

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Suspension of the
License of Christine Svee to Provide
Family Day Care

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

This matter came on for Hearing before Administrative Law Judge Steve M. Mihalchick on October 24, 2003, at Douglas County Social Services, Conference Room 1073, 809 Elm Street, Suite 1186, Alexandria, MN 56308. The record closed upon adjournment of the hearing that day.

Daniel Lee, Assistant Douglas County Attorney, 305 Eighth Avenue West, Alexandria, MN 56308, appeared for the Minnesota Department of Human Services (Department) and Douglas County Social Services (DCSS).

Michael J. Dolan, Attorney at Law, P.O. Box 819, Alexandria, MN 56308, appeared for Christine Svee (Licensee).

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 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 Department 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

Whether Licensee's stepdaughter poses a risk of harm to the children served by Licensee's day care program under a safety plan that prohibits contact between the stepdaughter and the day care children? The Administrative Law Judge concludes she does not.

Whether the disqualification of Licensee's stepdaughter should be set aside and the indefinite suspension of Licensee's family day care license modified to a conditional license conditioned upon such a safety plan? The Administrative Law Judge concludes it should.

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

FINDINGS OF FACT

1. Licensee is a resident of Douglas County, licensed as a Family Day Care Provider for approximately eight years. She provides day care at her residence in Alexandria. Licensee's family includes her husband, Steve, and his now 13-year-old daughter, B.S. (DOB 10/8/90).

2. When Steve Svee divorced B.S.'s mother, she was granted custody of B.S. About six months after he married Licensee four years ago, Steve Svee and his wife agreed that B.S. should live with him and Licensee. Since then, B.S. spends five to six weeks each summer with her mother^[1] and approximately two weeks with her paternal grandmother,^[2] in addition to liberal visits with each throughout the year.^[3]

3. Licensee's day care hours are Monday through Friday from 7:30 a.m. until 5:30 p.m. The lower level of the residence is a walkout and the day care is confined to that area; the day care parents and their children enter and exit the business at the walkout level.^[4] The bi-fold door at the foot of the interior stairs to the upper level is kept closed at all times during business hours. The lower level has a kitchen, a bathroom, and playrooms.^[5] The majority of Licensee's day care children are school age or pre-school.

4. In eight years of doing day care, Licensee has no history of negative licensing actions or significant violations. She has received three correction orders on relicensing visits for relatively minor, single instance violations. Her DCSS Licensing Worker Barbara Kleinschmidt considers her to be cooperative, reliable, and responsible and to communicate well with her.^[6]

5. Licensee's husband works as a supervisor at an irrigation company servicing commercial and residential customers in Alexandria and the surrounding

areas.^[7] The seasonal nature of his job requires him to work only six and one half months per year; he is laid off during the winter months. In his role as a supervisor, Licensee's husband has great flexibility in his work hours and can come and go as necessary. Licensee's husband takes B.S. to school each day at 7:00 a.m. When he is working, he does it before he goes to work.

6. On July 25, 2003, DCSS received a report of an incident that occurred at Licensee's day care on July 22, 2003. According to the reporter, B.S. and a seven-year-old male day care child had been in the shed in Licensee's backyard where B.S. kissed the boy and touched his penis. On July 28, 2003, DCSS faxed a copy of the Intake Summary to the Alexandria Police Department.^[8]

7. On July 29, 2003, the Alexandria Police followed up with Licensee, who verified that the incident occurred. On July 30, 2003, they conducted interviews of the boy, who also verified the incident, and B.S. She admitted to going in the shed with the boy, kissing him on the lips, sitting on his lap while his pants were on, and touching his penis while they were off. The Alexandria Police forwarded the case to the Douglas County Attorney's Office for consideration of delinquency matters.^[9] As of the time of the hearing, no determination had been made on whether to proceed with a delinquency petition.

