

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

In the Matter of the Appeal of the Order
of Conditional License and Order to
Forfeit a Fine issued to CCP Community
Services

**ORDER REGARDING CCP'S
MOTION FOR SUMMARY
DISPOSITION, MOTION TO
COMPEL, AND REQUEST FOR
TELEPHONE TESTIMONY**

The above matter is pending before the Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing dated June 19, 2006, and a Motion for Summary Disposition and Motion to Compel filed by CCP Community Services. Samuel D. Orbovich, Attorney at Law, Orbovich & Gartner, 408 St. Peter Street, St. Paul, MN 55102-1187, represents Cooperating Community Programs, Inc. ("CCP"). James C. Zuleger, Assistant Washington County Attorney, 14949 - 62nd Street North, P.O. Box 6, Stillwater, MN 55082-0006, represents Washington County Community Services and the Minnesota Department of Human Services.

Based upon all of the files, records, and proceedings in this matter, and for the reasons discussed in the attached Memorandum,

IT IS HEREBY ORDERED as follows:

1. CCP's motion for summary disposition is DENIED.
2. CCP's motion to compel responses to its document requests is GRANTED in part and DENIED in part, as described more fully below.
3. CCP's request that its expert witness, Paul David Meek, be allowed to testify by telephone is GRANTED.
4. A telephone conference call shall be held in this matter on **Monday, January 8, 2007, at 10:30 a.m.** to discuss the time needed by the County and DHS to provide the ordered discovery to CCP and whether the January 17-18, 2007, hearing dates must be changed. The Administrative Law Judge will initiate the conference call.

Dated: December 28, 2006.

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

This case involves CCP's challenge to a determination by the County and DHS that it committed maltreatment by neglect under Minn. Stat. § 626.556 on two separate occasions (April 9, 2005, and October 21, 2005) when a child in its care wandered away from a group home without supervision. CCP is also challenging the Department's resulting order that CCP's license to provide child foster care services be placed on conditional status for one year and CCP forfeit a fine of \$2,000 under Minn. Stat. §§ 245A.06 and 245A.07.

Based upon the submissions of the parties, and solely for the purposes of the pending motions, it appears that the underlying facts are as follows. CCP operates a group home for persons with developmental disabilities on Hawthorne Lane in Stillwater, Minnesota.¹ B.S., who was born on April 22, 1995, is one of the children residing at the group home. B.S. has been diagnosed with Pervasive Developmental Delay/Autism with speech delays and moderate to severe developmental delay.² B.S.'s family told CCP staff that B.S. had a propensity to wander.³ The risk assessment prepared by CCP for B.S. indicates that "[s]taff will be aware of [B.S.'s] location at all times" and "must be within audio range of [B.S.] when at home. . . . Staff will shut the gate when house becomes busy in order to better visually supervise [B.S.] to prevent elopement. Staff will visually monitor [B.S.] when around exterior doors to see if he has figured out how to unlock them. Alarms will be set to alert staff if he does attempt to leave."⁴ The risk assessment also indicated that "[s]taff will check on [B.S.] every five minutes if they are not within visual range." On April 9, 2005, and October 21, 2005, B.S. walked away from the CCP residence. Although the exterior doors of the group home are equipped with an alarm system, B.S. was able to leave undetected because, in each instance, a caregiver at the home had turned off the alarm.⁵ On each occasion, B.S. was found unharmed within approximately 30 to 45 minutes.⁶

Washington County conducted investigations of the two incidents and issued determinations that maltreatment (neglect) had occurred and that CCP was responsible for the maltreatment.⁷ The two CCP caregivers who turned off the alarms were not disqualified by the County or DHS.⁸ CCP submitted additional information and requested reconsideration in each case, but the County did not change its maltreatment findings.⁹ The County also recommended to the Minnesota Department of Human Services (DHS) that it impose fines and a conditional license against CCP,¹⁰ and the DHS ultimately did

¹ Affidavit of Lisa Zaspel at ¶ 2.

² Zaspel Aff., ¶ 2.

³ Zaspel Aff., ¶ 3.

⁴ Zaspel Aff., Ex. C at 6, 8; Response to Admission No. 10, Ex. D to Affidavit of Samuel Orbovich.

⁵ Zaspel Aff., ¶¶ 3-9.

⁶ Zaspel Aff., ¶¶ 7, 10 and Exs. B, C at 100, and D.

