

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

In the Matter of the Revocation of the  
License of Raylen and Ontrella Hicks  
to Provide Family Foster Care.

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

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy at 9:30 a.m. on July 1, 2004, at the Office of Administrative Hearings in Minneapolis, Minnesota. The OAH record closed upon completion of the hearing that day.

Vicki Vial Taylor, Assistant Hennepin County Attorney, 525 Portland Avenue South, 12<sup>th</sup> Floor, Minneapolis, Minnesota 55415, appeared on behalf of the Department of Human Services. Raylen and Ontrella Hicks and their son J.H., 3008 Lyndale Avenue North, Minneapolis, Minnesota 55411, appeared on their own behalf without counsel.

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

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

**STATEMENT OF ISSUES**

1. Is J.H. disqualified from access to foster children based on delinquency adjudications for violation of Minn. Stat. § 609.66 (gross misdemeanor possession of a BB gun on school property) and § 609.52 (misdemeanor theft)?

The Administrative Law Judge concludes that J.H. is disqualified from access to foster children based on the delinquency adjudications.

2. If J.H. is disqualified, should the disqualifications be set aside?

The Administrative Law Judge concludes that the disqualification for misdemeanor theft should be set aside, but that the Commissioner may not set aside the disqualification for possession of a BB gun on school property.

3. If the disqualifications are not set aside, should his parents' foster care license be revoked?

The Administrative Law Judge concludes that the Commissioner must revoke the foster care license, unless the Commissioner determines that a variance should be issued to the license holder.

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

### **FINDINGS OF FACT**

1. Raylen and Ontrella Hicks are the parents of five children, including three adopted siblings. One of their children, J.H., is now 15 years old. J.H. has emotional disabilities that predate his adoption. The Hickses have worked diligently to obtain services to provide for his needs, including in-home family therapy, individual therapy, and neuropsychological evaluations.<sup>[1]</sup>

2. In the year after the adoption the Hickses became aware that J.H. was shoplifting small items. They became frustrated when he continued to do so despite their efforts to teach him that stealing is wrong.<sup>[2]</sup>

3. In late October 2001, when J.H. was 12 years old, he went shopping with his family at Walmart, where he shoplifted a BB gun and some BBs. That evening, Mrs. Hicks discovered the BBs and brought J.H. back to the store to return them and to acknowledge what he had done. She was not aware that he had also taken the BB gun. The next day, J.H. took the BB gun to school and showed it to friends. School personnel subsequently discovered it. When the police liaison officer called Mrs. Hicks to ask her to come pick up J.H. from school, she advised the officer to arrest him and take him downtown. She believed this consequence would reinforce the message that shoplifting was wrong and could get him into serious trouble.<sup>[3]</sup>

4. In March 2002, J.H. was charged in Hennepin County Juvenile Court with possession of a BB gun on school property, a gross misdemeanor under Minn. Stat. § 609.66, subd. 1d.<sup>[4]</sup>

5. In early July 2002, Mr. and Mrs. Hicks became licensed to provide foster care.<sup>[5]</sup>

6. On August 2, 2002, J.H. admitted to the offense in Juvenile Court and was adjudicated delinquent for violation of Minn. Stat. § 609.66. He was placed on probation and ordered to continue family counseling and individual counseling.<sup>[6]</sup> The Juvenile Court evaluated J.H. for placement in a diversion program for juvenile gun offenders, but because of his emotional difficulties, the court determined that the program was not appropriate for him.<sup>[7]</sup>

7. In March 2003, J.H. shoplifted two laser pointers, valued at \$9.99, from a Target store. When he was arrested, he refused to tell authorities his name, so authorities were unable to contact his parents. He was taken to St. Joseph's Children's Home until the next day, when he did disclose his name and his parents were able to pick him up. For this conduct J.H. was charged in Hennepin County Juvenile Court with misdemeanor theft, in violation of Minn. Stat. § 609.52, subs. 2(1) & 3(5).<sup>[8]</sup>

8. In April 2003, J.H. admitted the theft in Juvenile Court and was adjudicated delinquent based on violation of Minn. Stat. § 609.52, subs. 2 & 3. He was ordered to complete a day of community service and to continue counseling.<sup>[9]</sup> He completed the community service and continued the counseling.<sup>[10]</sup>