8. Kleinschmidt spoke with Licensee on July 29, 2003. Licensee informed her that B.S. was scheduled to visit her mother from August 7-26, 2003, when B.S. would return to Licensee's residence for the start of the school year. Licensee and her husband acknowledged the seriousness of the incident and involved B.S.'s mother and her husband in the situation. The two couples discussed the possibility of B.S. returning to live with her mother, though neither couple felt that would be best for B.S. Instead, Licensee and her husband developed a plan that would not allow B.S. access to the day care children. Licensee had discussed the matter with the victim's parents and informed them that B.S. would not be allowed access to the day care children inside the home and would not be allowed outdoors at any time the day care children were outside. The victim's family, while upset over the incident, trusted that the plan would work and have continued to use Licensee's day care to this day. Licensee reported to Kleinschmidt that they had scheduled intake and subsequent appointments at a mental health center for B.S. after her return to Alexandria. A few days later, Licensee and her husband agreed to have B.S. leave early for her stay with her mother.^[10]

9. Kleinschmidt approved of Licensee's plan as an appropriate means of protecting the safety of the day care children. Kleinschmidt discussed the matter with an Assistant County Attorney, who agreed that as long as B.S. was not living in the home, then there was no immediate threat to Licensee's day care children, and DCSS would not recommend a temporary immediate suspension of the license.^[11]

10. In a letter to the Department dated August 7, 2003, DCSS recommended a conditional license for Licensee instead of a temporary immediate suspension, since B.S. was not currently residing in Licensee's home and Licensee and her husband had developed a plan to keep B.S. separate from the day care children upon her return.

The recommended conditions were that: 1) B.S. keep all scheduled mental health appointments for August 12 and 26 and follow recommendations of the therapist; 2) Licensee and her husband sign releases of information so that Douglas County could communicate with the therapist and with B.S.'s mother and stepfather and both sets of grandparents if necessary; 3) Licensee and her husband keep B.S. and the day care children separated at all times; 4) Licensee notify Douglas County of B.S.'s residence at all times; 5) in the event B.S. needs a caregiver due to illness or injury, Licensee provides an alternative care provider for either B.S. or the day care children; 6) both sets of parents participate in mental health sessions when requested; 7) Licensee keep the licensing worker notified of recommendations by mental health; and 8) DCSS inform the Department of any changes.^[12]

11. B.S.'s therapist submitted a memo to Kleinschmidt dated August 13, 2003, in which she noted that B.S. was experiencing signs of depression, anxiety and learning difficulties. The therapist emphasized the importance of maintaining B.S.'s current support system and living situation "at this time."^[13]

12. By letter to Licensee dated August 13, 2003, Kleinschmidt directed Licensee to write up B.S.'s supervision plan, including how and by whom she would be supervised, how the safety of the day care children would be ensured, and why Licensee chose the plan as the best option, and submit it to DCSS, who would submit it to the Department.^[14]

13. On August 18, 2003, DCSS received a letter of from the parents of one of Licensee's day care children asking that her license not be suspended or revoked because of Licensee's integrity and confidence in her ability to insure that such an incident would not happen again.^[15]

14. DCSS received Licensee's supervision plan on August 19, 2003, and sent it to the Department. The plan stated that, until further evaluation by her therapist, B.S. would not be allowed to have contact with the day care children. Licensee included a floor plan of her day care and explained how her husband would supervise B.S. after school on days when B.S. came home before 5:30 p.m.^[16]

15. The Douglas County Attorney's Office advised DCSS that B.S.'s admitted conduct constituted the crime of Felony Criminal Sexual Conduct in the Second Degree.^[17] Since that crime that results in a disqualification under Minn. Stat. § 245C.14, subs. 1 and 2, on August 21, 2002, DCSS amended its recommendation to the Department from a conditional license to an indefinite suspension.^[18]

16. As part of the disqualification determination, Kleinschmidt completed a Risk of Harm Assessment form on August 21, 2003. Kleinschmidt found that B.S. posed a high risk of harm to the children served by Licensee's day care program due to the intrusiveness and recency of the event, the similarity between the victim and Licensee's clients, and the developmental and emotional capacity of B.S. due to her age. Kleinschmidt noted B.S.'s age and inability to understand what she did and why,

as well as Licensee's active cooperation and immediate temporary removal of B.S. from the home.^[19]

