

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

In the Matter of the Maltreatment Determination, Temporary Immediate Suspension and Revocation of the License of Lori Schiller	FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION
--	--

This matter comes before Administrative Law Judge (ALJ) Raymond R. Krause following a hearing pursuant to an appeal by Lori Schiller (Licensee) from Orders Determining Maltreatment by Licensee, imposing a Temporary Immediate Suspension (TIS) of her family daycare license and revoking her family daycare license. The hearing in this matter was held on February 20, 2008, at the Watonwan County Human Services office in St. James, Minnesota.

Both the county attorney and the attorney for the Licensee submitted proposed Findings of Fact, Conclusions of Law and Recommendations at their own request. The parties' Findings were received by the Office of Administrative Hearings on March 17, 2008, and the record closed on that date.

LaMar Piper, Watonwan County Attorney, appeared on behalf of Watonwan County Human Services and the Minnesota Department of Human Services (County and Department). Daniel A. Birkholz, Birkholz Law, LLC, appeared on behalf of the Licensee.

STATEMENT OF ISSUES

1. Did the Department demonstrate by a preponderance of the evidence that Licensee's actions or failure to comply with applicable law or rule constitute serious or recurring maltreatment, therefore justifying a determination of maltreatment and disqualification?¹

2. Did the Department demonstrate that reasonable cause exists to believe that Licensee'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

¹ Minn. Stat. §§ 245C.15, subd. 4(b) and 626.556, subd. 2(g) (2006).

by her daycare program, thereby justifying the continuation of the Order of Temporary Immediate Suspension²?

3. Did the Department demonstrate that reasonable cause exists to revoke Licensee's child care license based on her failure to comply with licensing laws and rules?³

The ALJ finds that the Department did not meet its burden of proof with regard to the determination of maltreatment or continuation of the Temporary Immediate Suspension. The Department did, however, meet its burden with regard to the order of revocation.

Based on the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

PROCEDURAL HISTORY

1. On November 1, 2006, Watonwan County Human Services notified Licensee that it had determined that Licensee had abused children attending her child care program and that she was disqualified from "direct contact with, or access to, persons receiving services from the licensed program." Because of the determination that she posed "a risk of harm to persons served by the program" she was "required to be within the sight or hearing of another adult caregiver."⁴

2. The November 1, 2006 letter notifying Licensee of the results of the maltreatment investigation stated:

The reasons for the determinations are that multiple interviews with children in the daycare were completed, with the children reporting that you used corporal punishment, such as hitting children with a remote control, hitting children with a wooden spoon, hitting children with a measuring stick, and taping a child's mouth shut.⁵

3. Watonwan County received Licensee's request for reconsideration of the determination of abuse and the disqualification on November 9, 2006.⁶

² Minn. Stat. § 245A.07, subd.2a (a) (2007).

³ Minn. Stat. § 245A.07, subd. 3. (2007).

⁴ Hearing Exhibit O (Exhib. O), letter from Deanne Louris and Joan Stordalen to Lori Schiller (Nov. 1, 2006)

⁵ Hearing Ex. O, Bates stamp page 74.

⁶ Hearing Ex. F, Bates stamp page 36.

4. In a letter dated November 21, 2006, Watonwan County notified Licensee that it would not change the outcome of the abuse determination or of the disqualification.⁷

5. In a letter dated December 6, 2006, Licensee, through her attorney, sent a Notice of Appeal of the abuse determination and the disqualification to the Department.⁸

6. The Department notified Licensee that it was revoking her license to provide family child care in a letter dated April 24, 2007. The decision to revoke was made on a recommendation from Watonwan County Human Services.⁹

7. The April 24, 2007 Order of Revocation stated that, in addition to the findings of physical abuse and the resulting disqualification, Licensee's license was being revoked because the following were licensing violations related to inappropriate behavior guidance:

- You spanked children in your care
- You hit a child in his/her head with a remote control
- You hit a child with a wooden spoon
- You hit a child with a measuring stick
- You taped a child's mouth shut
- You took food out of the garbage and forced a child to eat the food
- You lifted a child by his/her arm and put them on the couch¹⁰

8. On or about May 7, 2007, Licensee, through her attorney, notified the Department that she was appealing the Order for Revocation.¹¹

9. On May 10, 2007, the Department consolidated the fair hearing scheduled for the abuse and disqualification actions with the appeal of the revocation into a single contested case proceeding.¹²

10. On July 23, 2007, while the contested case proceeding was pending, the Department issued an Order of Temporary Immediate Suspension (TIS) based on a report received by Watonwan County Human Services on July 16, 2007, regarding Licensee's child care program.¹³

⁷ *Id.*

⁸ Hearing Ex. F., Bates stamp page 41.