⁷ Zaspel Aff., Exs. A, B, E, and F; Second Affidavit of James Zuleger, Exs. B, C, E. and F.

⁸ Zaspel Aff., ¶ 12; Admission No. 4, attached to Orbovich Aff. as Ex. D.

⁹ Zaspel Aff., Exs. C, D, and G.

¹⁰ Zaspel Aff., Exs. B, D; Second Zuleger Aff., Exs. D,

take such action.¹¹ The County's recommendation indicated that having a limited number of employees serving the Hawthorne site "would facilitate more continuity of staff as well as staff more knowledgeable about this population of children."¹² The terms of the conditional license included mandatory review by CCP of chore completion policies; required training and retraining of staff on B.S.'s risk assessment plan; required staff training on autism/autism spectrum disorder; purchase and maintenance of outdoor play equipment for the fenced yard of the home in an effort to decrease B.S.'s desire to leave the home; and imposition of a 15-person limit on the number of employees who work at the Hawthorne location. CCP appealed the DHS determination, resulting in the present contested case proceeding.¹³

Motion for Summary Disposition

CCP has moved for summary disposition based upon its contention that, "as a matter of law, Respondents have no grounds for attributing culpability for maltreatment to CCP, and have no sufficient grounds for their contested conditional license and fines."¹⁴

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.¹⁵ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.¹⁶ A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.¹⁷

The moving party (CCP) has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party (the Department) must show that there are specific facts in dispute that have a bearing on the outcome of the case.¹⁸ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.¹⁹ The evidence

¹¹ Second Zuleger Aff., Ex. A.

¹² Second Zuleger Aff., Ex. F.

¹³ Second Zuleger Aff., Ex. A at 4-5.

¹⁴ Notice of and Motion for Summary Disposition at 1.

¹⁵ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. Rule pt. 1400.5500K; Minn.R.Civ.P. 56.03.

¹⁶ See Minn. R. 1400.6600.

¹⁷ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

¹⁸ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

¹⁹ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.²⁰

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.²¹ All doubts and factual inferences must be resolved against the moving party.²² If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.²³

While CCP does not dispute that B.S.'s elopements resulted from neglect of supervision, it contends that CCP is not culpable for that neglect and there is no proper basis for imposition of a fine or conditional license against CCP. Minn. Stat. § 626.556, subd. 10e(e), requires that agencies investigating maltreatment consider whether the facility or an individual was responsible for the maltreatment using the "mitigating factors" analysis set forth in Minn. Stat. § 626.556, subd. 10e(i). These mitigating factors include consideration of the "comparative responsibility of the facility and other caregivers, and requirements placed upon an employee, including the facility's compliance with related regulatory standards and the adequacy of facility policies and procedures, facility training, an individual's participation in the training, the caregiver's supervision, and facility staffing levels and the scope of the individual employee's authority and discretion."²⁴ CCP asserts that it had a policy that the alarm system was to be left on at all times, it trained staff about this policy, and the staff members who turned off the alarm violated CCP's clear directives.

In connection with its motion, CCP submitted an affidavit of Lisa Zaspel, Executive Director of CCP, who stated that CCP trained staff to leave the alarms on at all times and posted signs to remind them.²⁵ Ms. Zaspel also indicated that CCP conducted additional training after the April 9, 2005, incident, and disciplined and retrained the staff person who turned off the alarm during the October 21, 2005, incident.²⁶ CCP also provided documents showing that Alicia Hurd, the caregiver who turned off the front door alarm on April 9, 2005, initialed that she had read B.S.'s Risk Management Plan and Individual Service Plan and attended staff meetings in January, February, March, April, and May of 2005. The minutes of each of these meetings contain identical language indicating that CCP employees were told that the doors in the house should be locked at all times and the alarms set in order to "protect the boys and the staff so that we are alarmed when anyone leaves"²⁷ The March, April, and May minutes also

²⁰ *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

²¹ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

²² See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

²³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

²⁴ Minn. Stat. § 626.556, subd. 10e(i)(2).

²⁵ Zaspel Aff., ¶ 3.

²⁶ Zaspel Aff., ¶¶ 8, 11.

