

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

In the Matter of the Order to Forfeit a
Fine and Order of Conditional License;
and Order of License Revocation of
Tikes n Tots Child Care

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

A hearing was held on February 16 and 17, 2012, at the Office of Administrative Hearings by Administrative Law Judge (ALJ) Beverly Jones Heydinger, pursuant to a Notice and Order for Prehearing Conference and Hearing dated August 3, 2011.

The hearing record closed upon receipt of the final post-hearing submission, March 13, 2012.

Appearances: Cynthia B. Jahnke, Assistant Attorney General, on behalf of the Department of Human Services (Department); Christa Groshek, Groshek Law, on behalf of Tikes n Tots Child Care (Facility or Tikes n Tots).

During the course of the hearing, the Facility withdrew its appeal of the Conditional License and some of the fines imposed. Other fines and the Order of License Revocation remain in dispute.

The ALJ recommends that the Commissioner of Human Services affirm fines in the amount of \$1700 and affirm the Order of Revocation.

STATEMENT OF THE ISSUES

1. Did the Department properly impose fines for the following violations:
 - a. A fine of \$200 for failure to provide continuous direct supervision of staff pending the outcome of a background study on three occasions, in violation of Minn. Stat. § 245C.13, subd. 2;
 - b. A fine of \$200 for failure to maintain staff distribution requirements, in violation of Minn. R. 9503.0040, subp. 2 D, and 9503.0034, subp. 1;

c. A fine of \$200 for failure to comply with required staff-to-child ratios and maximum group size, in violation of Minn. R. 9503.0040, subp. 1;

d. A fine of \$200 for failure to maintain documentation of fire drills, in violation of Minn. R. 9503.0110, subp. 3 D and E, and subp. 4;

e. A fine of \$200 for failure to properly use high chair safety straps, in violation of Minn. R. 9503.0140, subp. 17;

f. A fine of \$200 for failure to follow the behavior guidance policy that prohibits certain disciplinary actions, in violation of Minn. R. 9503.0055, subp. 3 A, B and F;

g. A fine of \$200 for failure to properly post diaper-changing procedures, in violation of Minn. R. 9503.0140, subp. 12; and

h. A fine of \$100 for failure to provide meals and snacks that meet the requirements of the United States Department of Agriculture (USDA), in violation of Minn. R. 9503.0145, subp. 2.

2. Did the Department properly cite the Facility for the following violations:

a. Did the Facility knowingly give false or misleading information to the Commissioner concerning completion of a fire drill, in violation of Minn. Stat. § 245A.07, subd. 3(a)?

b. Did the Facility fail to comply with the requirements for reducing the risk of sudden infant death syndrome by placing an infant in a crib with an improperly fitted sheet, by allowing an infant swaddled in a blanket to sleep on a pillow, and by allowing an infant swaddled in a blanket to sleep in a bouncy seat, in violation of Minn. Stat. § 245A.1435 (b), and Minn. R. 9503.0045, subp. 1 F?

c. Did the Facility fail to provide continuous, direct supervision of a staff person pending receipt of a background study, in violation of Minn. Stat. §245C.13, subd. 2?

d. Did the Facility fail to properly supervise children at all times, in violation of Minn. Stat. § 245A.02, subd. 18, and Minn. R. 9503.0045, subp. 1 A?

e. Did the Facility fail to comply with the required staff-to-child ratios, in violation of Minn. R. 9503.0040, subp. 1?

f. Did the Facility fail to comply with required staff distribution requirements, in violation of Minn. R. 9503.0040, subp. 2 D, and Minn. R. 9503.0034, subp. 1?

g. Did the Facility fail to properly group children by age, in violation of Minn. R. 9503.0040, subp. 3 B (1)?

h. Did the Facility fail to provide each infant's feeding schedule in the food preparation area, in violation of Minn. R. 9503.0145, subp. 7 B?

i. Did the Facility fail to assure that each child's records contained required information about the names and telephone numbers of persons authorized to take the child from the child care center, in violation of Minn. R. 9503.0125 D?

j. Did the Facility fail to assure that each child's records included documentation of a current immunization record, in violation of Minn. R. 9503.0125 G and 9503.0140, subp. 5?

k. Did the Facility fail to assure that each child's records included documentation of a current physical examination, in violation of 9503.0125 G, and 9503.0140, subp. 3?

l. Did the Facility fail to keep program policies and procedures readily accessible to staff, in violation of Minn. Stat. §245A.04, subd. 14 (c)?

m. Did the Facility fail to conspicuously post Correction Orders for two years, in violation of Minn. Stat. §245A.06, subd. 8?

n. Did the Facility fail to conspicuously post an Order to Forfeit a Fine and Order of Conditional License, in violation of Minn. Stat. § 245A.07, subd. 5?

o. Did the Facility fail to document the date that background studies for three staff persons were submitted to the commissioner of human services, in violation of Minn. Stat. § 245C.20?

p. Did the Facility fail to store diaper wipes so that they were inaccessible to children, in violation of Minn. R. 9503.0140, subp. 7 E?

q. Did the Facility fail to store a bottle of bleach and water so that it was inaccessible to children, in violation of Minn. R. 9503.0140, subp. 17?

r. Did the Facility fail to properly label products to control diaper rash, in violation of Minn. R. 9503.0140, subp. 7 D?

