

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

In the Revocation of the License of Wendy
J. Melby to Provide Family Child Care

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

The above-entitled matter came on for hearing before Administrative Law Judge Barbara J. Runchey on June 30, 2009, at the Pipestone County Courthouse, Pipestone, Minnesota 56164. The record was closed with the submission of letter briefs on July 17, 2009.

Damian D. Sandy, Assistant Pipestone County Attorney, appeared on behalf of the Department of Human Services. Tracy R. Eichhorn-Hicks appeared on behalf of Wendy J. Melby.

STATEMENT OF ISSUE

Whether the Order of Revocation revoking the family child care license of Wendy J. Melby should be affirmed?

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

FINDINGS OF FACT

1. The witnesses who testified at the hearing were Danette Smit, Pipestone County Social Worker (hereafter "Smit"), and Wendy Melby (hereafter "Licensee").

2. Licensee has been licensed as a family child care provider since approximately June 2003.¹ Prior to 2007, there was no record of any reports, correction violations or licensing infractions.²

3. On or about June 12, 2007, the Minnesota Department of Human Services (hereafter "Department") documented the following two licensing violations and issued the following Correction Order dated June 21, 2007:

¹ Testimony of Wendy J. Melby

² *Id.*

On 6-12-07, License Holder (LH) was at the local aquatic center. LH was in the water holding an infant. A child jumped into water that was over their head. Lifeguard jumped in and helped the child to the edge.

On 6-12-07, LH was walking in the water holding an infant. LH was going to catch a child jumping into the water. The child jumped in before the LH could get there. Lifeguard pulled the child out of the water.³

4. At this hearing, Licensee explained how these two instances occurred which was consistent with the description set forth in the Correction Order except she was always within 2 or 3 feet of the sight or hearing of the children when the instances occurred and that she was at all times capable of intervening.⁴

5. Licensee did not timely seek reconsideration of the June 21, 2007 Correction Order.⁵

6. On November 29, 2007, an unannounced home visit was made by Smit to Licensee's home due to a complaint that was received on an unknown earlier date.⁶

7. During the November 29, 2007 visit with Licensee, Smit discussed several concerns with her including supervision of children getting on/off the Taxi or Head Start bus.⁷ Licensee initially indicated that she did not have any children who used the Taxi and then acknowledged that "Avery" used the Taxi on Tuesdays and Thursdays.⁸

8. Licensee testified that she could not always be with the children who used the Taxi or the Head Start Bus as she had to care and feed the other 12 children in her care, although she went up and down the stairs periodically to check on the children waiting for the bus. In addition, she believed that the Taxi driver waited and watched and/or walked the children to her door.⁹

9. Smit asserts that Licensee gave deliberately misleading information regarding this incident, particularly as it related to an assumption made by her about "Avery" getting on the Taxi without supervision. "Avery" is the name of Licensee's son and is also the name of another child in Licensee's care.¹⁰ Licensee stated that she did not see the children get off the bus.¹¹

³ Test. of Danette Smit; Ex. 1

⁴ Test. of W. Melby

⁵ Test. of W. Melby and D. Smit

⁶ Ex. 1

⁷ Test. of D. Smit; Ex. 1

⁸ Test. of W. Melby

⁹ Test. of W. Melby; Ex. 1

¹⁰ Test. D. Smit; Ex. 1

¹¹ Test. of W. Melby; Ex. 1

10. Ultimately, Smit learned that the “Avery” was another preschool child in Licensee’s care with the same name as Licensee’s son. On December 10, 2007, Smit discussed this discrepancy with Licensee.¹²

11. On or about January 2, 2008, the Department documented the following licensing violation and issued a Correction Order:

On November 29, 2007, L.H. admitted to being downstairs at her home where she was unable to see the children get on and off the Taxi.¹³

12. Licensee did not appeal this Correction Order.¹⁴

13. On December 3, 2007, Smit reviewed child care assistance billing vouchers in an attempt to determine if any children were receiving daycare assistance that were not listed as children in Licensee’s daycare. It was determined by Smit that H.B. and Z.W. may have been attending Licensee’s daycare and were not listed on Licensee’s variance request in October, 2007.¹⁵

14. On December 5, 2007, Smit submitted a report that she “received a print out of Licensee’s child care assistance families” and that two (names and date of births unknown) children were not listed on her variance and they were enrolled at the time she was granted a variance.¹⁶

15. On December 10, 2007, Licensee reported to Smit that she had 16 children enrolled in her daycare. Smit specifically asked Licensee why Z.W. and H.B. were not listed on her variance request.¹⁷ Licensee indicated that Z.W. was supposed to be “done” and that she expected him to be gone before the variance was approved, and that H.B. was planning on “quitting” in October.¹⁸