⁹ Hearing Ex. G, Bates stamp page 42.

¹⁰ Hearing Ex. G, Bates stamp page 45.

¹¹ Hearing Ex. F, Bates stamp page 39.

¹² *Id.*

¹³ Hearing Ex. D.

11. In its August 7, 2007, Notice of and Order for Hearing regarding the Licensee's appeal of the TIS, the Department listed the following issues to be considered:

- Inadequate supervision, based on the July 17, 2007, incident when Licensee failed to pick up J.A. from his swimming lesson.
- Failure to obtain written permission from J.A.'s parents for him to attend an activity away from Licensee's home during daycare hours in violation of Minn. R. 9502.0435, subp. 9d.
- Failure to post the April 24, 2007 Order of Revocation as required by Minn. Stat. § 245A.06.
- Failure to have background studies completed on a second adult caregiver who was in the home on July 23, 2007; or on Licensee's 14-year-old helper, J.R.¹⁴

12. On July 31, 2007, Laura Plummer Zrust, Manager of the Department's Licensing Division, signed a Notice of and Order for Hearing in the appeal of the Temporary Immediate Suspension of Licensee's license.¹⁵

13. Following several continuances requested by the parties, the hearing in this matter was held on February 20, 2008.

BACKGROUND

14. Licensee has been licensed to operate a family child care in her home continuously since the early 1980's.¹⁶

15. At all times relevant to this proceeding, Licensee was licensed though Watonwan County to provide child care in her home, except that beginning on July 23, 2007, her license was temporarily suspended.¹⁷

16. Licensee's license allows her to care for up to 14 children with an adult helper.¹⁸

17. Licensee's child care program accepts children beginning at approximately 5:15 a.m. each day.¹⁹

¹⁴ Hearing Ex. C, Bates stamp pages 8-9.

¹⁵ Hearing Ex.C, Bates stamp pages 6-7. There is nothing in the hearing record to show when Licensee appealed the TIS. The ALJ assumes that there was a timely appeal, since the Department issued the Notice of and Order for Hearing within eight days of the date of the TIS.

¹⁶ Testimony of Lori Schiller.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

18. Licensee offers breakfast at 7:30 a.m. to those children who wish to eat breakfast at her home.²⁰

19. Licensee serves lunch to children in her care between about 11 a.m. and noon, with the younger children eating first.²¹

20. Licensee provides drinks of water to children requesting them from time to time during the day, but will refuse a child asking repeatedly for water if he or she has just had a drink, in order to avoid an in-and-out pattern of traffic.²²

21. Licensee has regular snack times during the day during which children in care are provided with snacks.²³

22. Licensee has participated for about 20 years in Provider's Choice, Inc., a state-supported food program. A Provider's Choice staff person performs unannounced drop-in visits three times each year, in addition to an annual visit to review Licensee's documentation for the program. Licensee has never been found to be in violation of any requirements of the Provider's Choice program.²⁴

23. Licensee has times during the day when younger children are napping that she requires the older children in care to engage in quiet activities such as reading or watching television if they are not outside.²⁵

24. Licensee's deck is designed and constructed to be safe for small children. Often the small children will play outside on the deck supervised by an adult while the older children play in the yard below, where they are within view and supervised by a second adult or a helper.²⁶

FINDINGS OF MALTREATMENT; DISQUALIFICATION; AND REVOCATION OF CHILD CARE LICENSE

25. On September 16, 2006, Watonwan County licensing worker Joan Stordalen received a report alleging that Licensee had used corporal punishment to discipline children attending her child care; and that she had forced a child in her care to eat food retrieved from the garbage can.²⁷

²⁰ *Id.*

²¹ Test. of L. Schiller and D. Schiller.

²² *Id.*

²³ Testimony of L.G. For purposes of protecting the privacy of the minors who testified at the hearing or gave statements, this Recommended Order uses their initials, as well as the initials of any of their parents whose testimony is referred to. The accompanying Non Public Addendum identifies each of these individuals by name.

²⁴ Test. of L. Schiller.

²⁵ Test. of L. Schiller.

²⁶ Test. of L. Schiller.

²⁷ Testimony of Joan M. Stordalen.

