

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Maltreatment
Determination, Order to Forfeit a Fine,
and Order of Conditional License
Imposed Against the Family Child Care
License of Joyce L. Arends

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

This matter came on for hearing before Administrative Law Judge Barbara L. Neilson on March 10, 2011, at the Wright County Human Services Building, 1004 Commercial Drive, Buffalo, Minnesota. The record closed at the conclusion of the hearing on March 10, 2011.

Brian Asleson, Chief Deputy County Attorney, appeared on behalf of the Wright County Human Services Agency (County) and the Minnesota Department of Human Services (Department). Joyce Arends (Licensee) appeared without counsel on her own behalf.

STATEMENT OF ISSUES

Did the Licensee commit maltreatment in violation of state statute by neglecting a child in her day care, or fail to provide adequate supervision to a child in her care in violation of rules applicable to her child care license; and if so, should she be fined and have conditions imposed on her license?

The Administrative Law Judge concludes that the Licensee did not commit maltreatment and that she should not be fined or have conditions imposed on her license for that reason. However, the Licensee did fail to provide adequate supervision to a child in her care in violation of the licensing rules. While a reduced fine could be levied for this violation, it is recommended that a conditional license not be imposed.

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

FINDINGS OF FACT

1. The Licensee, Joyce Arends, has been a licensed family child care provider for approximately fifteen years. She currently holds a Class C-2 license.¹

¹ Testimony of Joyce Arends.

2. The Licensee's home is a rambler with a one-acre backyard that includes play areas with a sandbox, slide, swings, and monkey bars. The yard is not fenced but is bounded by evergreen trees and bushes, and adjoins neighbors' yards. The backyard play areas are visible from the kitchen, living room, and bathroom of the home.²

3. The Licensee has a 19-year-old son, Travis. Travis knew the Licensee's day care children and had frequently spent time with them. He had been trained in first aid and CPR and had had training to be a helper in the day care. He had not had formal Shaken Baby Syndrome training prior to June 21, 2010, but had viewed a video regarding SBS.³

4. On June 21, 2010, the Licensee had planned to drive the day care children to a nearby park in connection with a scheduled field trip. Her 14-year-old son was coming along as a helper. After her 14-year-old son and all of the other children were in the van, the remaining child, a three-year-old boy, ran into the Licensee's backyard. When the Licensee went into the backyard to get him, he told her that he did not want to go the park. The Licensee tried to convince him to come along and explained that the other day care children were going and it would be fun at the park. She attempted to carry the child to the van, but the child became very upset, was screaming and kicking, and ultimately bit the Licensee, leaving marks. He kept running away from her, up the ramp by the slide in the backyard. The Licensee became upset and angry, and decided it was advisable to remove herself from the situation. She was also aware that the other day care children were waiting for her in the van in the warm weather. The Licensee decided to allow the child to stay home with Travis, who was home from college and was inside the house watching television. As the Licensee walked between the house and the garage to the van, she called Travis's cell phone and asked him to watch the child while she took the other children to the park for a short time. He agreed to do so. Cell phone records show that the Licensee placed this call to Travis at 9:54 a.m. The child was sitting at the entrance to the slide in the backyard at the time. The Licensee told the child that he would be staying with Travis. She stayed in the driveway for a short time and watched the child, then left in her van with the other children. Prior to leaving, she did not see Travis come out into the yard.⁴

5. Almost immediately after the Licensee left, a parent of another day care child arrived at the Licensee's home. When the parent arrived, she saw the three-year-old child sitting on the Licensee's front steps. The parent then called the Licensee to ask if she had forgotten a child at home. Cell phone records show that the Licensee received this call at 9:54 a.m., during the same minute that she placed her initial call to Travis. The Licensee told the parent she had just left, explained the situation, and told her that Travis was home to supervise

² Testimony of J. Arends; Testimony of Lisa Gertken.

³ Testimony of J. Arends; Testimony of L. Gertken.