16. On December 21, 2007, when confronted about child care assistance records, Licensee indicated that they were not reliable because when a child “does not show up for daycare she does not mark them as absent.” The only children marked as absent were the ones that call ahead of time. On this date, Licensee indicated that Z.W. was gone “all last week and was a no show all of this week” and had no idea if he was coming back. Licensee’s helper, J.D., also verified that Z.W. had not been to daycare for two to three weeks, that Z.W. is a no-show and does not call.¹⁹

¹² Test. of D. Smit; Ex. 1
¹³ Test of D. Smit; Ex. 1
¹⁴ Test. of D. Smit and W. Melby
¹⁵ Test. of D. Smit; Ex. 1
¹⁶ Ex. 1
¹⁷ Test. of W. Melby; Ex. 1
¹⁸ *Id.*
¹⁹ *Id.*

17. On December 10, 2007, Licensee had two additional “drop in” children at her daycare (D.D. and K.D.).²⁰ Licensee asserted that if she knows she will have an opening she calls the mom and also tells some of her families that they cannot come on certain days when she knows she will be over. When asked to show a schedule Licensee indicated that “she does not keep a schedule and does not write it down.”²¹ In a report dated December 13, 2007, the father of D.D. and K.D. verified that Licensee was only used as a drop-in and that they had another daycare and that they are unable to attend Licensee’s daycare at times because she does not have room.²²

18. On December 10, 2007, Licensee did not have Admission and Arrangement paperwork for T.C. and A.F. Licensee asserted that T.C. was a drop-in and only came once. Licensee did not have paperwork for A.F.²³

19. On December 17, 2007, B.S., the parent of T.C., reported to Smit that her preschooler, A.F., was also enrolled in Licensee’s daycare on a full time basis but some weeks, Licensee could not take her because she was full. It was during this contact that B.S. also revealed that her son, T.C. was also enrolled full-time and that she was told by Licensee that she could start full-time on 12/17/07. She also indicated that her daughter A.F. was present at Licensee’s on 12/10/07, but T.C. was not and that both children were there on 12/10/07 and 12/13/07. However, on December 27, 2007, B.S. contacted Smit by telephone and contradicted her earlier statement to her reporting that she was unsure if T.C. was at Licensee’s daycare on December 10th and that sometime her children are split up and go to grandparents. Later, on March 25, 2008, B.S. admitted to Smit that Licensee had told her that she was over capacity and that she should “deny T.C. was her son and tell us A.F. was her only child.” According to the March 25, 2008 report made to Smit, B.S. was coached as to what to say if Family Services called. Because B.S. need daycare and could not afford to not have it, she lied for Licensee. As of the date of the March 25, 2008 report, B.S. had located new daycare for her children.²⁴

20. On December 21, 2007, Licensee reported to Smit that J.D.’s daughter M.D. rarely attended her daycare, and that J.D.’s other daughter’s, G.D.’s, hours varied. Licensee could not submit any proof as to when M.D. or G.D. were at her daycare.²⁵

21. On December 21, 2007, Licensee’s helper, J.D., reported to Smit that G.D.’s hours of attendance at Licensee’s daycare varied and that M.D. goes to her mother-in-law’s.²⁶

22. On March 4, 2008, Smit received a telephone report from A.R. that Licensee was “over in numbers.” A.R. reported that Licensee had 3 infants (T.C., M.M.

²⁰ Test. of D. Smit; Ex. 1

²¹ Test. of W. Melby; Ex. 1

²² Ex. 1

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

and C.D.), 5 toddlers (M.D., C.B., H.B., A.M. and D.D.) and 8 preschoolers (G.D., I. (a/k/a B.), M.D. T.H., A.F., J.G. and K.D.) and 2 school aged children (C. and A.). A.R. also reported that Licensee told her (although she never knew if it actually occurred) that she conceals children in the “back shed” when Licensee sees Smit coming.²⁷

23. On March 11, 2008, an unannounced visit was made to Licensee’s home. There were no children in the shed which was dark and there was nothing to note in the shed which would have indicated the presence of children. Licensee was asked about D.D. and K.D. as child care assistance vouchers showed these children were enrolled in her daycare since October 2007, despite the fact Licensee had represented earlier to Smit that these children were just drop-ins and Licensee would call their parents when she had room for them. According to Smit, Licensee did not respond to this inquiry.²⁸