3. Did the Department demonstrate that the Facility's license to provide child care should be revoked, based on the nature, chronicity or severity of its violations of law or rule and the effect of the violations on the health, safety, or rights of persons served by the program?

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

FINDINGS OF FACT

1. Tikes n Tots Child Care is owned by Shelley Ben and operates at 1208 Shakopee Town Square, Shakopee, Minnesota. Ms. Ben has been licensed since July 2006 by the Department of Human Services pursuant to the rules for child care centers, Minn. R. 9503.0005 – 9503.0175, commonly referred to as Rule 3.

2. In 2007, the Facility was reviewed for renewal of its license and issued a Correction Order dated July 9, 2007, for three violations of the licensing rules. One of the violations was for failure to document fire drills in five months between July 2006 and March 2007.¹

3. In September 2008, the Department investigated a complaint regarding Tikes n Tots and issued a Correction Order dated October 17, 2008, for four violations of the licensing rules. The violations included failure to have approved diaper-changing procedures,² and three violations related to behavior guidance.³

4. In April 2009, the Department investigated another licensing complaint and issued a Correction Order, citing four violations of the licensing rules. The violations included failure to comply with required staff-to-child ratios and staff distribution requirements.⁴

5. The applicable rule requires minimum staff-to-child ratios for each of the four age groups in care (infant, toddler, pre-school and school-age), and the rule requires a certain allocation of staff (teacher, assistant teacher and aide) for the number of children in each age group.⁵

6. Tikes n Tots was also cited for failure to supervise children at all times,⁶ and for exceeding the maximum number of children within a group.⁷

7. In July 2009, the Department investigated another complaint and conducted the annual licensing review. It issued a Correction Order on July 21, 2009, citing six rule violations. Straps were not properly placed around the waist of children in

¹ Minn. R. 9503.0110, subp. 3 D and E, and subp. 4 B; Ex. 58.

² Minn. R. 9503.0140, subp. 12.

³ Minn. R. 9503.0055; Ex. 59.

⁴ Minn. R. 9503.0040, subps. 1 and 2.

⁵ Minn. R. 9503.0040, subps 1 and 2.

⁶ Minn. Stat. § 245A.02, subd. 18; Minn. R. 9503.0045, subp. 1 A.

⁷ Minn. R. 9503.0040, subp. 1; Ex. 60.

high chairs; children's hands were not washed properly; the menus did not comply with the nutritional requirements of the USDA; there were diaper wipes accessible to children in the bathrooms; staff ratios and distribution requirements were not maintained; and the Facility did not have policies and procedures in place to address alleged or suspected maltreatment.⁸

8. On September 2, 2009, the Department began its investigation of an allegation that a staff person at Tikes n Tots had pushed a child, causing the child to fall and sustain scrapes and bumps. It was alleged that the incident had occurred around February 2009. Interviews were conducted with the victim and the victim's family, three Facility staff and Ms. Ben. In the report issued September 20, 2010, the Department concluded that there was insufficient evidence to determine that maltreatment had occurred.⁹

9. In December 2009, the Department investigated an allegation that two toddlers were left unsupervised and that one of them bit the other nine times on the face and body. The Department determined that there was maltreatment for failure to provide appropriate supervision and failure to protect a child from conditions that seriously endangered the child's health when reasonably able to do so. It issued a Determination of Maltreatment and Order to Forfeit a Fine of \$1000.¹⁰

10. Based on its investigation of the December incident and another complaint in January 2010, the Department issued a Correction Order on February 16, 2010, that included five violations. The violations included improper supervision; staff ratios and distribution requirements were not maintained; failure to conduct required fire and tornado drills; failure to keep a crib in good repair; and failure to inform the Department within 48 hours of an incident requiring the services of the fire department, in violation of.¹¹

11. In addition, the Correction Order stated that the Department had reason to believe that the Facility had logged tornado drills in 2009 that were not actually conducted. It included a warning that the commissioner may suspend or revoke a license or impose a fine if the license holder withholds relevant information from or gives false or misleading information to the commissioner about compliance with the licensing rules.¹²

12. On March 29, 2010, the Department issued a Correction Order because it determined that three staff members were aware that a child had gone to the doctor as

⁸ Minn. R. 9503.0140, subp. 17; Minn. R. 9503.0140, subp. 13; Minn. R. 9503.0145, subp.2; Minn. R. 9503.0140, subp. 7 E; Minn. R. 9503.0040, subps. 1 and 2; Minn. Stat. § 245A.66 (1), respectively, Ex. 61.

⁹ Ex. 35.

¹⁰ Ex. 63.

¹¹ Minn. Stat. § 245A.02, subd. 18, and Minn. R. 9503.0045, subp. 1 A; Minn. R. 9503.0040, subps. 1 and 2; Minn. R. 9503.0110, subp. 3 D and E and subp. 4 B; Minn. R. 9503.0140, subp. 19; Minn. R. 9503.0130, subp. 2 C, respectively, Ex. 64.