9. J.H. did well during the 2002-03 school year. He attended school every day, was on time, and was transitioned from a classroom for students with emotional/behavioral disorders to the Afrocentric Educational Academy. His social skills were appropriate, he got along well with peers, and was respectful to adults.<sup>[11]</sup>

10. On June 19, 2003, Mrs. Hicks completed a foster care annual review and relicensing questionnaire. The form provides at the top that each adult must complete the questionnaire. Mrs. Hicks indicated that there had been no changes with regard to herself or her husband since the last review. On the second page of the form, the questionnaire asks for status changes concerning household members. Mrs. Hicks again answered on behalf of herself and her husband. She did not realize when she completed the form that "household members" was to include children.<sup>[12]</sup> The licensing worker later advised Mrs. Hicks that she would have to provide background study consent forms for J.H. and a daughter, both of whom were then older than 13 years of age. On or about July 1, 2004, Mr. and Mrs. Hicks signed a background study form for their daughter, and J.H. signed his own form.<sup>[13]</sup> The Hickses also signed the relicensing questionnaire.

11. The County obtained the background study results. Both misdemeanor theft of property and gross misdemeanor possession of a BB gun are disqualifications under Minn. Stat. § 245C.15.

12. On July 31, 2003, the licensing worker completed a risk of harm determination with regard to J.H.. She concluded that he posed a high risk of harm in

that the disqualifying events were recent; the dates of discharge were recent; the disqualifying events involved deliberate/overt and violent behavior, and involved a repeat offense; and that the victim was similar to persons served by the program.<sup>[14]</sup> On a second list of risk factors developed by Hennepin County, she determined that he posed a high risk of harm because he refused or was unable to understand the level of harm to the victim; accepted little or no responsibility for his behavior; and had little insight into the behavior that resulted in disqualification.<sup>[15]</sup>

13. The record contains no factual basis to support the conclusions that the disqualifying events were deliberate, overt, or violent; that there were any victims involved other than Walmart and Target; or that J.H. was not able to understand the harm to the “victim” and accepted little or no responsibility for his behavior.

14. On August 13, 2003, the County notified J.H. (in care of his parents) of the disqualifying factors and that possession of a BB gun on school property is a 10-year disqualification that cannot be set aside unless the information relied upon is incorrect. The County also notified him and his parents of the determination that J.H. posed an imminent risk of harm to persons served by the program and that the Hickses were to remove him immediately from contact with persons served by the program.<sup>[16]</sup>

15. In August and September 2003 the Hickses requested reconsideration of both disqualifications.<sup>[17]</sup> In support of their request, they submitted a letter from their family therapist stating that they are excellent foster care providers who provide for the safety, structure, and emotional well-being of their own children and the children observed in their care.<sup>[18]</sup>

16. On October 30, 2003, Hennepin County recommended to the Department of Human Services that the disqualifications not be set aside nor a variance granted. It also recommended that the Hickses’ foster care license be revoked for failing to disclose the offenses or their son’s contacts with Juvenile Court in the relicensing questionnaire.<sup>[19]</sup>

17. In April 2004, J.H. began attending the Life Skills Program at North High School. His teacher describes him as a polite and delightful young man who has exhibited appropriate behavior toward staff and students. He had a perfect attendance record, was motivated to do well, and was a good role model for other 9<sup>th</sup> graders in the class.<sup>[20]</sup>

18. On April 16, 2004, the Department of Human Services issued a determination declining to set aside the disqualifications of J.H. or to grant a variance.<sup>[21]</sup> The Commissioner found the following factors determinative: the seriousness of the events; the chronicity of events; the recency of the event, given the length of time this type of event is a disqualification; and the lack of evidence of sufficient rehabilitation. The Commissioner noted that although J.H. had undergone some therapy for behavioral problems, it was too soon to conclude that he would not be a risk to children in foster care.

19. On April 16, 2004, the Department of Human Services issued an order revoking the Hickses' foster care license on the basis that (1) the disqualifications of J.H. had not been set aside, nor had a variance been granted; and (2) the Hickses had submitted false or misleading information during the relicensing process.<sup>[22]</sup>

20. On April 19, 2004, Mr. and Mrs. Hicks requested an appeal.<sup>[23]</sup>

21. The Department of Human Services served the Notice and Order for Hearing by mail on May 20, 2004.

22. The hearing was originally scheduled for June 25, 2004, and was rescheduled at the request of the Administrative Law Judge to July 1, 2004.

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

### **CONCLUSIONS OF LAW**

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 245A.07, subds. 2 & 3, and 14.50.