24. On March 12, 2008, the grandfather of G.D. and K.D. indicated that his grandchildren were hidden in the shed although he could not give Smit the dates of the alleged occurrences. However, he reported that G.D. and K.D. were placed in the shed when Family Services made visits.²⁹

25. On March 17, 2008, J.D. initially indicated that Licensee had never hidden children when there was an unannounced home visit. She further indicated on this date that she and Licensee never cared for three infants and were not over in toddlers; represented that G.D. (a preschooler) came Monday through Thursdays and M.D. (a toddler) only came if there was room otherwise she was with her grandmother.³⁰

26. Also, on March 17, 2008, J.D.’s mother-in-law (the children’s grandmother), reported to Smit that she only watches M.D. and G.D. on Fridays and that they typically attend daycare at Licensee’s Monday through Thursday.³¹

27. Later on March 17, 2008, J.D. contacted Smit by telephone and acknowledged that she had given false information to Smit in the past. She indicated there were times that Licensee was overcapacity and that she lied about M.D.’s hours. J.D. further indicated that there were a few times they cared for three infants and times when there were more toddlers than allowed. She also indicated that she lied about her daughter M.D.’s hours.³²

28. Smit cross-checked the listing of child care children enrolled in Licensee’s daycare with child care assistance records and/or food program records, and concluded based upon this information and telephone interviews with several parents that there were occasions that Licensee had over 14 children (attachment J to Exhibit 1). Smit testified that she did not verify whether or not a certain child was actually present on a

²⁷ *Id.*
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.*
³¹ *Id.*
³² *Id.*

certain day (for example by calling a parent), nor did Smit verify what the policy of the child care assistance or food program was as it related to reimbursement for a child who was not actually present on a given day. Smit acknowledged that a child could have been absent on a given day even though the child care assistance record or food program record indicated otherwise.³³

29. Licensee represented that if a parent calls in she marks that child as absent and if the child is a no show the child is marked as present. As a consequence, a child does not have to actually be in her care for her to submit reimbursement for child care assistance.³⁴

30. On March 26, 2008, Pipestone County issued Licensee a correction order for operating overcapacity. The Department received Licensee's request for reconsideration and by letter dated August 1, 2008, affirmed the citations contained in the March 26, 2008 correction order.³⁵

31. On September 25, 2008, M.F, who was another helper of Licensee, made a report to Smit regarding Licensee's overcapacity during the summer months of June, July and August 2008, and specifically on September 16, 2008.³⁶

32. M.F. reported that Licensee had taken her son to Sioux Falls for a medical appointment on September 16 or 17, 2008. M.F. reported that on this day one of the children, S., woke up and had wet her pants. M.F. texted Licensee to inquire where the carpet cleaner was. Licensee texted her back with the information. A second text was sent that indicated "smack that dumb fucking bitch S. across the fucking face a coupla times for me." While the evidence is unclear as to whom actually texted this message, the cell phone belonged to Licensee and was in her possession on the day in question. On this date, M.F. indicated that she was left with one infant, two toddlers, six preschoolers and one school aged child.³⁷ Licensee stated that all the children were at her daycare at some point in the day, but were never all there with M.F. as a solo provider and that one of the children, who was in preschool, was in school during the afternoon until approximately 3:30 p.m., and when the child returned from school another toddler left and therefore, she was not out of age distribution or over capacity.³⁸

33. On September 25, 2008, M.F. also indicated that she was alone with 12-15 children when Licensee would go to Marshall, Sioux Falls or to run weekly errands during the summer months of June, July and August, 2008. M.F. was able to name the 16 children who were left alone in her care during these months although it is unknown (except for the September 16 incident) on what specific days or how many times this actually occurred.³⁹ Licensee asserted that she was at her son's medical appointment

³³ Test. of D. Smit; Ex. 1

³⁴ Test. of W. Melby; Ex. 1

³⁵ Ex. 3

³⁶ Ex. 3

³⁷ *Id.*

³⁸ Test. of W. Melby; Ex. A

³⁹ Ex. 3

on September 16, 2008, that M.F. did not work for her during the month of July and that M. F. had Fridays off during the month of August.⁴⁰

34. Smit did not discuss M.F.'s allegations with Licensee or give her the opportunity to refute these allegations as she believed M.F. was a reliable witness.⁴¹

35. On February 6, 2009, on the basis of the violations set forth in the Revocation Order, the Department issued an Order of Revocation revoking the Licensee's license to provide family child care.⁴²

36. The Appellant properly appealed the Order of Revocation.

37. The Department provided Notice of an Order for Hearing and a contested hearing was held.

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

39. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

40. The Administrative Law Judge adopts as Findings any conclusions that are more appropriately described as Findings.

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

CONCLUSIONS OF LAW

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 245A.07 and 245A.08.