26. Stordalen worked with Watonwan County child protection staff to investigate the allegations against Licensee.²⁸

27. Ms. Stordalen and/or Deanna Louris, the Watonwan child protection worker assigned to investigate the complaints, spoke to at least nine families. Statements by family members in six of those families did not raise concerns about maltreatment.²⁹

28. The findings of maltreatment based on corporal punishment rested primarily on the statements of four children, M.T., L.G., E.G. and P.R.³⁰

29. M.T. was a third grader in the fall of 2006. In June of 2006, when the child care provider whose program he and his brothers usually attended was unavailable for several days, they were scheduled to attend Licensee's daycare program.³¹

30. On the second day that M.T. and his brothers attended Licensee's daycare in June of 2006, M.T. did not want to eat all of the pork chop that Licensee had served him. M.T. put his disposable lunch plate with the uneaten food either on the counter next to, or directly on top of, the kitchen trash. When Licensee saw the plate with the uneaten food, she called M.T. back to the table, put the plate on the table in front of M.T. and instructed M.T. to eat the food.³²

31. M.T. sat in front of the uneaten food for a time but ate little, if any, of the rest of the food.³³

32. On the same day, after lunch, Licensee picked up A.T., M.T.'s 3-year-old brother, who had been crying, spanked him and put him onto the deck overlooking the backyard. M.T. was outside playing in the backyard at the time.³⁴

33. When M.T.'s mother arrived to pick up her children at about 1:15 p.m. that day, A.T. was in the kitchen. Licensee told her that A.T. had been crying a lot that day and about M.T. wasting his food. Licensee was clearly upset, as was M.T.³⁵

34. M.T. and his brothers did not return to Licensee's daycare after that day.³⁶

²⁸ *Id.*

²⁹ Testimony of Deanna Louris.

³⁰ Ex. S.; test. of D. Louris. L.G. and E.G. are siblings.

³¹ Testimony of T.F.

³² Testimony of J.R. and test. of L. Schiller.

³³ Testimony of M.T..

³⁴ Test. of M.T.

³⁵ Test. of T.F.

³⁶ *Id.*

35. M.T.'s mother did not report her concerns about Licensee's daycare at the time. Several months later M.T. expressed concerns about what rules would apply at his new daycare with regard to finishing all of his food. M.T.'s mother decided, at that point, that he was seriously bothered by the incident and that it was important to report to county authorities the incidents about the pork chop and Licensee spanking A.T. and putting him outside on the deck.³⁷

36. In the course of interviewing families in response to the complaints from M.T. and his mother, Ms. Stordalen and Ms. Louris became aware of other concerns about Licensee's treatment of children in her care.³⁸

37. Licensee asked children attending her daycare to perform various household chores, including scrubbing walls made dirty by the children, making beds, vacuuming, dusting, taking out the trash and cleaning and vacuuming Licensee's family's camper.³⁹

38. Children were asked to help awaken napping babies and to help change their wet diapers.⁴⁰

39. Some of the children did the chores because they wanted to.⁴¹

40. Other children felt that they did not have a choice to say "no" when Licensee asked them to do the chores.⁴²

41. Licensee used corporal punishment in the following instances:

a) E.G., who stopped attending Licensee's daycare in the summer of 2006, saw her spank children with her hand. Sometimes a child would cry when spanked.⁴³

b) Licensee hit E.G. on the head with the remote once and E.G. saw Licensee hit lightly or tap other children with the remote.⁴⁴

c) E.G.'s youngest brother, who was almost four in the summer of 2006, was crying and Licensee picked him up by his arm and put him on the couch.⁴⁵

³⁷ *Id.*

³⁸ Test. of J. Stordalen and D. Louris; Hearing Exhib. S.

³⁹ Testimony of L.G., E.G, S.E., J.R.

⁴⁰ Testimony of P.R., J.R. and S.E.

⁴¹ Test. of P.R. and S.E.

⁴² Test. of L.G. and E.G.

⁴³ Test. of E.G.

⁴⁴ Hearing Ex. S, interview of E.G.;test. of E.G.

⁴⁵ Test. of E.G.

d) Licensee hit L.G. with her hand and sometimes with a fly-swatter. L.G. who was 8 years old in the summer of 2006, did not cry when Licensee hit him because it was not that painful.⁴⁶

e) L.G. saw Licensee hit or tap some of the children with the television remote control.⁴⁷

f) Licensee pulled L.G.'s ear approximately five times during the years he attended her child care.

