

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

In the Matter of the Temporary Immediate
Suspension of the License of Katherine
Littlefield to Provide Family Child Care

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

This matter came on for hearing before Barbara L. Neilson, Administrative Law Judge, on September 29, 2003, at the Winona County Government Center in Winona, Minnesota. Assistant Winona County Attorney Susan E. Cooper, Winona County Courthouse, 171 West Third Street, Winona, Minnesota 55987, appeared on behalf of the State Department of Human Services and the Winona County Department of Human Services. The Licensee, Katherine Littlefield, 566 Whitewater Avenue, St. Charles, Minnesota 55972, appeared on her own behalf, without an attorney. The OAH record closed at the end of the hearing on September 29, 2003.

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 these Findings of Fact, Conclusions and Recommendation. The parties have ten days to file exceptions to this report with the Commissioner.^[1] However, the law also requires that the Commissioner's final order be issued within ten working days from receipt of this report.^[2] Because of these short timelines, the parties are urged to file any exceptions as soon as possible. The parties should contact the Department of Human Services' Appeals and Regulations Division at 651-296-5764 to determine the procedures for filing exceptions and presenting argument.

STATEMENT OF ISSUE

The issue presented in this hearing is whether there is reasonable cause to believe that the License Holder poses an imminent risk of harm to the health, safety or rights of children in her care based upon allegations that she failed to adequately supervise day care children at a swimming pool.

The Administrative Law Judge concludes that there was reasonable cause for such a belief, and that the Commissioner properly ordered a temporary immediate suspension of the Licensee's license.

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

FINDINGS OF FACT

1. Katherine Littlefield, the Licensee, has been a licensed child care provider since 1981. She is currently licensed by the State to provide family child care under a Class C-3 license. This license allows up to 14 children as long as two adults are present.^[3]

2. During the afternoon of August 15, 2003, the Licensee took ten of her day care children (three four-year-olds and seven school-age children) to a public swimming pool located in St. Charles, Minnesota. The rest of the children in her care that day remained at the day care home with the Licensee's mother.^[4]

3. Although the Licensee's home is approximately five blocks from the pool, she decided to drive the children to the pool on August 15 because it was a very hot day and she knew the children would be tired when they were done swimming. The Licensee made two trips to the pool. During the first trip, she brought four children (a fifth grader, a fourth grader, a second grader, and a kindergartener) to the pool. The parents of these children had given their permission for their children to be at the pool alone under certain circumstances. The Licensee left these children at the pool and returned to her home. During the second trip, she brought the six other children, including the three four-year-olds.^[5]

4. Dixie Bakken, an adult woman who lives in a nearby community, was also at the St. Charles pool during the afternoon of August 15 with her children, her mother, and other relatives. Neither Ms. Bakken nor her mother knows the Licensee.^[6]

5. The swimming pool in St. Charles is a zero degree entry pool with a shallow area that permits children to wade gradually into the water. The pool also has deeper areas. There are lifeguards at the pool. The pool was very crowded on August 15.^[7]

6. At some point after arriving at the pool with the day care children, the Licensee scolded D., one of the four-year-old children in the Licensee's care, because he was throwing water on some towels. D. thereafter went over to the opposite side of the pool from where the Licensee was sitting.^[8]

7. D. eventually approached Ms. Bakken's group and sat on the edge of the pool next to Ms. Bakken's mother. She was sitting near the shallow area of the pool where the water was approximately two feet deep. A lifeguard was stationed approximately 2 or 3 feet away. D. was not with any adult or older child at the time. Ms. Bakken and her mother did not recognize D. or know who he was. D. informed them that he was at the pool with his day care. As he sat next to Ms. Bakken's mother, D. began falling asleep. Ms. Bakken's mother had to hold D. to keep him from falling into the pool. After D. nearly fell into the pool a couple of times, Ms. Bakken's mother asked him if he wanted to lay down. D. laid on the deck of the pool with his head on Ms. Bakken's mother's leg, and slept for approximately 15-20 minutes.^[9]

8. Ms. Bakken and her mother asked people who were swimming in their area of the pool and a few lifeguards if any of them knew who had brought D. to the pool. No one they asked knew.^[10]