²⁷ Zaspel Aff., Ex. C at 26, 39-40, 43-45, 48-50, 53-55, 58-60.

state that “they [presumably the alarms] should NEVER be turned off.”²⁸ Materials supplied by CCP also indicated that Sarah Houtkooper, another caregiver present in the home on April 9, 2005, initialed that she had read B.S.’s Risk Management Plan and Individual Service Plan and attended the March, April, and May 2005 staff meetings.²⁹ Similarly, CCP provided documents showing that Bradley Stutz, the caregiver who turned off the door alarm on October 21, 2006, and Catherine Ogwuegbu, another caregiver present that day, both had initialed that they had read B.S.’s Risk Management Plan and ISP Support Plan.³⁰ CCP’s internal review stated that Mr. Stutz had attended a July 2005 staff meeting and Ms. Ogwuegbu had attended staff meetings in May and September 2005 during which the importance of door alarms had been stressed.³¹ However, no minutes of the July or September meetings were provided in connection with the motion. CCP emphasizes that neither Ms. Hurd nor Mr. Stutz are the license holder with respect to CCP’s Hawthorne location.³²

In their response in opposition to the motion, the County and DHS argue that they have made an adequate showing that the DHS order requiring CCP to forfeit a fine of \$2,000 and placing its license on conditional status is based on reasonable cause. They assert that there is, at a minimum, a genuine issue of material fact regarding whether CCP is responsible for the maltreatment that occurred on April 9 and October 21, 2005. The County and DHS attached copies of County case assessments, correspondence between the County and DHS, and DHS orders relating to the elopement incidents. They contend that the investigative reports and staff interviews suggest that CCP staff engaged in a pattern of turning off the door alarm both before and after the incidents in question; some staff members told the investigators that they did not know that the alarm was never supposed to be turned off; staffing levels may have been inadequate to maintain proper supervision; some staff members lacked a clear understanding of who was responsible for supervising particular residents; and household chores may have distracted staff from their responsibility to supervise residents.³³

After careful consideration of the arguments made by the parties, the Administrative Law Judge concludes that CCP’s motion for summary disposition must be denied. Minn. Stat. § 245A.08, subd. 3(a) specifically authorizes DHS to 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 reasonable cause, “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 alleged to have been violated. The County and DHS have properly relied upon investigative reports and other documents to

²⁸ Zaspel Aff., Ex. C at 50, 55, 60.

²⁹ Zaspel Aff., Ex. C at 66, 81-84, 87-89, 92-94, 98.

³⁰ Zaspel Aff., Ex. G at 3, 19.

³¹ Zaspel Aff., Ex. G at 35; see Ex. C at 59,

³² Response to Admission No. 23, Orbovich Aff., Ex. D.

³³ See, e.g., Second Zuleger Aff., Exs. A at 4, B at 1-3, E at 4-5.

demonstrate reasonable cause for the maltreatment findings, the conclusion that CCP was responsible for the maltreatment, and the imposition of a fine and conditional license. Even though the investigative reports and other materials relied upon by the County and DHS in response to the motion were not sworn, counsel for the County provided an affidavit verifying that they were true and accurate copies of DHS and County documents. These are the official agency records relating to the investigative interviews, maltreatment determinations, and licensing sanctions. Moreover, the facts set forth in those reports are substantial in nature and do not appear to be speculative. Under the circumstances, it is appropriate to permit the County and DHS to rely on these materials to support the existence of genuine issues of material fact remaining for hearing in this matter.

Although CCP has shown that it provided some degree of training to its employees regarding B.S.'s risk assessment plan and the door alarms, it has not demonstrated on this record that it was in full compliance with the applicable laws and rules and is therefore entitled to judgment as a matter of law. In particular, when the facts are viewed in the light most favorable to DHS and the County, genuine issues of material fact remain for hearing with respect to whether CCP adequately trained its staff, maintained sufficient staffing levels, provided clear instructions to staff regarding who was responsible for supervising particular residents, required completion of household chores to the detriment of supervision, and otherwise had adequate policies and procedures to ensure the proper supervision and safety of B.S. Accordingly, the motion for summary disposition is denied and this matter will proceed to hearing.