42. P.R. stated to County child protection workers in 2006 that she saw Licensee hit children with a measuring stick. During the hearing, P.R. denied that she saw Licensee using a measuring stick to hit children.⁴⁸

43. The only evidence that Licensee hit a child with a wooden spoon was J.M.'s statement made during an interview in July, 2007.⁴⁹

44. J.R. worked during the summers of 2006 and 2007 as Licensee's helper. She was 14 in the summer of 2007. When she was younger, she attended Licensee's daycare for about five years.⁵⁰

45. J.R. has seen Licensee tap children lightly, mostly to get their attention, but not spank them or hit them hard. She has not seen Licensee use a ruler to hit a child. She may have seen Licensee tap a child while holding the remote, but does not believe that Licensee actually hit a child with the remote.⁵¹

46. A number of witnesses have never seen Licensee spank or hit a child, including Kathleen Thornblad, S.E., Lisa Beilke, Sarah Schiller and Kathleen Phiesse. Lisa Beilke, Sarah Schiller and Kathleen Phiesse have all worked at Licensee's daycare.⁵²

TEMPORARY IMMEDIATE SUSPENSION

47. On the morning of July 17, 2007, J.A.'s mother dropped his younger sister off at Licensee's daycare. She told Licensee that J.A.'s father was taking J.A. to his morning swimming lesson and asked whether Licensee could pick J.A. up at 9:30 when the swimming lesson was over.⁵³

⁴⁶ Test. of L.G.

⁴⁷ Test. of L.G.

⁴⁸ Hearing Ex. S, interview of P.R.; test. of P.R.

⁴⁹ Hearing Ex. R.

⁵⁰ Test. of J.R.

⁵¹ Test. of J.R.

⁵² Testimony of Kathleen Thornblad, S.E., L.B., Sarah Schiller and Kathleen Phiesse.

⁵³ Test. of L. Schilling; Hearing Ex. E, Bates stamp page 21.

48. Licensee told J.A.'s mother that Licensee's helper could pick up J.A. and then take him to t-ball practice at 10:30 a.m.⁵⁴

49. Soon after, J.A.'s father stopped by Licensee's home to drop off J.A.'s shorts and glove. He, too, asked about Licensee picking up J.A. at 9:30 and then delivering him to t-ball at 10:30. Again, Licensee said her helper could do that.⁵⁵

50. J.A.'s mother understood from what Licensee had told her that Lisa Beilke, her second adult helper, was the person who walked J.A. to and from his lessons.⁵⁶

51. Licensee telephoned her 14-year-old helper, J.R., to ask her to pick up J.A. after his swimming lesson. No one answered the phone at J.R.'s home, so Licensee left J.R. a message on the answering machine.⁵⁷

52. Licensee did not have a backup plan in mind if she did not hear back from J.R. She did not recall that J.R. was not working that day and assumed that J.R. would get the message and pick up J.A.⁵⁸

53. J.R., Licensee's 14-year-old helper, had told Licensee the week before this incident that she would not be able to work on July 17 because she had to stay at home to care for her own siblings.⁵⁹

54. J.R. was at the high school during the swimming lessons that ended at 9:30 observing her own siblings. She did see J.A. in the same class and she saw J.A.'s father, observing him.⁶⁰

55. J.R. left the swimming lessons quickly as they ended because she had to get to her tennis practice, but had to stop at home to pick up her water bottle, which she had forgotten.⁶¹

56. Her stepfather drove J.R., along with her younger siblings, to her home. She ran into the house to get the water bottle while her stepfather and siblings waited in his truck.⁶²

57. While J.R. was in the house, she noticed that there was a message on the answering machine. She listened to the message, which was from

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Hearing Ex. E, Bates stamp page 21.

⁵⁷ Test. of J.R.

⁵⁸ Test. of Lori Schilling.

⁵⁹ Test. of J.R.

⁶⁰ Test. of J.R.