9. D. spent at least 30 minutes sitting next to Ms. Bakken's mother or sleeping on her lap. No one came looking for him during that time, and there was no announcement on the public address system saying that anyone was looking for a lost child.^[11]

10. Ms. Bakken went to the pool house concession stand and asked if anyone was looking for a child or if there had been any reports of a missing child. One lifeguard asked another lifeguard, who responded that someone had reported someone missing a short time before. That lifeguard stepped out of the pool house and started searching the crowd to see if she could spot someone she referred to as "Littlefield." The lifeguard eventually walked over to the opposite side of the pool where the Licensee was sitting. The lifeguard pointed across the pool to where D. was sleeping on Ms. Bakken's mother's lap and asked if that was the little boy the Licensee had been looking for earlier. The Licensee looked up from her reading materials, said, "Oh, did he fall asleep?" and started to walk around to the other side of the pool. Ms. Bakken, who had walked over to the Licensee with the lifeguard, followed the Licensee as she walked over to where Ms. Bakken's mother was sitting with D. The Licensee told Ms. Bakken in response to a question that D. was one of her day care kids. Ms. Bakken became upset and angrily asked the Licensee if that was how she typically watched her day care kids. Ms. Bakken asked the Licensee her name and the Licensee did not respond. The Licensee picked up D., told him that he should have come and sat by her if he was tired, and walked away.^[12]

11. Ms. Bakken took pictures with a digital camera while she was at the pool. Pictures taken while D. was sleeping in Ms. Bakken's mother's lap show the Licensee sitting in a lounge chair across the pool from D. and holding a book.^[13]

12. Shortly after retrieving D., the Licensee gathered up some of her things and left the pool with six children. She drove them to her day care home, left them in the care of her mother, and then returned to the pool approximately fifteen minutes later to pick up the remaining four children (the same four children who had been brought in the first trip to the pool).^[14]

13. On August 19, 2003, Cece Keeling and Nancy Prodzinski, employees of Winona County Human Services whose responsibilities include day care licensing, went to the Licensee's home to investigate a report they had received earlier that day that the Licensee had left children unattended at the pool. They informed the Licensee that they had received a call that she was not attending to children as she should while at the pool. They told her that it had been alleged that a four-year-old was out of her sight for more than one-half hour and had fallen asleep, and she had left four other children at the pool unattended. The Licensee initially denied the accusations. After Ms. Keeling showed her the photographs that had been taken by Ms. Bakken (Exs. 1 and 2), the

Licensee admitted both allegations. The Licensee did not say anything else about the incident.^[15]

14. The County recommended to the Commissioner of the State Department of Human Services that the Licensee's license be immediately suspended due to the seriousness of leaving children unattended at the pool. The Commissioner agreed and, on August 28, 2003, Laura Plummer Zrust, Supervisor of the Division of Licensing, issued an Order of Temporary Immediate Suspension based upon a finding that the health, safety, and rights of children in the Licensee's care were in imminent danger. The suspension was effective on August 29, 2003, at 12:01 a.m. Ms. Keeling and Ms. Prodzinski served the Order of Temporary Immediate Suspension on the Licensee on August 28, 2003, in the presence of D. and other day care children. The Order informed the Licensee of her right to appeal the suspension decision.^[16]

15. Based upon the Licensee's request for appeal, a Notice of and Order for Hearing was issued by the Department on September 4, 2003, setting the hearing in this matter for September 29, 2003, in Winona.

16. Just prior to the commencement of the hearing on September 29, 2003, the Administrative Law Judge issued a Protective Order that prohibited the disclosure of data identifying victims or witnesses who are children or vulnerable adults except to the Licensee and her counsel, representatives or witnesses. They, in turn, were prohibited under the terms of the Protective Order from disclosing such data outside of the hearing.

17. At the hearing, both parties agreed to waive the requirement set forth in Minn. Stat. § 245A.08, subd. 4, requiring service of the report of the Administrative Law Judge by certified mail, and agreed to accept service by regular U.S. mail.

18. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

19. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

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

CONCLUSIONS

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 245A.07, subs. 2 and 2a, and 14.50.

2. The Commissioner, through Winona County Human Services, has complied with all substantive and procedural requirements of law and rule.