⁴ Testimony of J. Arends; Exhibits 1, 3.

the child. Their conversation lasted approximately two minutes. Thereafter, the Licensee called Travis back at 9:56 a.m. and again at 9:57 a.m. to ensure that he was watching the child. During these calls, Travis assured the Licensee that everything was fine. He told the Licensee that, after receiving her initial call, he had looked out the window and had seen the child in the yard; had used the bathroom (which is on the back of the Licensee's house overlooking the backyard); and was on his way outside to play with the child when he noticed that the parent had arrived and the child was at the front door.⁵

6. The Licensee and the other day care children came home from the park within approximately twenty minutes.⁶

7. On June 28, 2010, the Licensee informed the child's parent of the incident.⁷

8. On June 29, 2010, the Licensee reported to a Wright County licensing worker that the day care child had been outside alone for 2-3 minutes while her son finished using the bathroom. On the same date, Sherburne County forwarded a report it had received from another individual regarding the incident to Wright County Child Protection. A Wright County Child Protection worker conducted an investigation which included interviews of the Licensee, Travis, the parent of the child, and the parent who arrived at the Licensee's home during the incident.⁸

9. By letter dated August 31, 2010, the County notified the Licensee that it had determined that neglect occurred for which she was responsible, but that child protective services were not needed. The County informed the Licensee of her right to request reconsideration.⁹ The Child Protection Division further indicated that Wright County Licensing should address any consequences regarding the Licensee's child care license.¹⁰

10. By letter dated September 1, 2010, the Licensee requested reconsideration of the neglect determination. The County received the Licensee's request for reconsideration of the maltreatment determination on September 3, 2010.¹¹

11. By letter dated September 16, 2010, the County informed the Licensee that it had completed an administrative review of the maltreatment determination and had decided to affirm the determination. The County stated:

⁵ Testimony of J. Arends; Exhibits 1, 3.

⁶ Testimony of J. Arends.

⁷ Exhibit 2 (Licensing Complaint Form).

⁸ Exhibit 1; Exhibit 2 (Licensing Complaint Form); Testimony of K. Cohn; Testimony of L. Gertken.

⁹ Exhibit 2 (Aug. 31, 2010, Letter to Licensee from Jessica Nelson).

¹⁰ Exhibit 1; Exhibit 2 (Licensing Complaint Form).

¹¹ Exhibit 2 (Sept. 1, 2010, Letter to Don Mleziva from Licensee and Sept. 16, 2010, Letter to Licensee from Marianne Charbonneau).

Upon review of the assessment and supportive documentation, it is our finding that the accuracy and completeness of data found within the assessment is satisfactory to constitute a finding that neglect occurred for which you are responsible. The decision was based upon the fact that a child was left alone and unsupervised for 5-10 minutes before the substitute provider arrived; you had left for the park with the other daycare children. The neglect finding according to 626.556 Subd 2 f(3) was made based upon a review of the records, interviews and a review of consultation with the Department of Human Services. Licensed facilities are held to higher standards and must be investigated on a traditional track according to Minnesota Statute 626.556 Subd. 2(b).

The County's letter further informed the Licensee of her right to appeal the determination to the Department and request a hearing.¹² The documentation accompanying the administrative review indicated that the "consultation group" (whose members were not described) did not agree with the determination because "staff felt [the decision was] too harsh" but that "[a]ll supervisors on appeal review and DHS–Tom Campbell felt maltreatment needed to be determined because it did occur and was a facility."¹³

12. Once a maltreatment determination is made, the applicable statute requires imposition of a \$1,000 fine.¹⁴ As a result, the County's licensing division decided that it had no choice but to recommend that a \$1,000 fine be assessed against the Licensee. It made such a recommendation to the Department of Human Services on October 14, 2010. The County did not recommend that the Licensee's license be placed on conditional status.¹⁵

13. County licensing Worker Lisa Gertken issued a Correction Order to the Licensee on or about October 14, 2010, alleging that the Licensee had violated the supervision requirements set forth in Minn. Rules 9502.0315, subp. 29a, by leaving a child alone outside.¹⁶

14. On December 16, 2010, the Department issued an Order to Forfeit a Fine and an Order of Conditional License to the Licensee. The Department assessed a fine of \$1,000 based on the maltreatment determination, and placed the Licensee's license on conditional status for two years. Under the terms of the conditional license, the Licensee would be required to submit a detailed written supervision plan to the County by December 30, 2010, and complete six hours of additional training in the areas of supervision and children's health and safety by

¹² Exhibit 2 (Sept. 16, 2010, Letter to Licensee from Marianne Charbonneau).

¹³ Exhibit 2 (Administrative Review of Maltreatment Determination).

¹⁴ Minn. Stat. § 245A.07, subd. 3(c)(4).

¹⁵ Testimony of L. Gertken; Exhibit 2 (October 14, 2010, Letter to Commissioner of DHS from L. Gertken).

¹⁶ Exhibit 2 (Correction Order).