17. By letters dated August 21, 2003, DCSS informed Licensee and her husband of B.S.'s disqualification and its determination that B.S. posed an imminent risk of harm to the children in Licensee's day care and ordered Licensee to immediately remove B.S. from direct contact with the day care children. The letters further informed Licensee and her husband how to request reconsideration of the disqualification and risk of harm determination.^[20]

18. On August 22, 2003, the Department issued Licensee an Order of Suspension suspending her license indefinitely until B.S. is no longer residing in the home. The Order was based upon Licensee's failure to provide adequate supervision in connection with the incident in the shed as required by Minn. Rules 9502.0365, subp. 5, and 9502.0315, subp. 29a. The Order informed Licensee of her right to appeal, which she filed on August 25, 2003.^[21]

19. On August 29 and September 11, 2003, DCSS received three more letters from Licensee's day care parents in support of Licensee. All of Licensee's day care families are aware of the incident in the shed and have nonetheless continued to use her for the day care of their children.^[22]

20. On September 12, 2003, Licensee's husband filed a timely request for reconsideration of the risk of harm determination on behalf of B.S. He acknowledged the seriousness of the incident, but emphasized that B.S. is a caring person who does not pose a risk of harm to children.^[23]

21. On September 19, 2003, DCSS served the Notice of and Order for Hearing, setting the hearing to take place on October 24, 2003.^[24]

22. By letter dated October 6, 2003, the Department informed Licensee's husband that his requests for reconsideration and set-aside of the disqualification were denied. The Commissioner determined that the preponderance of the evidence indicated that B.S. had committed felony criminal sexual conduct in the second degree. The letter also stated that Licensee's husband had failed to demonstrate that B.S. does not pose a risk of harm to Licensee's day care children, and that "[d]ue to the age and vulnerability of the victim at the time of the event, the similarity between the victim and persons served by the program, the severity, the recency, and the nature of the event, the disqualification has not been set aside, nor has a variance been granted."^[25]

23. Also on October 6, 2003, the Department issued Licensee an Amended Order of Suspension. It retained the reason for indefinite suspension cited in the first Order of Suspension: Failure to provide adequate supervision in connection with the incident in the shed. It added a second reason: The disqualification of B.S. that had not been set aside. And it expanded the explanation of appeal rights to include the option to have the determination not to set aside the disqualification considered at the

contested case hearing on the suspension, if all parties and the Administrative Law Judge consented.^[26]

24. On October 23, 2003, Licensee, by her attorney, submitted a restated safety plan to the County Attorney, which expanded somewhat upon Licensee's previous plan. She reiterated that the day care would remain in the lower level and would not be mixed in any way with the upper floor. Licensee also proposed a change to her play supervision arrangements so that all the children, regardless of age, would be inside or outside at the same time, under Licensee's direct supervision. With regard to B.S., Licensee's plan stated:

[B.S.] will not be in the family residence during day care hours unless she is directly supervised. By that I mean, either her father will actually be in the residence and providing direct supervision to the child who will remain in the separate private portion of the residence, or in the alternative, if the father is not available to provide direct supervision to her at the residence, then the child will not physically be at the residence. Arrangements have been made for participation in after school programs, as well as alternate care if those programs are unavailable, using the paternal grandmother as a supervisor.

Finally, the plan indicated Licensee's intent to continue therapy and follow any recommendations from B.S.'s therapist for additional treatment or education, with the hope of reducing the risk of reoffense.^[27]

25. Licensee and her husband felt that the plan was highly workable and would avoid all reasonable concerns about future offenses. B.S. is very seldom at home during day care hours because she participates in sports and receives tutoring after school three to four days per week. If Licensee's husband is not available, several family members beyond the paternal grandmother are also nearby and available, and they all understand the need and reason to isolate B.S. from the day care children. B.S. had, at the time of the hearing, attended eight counseling sessions. She realizes the seriousness of her offense and does not understand why she did it. She acknowledges the necessity of being denied access to the day care children and does not object to Licensee's proposed plan. Licensee and her husband feel that it is very important to maintain B.S. in their home as part of their family and, if required to choose, will give up doing day care.^[28]

26. DCSS (Kleinschmidt and her supervisor Laurie Bonds) believes that Licensee's plan is more than sufficient to protect the day care children. They point to fact that Licensee and her husband both took the matter seriously and reacted appropriately, Licensee's excellent history with DCSS, the fact that all the day care parents have remained with Licensee and support her, and the family values demonstrated by placing B.S.'s needs ahead of Licensee's desire to do day care. DCSS continues to believe that a conditional license incorporating conditions imposing Licensee's safety plan or similar conditions should be issued and that the situation can be can be adequately self-monitored by Licensee, perhaps with weekly reporting.