3. If the Commissioner finds that the health, safety or rights of the children in care are in imminent danger, the Commissioner shall immediately suspend the license. Minn. Rules part 9502.0341, subp. 9; see also Minn. Stat. § 245A.07, subd. 2 (if the license holder's actions post an imminent risk of harm to the health, safety, or rights of persons served by the program, the Commissioner shall act immediately to temporarily suspend the license.)

4. If a license holder appeals an Order immediately suspending a license, the scope of the resulting expedited hearing is limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the Commissioner's final order under Minn. Stat. § 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension. The burden of proof in expedited hearings is limited to the Commissioner's demonstration that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program.^[17]

5. Minn. Rules part 9502.0365 requires that "[c]hildren in care must be supervised by a caregiver." The term "supervision" is defined in Minn. R. 9502.0315, subp. 29a, to mean " 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."

6. In this case, the Commissioner has demonstrated reasonable cause to believe that there is a risk of imminent harm to the health and/or safety of children served by the license holder, based upon the allegations of a failure to adequately supervise day care children, which required a temporary immediate suspension of the license to provide family child care.

7. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

8. The reasons for these Conclusions are expressed in the attached Memorandum, which is hereby incorporated in these Conclusions by reference.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Human Services uphold the immediate suspension of Katherine Littlefield's family child care license.

Dated: October 8, 2003

/s/ Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

Reported: Tape Recorded (1-Tape); Not Transcribed.

NOTICE

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.

MEMORANDUM

It is important to understand that, at this stage, the State Commissioner of Human Services (represented here by the County) is not required to prove that this incident actually occurred. Instead, at this stage, the Commissioner must only prove that there is reasonable cause to believe that the health, safety or rights of persons in the Licensee's care are at imminent risk. This is a modest standard, intended to insure that vulnerable children are protected until there can be a full hearing and final determination on the underlying charges.

During an expedited hearing regarding a temporary immediate suspension, the Commissioner must only present reliable oral testimony and/or reliable documentary evidence in support of a finding of reasonable cause. The statute governing family day care does not specifically define what is meant by reasonable cause to suspend a license, but it is appropriate to look for guidance to the "probable cause" standard in a criminal proceeding.^[18] The State is entitled in such cases to rely on hearsay evidence linking the license holder (or a person present during the hours that children are in care) to an act that puts children at risk of imminent harm. The term "imminent harm" also is not defined in the statute or day care rules, but other rules adopted by the Commissioner define the term "imminent danger" to encompass situations in which a child is threatened with immediate and present abuse or neglect that is life-threatening or likely to result in abandonment, sexual abuse, or serious physical injury. Although this definition is not binding, it is instructive. The function of the Administrative Law Judge at this stage of the process is not to assess the relative credibility of conflicting testimony, but rather it is to determine whether there is enough evidence to proceed. Unless the Licensee submits evidence that makes the alleged violation "inherently incredible" or "seemingly impossible under the circumstances," evidence offered by the Licensee will not overcome a probable cause determination.^[19]

The State relied upon the testimony of an individual concerning her observations of the events at the pool on the day in question, photographs taken by that individual that appear to show the Licensee reading a book while D. slept in a stranger's lap across the pool, and testimony of a County licensing worker concerning admissions made by the Licensee during the complaint investigation. In response, the Licensee offered her own testimony that she knew that D. was across the pool from her and she had observed D. talking to Ms. Bakken and her mother. While disputing the exact time

scheme to which Ms. Bakken testified, she admitted that D. might have been on the other side of the pool for one-half hour. The Licensee stated that she had assessed the situation as safe, even though she did not know Ms. Bakken or her mother. She admitted that she had not realized that D. had fallen asleep. The Licensee stated that D. had never fallen asleep at the pool before and said that he did not seem tired that day. The Licensee denied having told anyone at the concession stand that D. was lost. The Licensee testified that she was busy for a period of time attending to a child who had a bloody nose, watching a child who had been bullied by another child at the pool, and ensuring that another child was not taken by a non-custodial parent. She acknowledged that she sat down after dealing with these other children and that she had reading material with her. The Licensee also admitted that, with the permission of their parents,^[20] four children were left unattended at the pool for a short period of time at the beginning and end of the day care's excursion to the pool, while she transported other day care children. She asserted that the children she took to the pool in her first trip were not allowed to get into the water until she returned with the remainder of the children. She alleged that she had visited the pool every week with her day care children, all of the pool employees knew her and her day care children, and the pool employees would not have let someone else leave with one of the children. She further testified that she did not say anything during the investigation of the complaint because she assumed that she should "keep her mouth shut" and "do as she was told" in accordance with instructions that she had been given by County investigators during a prior complaint investigation years ago. The Licensee also offered letters attesting to the fine care she has provided in her day care. It should be noted that one of those letters (Ex. 6) indicated that the writer could not say that the Licensee was an outstanding child care provider every moment of every day and that the writer had observed the Licensee "reading a book" and "tak[ing] breaks by talking with other people as she is caring for children."