April 30, 2011. The Order informed the Licensee of her right to appeal the fine and conditional license.¹⁷

15. After issuance of the Order to Forfeit a Fine and Order of Conditional License, the Licensee's appeal of the maltreatment determination was consolidated with the licensing sanction in this contested case.

16. The Licensee's child care license was placed on conditional status during 2008-2010 for reasons that were not related to any conduct of the Licensee. During that time frame, the County conducted frequent unannounced visits to the Licensee's home. With the exception of one correction order regarding gates issued early in this time period, the County did not find any violations of licensing rules, and ultimately viewed the visits as unnecessary. The Licensee successfully completed the period of conditional licensure. The County remains pleased with the quality of child care offered by the Licensee.¹⁸

17. Three parents and one grandparent of children who have attended the Licensee's day care submitted letters in support of her and urged that the neglect finding be rescinded. They praised the quality of the care and the educational and nurturing environment that the Licensee provides. They trust the Licensee and have never felt that the safety of the children has been in jeopardy while in the Licensee's care. They also complimented her honesty in reporting the incident to day care families and the County and her willingness to take responsibility.¹⁹

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

CONCLUSIONS

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 245A.08, subd. 2a, and 14.50 (2010).²⁰

2. This is a consolidated contested case hearing regarding the Licensee's appeals of the maltreatment determination, fine, and conditional license.²¹

3. The Department has the burden of proving by a preponderance of the evidence that the Licensee maltreated the child.²²

¹⁷ Exhibit 2.

¹⁸ Testimony of L. Gertken.

¹⁹ Exhibits 4-7.

²⁰ Unless otherwise noted, all references to Minnesota Statutes are to the 2010 version.

²¹ Minn. Stat. § 245A.08, subd. 2a.

²² Minn. Stat. §§ 256.045, subd. 3b; 626.556, subd. 10e; Minn. R. 1400.7300, subp. 5.

4. Maltreatment of a child through neglect is defined, in relevant part, as “the commission or omission of any of the acts specified under clauses (1) to (9), other than by accidental means: . . . (3) failure to provide for necessary supervision or child care arrangements appropriate for a child after considering factors as the child’s age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child’s own basic needs or safety, or the basic needs or safety of another child in their care”²³ The maltreatment statute does not define the term “supervision.”

5. The statute governing family child care providers specifies that license holders “shall forfeit \$1,000 for each determination of maltreatment of a child . . . for which the license holder is determined responsible” or “\$200 for each occurrence of a violation of law or rule governing matters of health, safety, or supervision”²⁴

6. When issuing a conditional license, the Commissioner is required to 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.²⁵ In addition, before making a license conditional, the Commissioner is required to consider the facts, conditions, or circumstances concerning the program’s operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the licensee.²⁶

7. The Department did not prove by a preponderance of the evidence that the Licensee failed to provide for necessary supervision or child care arrangements appropriate for the child on June 21, 2010, and thus did not prove that maltreatment (neglect) occurred.

8. Because the Licensee did not commit maltreatment on June 21, 2010, there is no basis to fine her or impose conditions on her license based on that allegation.

9. Under the rules applicable to family child care, “supervision” is defined in relevant part to mean “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.”²⁷

10. The Licensee’s failure to ensure that her son was actively engaged in watching the child before she left home did violate the supervision requirements for those who hold family child care licensure that are set forth in

²³ Minn. Stat. § 626.556, subd. 2(f).

²⁴ Minn. Stat. § 245A.07, subd. 3(c)(4).

²⁵ Minn. Stat. § 245A.06, subd. 1.

²⁶ Minn. Stat. § 245A.04, subd. 6.

²⁷ Minn. R. 9502.0315, subp. 29a (2009). Unless otherwise noted, all references to the Minnesota Rules are to the 2009 version.

Minn. R. 9502.0315, subp. 29a. Although imposition of a \$200 fine for that violation of the licensing rules is warranted, the need to impose a conditional license for this isolated and unintentional violation has not been demonstrated.

11. The reasons for these Conclusions are further discussed in the attached Memorandum, which is incorporated in these Conclusions by reference.

Based upon the foregoing Conclusions, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Human Services REVERSE the finding of maltreatment by neglect and RESCIND the Order to Forfeit a Fine and Order of Conditional Licensure.

Dated: April 11, 2011

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Digitally recorded (no transcript prepared).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the Commissioner shall not issue a final decision 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. 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. Parties should contact Lucinda Jesson, Commissioner, Department of Human Services, P.O. Box 64998, St. Paul, MN 55164 (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. 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.