Kleinschmidt believes that Licensee's proposed safety plan might be improved marginally by prohibiting B.S. from being present in the home at all during day care hours, but does not necessarily recommend that option.^[29]

27. The Department's position, as stated to Kleinschmidt by Department staff, is that it is too difficult to monitor the situation when a member of the household has a disqualification and that in all such cases, in light of the duty to protect children, the Department has required removal of the individual or not allowed day care to continue. The Department informed Kleinschmidt that even the additional step of not allowing B.S. to be present at all during day care hours was inadequate because there was no guarantee that B.S. would not harm any of the day care children again. Moreover, this would be a difficult way for the family to live.^[30] As the County Attorney argued for the Department, if something did go wrong, there could be very serious harm done to another child and the plan will be difficult to maintain over a long period without occasional lapses.

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. Pursuant to Minn. Stat. §§ 245A.08, subd. 2a, and 245C.28, this is a consolidated contested case hearing regarding suspension of a family day care license based upon a disqualification that was not set aside.

4. Under Minn. R. 9502.0365, subp. 5, children in care must be supervised by a caregiver. Under Minn. R. 9502.0315, subp. 29a, "supervision" of a school age child requires a caregiver being available for assistance and care so that the child's health and safety is protected.

5. Licensee failed to meet the supervision requirements of the rules on July 22, 2003, when she failed to be aware of the fact that her stepdaughter and the seven year old boy had gone into the shed.^[31] School age children do not have to be kept with sight or sound at all times, and Licensee had no reason to believe that her stepdaughter posed any particular risk, but day care providers should be generally aware of the location and circumstances of the school age children, particularly the youngest ones. Licensee was not available to protect the health and safety of this child.

6. A family day care license shall be revoked, not renewed, or suspended if the provider, or any other person residing in the day care residence, has a disqualification under Minn. Stat. § 245C.14.^[32]

7. Minn. Stat. § 245C.14, subds. 1 and 2, require the Commissioner to disqualify the subject of a background study from direct contact with or access to

persons served by the license holder where “a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15.” The crime of Felony Criminal Sexual Conduct in the Second Degree is one of those statutorily designated crimes.

8. “Direct contact” is defined as “providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to persons served by the program.”^[33] Licensee’s proposed plan prohibits direct contact between her stepdaughter and the day care children.

9. “ ‘Access to persons served by a program’ means physical access to persons receiving services or the persons’ personal property without continuous, direct supervision, as defined in subdivision 8.”^[34] Licensee’s proposed plan denies her stepdaughter access to the day care children.

10. A disqualified individual may resume direct contact with or access to persons served by a program if the Commissioner sets aside the disqualification or grants the license holder a variance.^[35]

11. The Commissioner may set aside a license disqualification if the Commissioner finds that the individual does not pose a risk of harm to any person served by the provider.^[36] In determining that an individual does not pose a risk of harm, the commissioner shall consider the nature, severity, and consequences of the event or events leading to the disqualification, whether there is more than one disqualifying event, the age and vulnerability of the victim at the time of the event, the harm suffered by the victim, the similarity between the victim and persons served by the program, the time elapsed without a repeat of the same or similar event, documentation of successful completion by the individual of training and rehabilitation, and any other relevant information. In reviewing a disqualification, the Commissioner shall give “preeminent weight” to the safety of each person to be served by the applicant.

12. Licensee has the burden of proving by a preponderance of the evidence that her stepdaughter does not pose a risk of harm to the clients she serves.^[37] Licensee has proved by a preponderance of the evidence that the disqualification should be set aside because the supervision plan ensures that her stepdaughter does not pose a risk of harm to Licensee’s clients.