Motion to Compel

In its motion, CCP seeks an order compelling the County to provide full and complete responses to Interrogatories 3-6, 15, and 17, and Document Requests 2-5 and 8-9. In these requests, CCP requested information regarding sanctions imposed by DHS and the County in the most recent 25 elopements from residential providers known to have occurred in Washington County; the basis for distinctions made in Minn. Stat. §§ 626.5572, subd. 17(c)(4), and 626.556, subd. 2(f); documents describing the County's difficulty in managing its backlog of background study reports; an explanation of why the County required CCP to submit names of employees for background study by the County; the legal basis for the restriction in the conditional license concerning the number of employees CCP may hire; copies of all conditional licenses arising from elopements; copies of all public reports issued during the past ten years regarding investigations of maltreatment arising from elopements; delegations of authority relating to the Child Citizens Review Panel; notes generated during the Panel's review of CCP's requests for reconsideration; the resumes of four named employees; and documents stating the position of the Center for Medicare and Medicaid Services regarding the use of door chimes and alarms in homes

serving persons with developmental disabilities. The County provided limited responses to some of these requests and refused to respond to others on the grounds that they are unduly burdensome, are not reasonably calculated to lead to discoverable evidence, encompass protected nonpublic data, or the amounts in controversy are not significant enough to warrant the discovery.

In its motion to compel, CCP contends that it needs the requested information to properly present its case, the inquiries are not being made for purposes of delay, and the issues involved in the case warrant such discovery. The County and DHS urge in their response that the motion to compel be denied in its entirety on the grounds that the discovery requests are unduly burdensome, would not lead to any relevant evidence, and go beyond the issues involved in this hearing. The County points out that it has provided copies of its entire file relating to the two incidents of elopement to counsel for CCP as well as copies of various letters recommending conditional status for CCP's license.

Where, as here, a maltreatment determination is the basis for a licensing sanction under Minn. Stat. § 245A.07, state law specifies that the license holder "has a right to a contested case hearing under chapter 14 [the Minnesota Administrative Procedure Act] and *Minnesota Rules, parts 1400.8505 to 1400.8612*."³⁴ The rules referenced in the statute are known as the Revenue Recapture Rules. The rules were originally adopted by the Office of Administrative Hearings to govern hearings arising under the Revenue Recapture Act, but also were intended to apply to "other hearings as directed by statute."³⁵ These rules provide streamlined procedures as compared to the more typical rules governing contested case proceedings that are set forth in Minn. R. 1400.5100 through 1400.8401. When the provisions of the two sets of rules relating to prehearing discovery are compared, several differences are evident. The Revenue Recapture rule on prehearing discovery states in its entirety as follows:

1400.8600 Prehearing Discovery.

A party may demand that any other party disclose the names and addresses of all witnesses that the other party intends to have testify at the hearing. The demand shall be in writing and shall be directed to the party or the party's attorney. Responses to the demand shall be served within ten days of receipt of the demand. Any witnesses unknown at the time of the disclosure shall be disclosed as soon as they become known. Any party that unreasonably fails to make a requested disclosure shall not be allowed to call the witness at hearing.³⁶

In contrast, the more typical contested case rule governing discovery is much more expansive:

³⁴ Minn. Stat. § 626.556, subd. 10i(f) (emphasis added).

³⁵ Minn. R. 1400.8505.

³⁶ Minn. R. 1400.8600.

1400.6700 Discovery.

Subpart 1. Witnesses; statement by parties or witnesses.

Each party shall, within ten days of a written demand by another party, disclose the following:

A. The names and addresses of all witnesses that a party intends to call at the hearing, along with a brief summary of each witness' testimony. All witnesses unknown at the time of said disclosure shall be disclosed as soon as they become known.

B. Any relevant written or recorded statements made by the party or by witnesses on behalf of a party. The demanding party shall be permitted to inspect and reproduce any such statements.

C. All written exhibits to be introduced at the hearing. The exhibits need not be produced until one week before the hearing unless otherwise ordered.

D. Any party unreasonably failing upon demand to make the disclosure required by this subpart may, in the discretion of the judge, be foreclosed from presenting any evidence at the hearing through witnesses or exhibits not disclosed or through witnesses whose statements are not disclosed.