¹² *Id.*, See Minn. Stat. § 245A07, subd. 3 (a).

a result of injuries sustained at the Facility on June 12, 2009, but the staff had failed to report the incident.¹³

13. The Department conducted additional licensing visits on March 19, 2010, June 30, 2010, and June 30, 2010, to investigate licensing complaints, to determine compliance with the rules, and as part of the alleged maltreatment on September 2, 2009, and March 30, 2010.¹⁴

14. Based on these visits, the Department issued an Order to Forfeit a Fine and Order of Conditional License on September 10, 2010. The Department imposed a fine of \$1,900, based on a fine of \$200 for each of 9 violations and fine \$100 for an additional violation.¹⁵ The license holder appealed the Order to Forfeit a Fine and the Order of Conditional License.¹⁶

15. During the course of the hearing in this matter, Tikes n Tots withdrew its appeal of the Conditional License and its appeal of two of the fines.

Order to Forfeit a Fine

Citation 1: Fine of \$200 for violation of Minn. Stat. § 245C.13, subd. 2.

16. Minn. Stat. § 245C.13, subd. 2, states that the subject of a background study may not perform any activity requiring a background study until the commissioner has issued the appropriate notice. Prohibited activities include “providing direct contact services to person served by a program unless the subject is under continuous direct supervision.”¹⁷

17. The Department asserted that Tikes n Tots permitted staff to work alone without continuous direct supervision prior to receiving a background study notice. The Department cited three violations of this requirement in the Order to Forfeit a Fine, stating that the licensors had observed two instances of staff providing direct contact without continuous direct supervision pending receipt of a background study notice, and were informed of a third violation.¹⁸

18. The Facility challenged only one of the three violations, the violation based on a staff report.¹⁹

19. The Department interprets “continuous, direct supervision” in this context to mean that the staff member is within sight or hearing of the program’s supervising

¹³ Minn. R. 9503.0130, subp. 2 B, Ex. 65.

¹⁴ Ex. 1.

¹⁵ Ex. 1.

¹⁶ Ex. 3.

¹⁷ Minn. Stat. § 245C.13, subd. 2 (b)(3).

¹⁸ Ex. 1 at 2-3.

¹⁹ Post-hearing submission of Tikes n Tots, March 12, 2012, at 1 (reference to Page 2, citation 1).

individual so that the supervisor is capable at all times of intervening to protect the health and safety of the persons served by the program.²⁰

20. The Department based the violation on information obtained from a staff member at the Facility on June 30, 2010, that SP4 was not provided with continuous direct supervision on the two prior days that she had worked alone in the infant room.²¹ In addition, the child care center did not document in its personnel files when the background study was initiated, as required by Minn. Stat. § 245C.20.²²

21. Ms. Ben stated that she had provided appropriate supervision and that when she left the room to prepare meals or usher children to the bathroom she was always within sight and hearing of SP4.²³ She acknowledged that the Facility did not always comply with the supervision requirement pending receipt of the background study.²⁴

22. The floor plan for the Facility shows that the kitchen is not within sight or hearing of the infant room;²⁵ also, one can reasonably assume that Ms. Ben was ushering toddlers or older children, not infants, to the bathroom.

Citation 2: Fine of \$200 for violation of Minn. R. 9503.0040, subp. 2 D and 9503.0034, subp. 1.

23. The Department levied this fine for the Facility's failure to maintain appropriate staff distribution requirements on several occasions between March and June 2010.²⁶ The applicable rule provides that staff distribution must follow a specified pattern. For each age group, the first assigned staff member must meet the qualifications of a teacher; the second staff member must meet the qualifications of a child care aide; the third staff member must meet the qualifications of an assistant teacher; and the fourth staff member must meet the qualifications of a case aide.²⁷ Only persons meeting these qualifications may be considered in the child-to-staff ratio.²⁸ The Order specifies the particular violations on each of several days.

24. Tikes n Tots challenged this fine, based in part on a provision of the rule that allows children in different age categories to be grouped and staffed together during morning arrival and afternoon departure times, so long as the total arrival and departure time does not exceed 25 percent of the daily hours of operation.²⁹

²⁰ Ex. 1 at 3. See Minn. Stat. § 245A.02, subd. 18.

²¹ Ex. 11 at DHS 83.

²² Ex. 1 at 3.

²³ Test. of S. Ben.

²⁴ Test. of S. Ben.

²⁵ Ex. 80.

²⁶ Ex. 1 at pages 3-5.

²⁷ Minn. R. 9503.0040, subp. 2 D.

²⁸ Minn. R. 9503.0040, subp. 2 A.

²⁹ Minn. R. 9503.0040, subp. 3 A.

25. The applicable rule subpart allows children in different age categories to be grouped together if the total arrival and departure time does not exceed 25 percent of the daily hours of operation, the group is staffed appropriately for the youngest child, and divided when the number of children present reaches the maximum group size of the youngest child present.³⁰ The Facility did not offer evidence to show that it complied with this subpart.

