

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Darcy Hoban

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came before Administrative Law Judge Eric L. Lipman upon an appeal by the Licensee, Darcy Hoban, from an Order imposing a Temporary Immediate Suspension of her family day care license.

Michelle W. Lawson, Chief Assistant Clay County Attorney, appeared on behalf of the Clay County Social Services and the Minnesota Department of Human Services (County and Department). Darcy Hoban, the Licensee, appeared on her own behalf and without counsel.

An evidentiary hearing was held by way of video conference between the Saint Paul offices of the Office of Administrative Hearings and the Clay County Courthouse on April 11, 2011. The hearing record closed on that day following the adjournment of the evidentiary hearing.

STATEMENT OF THE ISSUE

Did the Department demonstrate that reasonable cause exists to believe that the Licensee's actions pose an imminent risk of harm to the health, safety or rights of persons served by her child care program?

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

FINDINGS OF FACT

1. Ms. Hoban operates a family day care out of her home in Glyndon, Minnesota. Ms. Holden holds a bachelors degree in business administration and accounting and worked as an accountant before establishing her day care.¹

2. Ms. Hoban holds DHS License Number 1054340-R02. She obtained licensure for her family day care approximately 2 and ½ years ago.²

¹ Testimony of Darcy Hoban; Testimony of Kathleen Cardinal.

3. Kathleen Cardinal is the licensing official for Ms. Hoban's day care.³

4. Ms. Hoban holds a "C-1 license" – a reference to the applicable subparagraph of Minn. R. 9502.0367. Under the terms of that license, Ms. Hoban is permitted to provide day care for no more than 8 children at any one time. Additionally, the C-1 license limits the total number of children who have not reached school age that may be under care. Of the eight children authorized, no more than of these 3 may be infants or toddlers, and no more than 2 of those children may be infants.⁴

5. With the exception of those occasions in which Ms. Hoban's day care programming involves another adult, she is the only adult in the day care home.⁵

Injuries to M.W.

6. In June of 2010, M.W. was a 7-month old boy enrolled in Ms. Hoban's day care.⁶

7. On June 3, 2010, M.W.'s parents, noticing that he cried when lifted or held, brought him to the emergency room for an examination. Following a series of tests and Magnetic Resonance Imaging, M.W.'s doctors determined that the boy had a fractured forearm and chip fractures in his shoulders.⁷

8. Ms. Hoban testified as to two events in the spring of 2010 that may have occasioned these injuries. The first occurred in the middle of May of 2010. Ms. Hoban recalls that M.W.'s older brother, D.W., (then age 3) picked up his infant brother while M.W. was sitting in a bouncy chair, and in a quick motion, released the smaller boy. Additionally, Ms. Hoban recalls that a few weeks later, she laid M.W. down at the bottom of the staircase in her home while she went to an adjacent room to change another child's diaper. She speculates that during the interval in which she was changing a diaper, one of the older children under care may have stepped on M.W.'s forearm while traversing the stairs.⁸

9. Ms. Hoban did not report D.W.'s dropping his younger brother to licensing authorities in May of 2010. Ms. Hoban did inform licensing officials of these events after M.W.'s mother took the boy to a local hospital for evaluation.⁹

² Test. of K. Cardinal; Minn. R. 9502.0367 (C) (2) (2007).

³ Test. of K. Cardinal; Minn. R. 9502.0367 (C) (2) (2007).

⁴ Test. of K. Cardinal; Minn. R. 9502.0367 (C) (2) (2007).

⁵ Test of D. Hoban.

⁶ Exhibit 7.

⁷ Ex. 8.

⁸ Test. of D. Hoban; *see also*, Exs. 3, 6 and 7.

⁹ Ex. 6.

10. Glyndon Police Chief Michael Cline undertook an investigation of M.W.'s injuries. Neither M.W.'s physicians nor local law enforcement have identified a source for those injuries.¹⁰

Injuries to A.T.

11. In September of 2010, while Ms. Hoban and the day care children were visiting a park near the day care, A.T., a 2 year-old girl under care, dislocated her elbow while climbing on the park's playground equipment.¹¹

12. Ms. Hoban did not promptly report A.T.'s injuries to licensing authorities.¹²

Injuries to K.A.C. and K.C.

13. In December of 2010, K.A.C., a 7-month old infant, and his older brother, K.C., then 2 years old, were both enrolled in the Hoban day care.¹³

14. On December 31, 2010, K.A.C.'s mother brought the infant to the emergency room because he had bruised and blue lips. An examination of K.A.C. revealed a linear bruise along his lips that his physician speculated might be from a frost injury.¹⁴

15. A part of the clinic visit with K.A.C., it was noted that his older brother, K.C., likewise had a bruised nose.¹⁵

16. It was later determined that earlier that week, while K.C. was entering the Hoban day care through a garage door into the house, K.C. fell on the stairs and injured his nose.¹⁶

17. Ms. Hoban did not promptly report K.C.'s injuries to licensing authorities.¹⁷

¹⁰ See, Ex. 8; Test. of Michael Cline.

¹¹ Ex. 4; Test. of D. Hoban.

¹² Test. of K. Cardinal.

¹³ Ex. 9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, Ex. 12.

Injuries to K.T.