Subp. 2. Discovery of other information. Any means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed. If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may bring a motion before the judge to obtain an order compelling discovery. In the motion proceeding, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery. In ruling on a discovery motion, the judge shall recognize all privileges recognized at law.³⁷

CCP initially relied upon the general rules of discovery applicable to contested case proceedings which are found at Minn. R. 1400.6700 in support of its argument that it should be able to obtain the discovery at issue in this motion to prepare its defense. The County and DHS also assumed that that rule applied and did not claim that the requested discovery was inappropriate because the Revenue Recapture Act rules applied. During oral argument on the motion that was held on October 20, 2006, the Administrative Law Judge mentioned that she

³⁷ Minn. R. 1400.6700, subp. 1 and 2. The rule goes on in subparts 3-5 to authorize the Administrative Law Judge to impose certain sanctions for noncompliance with discovery orders, permit the entry of protective orders, and address issues relating to the filing of discovery requests.

had recently become aware that the Revenue Recapture Rules applied to proceedings of this type and afforded both parties an opportunity to provide further argument with respect to the motion to compel.

The County and DHS filed an additional letter brief in which they argue that the Revenue Recapture Act rules permit only discovery of the names and addresses of witnesses and reflect an intent not to grant the parties the right to discovery beyond disclosure of the identity of witnesses. They contend that CCP's motion to compel seeks information well beyond the scope of discovery allowed under the Revenue Recapture Act rules. They also note that they have provided CCP with their witness and exhibit lists and have exceeded their obligation under the Revenue Recapture Act rules by providing CCP copies of their entire investigative files and responding to additional discovery requested by CCP.

In its additional letter brief, CCP continues to argue that the discovery motion should be granted. CCP points out that other portions of the Revenue Recapture Rules refer to the ability of the parties to request depositions and subpoenas for the production of documents.³⁸ CCP thus argues that Minn. R. 1400.8600 should not be treated as setting forth the sole discovery available because that interpretation would render the references to depositions and "subpoenas requesting documents or other discovery" contained in other portions of the rules superfluous. CCP also contends that it would not be logical to limit the discovery available under the Revenue Recapture Act rules to the items identified in Minn. R. 1400.8600 since that interpretation would mean that a person challenging a licensing sanction imposed as a result of a maltreatment would receive less information than a person accused of maltreatment who requests a fair hearing before a DHS Human Services Judge under Minn. Stat. § 256.045.³⁹ CCP further asserts that a full and complete record cannot be developed in this case unless the County and DHS produce documents and provide responses concerning the conditions included in the proposed conditional license and whether comparable licensing sanctions have been imposed in similar cases. If its motion to compel is denied, CCP indicates that it will seek to gain the documents at issue by requesting that subpoena duces tecum be issued to DHS and County employees and/or filing a Government Data Practices request. Finally, CCP argues that restriction of discovery to matters encompassed by Minn. R. 1400.8600 would result in a denial of its due process rights.

³⁸ See, e.g., Minn. R. 1400.8601, subp. 1, and Minn. R. 8604, subps. 1 and 3.

³⁹ Under Minn. Stat. § 256.045, subd. 4(a) and (b), persons contesting maltreatment in a fair hearing are given the right to "examine the contents of the case file and all documents and records to be used by the county or state agency at the hearing at a reasonable time before the date of the hearing and during the hearing" and subpoena the private data relating to the investigation prepared by the agency under Minn. Stat. §§ 626.556 or 626.557 that is not otherwise accessible under section Minn. Stat. § 13.04, as long as the identity of the reporter is not disclosed. Human Services Judges are also specifically authorized under Minn. Stat. § 256.045, subd. 4(b), to issue protective orders protecting the private data obtained by subpoena.

Minn. Stat. § 626.556, subd. 10i(f), makes it clear that the Revenue Recapture rules are to be applied to appeals of maltreatment cases rather than the rules that are generally applicable to contested case proceedings. The Notice of Hearing issued in this matter also specified that the hearing would be governed by Minn. Stat. § 245A.08 and “Minn. R. 1400.8505 to 1400.8612.”⁴⁰ Review of Minn. R. 1400.8600 and comparison of that provision with its counterpart in the more typical contested case rules leads to the initial impression that prehearing discovery in such cases was meant to be much more limited.⁴¹ However, as CCP points out in the current case, other provisions of the Revenue Recapture Act rules authorize parties to “obtain a subpoena to compel the attendance of a witness or the production of documents”⁴² or “other discovery,”⁴³ state that requests for “subpoenas, depositions, or continuances shall be made within a reasonable time after their need becomes evident,”⁴⁴ and recognize that parties may have already received a copy of exhibits “through discovery.”⁴⁵ Reading these provisions together as a whole, it must be concluded that some discovery beyond the disclosure of witness information may be warranted in proceedings applying the Revenue Recapture Act rules, even though the overall scope of discovery is intended to be more limited than that permissible under the contested case rules.