26. Most of the violations involved an aide working alone, without supervision. Under the rules, an “aide” is a staff person age 16 or older who carries out child care program activities under the supervision of a teacher or assistant teacher. If the aide is under the age of 18, there must be direct supervision by a teacher or assistant teacher at all times, with some exceptions to supervise sleeping children or assist children with washing, toileting, and diapering.³¹

27. On March 19, 2010, Donna Gainor, one of the Department’s licensing workers, observed a staff person caring for children in the infant room without a teacher present.³² Several staff, including aides, reported to the licensing workers that aides were frequently left alone with children, including infants.³³ In an interview with a licensing worker, Ms. Ben acknowledged that the Facility did not fully comply with the distribution requirements.³⁴

28. The Facility’s response to this group of violations addressed ratios and supervision rather than staff distribution. It argued that, contrary to the Department’s view, an aide who is 18 or over does not have to be under “direct” supervision, but instead, the supervisor must be close at hand and immediately available. It pointed out that there had been no reported injuries or problems that occurred during short periods when the Facility was not in compliance with the required ratios. It did not present evidence that the staff distribution requirements were met.

Citation 3: Fine of \$200 for Violation of Minn. R. 9503.0040, subp. 1.

29. The rules establish certain child-to-staff ratios and also set a maximum group size.

Infant, 1:4, maximum group size – 8

Toddler, 1:7, maximum group size – 14

Preschooler, 1:10, maximum group size – 20

School-age, 1:15, maximum group size - 30.³⁵

³⁰ Minn. R. 9503.0040, subp. 3 A (1), (2) and (3).

³¹ Minn. R. 9503.0034, subp. 1.

³² Ex. 3 at 39.

³³ Ex. 9 at 195; Ex. 7 at 239; Ex. 24 at 220; Test. of Jackie Szalicky (formerly Melchior).

³⁴ Ex. 8 at 233.

³⁵ Minn. R. 9503.0040, subp. 1.

30. The Order to Forfeit Fine outlined many specific dates and times when the Department's licensing staff observed ratios and group sizes that exceeded the rule standards, in addition to other violations reported by staff members.³⁶

31. The Facility did not offer evidence that it was in compliance with the child-to-staff ratios and the maximum group size.

Citation 4: Fine of \$200 for Violation of Minn. R. 9503.0110, subp 3 D and E, and subp. 4 B.

32. A facility is required to have procedures for fire prevention and for fire, tornado, or other natural disaster, to conduct regular fire and tornado drills, and to maintain a log that reflects the dates the drills were conducted.³⁷ The Facility was cited for this violation in February 2010.³⁸

33. During a site visit on March 30, 2010, there was no documentation of a fire drill for January, February or March 2010.³⁹ At hearing, Ms. Ben acknowledged that the fire drills were not conducted each month.⁴⁰

Citation 5: Fine of \$200 for Violation of Minn. R. 9503.0140, subp. 17.

34. The licensing rule provides: "Sharp objects, medicines, plastic bags, and poisonous plants and chemicals including cleaning supplies, must be stored out of reach of children."⁴¹

35. Relying on its interpretation of this provision, the Department cited Tikes n Tots for improperly fastening a high chair safety strap around a child's legs rather than around the child's waist.⁴² The Facility was cited for this violation in the Correction Order issued on July 21, 2009, and was aware of the Department's interpretation.⁴³

36. The Department's licensing worker, Cathy Mears, stated that this rule provision is broadly applied to any hazardous object, and that its application to improper use of high chair safety straps was explained in the prior Correction Order.

37. A separate provision of the Department's rule requires that equipment and furniture be sound and in good repair, but it does not state that the equipment must be used properly or safely,⁴⁴ and the provision was not relied upon as a basis for this violation.

³⁶ Ex. 1 at 5-7; *see also* Ex. 35 at 4 and Ex. 41 at DHS 405 and 407.

³⁷ Minn. R. 9503.0110, subp. 3 D and E, and subp. 4.

³⁸ Ex. 64.

³⁹ Ex. 31; *see also* Ex. 3 at 56.

⁴⁰ Test. of S. Ben.

⁴¹ Minn. R. 9503.0140, subp. 17.

⁴² *See* Ex. 35 at 4; Test. of Mears.

⁴³ Ex. 61.

⁴⁴ Minn. R. 9503.0140, subp. 19.

38. At no time was a child left in a high chair without close supervision,⁴⁵ but up to four infants could be in high chairs at one time.⁴⁶

Citation 6: Fine of \$200 for Violation of Minn. R. 9503.0055, subp. 3 A, B and F.

39. The licensing rules set standards for appropriate behavior guidance. The facility must develop appropriate written policies that are tailored to the developmental level of the children, and children may not be subjected to any form of corporal punishment, including rough handling or shoving. Children may not be shamed or physically restrained and may not be separated from other children, except under circumstances set forth in the rule.⁴⁷

40. The Department determined that there were three instances where staff used inappropriate behavior guidance. The Department investigated an allegation that a staff member physically restrained a child on his cot during nap time when restraint was not necessary to protect the child or others from harm. The Department concluded that the Facility had an appropriate policy but had not provided sufficient guidance to the staff concerning use of physical restraint. The Department's conclusion was based on a child's separate statements to each parent that a staff member held him on his cot with her arms or legs when he did not want to nap.⁴⁸ The involved staff member did not deny that she might have done so.⁴⁹

41. The Department investigated an allegation that a staff member had been rough with a child, grabbing the child by the hands and arms and compelling the child to move, which was reported by a parent and confirmed by a prior staff member.⁵⁰ Although the staff member denied that she was rough,⁵¹ other staff confirmed that she was rough with children and not "kid friendly."⁵²

42. The Facility used a yellow time-out chair to separate misbehaving children from the group.⁵³ The Department does not approve of using a designated chair because a child directed to sit in it may be embarrassed or humiliated.⁵⁴

Citation 7: Fine of \$200 for Violation of 9503.0140, subp. 12.