⁶¹ *Id.*

⁶² *Id.*

Licensee, asking her to pick up J.A. after his swimming lesson and to bring him to Licensee's home.⁶³

58. J.R. noticed that it was 9:48 a.m. when she got the message and immediately called Licensee. Licensee did not answer the phone, so J.R. left a message on Licensee's voice mail saying that she had tennis lessons.⁶⁴

59. Licensee did not hear the phone ring when J.R. called to say she had tennis lessons. Some time after J.R. left the message, Licensee noticed her message light blinking on her phone and listened to the message.⁶⁵

60. At about 10:00 a.m. on July 17, 2007, St. James Police Officer Rick Eisfeld was called to 11th Street North in St. James. Randy Firchau, a city worker driving on 11th Street North had picked up a young boy who was walking down the center line of the two-lane road, crying.⁶⁶

61. Mr. Firchau stopped when he saw the child who was in the middle of the road and close to the railroad tracks that intersect 11th Street North. He approached the boy and offered to help him. He had difficulty understanding the boy because he was sobbing, but he did get his first name. The boy, J.A., said he was going to St. James hospital to see his mother.⁶⁷

62. Mr. Firchau had a radio in his truck. He brought J.A. to his truck and radioed the police department, keeping the boy in the truck until the police arrived.⁶⁸

63. Officer Eisfeld arrived and spoke to J.A., who was somewhat difficult to understand. J.A. said he wanted to go home, but he did not know his address. Officer Eisfeld did not know J.A., or recognize his last name. He determined that someone the boy knew was at the high school, so he took the boy there. People at the high school pool identified J.A. and were able to contact his mother via cell phone. Officer Eisfeld understood that J.A. was supposed to have gone to Licensee's house, but that he did not want to go there. Someone waited with J.A. until his mother arrived to get him. Officer Eisfeld spoke with J.A.'s mother later.⁶⁹

64. Randy Firchau reported the incident to Watonwan County Human Services which initiated licensing and child protection investigations.⁷⁰

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Test. of L. Schiller and testimony of Kathleen Thornblad.

⁶⁶ Testimony of Rick Eisfeld, Hearing Ex. E, Bates stamp page 23.

⁶⁷ Testimony of Randy Firchau.

⁶⁸ *Id.*

⁶⁹ Test. of R. Eisfeld, Hearing Ex. E, Bates stamp page 23.

⁷⁰ Hearing Ex. E, Bates stamp page 20; Hearing Ex. D, Bates stamp page 18.

65. Not long after Licensee listened to J.R.'s telephone message, J.A. and his mother arrived at Licensee's home. J.A.'s mother had just picked up J.A. from the high school after he was found by Mr. Firchau. J.A. and his mother were very upset about what had happened.⁷¹

66. Licensee had signed permission slips from J.A.'s parents for Licensee to act in an emergency for their children, as well as for the children to participate in field trips and to be transported. The permission slips were signed and dated on October 2, 2006.⁷²

67. Licensee's name is listed as the person to supervise field trips on the field trip permission form. In different ink and different handwriting from the rest of the form, the names of Licensee's husband, Lisa Beilke and J.R. are added as possible field trip supervisors. There is nothing to show that the additional names were on the form when J.A.'s parents signed them or that they were aware that the additional names were added as supervisors after they signed the forms.⁷³

68. Licensee did not have her Order of Revocation posted as required by Minn. Stat. § 245A.06 when Joan Stordalen visited Licensee's daycare home on July 20, 2007.⁷⁴

69. J.A.'s father was never aware that there was a Revocation Order and had never seen it posted at Licensee's home⁷⁵

70. While the Licensee's appeal of the maltreatment determination and disqualification were pending, she was required to have a second adult caregiver present with her during daycare hours.⁷⁶

71. Licensee agreed to the condition requiring a second adult caregiver and provided Ms. Stordalen with the name of Lisa Bielke, who would be working with her, along with information necessary for a background study and information showing that Ms. Bielke had taken the training required for her to work in the daycare.⁷⁷

72. On January 23, 2007, Watonwan County licensing workers Amy Pluym and Lori K. conducted a drop-in licensing visit to Licensee's home. When they arrived, there was no second caregiver present. The licensing workers waited until Licensee got a second adult to come to the house. However, that

⁷¹ Test. of L. Schiller and K. Thonblad.

⁷² Hearing Ex. 1.

⁷³ *Id.*

⁷⁴ Hearing Ex. E, Bates stamp page 21.

⁷⁵ Hearing Ex. Q.

⁷⁶ Hearing Ex. O, Bates stamp page 74.

⁷⁷ Test. of L.B.; Hearing Ex. P, Bates stamp pages 87, 88.

adult had had no background study done. The licensing workers returned the next day with background study forms for that caregiver or others to fill out.⁷⁸

73. When Joan Stordalen and Deanne Louris visited Licensee's home on July 23, 2007, there was a second adult caregiver in the home with Licensee but that second adult caregiver had not had a background study completed.⁷⁹

74. Also on July 23, 2007, Ms. Stordalen and Ms. Louris noted that there was no background study completed for J.R., Licensee's 14-year-old helper.⁸⁰

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

CONCLUSIONS

Jurisdictional Conclusions

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Notice of Hearing is proper in all respects and the County and the Department have complied with all procedural requirements of law and rule.