13. The attached Memorandum is incorporated by reference.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner set aside the disqualification of Licensee’s stepdaughter and lift the suspension of the family day care license of Licensee.

Dated: November 26, 2003

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

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

MEMORANDUM

Since the parties stipulate to Licensee's stepdaughter's disqualification, it is Licensee's burden to show, by a preponderance of the evidence, that B.S. does not pose a risk of harm to her day care children, and accordingly, that her license should not be indefinitely suspended. "Preeminent weight" is given to the safety of Licensee's day care children.

Licensee's plan gives preeminent weight to the safety of her day care children, while also maintaining the consistency and balance that B.S. needs during and after therapy. Licensee has gone out of her way to create a workable plan that denies B.S. access to and direct contact with the day care children. Additionally, the proximity and number of Licensee's husband's family members allows for multiple practical and realistic alternatives for the supervision of B.S. Licensee's plan is an appropriate safeguard to the day care children.

The Department has stated its policy that a household member with a disqualification must be removed from the residence if a licensee is to remain licensed. Yet nowhere in the statutes or legally adopted rules of the Department does this universally applicable requirement appear. Minn. Stat. § 245C.14, subds. 1(b) and 2(b), prohibit direct contact with or access to persons served by the program. Those are the standards that must be applied. The concerns behind the Department's unwritten policy are legitimate and may be helpful in evaluating the statutory criteria on a case-by-case basis. Under the particular facts of this particular case, complete removal of the stepdaughter from the residence is not required to protect the day care children.

S.M.M.

^[1] B.S.'s mother is remarried and lives in Monticello, MN.

^[2] Much of Steve Svee's immediate and extended family lives in Alexandria and the surrounding area.

^[3] Testimony of Christine Svee.

^[4] In the winter, Steve Svee clears snow from the path leading to the back of the house.

^[5] Exs. 3-5.

[6] Ex. 1 at 46 (the ALJ numbered all the non-blank pages of Exhibit 1); Testimony of Kleinschmidt.

[7] Testimony of Steve Svee. Mr. Svee has been employed at this company for approximately fifteen years.

[8] Ex. 1 at 54-55.

[9] Ex. 1 at 51-53.

[10] Ex. 1 at 47-48.

[11] Testimony of Barbara Kleinschmidt.

[12] Ex. 1 at 46-50.

[13] Ex. 1 at 40.

[14] Ex. 1 at 43.

[15] Ex. 1 at 38.

[16] Ex. 1 at 35-37.

[17] Under Minn. Stat. § 609.343, subd. 1 (a), the crime includes sexual contact with another person if the complainant is under 13 years of age and the actor is more than 36 months older than the complainant and is a felony.

[18] Ex. 1 at 31.

[19] Ex. 1 at 33-34.

[20] Ex. 1 at 28-30.

[21] Ex. 1 at 22-25.

[22] Ex. 1 at 11-13; Testimony of Kleinschmidt.

[23] Ex. 1 at 18-19.

[24] Ex. 1 at 14-17.

[25] Ex. 1 at 5-6.

[26] Ex. 1 at 1-3. At the start of the hearing, it was stipulated by Licensee that the disqualification would not be contested and agreed by the parties and the ALJ that the issue of whether the disqualification should be set aside would be addressed.

[27] Ex. 2.

[28] Testimony of Steve and Christine Svee.

[29] Testimony of Kleinschmidt.

[30] Testimony of Kleinschmidt.

[31] The parties did not specifically address this issue during the hearing.

[32] Minn. R. 9502.0335, subp. 6.D.

[33] Minn. Stat. § 245C.02, subd. 11 (2003).

[34] Minn. Stat. § 245C.02, subd. 2 (2003). Under subd. 8, "continuous, direct supervision" requires that the supervisor be available at all times to intervene to protect the health and safety of those served by the program.

[35] Minn. Stat. § 245C.14 subds. 1(b) and 2(b).

[36] Minn. Stat. § 245C.22, subd. 4 (2003).

[37] Minn. Stat. § 245A.08, subd. 3(b).