2. The Commissioner, through Hennepin County Human Services, has complied with all substantive and procedural requirements.

3. The Commissioner shall conduct a background study on individuals age 13 or over living in a household where a licensed program is provided.<sup>[24]</sup>

4. For licensing purposes, a finding that a delinquency petition is proved in juvenile court shall be considered a conviction in state district court.<sup>[25]</sup>

5. An individual is disqualified under section 245C.14 if (1) less than ten years have passed since the discharge of the sentence imposed for the offense; and (2) the individual has received a gross misdemeanor conviction for violation of the offense of dangerous weapons (609.66).<sup>[26]</sup> An individual is disqualified if less than seven years have passed and the individual has received a misdemeanor conviction of theft (609.52).<sup>[27]</sup>

6. Based on his juvenile court adjudications, J.H. is disqualified from access to foster children in his parents' home.

7. If the individual studied has a disqualifying characteristic, the Commissioner shall review the information immediately available and make a determination as to the subject's immediate risk of harm to persons served by the program where the individual studied will have direct contact. The Commissioner shall consider all relevant information available, including the following factors in determining

the immediate risk of harm: (1) the recency of the disqualifying characteristic; (2) the recency of discharge from probation; (3) the number of disqualifying characteristics; (4) the intrusiveness or violence of the disqualifying characteristic; (5) the vulnerability of the victim involved in the disqualifying characteristic; and (6) the similarity of the victim to the persons served by the program where the individual studied will have direct contact.<sup>[28]</sup>

8. The Commissioner may set aside the disqualification if the commissioner finds that the individual does not pose a risk of harm to any person served by the license holder.<sup>[29]</sup> In determining whether an individual poses a risk of harm, the Commissioner shall consider (1) the nature, severity, and consequences of the event or events that led to the disqualification; (2) whether there is more than one disqualifying event; (3) the age and vulnerability of the victim at the time of the event; (4) the harm suffered by the victim; (5) the similarity between the victim and persons served by the program; (6) the time elapsed without a repeat of the same or similar event; (7) documentation of successful completion of training or rehabilitation pertinent to the event; and (8) any other information deemed relevant to reconsideration.<sup>[30]</sup>

9. The Commissioner should set aside the disqualification of J.H. based on his delinquency adjudication for misdemeanor theft, in violation of Minn. Stat. § 609.52. This is a crime of petty theft by a 13-year-old, and there is no evidence that any “rehabilitation” pertinent to the event must be completed. When the above factors are considered, one cannot reasonably conclude that J.H. poses a risk of harm to anyone based on the shoplifting of two laser pointers valued at \$9.99.

10. The Commissioner may not set aside the disqualification of an individual in connection with a license to provide foster care in the provider’s home if the individual is disqualified for conviction within the last ten years of violating Minn. Stat. § 609.66.<sup>[31]</sup>

11. When the Commissioner has not set aside a background study subject’s disqualification, and there are conditions under which the disqualified individual may provide direct contact services or have access to people receiving services that minimize the risk of harm to people receiving services, the Commissioner may grant a time-limited variance to a license holder.<sup>[32]</sup> The Commissioner’s decision to grant or deny a variance is final and not subject to appeal under the provisions of chapter 14.<sup>[33]</sup>

12. At a hearing regarding a licensing sanction under Minn. Stat. § 245A.07, the commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with the laws or rules that the Commissioner alleges the license holder violated.<sup>[34]</sup>

13. The Commissioner may suspend, revoke, make conditional, or deny a license if a license holder fails to comply fully with applicable laws or rules, or knowingly withholds relevant information from or gives false or misleading information to the Commissioner in connection with an application for a license or during an investigation.

14. Raylen and Ontrella Hicks proved by a preponderance of the evidence that they complied with all applicable laws and rules and that they did not knowingly withhold relevant information from or give false or misleading information to the Commissioner in connection with the relicensing process.

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

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner of Human Services uphold the revocation of the license of Raylen and Ontrella Hicks to provide foster care on the basis that their son has a disqualification that the Commissioner cannot set aside, unless the Commissioner determines after review of the hearing record that a variance should be issued to the license holder.

Dated: July 22, 2004

/s/ Kathleen D. Sheehy

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KATHLEEN D. SHEEHY  
Administrative Law Judge

Reported: Tape-recorded (one tape)

### **NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1 (2000), the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail. 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 return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline to be imposed.

