

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 Kerri Martin

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on June 1, 2011. The hearing was conducted by telephone conference call between the OAH offices and the Crow Wing County Attorney's offices. The OAH hearing record closed at the conclusion of the hearing that day.

Janine L. LePage, Assistant Crow Wing County Attorney, 213 Laurel Street, Suite 31, Brainerd, MN 56401, appeared on behalf of Crow Wing County Social Services (County) and the Minnesota Department of Human Services (Department).

William D. O'Hara, Attorney at Law, 417 Laurel Street, Brainerd, MN 56401, appeared for Kerri Martin (Licensee).

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?

The Administrative Law Judge concludes that reasonable cause does not exist to believe that the Licensee's actions pose any risk of harm to the health, safety or rights of children in care and that the order of temporary immediate suspension should be rescinded.

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

FINDINGS OF FACT

1. For approximately two years, Kerri Martin has operated a family day care from her home in Brainerd, Minnesota. During that time, her licensing worker has found her to be in compliance with all the rules governing child care providers.¹ In October

¹ Testimony of Diane Anderson.

2010, the Licensee requested and obtained a variance to the age distribution rules to allow her to provide care for another toddler.² The variance turned out to be unnecessary, and the Licensee advised the licensing worker that she did not need it.³

2. The Licensee attended the required courses on prevention of Sudden Infant Death Syndrome before she was licensed.⁴ She understands that state law requires licensed providers to place an infant to sleep on the infant's back.⁵ She has no disagreement with this requirement and has incorporated this practice into her routine care of infants.⁶

3. On April 19, 2011, the Licensee was caring for K.R., a ten-month-old boy, and four other children. In February and March 2011, K.R. had been diagnosed with pneumonia and treated with antibiotics.⁷ His cough had worsened after the last course of antibiotics. On the morning of April 19, 2011, he developed a fever of about 99 degrees F, and the Licensee gave him some infant Tylenol. The Licensee put him down for his nap at about 1:00 p.m., placing him on his back. The baby was awake when she placed him in the crib.⁸

4. There were no blankets or soft toys in the crib with K.R. during his nap.⁹

5. K.R. was old enough to be physically able to turn himself over into a different position. When the Licensee checked him at about 1:45 p.m., she found him on his stomach. She turned him over onto his back.¹⁰

6. At about 3:00 p.m. the Licensee went in to wake up K.R. and found him unresponsive, lying on his stomach. He was not breathing. She removed him from the crib, called 911, and began performing CPR. Police officers and paramedics arrived within minutes but were not able to resuscitate K.R.¹¹ The Licensee called licensing authorities to report the incident while police and paramedics were still there.¹²

7. At some point after the police arrived, an investigator asked the Licensee about the baby's health, medications, and any recent behavior changes in an effort to obtain information for the paramedics. He also asked her how she laid the baby down for his nap, and she said "on his tummy." She then demonstrated that the baby typically

² Exs. 11, 12, & 16.

³ Test. of D. Anderson.

⁴ Ex. 14.

⁵ Minn. Stat. § 245A.1435(a); Testimony of Kerri Martin.

⁶ Test. of K. Martin.

⁷ Ex. 6.

⁸ Test. of K. Martin; Test. of D. Anderson.

⁹ Ex. 5.

¹⁰ Test. of K. Martin.

¹¹ Test. of K. Martin; Testimony of Investigator Chad Kleffman.

¹² Ex. 4; Test. of K. Martin.

slept on his stomach with his arms out straight, his face resting on his arms, and his bottom slightly up in the air.¹³

8. In the same general timeframe, the Licensee advised licensing worker Amanda Crandall that she put the baby to sleep on his back, that she had checked him later and found he had flipped onto his stomach, and that she had turned him over onto his back. She said she checked him often because of his tendency to turn onto his stomach into his preferred sleeping position. At no time in speaking to licensing authorities did the Licensee state that she had placed him on his stomach.¹⁴

9. On April 21, 2011, Crow Wing County Social Services recommended a temporary immediate suspension of the child care license based on the conflicting statements the Licensee had reportedly made about how she placed the baby when she laid him down for his nap. In addition, the County had not yet obtained the coroner's report.¹⁵

10. The same day, the Department issued an Order of Temporary Immediate Suspension to the Licensee. It was served on her personally.¹⁶

11. By letter dated April 23, 2011, the Licensee appealed the Order of Temporary Immediate Suspension.¹⁷

12. On April 27, 2011, Crow Wing County Social Services obtained the final autopsy report, disclosing that K.R. suffered from a systemic infection of undetermined etiology, including interstitial pneumonia, bronchitis, tracheitis, and lymphocytic meningitis with focal encephalitis.¹⁸ Interstitial pneumonia is a chronic lung disease affecting the interstitial tissue (between the cells) of the lungs.¹⁹

13. Crow Wing County Social Services supports the reinstatement of the child care license. The licensing worker believes the Licensee was in compliance with all statutes and rules governing the care of children.²⁰

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

¹³ Testimony of C. Kleffman.