3. At all times relevant to these proceedings, Licensee was licensed as a family daycare provider.

4. The issues to be determined by this contested case proceeding are defined by the agency's Notices and Orders for Hearing, which are required by Minn. R. 1400.5600, subp. 2.D. to include "[a] statement of the allegations or issues to be determined"

Conclusions Regarding Maltreatment and Disqualification

5. A background study was required for Licensee because the Department is required to conduct a background study of "the person or persons applying for a license."⁸¹

6. A person who is the subject of a background study shall be disqualified from direct contact with persons receiving services from the license holder if the background study shows "substantiated serious or recurring maltreatment of a minor under section 626.556 . . . for which: (i) there is a

⁷⁸ Hearing Ex. K, Bates stamp pages 59-61.

⁷⁹ Hearing Ex. C, Bates stamp page 9.

⁸⁰ *Id.*

⁸¹ Minn. Stat. §245C.03, subd. 1(a)(1).

preponderance of evidence that the maltreatment occurred, and (ii) the subject was responsible for the maltreatment.”⁸²

7. To sustain the finding of maltreatment by physical abuse and the disqualification due to such maltreatment, the Department must demonstrate by a preponderance of the evidence that Licensee’s actions caused “any physical injury, mental injury or threatened injury, inflicted by a person responsible for the child’s care on a child other than by accidental means . . .” and that the maltreatment was serious or recurring.⁸³

8. The Department failed to prove by a preponderance of the evidence that Licensee caused any physical injury, mental injury or threatened injury.

9. There is insufficient basis in the record to disqualify Licensee from direct contact with children served by a licensed program.

Conclusions Regarding Temporary Immediate Suspension

10. The Commissioner of Human Services shall impose a temporary immediate suspension of a day care license “[i]f the license holder’s actions or failure to comply with applicable law or rule . . . pose an imminent risk of harm to the health, safety, or rights of persons served by the program.”⁸⁴

11. The temporary immediate suspension “shall remain in effect pending the commissioner’s final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension” if the commissioner demonstrates “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.”⁸⁵

12. The Department demonstrated that Licensee violated the supervision requirements of Minn. R. 9502.0365, subp. 5 and 9502.0315, subp. 29a on the morning of July 17, 2007 when she failed to insure that J.A. was picked up from his swimming lesson and brought to her daycare.

13. The Department demonstrated that Licensee violated Minn. R. 9502.0435, subp. 9.D. by failing to obtain written permission from J.A.’s parents for him to attend activities such as swimming lessons and t-ball away from Licensee’s home during daycare hours, or to be supervised by individuals other than Licensee.

⁸² Minn. Stat. § 245C.15, subd. 4(b)(2).

⁸³ Minn. Stat. §§ 245C.15, subd. 4(b) and 626.556, subd. 2(f) (2006).

⁸⁴ Minn. Stat. § 245A.07, subd. 2.

⁸⁵ Minn. Stat. § 245A.07, subd. 2a(a).

14. The Department demonstrated that Licensee violated Minn. Stat. § 245A.06 by failing to post the April 24, 2007 Order of Revocation.

15. The Department demonstrated that Licensee violated Minn. Stat. § 245C.03 by failing to insure that background studies were completed on a second adult caregiver who was in her home on July 23, 2007, or on Licensee's helper, J.R.

16. None of the violations of statutes or rules described in Conclusions 11 through 14, above, demonstrates that reasonable cause currently exists to believe that Licensee's actions or failure to comply with applicable law or rule pose an imminent risk of harm to the health, safety, or rights of persons served by the program.

17. There is not a sufficient basis for the temporary immediate suspension of Licensee's license to remain in effect pending the Commissioner's final order regarding revocation of the Licensee's license under section 245A.08, subdivision 3.

Conclusions Regarding Revocation

18. Minn. R. 9502.0385, subp. 1.A. requires that "[t]he provider . . . discuss methods of behavior guidance with parents . . . and the parent's standards shall be considered by the provider within the context of this part when guiding the behavior of a child."

19. Minn. R. 9502.0385, subp. 1.B. instructs that "[b]ehavior guidance used by caregivers must be constructive, positive, and suited to the age of the child."