The question then becomes whether the discovery sought by CCP in the present case is appropriate. Interrogatories 3 and 6 asked for a detailed statement of all reasons why the County recommended that the number of employees working at Hawthorne should be limited to 15 under the proposed conditional license, and asked for an identification of the statutes and rules that authorize such an approach. The information sought by CCP in these interrogatories is reasonably calculated to lead to the discovery of relevant evidence, and they are not unduly burdensome or overly broad. The County and DHS objected to these interrogatories but, notwithstanding the objection, generally indicated that they were relying on Chapter 245A, which authorizes DHS to license child foster care facilities and set conditions for licenses, and the discussion contained in a letter dated May 16, 2006, from Suzanne Pollack to the Commissioner of Human Services. To the extent that the County and DHS rely on specific provisions of Chapter 245A or any reasons other than those stated in Ms. Pollack’s letter, they shall be required to supplement their responses to these interrogatories.

Interrogatories 4 and 5 requested information about the County’s backlog of background study reports and why the County has adopted a practice of

⁴⁰ Notice of and Order for Hearing at 1.

⁴¹ At least one prior motion ruling has suggested that that is the case. See *In the Matter of the Maltreatment Determination and Order to Forfeit a Fine for New Horizon Child Care Center*, OAH Docket No. 11-1800-17277-2 (September 15, 2006) (order denying New Horizon’s motion to compel).

⁴² Minn. R. 1400.8601, subp. 1.

⁴³ Minn. R. 1400.8604, subp. 3.

⁴⁴ Minn. R. 1400.8604, subp. 1.

⁴⁵ *Id.*

requiring CCP to submit names of its employees to the County for background study. The relevance of such information to the present case is not apparent, and CCP did not explain in its motion why it believes this information is needed for proper presentation of its case. The motion to compel is denied with respect to Interrogatories 4 and 5.

Interrogatory 15 asks the County and DHS to explain whether they assert that there is a rational basis for the distinction made in Minn. Stat. §§ 626.5572, subd. 17(c)(4), and 626.556, subd. 2(f), between caregivers who provide services to vulnerable adults who commit therapeutic errors that do not result in harm and caregivers who provide services to vulnerable persons under 18 years of age who commit therapeutic errors that do not result in harm. The former are exempted from findings of neglect, while the latter are not. "Therapeutic conduct" is defined in Minn. Stat. § 626.5572, subd. 20, to mean "the provision of program services, health care, or other personal care services done in good faith in the interests of the vulnerable adult by: (1) an individual, facility, or employee or person providing services in a facility under the rights, privileges and responsibilities conferred by state license, certification, or registration; or (2) a caregiver." Because CCP has not asserted that B.S.'s elopement involved an error in the provision of "therapeutic conduct" and it is apparent that the elopement could not be deemed to have been allowed "in good faith in the interests of" B.S., the requisite showing of relevance has not been made with respect to this interrogatory.

Interrogatory 17 asked that the County and DHS describe in detail the most recent 25 elopements known by the County to have occurred from a Medicaid residential provider in the County, and identify all maltreatment determinations, conditional licenses or other agency action pursued by the County or any other agency as a result. Similarly, Document Request 2 asked for the production of "all conditional licenses issued by DHS as a result of maltreatment arising from one or more elopements" (with no specified time limit) and Document Request 3 asked for the production of all public reports issued by the County during the past 10 years regarding investigation of maltreatment arising from one or more elopements. The County and DHS assert that cases involving other residents or providers are not relevant because they would involve different facts and circumstances, different victims and offenders, and different agency decision makers. However, it is evident that such information would be relevant in determining whether the agencies' actions in the present case are consistent with past practice or are arbitrary or capricious. Accordingly, discovery of such information is appropriate as long as the discovery is restricted to an appropriate time frame. It appears that the period of January 2000 to the present would constitute an appropriate time frame. The County and DHS thus shall provide information responsive to Interrogatory 17 but shall not be required to go back further than January 2000 to find the 25 requested cases. The County and DHS shall provide documents in response to Document Requests 2 and 3 regarding incidents that occurred between January 2000 and the present. If documents are provided in response to Interrogatory 17, the County and DHS shall not be required to comply with the further request in that interrogatory for an

identification of who was found culpable and a description of the nature, chronicity, or severity of the violation and the effect of the violation on the health, safety, or rights of the vulnerable person.