43. The Department's rules set standards for diaper changing procedures. The procedures must be developed in consultation with a health consultant and posted in each diaper changing area.⁵⁵

⁴⁵ Test. of S. Ben.

⁴⁶ Test. of Szalicky.

⁴⁷ Minn. R. 9503.0055, subp. 3.

⁴⁸ Ex. 23 at 2.

⁴⁹ Ex. 51 at 8.

⁵⁰ Ex. 23 at 2-3; Ex. 24 at 2; Ex. 19. *See also* Ex. 54 at 1-2 (report of similar prior incident).

⁵¹ Test. of Szalicky.

⁵² Ex. 19 at DHS 257; Ex. 24.

⁵³ Ex. 7 at 5; Ex. 53 at 4.

⁵⁴ Test. of Mears.

44. On March 30, 2010, and June 3, 2010, the Department's licensing staff looked for the diaper changing procedures but did not find them in the preschool bathroom.⁵⁶ This violation had been previously cited in the Correction Order issued on October 17, 2008.⁵⁷ Ms. Ben asserted that the procedures were posted.⁵⁸

Citation 8: Fine of \$100 for Violation of Minn. R. 9503.0145, subp. 2.

45. The Department's rule requires license holders to provide meals and snacks that comply with USDA nutritional requirements set forth in 7 C.F.R. §226.20. Snacks must include foods from two of the four food groups; meals must meet one third of the child's daily nutrition need, and include protein, milk, two servings of fruits or vegetables, and bread or bread alternate.⁵⁹

46. On March 30, 2010, Department licensing staff observed Facility staff providing a snack of cookies and water.⁶⁰ One parent observed that children were served jelly sandwiches and an apple for lunch.⁶¹ Another parent had broader concerns about the meals, including jelly sandwiches with an apple and juice box or a tortilla shell with a bit of corn on the side.⁶²

Violations Included in the Order of Conditional License

47. In addition to the eight violations for which a fine was imposed, the Order of Conditional License included nineteen other violations.⁶³ Although the Facility's appeal of the Order of Conditional License was withdrawn at hearing, the violations are listed here because the Conditional License required that Tikes n Tots comply with all applicable requirements of rule and statutes, and gave notice that further violations could result in negative action, including revocation.

- Citation 9 and Citation 10: Failure to comply with sudden infant death syndrome and shaken baby syndrome training requirements.⁶⁴
- Citation 11 and Citation 12: Failure to post Correction Orders and an Order to Forfeit a Fine and the accompanying maltreatment Investigation Memorandum.⁶⁵
- Citation 13: Failure to properly train a staff member on mandated reporting requirements of Minn. Stat. § 626.556 (Reporting of Maltreatment of Minors Act).⁶⁶

⁵⁵ Minn. R. 9503.0140, subp. 12.

⁵⁶ Ex. 3 at DHS 49; Test. of Mears.

⁵⁷ Ex. 59 at 1-2.

⁵⁸ Test. of S. Ben; Ex. 56.

⁵⁹ Test. of Mears.

⁶⁰ Ex. 3 at 3; Test. of Mears.

⁶¹ Ex. 23 at 3.

⁶² Ex. 54 at 6.

⁶³ Ex. 1 at 12-17.

⁶⁴ Minn. Stat. § 245A. subd. 5 (a) and (d); Ex. 1 at 12-13.

⁶⁵ Minn. Stat. §§ 245A.06, subd. 8 and 245A.07, subd. 5; Ex. 1 at 13.

⁶⁶ Minn. R. 9503.0130, subp. 1; Ex. 1 at 13.

- Citation 14 and Citation 15: Inappropriate use of separation of a child from the group for discipline and incomplete recording of the use of separation.⁶⁷
- Citation 16: Failure to comply with the stated goals and objectives in the child care program plan that promote the physical, intellectual, social, and emotional development of the child.⁶⁸
- Citation 17: Failure to provide a staff member with appropriate training prior to starting assigned duties.⁶⁹
- Citation 18: Failure to comply with proper nap requirements.⁷⁰
- Citation 19: Failure to have each infant's feeding schedule available.⁷¹
- Citation 20: Failure to include all required information in each child's record.⁷²
- Citation 21 and Citation 22: Failure to properly group children by age.⁷³
- Citation 23: Failure to keep facility policies and procedures readily accessible to staff.⁷⁴
- Citation 24: Failure to properly label each infant's bottle.⁷⁵
- Citation 25: Failure to place each infant to sleep in a crib with a tightly fitted sheet.⁷⁶
- Citation 26: Failure to document that cribs had been checked annually against the U.S. Consumer Product Safety Commission web site listing of unsafe cribs.⁷⁷
- Citation 27: Failure to assure that equipment and furniture were in good repair.⁷⁸