18. In March of 2011, K.T., a 4 ½ month-old infant, was enrolled at the Hoban day care.¹⁸

19. On March 18, 2011, K.T.'s mother brought K.T. to be examined by local pediatricians. The infant had a swollen bruised area, approximately an inch in diameter, on the side of her head. Following a Computer Tomography scan ("CT scan"), it was determined that K.T. had a suffered calvarial skull fracture.¹⁹

20. In the view of K.T.'s physicians, the infant was too young for such an injury to have been occasioned by the child's own choices or movements.²⁰

21. Chief Cline undertook an investigation of K.T.'s injuries. Neither K.T.'s physicians nor local law enforcement have identified a source for those injuries.²¹

22. Upon learning that K.T. had been seen by doctors at the Sanford Clinic in Fargo, North Dakota, Ms. Hoban sent an electronic mail message to licensing officials regarding K.T.'s condition.²²

23. On the recommendation of Clay County Licensing Supervisor, Kathleen Cardinal, the Department issued an Order of Temporary Immediate Suspension on March 22, 2011.²³

24. Ms. Hoban timely appealed the Order of Temporary Immediate Suspension.²⁴

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

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 County and the Department have complied with all of the substantive and procedural requirements of law and rule.

¹⁸ Ex. 4.

¹⁹ Exs. 4 and 5.

²⁰ Ex. 5.

²¹ See, Ex. 8; Test. of Michael Cline.

²² Ex. 4.

²³ Ex. 1; Test. of K. Cardinal.

²⁴ Ex. 2.

3. At all times relevant to these proceedings, Ms. Hoban was a licensed family child care provider.

4. The Commissioner of Human Services shall impose a temporary immediate suspension of a child 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.”²⁵

5. 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.”²⁶

6. The supervision rules for a licensed child care facility require that a caregiver be “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

7. The Department demonstrated reasonable cause for the temporary immediate suspension order by showing that Ms. Hoban failed to sufficiently supervise M.W., A.T. and K.T. so as to prevent injury to these children.

8. The Department has demonstrated reasonable cause to believe that the combination of Ms. Hoban’s limited experience as a day care provider, her assumption of all of the supervision functions, the number of children under care, and the needs of those children under care, all combine to present an imminent risk of harm to the health, safety, or rights of persons served by the program.

9. Ms. Hoban did not establish that, at the relevant times, she was in full compliance with applicable statutes and rules.

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

²⁵ Minn. Stat. § 245A.07 (2) (2010).

²⁶ Minn. Stat. § 245A.07 (2a) (a) (2010).

²⁷ See, Minn. R. 9502.0315 (29a) (2007).

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner of Human Services AFFIRM the Order for Temporary Immediate Suspension of Darcy Hoban's license to provide family child care.

Dated: April 25, 2011

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally recorded.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) 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. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651) 431-2907 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 Minnesota Statutes § 14.62 (2a). The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon 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 Minnesota Statutes § 14.62 (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

I. Regulatory Standards

Minn. Stat. § 245A.07, subdivisions 2 and 2a establish the standard of proof that must be met to sustain a temporary immediate suspension order. The statute reads in pertinent part:

If the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program, the commissioner shall act immediately to temporarily suspend the license.

....

The scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should 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. The burden of proof in expedited hearings under this subdivision shall be limited to the commissioner's demonstration that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses, or if the actions of other individuals or conditions in the program poses an imminent risk of harm to the health, safety, or rights of persons served by the program. "Reasonable cause" means there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.

These are modest standards; intended to assure that children are protected until there can be a more complete evaluation process, a more detailed hearing and a final determination.

Indeed, this risk of harm analysis has been likened to the burden to establish probable cause in a criminal proceeding.²⁸ The analysis begins with a presumption of innocence and requires the admission of probative evidence to overcome that presumption. At a minimum, an order of temporary immediate suspension must be supported by some substantial evidence of "imminent harm."²⁹

²⁸ Compare, e.g., *State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976).

²⁹ See generally, Minn. Stat. § 14.69 (e) (2006); *In the Matter of the Temporary Immediate Suspension of the License of Laura Ellingson to Provide Family Child Care*, OAH Docket No. 3-1800-15905-2 (2004) (<http://www.oah.state.mn.us/aljBase/180015905.rt.htm>).

While the term “imminent harm” is not defined in either statute or rules, the Commissioner has defined the term “imminent danger” in the Family Day Care and Foster Care rules. This definition is instructive. “Imminent danger” includes circumstances in which a child is threatened with immediate and present neglect that is likely to result in serious physical injury.³⁰

The Administrative Law Judge must also determine if the evidence shows that the license holder’s actions, at the time of the hearing, continue to pose an imminent risk of harm. This determination is made so as to inform the Commissioner as to whether the suspension should continue pending final determination of any appropriate licensing sanction.³¹

II. Analysis

In this case, the temporary suspension should be maintained pending a final determination of the appropriate licensing sanction. In the view of the Administrative Law Judge, Ms. Hoban is simply overmatched when trying to provide care to so many young children and to keep those children safe from the kind of serious injuries that have occurred over the past year. It is reasonable to conclude that if Ms. Hoban were to resume operations, without significant changes in her supervision and staffing approaches, another serious injury would soon follow.

Ms. Hoban’s proposed remedy – namely, to purchase a portable play pen for use with the infants under care (see, Exhibit J) – is a helpful suggestion, but it is not sufficient to address the supervision failures in this case. In the view of the Administrative Law Judge, deploying such a play pen would not remove the imminent risk of future serious injury.

On this record, there are “specific articulable facts or circumstances which provide the Commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.”

In light of the Licensee’s skills, and strong support from some of the families for whom she provides care, it may be that it is appropriate for her to resume providing day care under certain conditions – such as those obliging specific training or employing additional staff for her day care operation. Yet, until the County’s investigation is completed, and the possibility of appropriate licensing conditions can be thoroughly evaluated, it would not be prudent to lift the suspension of her license.

E. L. L.

³⁰ See, Minn. R. 9543.0020 (11) (2005).

³¹ See, *In the Matter of the Temporary Immediate Suspension of the License of Sandra Julkowski*, OAH Docket No. 6-1800-21321-2 (2010) (<http://www.oah.state.mn.us/aljBase/180021321%20rt%20bjh.htm>).