20. Minn. R. 9502.0395, subp. 2.A. establishes the following standards for behavior guidance:

No child shall be subject to corporal punishment or emotional abuse. 'Corporal punishment' means the nonaccidental infliction of physical pain on a child by a caregiver. Corporal punishment includes, but is not limited to, rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, punching, hitting and spanking. 'Emotional abuse' means the infliction of verbal or psychological abuse on a child by a caregiver. Emotional abuse includes, but is not limited to, name calling, ostracism, shaming, derogatory remarks about the child or the child's family, and threats which threaten, humiliate, or frighten the child.

21. “The commissioner may suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules”⁸⁶

22. To sustain the revocation of a child care license, the Department must demonstrate that reasonable cause exists to revoke a child care license based on the licensee’s failure to comply with licensing laws and rules.⁸⁷

23. If the licensee demonstrates by a preponderance of the evidence that she was in full compliance with the laws or rules that the Department alleges she violated, the revocation will not be upheld.⁸⁸

24. The Department has demonstrated that reasonable cause exists to revoke Licensee’s child care license based on Licensee’s failure to comply with licensing rules regarding appropriate behavior guidance and discipline.

25. The Licensee has failed to demonstrate by a preponderance of the evidence that she was in full compliance with the licensing rules regarding appropriate behavior guidance and discipline.

26. The Department has met its burden under Minn. Stat. § 245A.08, subd. 3 to support revocation of Licensee’s license to provide child care.

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

28. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based on the Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS RECOMMENDED that the Commissioner of the Department of Human Services RESCIND the finding against Lori Schiller of maltreatment by physical abuse along with her disqualification from direct contact with persons served by a licensed program;

IT IS RECOMMENDED that the Commissioner of the Department of Human Services DISMISS the Order for Temporary Immediate Suspension of Lori Schiller’s license to provide family daycare; and

⁸⁶ Minn. Stat. § 245A.07, subd. 3

⁸⁷ Minn. Stat. § 245A.08, subd. 3. (2007).

⁸⁸ *Id.*

IT IS RECOMMENDED that the Commissioner of the Department of Human Services AFFIRM the decision to revoke the family child care license of Lori Schiller.

Dated: April 14, 2008

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

Reported: Digitally recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department 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 Cal Ludeman, Commissioner, Minnesota Department of Human Services, P.O. Box, 64998, St. Paul MN 55164-0998, 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.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Maltreatment Determination and Disqualification

The County determined that Licensee physically abused children in her care, basing the finding of maltreatment and the resulting disqualification on that determination. Minn. Stat. § 626.556, subd. 2(g) defines physical abuse as “any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child’s care on a child other than by accidental means” The statute does not define the word “injury” separately. The dictionary defines “injury” as “physical harm or damage to a person or property.”⁸⁹

In this case, there was no evidence presented that any of the children suffered any physical harm or damage as a result of Licensee’s actions. The evidence showed that Licensee spanked children, may have hit or tapped some children with the remote control, picked up a child by the arm and put him on the couch, hit one child (who did not cry) with a fly-swatter and pulled a child’s ear a number of times. While the Administrative Law Judge does not minimize the seriousness of these actions by Licensee, and does not condone them, no evidence was presented to demonstrate that any child was injured by Licensee’s actions. There was no claim that Licensee’s actions left a mark, swelling, bruises, abrasions, or any other sort of injury, or that a child required any medical attention as a result of her actions.

The standards for physical abuse under the maltreatment statute are different from those for corporal punishment under the licensing statute. As discussed below, Licensee’s actions were prohibited by the licensing rules. They did not, however, rise to the level of physical abuse as defined by the maltreatment statute because they did not result in an injury.

The Department was unable to support, by a preponderance of the evidence, several of the allegations on which the original maltreatment determination was made. The only evidence that a child was hit with a wooden spoon was in a statement made by J.M. in an interview conducted July 19, 2007, eight months after the maltreatment determination was made. M.P., who was seven years old at the time of the interview, made vague allegations about Licensee hitting children with a spoon only after being prompted by Ms. Stordalen, who was interviewing J.M.:⁹⁰

P.R., the only child to testify about Licensee hitting children with a measuring stick, recanted on her original statement about that when she was

⁸⁹ *Webster’s New World Dictionary, Second College Edition* (1976).