48. The Department imposed conditions in the Conditional License that required the Facility to complete a checklist of applicable laws and rules after 30 days and 90 days, to submit specified information to the Department on a monthly basis, and conduct additional staff training, including training on behavior guidance, staff-to-child ratios and staff distribution, age grouping and mandated reporting requirements.⁷⁹

49. After the Conditional License was issued and the Facility's appeal was pending, the Department conducted periodic inspections and investigated a complaint. During these reviews, the Department found 11 repeat licensing violations, including 9

⁶⁷ Minn. R. 9503.0055, subps. 4 and 5 and Minn. R. 9503.0115 G; Ex. 1 at 13-14.

⁶⁸ Minn. Stat. § 245A.1435 (b); Minn. R. 9503.0045, subp. 1 F; Ex. 1 at 14.

⁶⁹ Minn. Stat. § 245A.40, subds. 1 and 14(b)(1); Ex. 1 at 14.

⁷⁰ Minn. R. 9503.0050, subp. 3; Ex. 1 at 14.

⁷¹ Minn. R. 9503.0145, subp. 7 B; Ex. 1 at 15.

⁷² Minn. R. 9503.0125, D and F; Ex. 1 at 15.

⁷³ Minn. R. 9503.0040, subp. 3 A and B(2); Ex. 1 at 15-16.

⁷⁴ Minn. Stat. § 245A.04, subd. 14 (c); Ex. 1 at 16.

⁷⁵ Minn. R. 9503.0145, subp. 7 D; Ex. 1 at 16.

⁷⁶ Minn. Stat. § 245A.1435 (b); Ex. 1 at 16.

⁷⁷ Minn. Stat. § 24A.146, subd. 3; Ex. 1 at 17.

⁷⁸ Minn. R. 9503.0140, subp. 19; Ex. 1 at 17.

⁷⁹ Ex. 1 at 17-20.

violations that were repeats of violations included in the Conditional License. It also determined that the Facility provided false or misleading information about compliance with fire drill requirements. Based on the pattern of violations since July 2006, the determination of maltreatment for neglect in 2009, the Conditional License, repeat violations and the belief that false or misleading information had been provided, the Commissioner issued an Order of License Revocation on May 13, 2011.⁸⁰

50. By letter dated May 23, 2011, the Facility requested a hearing on the Order of License Revocation, to be consolidated with the Order to Forfeit a Fine and Order of Conditional License.⁸¹

Citation 1: Violation of Minn. Stat. § 245A.07, subd. 3 (a), providing knowingly false or misleading information to the Commissioner; and Minn. R. 9503.0110, subp. D and E, and subp. 4 (b), failure to conduct monthly fire and tornado drills and to keep a log of the drills.

51. A facility must have procedures to follow in the event of fire. The procedures must include monthly fire drills, and a log to record the date and time of each drill.⁸²

52. The Department had previously issued Correction Orders for failure to conduct fire drills.⁸³ On October 7, 2010, Department licensing staff members Gainor and Mears conducted a site visit and reviewed the Facility's fire drill logs for 2010. The log did not show that a fire drill had been conducted in June, August and September 2010. The log reflected that a fire drill had been conducted on October 5, 2010, for 25 children at 10:00 a.m.⁸⁴

53. A notation on the log for October 5, 2010, states: "preschool back door (illegible) toddler front door."⁸⁵ Two staff who worked on October 5, 2010, including a preschool teacher, reported that there had not been a fire drill that morning.⁸⁶

54. Ms. Ben asserted that October 5, 2010, fell during annual fire prevention week. On that day, only the preschool and toddler rooms participated in the fire drill; because some infants were sleeping, Ms. Ben did not include them in the drill. She maintained that staff working with the infants would not have been aware of the drill. This is consistent with Ms. Ben's notation on the fire drill log, but it is not consistent with the testimony of one of the preschool teachers.⁸⁷

⁸⁰ Ex. 66.

⁸¹ Ex. 70.

⁸² Minn. R. 9503.0110, subps. 3 and 4.

⁸³ Ex. 58 (July 9, 0227); Ex. 64 (February 16, 2010).

⁸⁴ Ex. 46 at DHS 419.

⁸⁵ *Id.*

⁸⁶ Ex. 42 (Interview with Rhonda, preschool teacher); Ex. 44 (Interview with Michaela, morning infant aide); Test. of Gainor.

⁸⁷ Ex. 42

55. The Facility has cameras and videotapes the daily activity for review by Ms. Ben.⁸⁸ One of the licensing staff, Ms. Gainor, was aware that there were videotapes but she did not review them.⁸⁹ The Facility did not offer the videotape as evidence that the fire drill occurred on October 5th.

56. The Facility had a fire drill for the whole center on October 7, 2010, the day of the licensors' visit.⁹⁰

57. Ms. Ben acknowledged that, although she now conducts the fire drills monthly, she had not regularly conducted monthly drills in the past. She could not recall whether she began to regularly conduct monthly drills before or after October 2010.⁹¹

Citation 2: Violation of Minn. Stat. § 245A.1435 (b) and Minn. R. 9503.0045, subp. 1 (F): failure to comply with the requirements to reduce the risk of sudden infant death syndrome.