2. The Department gave proper and timely notice of the hearing in this matter.

3. The Department has complied with all relevant substantive and procedural requirements of law and rule.

4. Pursuant to Minn. Stat. § 245A.06 if the commissioner finds that the applicant or licensee holder has not corrected the violations specified in the correction order or conditional license, the commissioner may impose a fine or order other licensing sanctions pursuant to section 245A. 07.

⁴⁰ Test. of W. Melby

⁴¹ Test. of D. Smit

⁴² Ex. 3

5. Minn. R. 9502.0315, subp. 29a, defines “supervision” as:

‘Supervision’ means a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child. For the school age child, it means a caregiver being available for assistance and care so that the child’s health and safety is protected.

6. Licensee failed to meet the requirement that a caregiver supervised the children in her daycare within the meaning of Minn. R. 9502.0315, subp. 29a.

7. Minn. R. 9502.0315 to 9502.0445 establishes procedures and standards for licensing family day care to ensure that minimum standards of care and service are given and the protection, proper care, health, safety, and development of the children are assured.

8. Pursuant to Minn. R. 9502.0035, when a provider is granted a variance from compliance with parts 9502.315 to 9502.0445, the applicant must comply with all applicable laws, ordinances and regulations.

9. Licensee failed to comply with all applicable laws, ordinances and regulations.

10. Minn. R. 9502.0365, subp. 1, sets forth capacity limits as follows:

Capacity limits. Family day care and group family day care providers shall comply with part 9502.0367, which limits the total number of children and the number of preschoolers, toddlers, and infants who may be in care at any one time, and provides for the number of adults who are required to be present.

A. Providers shall be licensed for the total number of children, ten years of age or younger, who are present in the residence at any one time. The licensed capacity must include all children of any caregiver when the children are present in the residence.

B. Within the licensed capacity, the age distribution restrictions specify the maximum number of children under school age, infants, and toddlers who are in care at any one time.

11. Licensee exceeded capacity limits under her licensure pursuant to Minn. R. 9502.0367 C(3) by exceeding the allowable number of children in her care.

12. Minn. R. 9502.0365, subp. 5 provides:

Subp. 5. **Supervision and use of substitutes.** A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute caregiver must be limited to a cumulative total of not more than 30 days in any 12-month period.

13. Licensee failed to be the primary provider of care in the residence several times during June, July and August, 2008 and on September 17, 2008.

14. Minn. R. 9502.0367 C(3) provides:

Child/Adult Ratio		Age Restrictions	
Licensed Capacity	Adults	Total children under school age	Total infants and toddlers
14	2 A helper may be used in place of a second adult caregiver when there is no more than 1 infant or toddler present.	10	Of the total children under school age, a combined total of no more than 4 shall be infants and toddlers. Of this total, no more than 3 shall be infants.

15. Licensee exceeded child/adult and age distribution restrictions.

16. When a licensee does not comply with the rules governing daycare licensure, Minn. Stat. § 245A.07 authorizes sanctions as follows:

Subdivision 1. **Sanctions; appeals; license. (a)** In addition to making a license conditional under section 245A.06, the commissioner may propose to suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

17. The burden of proof requires that the Department demonstrate reasonable cause for taking a negative licensing action by submitting evidence to substantiate the allegations that the license holder failed to comply fully with applicable laws or rules.

18. The Commissioner has demonstrated reasonable cause for revoking the license on the basis that the Licensee has failed to fully comply with applicable rule and law.

19. Because the Department has demonstrated reasonable cause, the burden of proof shifts to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with the laws and rules which the Department alleges the Licensee violated.

20. The Licensee has failed to sustain her burden of proof by a preponderance of the evidence that she fully complied with applicable laws and rules with respect to her license.

Based upon these conclusions and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

Based upon these conclusions, the Administrative Law Judge RECOMMENDS to the Commissioner of Human Services that the family child care license of Wendy J. Melby be REVOKED.