When the evidence offered by the Commissioner is reviewed in light of the modest standard of proof, it is concluded that the evidence is sufficient to establish probable cause for the temporary immediate suspension. The Commissioner was entitled to make a preliminary determination based upon this evidence that the children in care were at risk of harm due to a lack of supervision by the Licensee and that this lack of supervision might very well extend into other contexts, thereby posing a continuing risk of harm and requiring an immediate temporary suspension of the child care license. The evidence submitted by the Licensee did not rise to the level where the Administrative Law Judge is convinced that the alleged violation is "inherently incredible" or "seemingly impossible under the circumstances" and thus was not sufficient to overcome the State's showing of probable cause.

Resolving the conflicting testimony and determining whether it is more probable than not that the incident actually occurred as alleged by the State and what, if any, more permanent sanction should be imposed is a job left for a later hearing. For now, all that is necessary is to determine whether the Commissioner has reasonable cause for the immediate suspension. The Administrative Law Judge finds that the Commissioner does, in fact, have reasonable cause.

B.L.N.

^[1] Minn. Stat. § 14.61.

^[2] Minn. Stat. § 245A.07, subd. 2a(b).

^[3] Testimony of Nancy Prodzinski.

^[4] Testimony of Katherine Littlefield.

^[5] Testimony of Littlefield; Exs. 3-5.

^[6] Testimony of Dixie Bakken.

^[7] Testimony of Bakken, Littlefield.

^[8] Testimony of Littlefield.

^[9] Testimony of Bakken, Littlefield.

^[10] Testimony of Bakken.

^[11] Testimony of Bakken, Littlefield.

^[12] Testimony of Bakken, Littlefield.

^[13] Testimony of Bakken; Exs. 1-2.

^[14] Testimony of Bakken, Littlefield.

^[15] Testimony of Prodzinski.

^[16] Testimony of Prodzinski, Littlefield, Sarah Ferden; Order of Temporary Immediate Suspension, attached to Notice of and Order for Hearing.

^[17] Minn. Stat. § 245A.07, subd. 2a (a).

^[18] See *State v. Florence*, 306 Minn. 442, 239 N.W. 2d 892, 902 (1976).

^[19] *Id.* 239 N.W. 2d at 903 & N. 24; see also *In the Matter of the Temporary Immediate Suspension of the License of Darcy Sime to Provide Family Child Care*, OAH Docket No. 58-1800-14955-2 (2002), at 7-8.

^[20] As noted in the Conclusions of Law, the rules governing family child care providers specify that children in day care settings “must be supervised by a caregiver” and define supervision for infant, toddlers, and preschoolers to mean a caregiver being within sight or hearing at all times and for school age children to mean a caregiver being available for assistance and care. See Minn. Rules part 9502.0365 and 9502.0315, subp. 29a. Family child care providers must comply with these supervision requirements regardless of whether parents given permission for a different arrangement. See, e.g., *In the Matter of the Immediate Suspension of the License of Angel Adams*, OAH Docket No. 9-1800-12646-2 (2000) (license suspension was upheld due to provider’s absence from the home for 90 minutes despite fact that provider claimed that she had parents’ permission to leave children alone for short periods of time); *In the Matter of the Proposed Suspension of the Family Day Care License of Lori Veroeven*, OAH Docket No. 7-1800-9683-2 (1995) (fact that provider obtained parental permission for a person under the age of 18 to serve as a substitute caregiver was immaterial to a violation of the age requirement contained in the day care rules).