### **MEMORANDUM**

The BB gun incident happened almost three years ago, before Mrs. Hicks was a licensed foster care provider. Since then J.H. has made substantial progress and is now considered a role model for other students in his school program. Because Minn.

Stat. § 245C.24, subd. 3(a), provides that the ten-year disqualification cannot be set aside, however, the order of revocation must be affirmed.

The record reflects that the Hickses have been excellent foster care providers and parents. The Department's position during the hearing was that it has nothing negative to say about the foster care they provided, that there should be more foster parents like them, and that its hands are tied because of the statute's prohibition on setting aside the disqualification.<sup>[35]</sup> The Department apparently accepted the credible testimony of Mrs. Hicks that she did not understand that the relicensing questionnaire required updated information about her children, as well as the adults in the home. She was incorrect, but she did not knowingly withhold or provide false or misleading information.

The only way to avoid the effect of Minn. Stat. § 245C.24, subd. 3(a), is for the Commissioner to grant a variance to the license holder. The Commissioner's decision not to grant a variance, however, is final and is not subject to appeal under the provisions of Chapter 14. Because the decision may have been influenced by the County's unsupported characterization of J.H.'s conduct as being deliberate, overt, violent, and involving victims similar to foster children, the Administrative Law Judge urges the Commissioner to review the variance decision in light of the evidentiary record developed at the hearing.

K.D.S.

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<sup>[1]</sup> Ex. 7a.

<sup>[2]</sup> Testimony of Ontrella Hicks.

<sup>[3]</sup> Testimony of Ontrella Hicks.

<sup>[4]</sup> Ex. 9.

<sup>[5]</sup> Testimony of Mary Finstad.

<sup>[6]</sup> Ex. 10; Testimony of Ontrella Hicks.

<sup>[7]</sup> Ex. 3; Testimony of Ontrella Hicks.

<sup>[8]</sup> Ex. 6; Ex. 11; Testimony of Ontrella Hicks.

<sup>[9]</sup> Ex. 12.

<sup>[10]</sup> Testimony of Ontrella Hicks.

<sup>[11]</sup> Exs. 17 & 18. .

<sup>[12]</sup> *Id.* The form itself does not contain a list of household members or define household membership in any way, nor does it ask the licensee to identify household members.

<sup>[13]</sup> Ex. 8; Testimony of Ontrella Hicks.

<sup>[14]</sup> Ex. 19.

<sup>[15]</sup> *Id.*

<sup>[16]</sup> Exs. 4 & 5.

<sup>[17]</sup> Exs. 6 & 7.

<sup>[18]</sup> Ex. 7a.

<sup>[19]</sup> Ex. 1.

<sup>[20]</sup> See Ex. 16.

[\[21\]](#) Ex. 14.

[\[22\]](#) Ex. 13.

[\[23\]](#) Ex. 15. Although the Department suggested at the hearing that J.H. did not appeal the order declining to set aside the disqualification, his parents' "appeal [of] this case" should be construed to include both the licensing sanction as well as the disqualification of their son. J.H. is a minor; his parents make legal decisions on his behalf. Both the decision declining to set aside the disqualifications and the order revoking the foster care license were issued the same day, April 16, 2004, and the revocation order is dependent on the disqualification decision. When a licensing sanction is based on the disqualification of someone other than the license holder, the hearing on both the licensing sanction and the disqualification may be consolidated into a single contested case hearing upon consent of all parties and the Administrative Law Judge. See Minn. Stat. § 245C.28, subd. 2; § 245A.08, subd. 2a(e).

[\[24\]](#) Minn. Stat. § 245C.03, subd. 1(2).

[\[25\]](#) *Id.* § 245C.08, subd. 4(d).

[\[26\]](#) *Id.* § 245C.15, subd. 3(a).

[\[27\]](#) *Id.*, subd. 4(a).

[\[28\]](#) *Id.* § 245C.16, subd. 1(a).

[\[29\]](#) *Id.* § 245C.22, subd. 4(a).

[\[30\]](#) *Id.*, subd. 4(b).

[\[31\]](#) *Id.* § 245C.24, subd. 3(a).

[\[32\]](#) *Id.* § 245C.30, subd. 1(a).

[\[33\]](#) *Id.*, subd. 5.

[\[34\]](#) *Id.* § 245A.08, subd. 3(a).

[\[35\]](#) See Closing argument of Department's counsel.