58. Minnesota Statute Section 245A.1435 (b) states:

The license holder must place the infant in a crib directly on a firm mattress with a fitted sheet that fits tightly on the mattress and overlaps the mattress so it cannot be dislodged by pulling on the corner of the sheet. The license holder must not place pillows, quilts, comforters, sheepskin, pillow-like stuffed toys, or other soft products in the crib with the infant.

59. On October 7, 2010, the Department's licensing staff observed an infant swaddled in a blanket, sleeping on a "boppy pillow," a soft U-shaped pillow. Another infant was sleeping in a bouncy seat.⁹² On January 14, 2011, the licensing staff observed an infant swaddled in a blanket, asleep in a bouncy seat.⁹³ The Department staff determined that the Facility failed to comply with the statute.

60. A facility must have stated goals and objectives to promote the physical, intellectual, social and emotional development of the children in each age group.⁹⁴ Minnesota Rule 9503.0050, subp. 1, requires that the facility's policy for naps and rest be consistent with the developmental level of the children. The Department contended that allowing infants to sleep on pillows or in a bouncy seat was not consistent with the goals and objectives for the age group and did not promote their physical development.⁹⁵

⁸⁸ Test. of S. Ben.

⁸⁹ Test. of Gainor.

⁹⁰ Test. of S. Ben.

⁹¹ Test. of S. Ben.

⁹² Ex. 41 at 404-405.

⁹³ Ex. 47 at 423; Test of Mears.

⁹⁴ Minn. R. 9503.0045, subp. 1 (F).

⁹⁵ See *also* Minn. R. 9503.0045, subp. 1 F.

61. Ms. Ben stated that sheets are always tightly fitted on the cribs. She admitted that on October 7, 2010, an infant had been wrapped in a blanket and was not in a crib, but she maintained that the infant's face was not covered. She admitted that on January 14, 2011, an infant was swaddled and in a bouncy seat, but the infant had been fussy and was calmed by the swaddling. The child was plainly visible and could be observed. The blanket was not near the infant's face. Ms. Ben regularly reminded the staff to comply with the sleeping requirements.⁹⁶

Citations 3 and 15: Violation of Minn. Stat. § 245C.13, subd. 2: failure to provide continuous, direct supervision of a staff person pending receipt of a background study notice; violation of Minn. Stat. § 245C.20: failure to comply with background study record-keeping requirements.

62. Pending the outcome of the required background study, an employee is prohibited from "providing direct contact services to persons served by a program unless the [employee] is under continuous direct supervision."⁹⁷

63. On January 14, 2011, Ms. Mears observed a staff member, T.M., alone and unsupervised in the infant classroom.⁹⁸ Ms. Ben stated that she is always present in the Facility and supervising new employees who do not yet have a cleared background study. She did not state that she provided continuous, direct supervision.⁹⁹

64. The Facility was cited for the same violation, allowing staff to work without supervision prior to receiving a completed background study, in the Order to Forfeit a Fine.¹⁰⁰

65. The Facility also failed to document the date that the background studies for three staff persons were submitted to the commissioner.¹⁰¹

Citation 4: Minn. Stat. § 245A.02, subd. 18, and Minn. R. 9503.0045, subp. 1 A: failure to properly supervise children at all times.

66. For purposes of child care centers:

"supervision" means when a program staff person is within sight and hearing of a child at all times so that the program staff can intervene to protect the health and safety of the child. When an infant is placed in a crib room to sleep, supervision occurs when a staff person is within sight or hearing of the infant. When supervision of a crib room is provided by

⁹⁶ Test. of S. Ben.

⁹⁷ Minn. Stat. § 245C.13, subd. 2 (b)(3).

⁹⁸ Ex. 47 at 421 and 424.

⁹⁹ Test. of S. Ben; *see also* Ex. 8 at 5 (In March 2010, Ms. Bens stated that she was not aware that the infant teacher needed to be supervised until the background study was completed).

¹⁰⁰ Ex. 1 at 2-3.

¹⁰¹ Ex. 66 at 9; Ex. 41 at DHS 405; Test. of Mears.

sight or hearing, the center must have a plan to address the other supervision component.¹⁰²

67. Based on staff interviews, the Department licensing staff determined that on more than one occasion the toddlers napped on cots in the infant nap room and there was not a staff person present in that room.¹⁰³ The staff stated that no one was present in the room; Ms. Ben stated that one staff person stood outside the infant nap room and the toddler nap room during nap times when the groups were combined.