¹⁴ Test. of D. Anderson.

¹⁵ Ex. 5.

¹⁶ Ex. 26.

¹⁷ Ex. 3.

¹⁸ Ex. 6.

¹⁹ <http://www.websters-online-dictionary.org/definitions/interstitial+pneumonia?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=interstitial+pneumonia&sa=Search#888>

²⁰ Test. of D. Anderson.

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 (2010).²¹
2. The County and the Department have complied with all of the substantive and procedural requirements of law and rule.
3. 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.”²²
4. 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.”²³
5. State law provides that when a license holder is placing an infant to sleep, the license holder must place the infant on the infant’s back, unless there is documentation from the infant’s parent directing an alternative sleeping position.²⁴
6. The Department had reasonable cause to issue the Order of Temporary Immediate Suspension on April 21, 2011; however, the Licensee established at the hearing that she had acted in compliance with the law on April 19, 2011.
7. There is not reasonable cause to believe the Licensee violated Minn. Stat. § 245A.1435 (a) or that her conduct poses an imminent risk of harm to the health, safety, or rights of children in care.

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

²¹ All references to Minnesota Statutes are to the 2010 edition; all references to Minnesota Rules are to the 2009 edition.

²² Minn. Stat. § 245A.07 (2).

²³ Minn. Stat. § 245A.07 (2a) (a).

²⁴ Minn. Stat. § 245A.1435 (a).

RECOMMENDATION

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

Dated: June 3, 2011

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally recorded, not transcribed.

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

While the term "imminent harm" is not defined in either statute or rules, the Commissioner has defined the term "imminent danger" in other licensing rules. This definition is instructive. "Imminent danger" includes circumstances in which a child is threatened with immediate and present abuse or neglect that is life-threatening or likely to result in abandonment, sexual abuse, or serious physical injury.²⁵

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.

II. Analysis

In this case, the County stipulated at the outset of the hearing that K.R. died as a result of bacterial and viral infections and that his death is not attributable to the Licensee's care. The issue for hearing was whether the Licensee had complied with the statutory requirement that child care providers place an infant to sleep on the infant's back.

²⁵ See Minn. R. 9543.0020 (11).

The record reflects that that the Licensee routinely placed infants to sleep on their backs and that she has no objection to complying with this requirement. She cannot recall ever deviating from this practice. With regard to R.K., she testified that she had always placed him on his back and that he typically would turn himself over to sleep in his preferred position on his stomach, with his arms stretched forward. When she checked on him during his nap, her practice was to flip him onto his back, but he would usually turn over onto his stomach again before waking.

During the hearing, the Licensee appeared to be genuinely puzzled as to why the police investigator was so certain that she said she had placed R.K. on his tummy when she put him down for his nap, and she was reluctant to disagree with the investigator. She recalls telling the investigator how the baby liked to sleep, but she has no recollection that he asked her how she placed the baby when she laid him down. The officer agrees that the situation was stressful and chaotic, that he talked to the Licensee several times over the course of the hour in which paramedics attempted to revive the baby, and that during this time she was also on the telephone and caring for the other children in care. He believes it is possible that the Licensee may have misunderstood his question and answered by describing how the baby normally slept.

The Administrative Law Judge concludes it is more likely than not that the Licensee misunderstood the police investigator's question and responded by describing how the baby liked to sleep. There is no dispute that, in the same timeframe, the Licensee reported to licensing authorities that she had placed the baby down on his back, and she has consistently maintained that this is her standard practice.²⁶ In addition, the Licensee has carefully followed other rules regarding the provision of child care. It does not appear from the record that any additional investigation is pending by the police or the County. The Administrative Law Judge accordingly recommends that the Order of Temporary Immediate Suspension be rescinded.

K.D.S.

²⁶ Test. of D. Anderson.