Document Request 4 asked for all written delegations of authority or other documents on which the County relies to authorize the Child Citizens Review Panel to receive and review information and play a role in ruling against CCP's Requests for Reconsideration and notes generated during that review. Notwithstanding the objections made by the County and DHS to Document Request 4, they indicated that they were relying on Minn. Stat. § 256.01, subd. 15. The response to the Motion to Compel filed by the County and DHS also indicates that they provided CCP with a copy of a Case Consultation Data Sharing Agreement. Therefore, it appears that Document Request 4 has been adequately answered.

Document Request 5 requested copies of notes and other documents generated by the Review Panel during the review of CCP's request for reconsideration. The County and DHS noted its objections to this request and further indicated that Minn. Stat. § 256.01, subd. 15(e) protects the Panel's proceedings and records as nonpublic data under Minn. Stat. § 13.02, subdivision 13, and states that they "are not subject to discovery or introduction into evidence in a civil or criminal action against a professional, the state, or county agency arising out of the matters the panel is reviewing." Although this statute goes on to specify that documents and records otherwise available from other sources are not immune from discovery or use in litigation solely because they were presented during proceedings of the Review Panel, the County and DHS indicated in their response to the motion that the County does not maintain any records or documents generated in the Review Panel. No further response to Document Request 5 will be required.

Document Request 8 asked for the resumes of four County employees who were involved in the maltreatment determinations and licensing recommendations (Lynn Hansen, Child Protective Services Worker; Kristin Harvieux, Senior Social Worker; Suzanne Pollack, Licensing Supervisor; and Richard Backman, Social Services Division Manager). The County and DHS objected on the grounds that the request was overbroad, not reasonably calculated to lead to the discovery of relevant evidence, and not needed for proper presentation of CCP's case. Notwithstanding these and other objections, the County and DHS indicated that current resumes for these long-term employees were not available. The requested information is reasonably calculated to lead to the discovery of relevant evidence relating to the background, experience, and training of these employees. Even if they are called to testify primarily as fact witnesses, such information may be relevant in assessing the nature of their experience and training in conducting maltreatment investigations and rendering determinations. The County and DHS shall supplement their response to this interrogatory by providing copies of resumes in their possession pertaining to these employees, to the extent available, regardless of whether the resumes are current.

Document Request 9 asked for the production of any documents received by the DHS, the Department of Health, or the County which state the position of the federal Center for Medicare and Medicaid Services regarding the use of door chimes and alarms in homes serving persons with developmental disabilities. Because the Department of Health is not a party to this proceeding, the request for documents in its possession is not proper. The request for CMS documents in the possession of DHS and the County appears to be overbroad and not reasonably calculated to lead to the discovery of relevant evidence in this matter. Therefore, the motion to compel is denied with respect to Document Request 9.

Subpoena Request

By letter dated November 6, 2006, CCP requested the issuance of a subpoena duces tecum to Jerry Kerber of the Department of Human Services for hearing testimony and documents (specifically, copies of all conditional licenses issued by DHS under chapter 245A prompted by elopements or maltreatment committed by individuals who are not the license holder and documents relating to DHS's understanding of Minn. Stat. § 245A.07). CCP also requested that a subpoena duces tecum be issued to the County requiring the County to designate one or more witnesses for hearing testimony addressing the basis for the requirements included in the proposed conditional license and bring "all documents supporting the issuance of a conditional license, if not already produced in discovery." By letter dated November 17, 2006, CCP indicated that the need for these subpoenas may change depending on the outcome of the pending discovery motion. Because the portion of the motion to compel relating to the types of documents sought in the subpoenas has been granted to a large extent, it appears that certain of the documents encompassed in the subpoena requests will be made available through discovery. Should CCP wish to renew its request for issuance of these subpoenas, it should so inform the Administrative Law Judge.

Telephone Testimony

CCP intends to have Paul David Meek, an expert from the National Institute for Elopement Prevention and Resolution in Topeka, Kansas, testify at the hearing. CCP has requested permission for Mr. Meek to testify by telephone. The County and DHS have not made any objection to that request. Accordingly, the request is granted.

B. L. N.