MEMORANDUM

The County's child protection unit determined that the Licensee was responsible for neglect of a three-year-old child on June 21, 2010. The decision apparently was a difficult one, and it appears that certain County staff (including those responsible for child care licensing) disagreed with the ultimate determination.

Based on the record in this case, the Administrative Law Judge cannot agree that the Licensee neglected the child. The statute governing maltreatment of children defines neglect, in relevant part, as "failure to provide for necessary supervision or child care arrangements appropriate for a child after considering factors as the child's age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child's own basic needs or safety, or the basic needs or safety of another child in their care." Here, the record shows that the Licensee's adult son, who was inside the house, agreed to watch the child when the Licensee made the request at 9:54 a.m. There is no evidence that the Licensee's son gave the Licensee any reason to think that there would be a slight delay before he could go outside. In any event, her son did observe the child in the backyard through the window while he used the bathroom before going outside. The child apparently then came around the house and sat on the front steps of the home to empty sand out of his shoes, in accordance with the usual practice at the day care. By 9:56 a.m., the Licensee's son was with the child at the front door. The Licensee called her son back at 9:56 a.m. and 9:57 a.m. to ensure that he was watching the child.

The statute applicable to maltreatment of children does not define what is meant by "supervision" or appropriate child care arrangements. Dictionary definitions of the term "supervise" indicate that the common meaning is to "superintend, oversee"²⁸ or "to keep watch over (someone) in the interest of their or others' security."²⁹ The Licensee arranged for her son to watch the child and double-checked with him to ensure that he was. Moreover, her son in fact did watch the child from inside the house and was physically with the child within two minutes, as demonstrated by the Licensee's cell phone records and hearing testimony (not 5-10 minutes as found by the County's child protection unit). Under these circumstances, the Licensee demonstrated that she arranged for appropriate supervision of the child within the meaning of the maltreatment statute.

²⁸ <http://www.merriam-webster.com/dictionary/supervise?show=0&t=1302463453>.

²⁹ <http://www.google.com/dictionary?langpair=en%7Cen&q=supervise&hl=en&aq=f>.

It appears from the record that the County's child protection team improperly applied the definition of "supervision" contained in the licensing rules, Minn. R. 9502.0315, subp. 29a (2009),³⁰ in reaching its determination that the Licensee neglected the child. However, it is not appropriate to apply licensing rules, which are more stringent, in determining whether maltreatment occurred.³¹ The County apparently believes that licensed facilities must meet more rigorous requirements when assessing whether maltreatment occurred. For example, in its September 16, 2010, decision denying reconsideration of the maltreatment determination, the County indicated, "Licensed facilities are held to higher standards and must be investigated on a traditional track according to Minnesota Statute 626.556 Subd. 2(b)"³² and noted in the accompanying documentation that "maltreatment needed to be determined because it did occur and was a facility."³³ The statutory provision on which the County relied defines what is meant by the term "investigation" and merely specifies that "[a]n investigation must be used . . . for reports of maltreatment in facilities required to be licensed under [Minn. Stat.] Chapter 245A or 245B . . ." In the view of the Administrative Law Judge, this does not mean that licensed child care facilities are "held to higher standards" when determining whether maltreatment occurred; it simply means that the Legislature intended that investigations be conducted when allegations are made regarding such facilities. Accordingly, it is recommended that the maltreatment determination be reversed and the order to forfeit a fine based on that determination be rescinded.

The Licensee's failure to ensure that her son was actively engaged in watching the child before she left home did violate the licensing rule requirements regarding supervision as defined in Minn. R. 9502.0315, subp. 29a, and a \$200 fine for that violation is warranted. The Licensee acknowledged that she made an error in judgment when she left the driveway before she visually confirmed that her son was coming outside. However, it is evident that this was an isolated occurrence, and the Department has not demonstrated the need to impose a conditional license based on this unintentional violation.

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³⁰ Under that rule, "supervision" is defined to mean "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."

³¹ The Commissioner has previously concurred in the conclusion that licensing rules are not applicable in determining whether maltreatment occurred. See *In the Matter of the Revocation of the Family Child Care License of Nanette Ashton*, OAH 15-1800-15849-2, DHS File 731 (July 28, 2004).

³² Exhibit 2 (Sept. 16, 2010, Letter to Licensee from Marianne Charbonneau).

³³ Exhibit 2 (Administrative Review of Maltreatment Determination) (emphasis added).