⁹⁰ Hearing Ex. R at page 5. It is not clear what Ms. Stordalen was referring to when she said “And then you said something about her hitting you with a spoon?” because J.M. had not mentioned anything about Licensee hitting anyone with a spoon prior to Ms. Stordalen’s question about it.

questioned at the hearing.⁹¹ L.G. was the only person who claimed to have seen Licensee tape a young child's mouth shut. L.G.'s statements about the tape were inconsistent. At one time, L.G. said that the child, whose name he did not know, had her mouth taped closed and then got up and played with the tape on her mouth until her nap time. At another time, L.G. said that the child just sat there for one to two hours with the tape on her mouth. No one else ever saw Licensee put tape on a child's mouth. This less-than-certain testimony by L.G. is insufficient when compared with the many people, children and adults alike, who saw Licensee interact with the daycare children frequently but never saw her tape a child's mouth closed.

Of the original allegations on which the November 2006 maltreatment determinations were made, this leaves hitting with a remote control and spanking. The testimony of the witnesses who were subjected to this treatment was credible, nevertheless, as discussed above, these actions do not rise to the level of maltreatment. If there is no basis for a determination of maltreatment, then there is no disqualification.

Temporary Immediate Suspension

The Department imposed the TIS within six days of the incident when Licensee failed to pick up J.A. Although it was not unreasonable at the time for the Department to have concerns about Licensee's lack of attentiveness to the whereabouts of children in her care, it is apparent that this incident was an anomaly. There is no evidence that children in Licensee's care continue to be at imminent risk due to her lack of supervision, or because she failed to post the revocation order or have the background checks performed on her second adult caregiver or her teen-aged helper.

This does not minimize the seriousness of Licensee's actions, especially her failure to pick up J.A. as promised. J.A. was subjected to significant dangers as a result of Licensee's carelessness. Fortunately, J.A. was not harmed in any way. The testimony of Licensee demonstrates that she has learned from this incident and that she cannot ever assume that a child is being supervised by anyone other than herself unless another person confirms that she or he is providing the requested supervision.

Although Licensee's treatment of J.A. could be found to be neglect under Minn. Stat. § 626.556, subd. (f)(3), the Department has not alleged or determined in its Notice or Orders that Licensee committed maltreatment by neglect. Given that the allegations in the Notice and Order for Hearing in this matter do not allege neglect under the maltreatment statute, the Administrative Law Judge is limited in his ability to make findings concerning the incident with J.A.

⁹¹ Test. of P.R.

Revocation

The Department has shown reasonable cause to revoke Licensee's license based on her record of inappropriate behavior guidance and corporal punishment. The licensing rule explicitly states that spanking, rough handling and ear-pulling are prohibited. The Department presented repeated, credible statements to support its findings that Licensee committed prohibited corporal punishment to discipline children in her care.

In addition, while the evidence is inconclusive as to whether M.T. put his plate with leftover pork chops on the top of the garbage or on the counter next to the garbage, it is undisputed that Licensee took the plate, put it back on the table, and ordered M.T. in a manner that was intimidating to M.T., to eat the pork chops. This incident upset M.T. enough so that he was still thinking about it three months later when, faced with a new daycare situation, he asked his mother whether he was going to be forced to eat food he did not like by the new provider. Corporal punishment includes "emotional abuse" which, under the licensing rule, "includes . . . shaming . . . and threats which threaten, humiliate, or frighten the child."⁹²

Licensee has engaged in a pattern of corporal punishment, including emotional abuse. This behavior on the part of Licensee is sufficient to justify revocation of her license to provide child care.

Irrelevant Testimony

In addition to the testimony referred to in the Findings of Fact, Conclusions and the above paragraphs of this memorandum, there was a significant amount of testimony about several other subjects not relevant to these proceedings. While they may be the basis for action against the Licensee, the various Notices and Orders fail to enumerate these as reasons for the contemplated action.

For example, although it is true that J.R., the teen-aged helper, should not have been permitted to walk children to and from activities away from Licensee's home without adult supervision, none of the actions taken against Licensee were based on her practice of relying on J.R. to accompany the younger children. Similarly, testimony about whether Licensee provided breakfast to all of the children when they asked for it, whether she made them do chores, and whether Licensee made the children stay outside or stay quiet inside is not related to any of the stated reasons for any of the Department's disciplinary actions in this case.

⁹² Minn. R. 9502.0395, subp. 2.A.

Finally, the question of whether Licensee complied with the TIS when she provided care to one or two other families also need not be decided because it is not the basis of any action taken against her. Licensee had no notice that she would have to defend herself against this set of allegations and it is beyond the scope of this hearing.

R. R. K.