Dated: July 30, 2009

s/Barbara J. Runchey
BARBARA J. RUNCHEY
Administrative Law Judge

Reported: Digitally recorded

NOTICES

This report is a recommendation, not a final decision. The Commissioner of Human Services (Commissioner) will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. §§ 14.61 and 245A.07, subd. 2a(b), the parties adversely affected have ten (10) calendar days to submit exceptions to this Report and request to present argument to the Commissioner. The record shall close at the end of the ten-day period for submission of exceptions. The Commissioner then has ten (10) working days from the close of the record to issue his final decision. Parties should

contact Cal Ludeman, Commissioner of Human Services, Box 64998, St. Paul, MN 55155, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

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

While the events regarding overcapacity are tangled, it was clear from the evidence submitted that Licensee was overcapacity on occasions noted in the Findings. Based upon the evidence submitted Licensee was also out of age distribution requirements on occasions noted in the Findings. Even after Licensee should have been on notice about overcapacity issues (after discussions with Smit), child care assistance records and reports from two separate helpers substantiated overcapacity.

While less restrictive alternatives, such as regular inspections and/or ordering Licensee to take education classes could be envisioned they are not workable in this case. Based upon the evidence presented, particularly the deliberate withholding of information or giving false or misleading information by Licensee during the investigative process makes these alternatives untenable.

Licensee clearly failed to have two children within sight or hearing so that she was capable on intervening on June 12, 2007. Lifeguards intervened to assist two separate children before Licensee was able come to their assistance. She was not capable of intervening to protect the health and safety of the child on these occasions. In addition, Licensee was not within sight or hearing when a child got off a Taxi/HeadStart bus on November 29, 2007. These violations, coupled with the overcapacity Findings, all which occurred within 24 months of each other are troubling as the paramount concern in these types of cases is to ensure the safety and protection of young children.

While the animosity between Smit and Licensee was palpable, the reports and testimony of Smit were credible. There was no evidence submitted to suggest that Smit had any ulterior motive for distorting the truth or for being deceitful. While the issues of overcapacity and age distribution were difficult to track, in large part due to the number of children involved and the lack of documentary evidence supporting the testimony of Smit, her testimony and reports were convincing. In addition, while at least two individuals apparently recanted previous statements they made to Smit, there was sufficient, reliable evidence that multiple episodes of overcapacity occurred in Licensee's daycare. Specifically, the two separate reports by helpers J.D. and M.F. substantiated the conclusions of overcapacity. The failure by either party to call these individuals was troubling as it required evaluation of the evidence based upon the submission of written reports rather than oral testimony. Nonetheless, the weight of the evidence presented substantiated the allegations that Licensee failed to comply with

applicable laws or rules. Therefore, the Department met its burden of proof and demonstrated reasonable cause for the revocation action.

Licensee's credibility was dubious. At least twice in December 2007, Licensee was observed with children in her care that were not listed on her variance request. In December 2007, Licensee represented that children in her care were "drop-ins" when evidence showed that child care assistance was paid for these children on a regular basis since October 2007, and a helper indicated she was overcapacity. On December 29, 2008, Licensee reported that T.C was not in her care when he actually was. On December 21, 2007, Licensee reported that G.D. and M.D. were not regular children in her daycare where a helper and other reporters indicated they were. On September 16, 2008, a helper reported that Licensee was overcapacity, out of age distribution and that she was frequently left alone with 14 to 15 children. This evidence demonstrates a pattern of dishonesty in withholding information or giving misleading information during the investigation process.

In determining what sanctions should apply, the nature, chronicity or severity of the violation of law or rule and the effect of the violation upon the health, safety or rights of persons served by the program must be analyzed. Asserting there is no imminent danger to the children because nothing harmful occurred is not the measure which guides this case. The issue is whether Licensee complied with applicable rules and laws. Viewing the evidence as a whole the Department met its burden of proof and demonstrated chronic violations over a short period of time. The capacity rules are in place to ensure that daycare providers are able to maintain adequate supervision over children, are able to intervene to prevent injury and to respond to individual needs of the children as they arise. The overcapacity and age distribution violations, when considered as a whole, along with Licensee's violations of supervision rules coupled with Licensee's proclivity to minimize or distort facts, provides the Department with reasonable cause for revocation.

Because the Department met its burden of proof in demonstrating that reasonable cause existed for taking the revocation action, the burden then shifts to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with the law or rules that the Department claims was violated. The explanations given by Licensee at the hearing were evasive, dubious and/or not as credible as other reports filed by Smit. For example, child care assistance records and/or reports by Licensee's helpers indicated that children were in her daycare on days when Licensee indicated they were not present. Licensee's explanations that she could mark a child as "present" for child care assistance payments, even if the child was not present, is troubling. In particular, Licensee's testimony that only one of her helpers' children attended her daycare was directly contradicted by at least one contrary report by her helper, and by another report by her helper's mother-in-law that both children were at Licensee's daycare when Licensee asserted they were not present. In short, Licensee failed to sustain her burden of proof.

B. J. R.