sup>[20]</sup> Testimony of Judy Schmoll, Nicole Neuman, Pam Kjersten. Exs. 8-13.

<sup>[21]</sup> Minn. R. 9502.0365, subp. 5.

<sup>[22]</sup> Minn. R. 9502.0315, subp. 29a.

[\[23\]](#) Minn. R. 9502.0367 C. 2.

[\[24\]](#) Minn. R. 9502.0425, subp. 10.

[\[25\]](#) Minn. R. 9502.0435, subp. 4.

[\[26\]](#) Minn. R. 9502.0435, subp. 12(B).