Citations 5, 6 and 7: Minn. R. 9503.0040, subps. 1, 2 D, and 3 B, and 9503.0034, subp. 1: Failure to maintain staff-to-child ratios, staff distribution requirements, and appropriate age groupings

68. Based on staff interviews on October 10, 2010, it was determined that on June 25, 2010, an aide took 12 preschool children for a walk, violating the requirement that two staff were required to meet the 1:10 staff-to-child ratio.¹⁰⁴ Also, based on discussions with staff on January 14, 2011, it was determined that a teacher worked alone in the toddler classroom with 10 to 12 toddlers and preschool children at least two days per week from November 2010 to January 14, 2011, violating the requirement the 1:7 staff-to-child ratio for toddlers.¹⁰⁵

69. When a group combines children from two age groups, the age of the youngest child in the group determines the applicable staff-to-child ratio.¹⁰⁶

70. During the interviews, staff also reported that aides sometimes worked in a class room alone, and that, on occasions, the staff-to-child ratio was exceeded or children were not properly grouped by age.¹⁰⁷

71. Violations of staff-to-child ratios and staff distribution requirements had been cited in April and July, 2009, and September and February, 2010.¹⁰⁸

72. Ms. Ben stated that a teacher and an aide always accompany children when they are on a walk, and that the staff always carry a cell phone and an emergency card.¹⁰⁹ One staff member told the licensing investigator that she had taken the children on a walk without another adult.¹¹⁰

73. Ms. Ben also stated that an aide is sometimes alone with the children. Specifically, she did not deny that an aide was alone on October 7, 2010. She admitted

¹⁰² Minn. Stat. § 245A.02, subd. 18.

¹⁰³ Ex. 41 at 406; Ex. 43 at DHS 410.

¹⁰⁴ Exs. 41 and 44.

¹⁰⁵ Ex. 47; *see also* Exs. 42-45.

¹⁰⁶ Minn. R. 9503.0040, subp. 3 B (3).

¹⁰⁷ Ex. 41-45, 47.

¹⁰⁸ Exs. 1, 60, 61, 64.

¹⁰⁹ Test. of Ben.

¹¹⁰ Ex. 44.

that age groups were blended in the morning during the drop-off time.¹¹¹ Other staff members confirmed that an aide would sometimes work in a room without a teacher present.¹¹²

74. The applicable rule subpart allows children in different age categories to be grouped together if the total arrival and departure time does not exceed 25 percent of the daily hours of operation, the group is staffed appropriately for the youngest child, and divided when the number of children present reaches the maximum group size of the youngest child present.¹¹³ The Facility did not offer evidence to show that it complied with this subpart.

75. The Facility was cited for failing to comply with correct age groupings in the Order of Conditional License.¹¹⁴

Citation 8: Minn. R. 9503.0145, subp. 7 B: failure to have each infant's feeding schedule in the food preparation area.

76. The rules require specific procedures for infant diets, and require that the infant's feeding schedule is available in the food preparation area.¹¹⁵ The Department contended that on October 7, 2010, and January 14, 2011, the schedules were not available for each infant.¹¹⁶ This violation was also included in the Order of Conditional License.¹¹⁷

77. At hearing, the Ms. Ben and a teacher, Jackie Szalicky, were clear that the infant feeding schedules were kept on clipboards, approximately six feet from the food preparation area.¹¹⁸ The Department did not rebut the testimony and did not pursue this violation in its post-hearing memorandum.

Citations 9, 10 and 11: Minn. R. 9503.0125, subps. D and G; 9503.0140, subps. 3 and 5: Failure to maintain complete records for each child.

78. A facility must have complete records for each child in care, including an initial health exam and regular reexaminations, as well as documentation of current immunizations.¹¹⁹ The facility must also assure that, at the time of enrollment, it has the names and telephone numbers of any persons authorized to take the child from the center.¹²⁰

¹¹¹ Test. of Ben.

¹¹² Ex. 41; Test. of Szalicky.

¹¹³ Minn. R. 9503.0040, subp. 3 A (1), (2) and (3).

¹¹⁴ Ex. 1 at 15-16.

¹¹⁵ Minn. R. 9503.0145, subp. 7B.

¹¹⁶ Ex. 66 at 8; Ex. 41 at DHS 405.

¹¹⁷ Ex. 1 at 15.

¹¹⁸ Test. of S. Ben; Test. of Szalicky.

¹¹⁹ Minn. R. 9503.0140, subps. 3, 4 and 5; Minn. R. 9503.0125 G.

¹²⁰ Minn. R. 9503.0125 D.

79. On October 7, 2010, several children's records were reviewed. One was missing the names and telephone numbers of persons authorized to take the child from the center, one child did not have a current immunization record, and two children did not have documentation of a current physical examination.¹²¹

80. Ms. Ben stated that each child's emergency information card was complete, but admitted that she may have been missing an immunization record and documentation of physical exams. She surmised that one child's emergency information may have been missing but would be in the sibling's file.¹²²

81. The Facility was cited for incomplete children's records in the Order of Conditional License.¹²³

Citation 12: Minn. Stat. § 245A.04, subd. 14 (c): Failure to keep program policies and procedures readily accessible to staff.

82. A facility must "keep program policies and procedures readily accessible to staff."¹²⁴

83. Three staff members were uncertain about where the policies and procedures were kept.¹²⁵ One staff member was aware of where the records were kept, but stated that she did not have access to the files, and did not have reason to access them. She stated that the emergency cards for each child were in the classrooms.¹²⁶

84. Ms. Ben was on site every day and the policies and procedures were available in the office, but when she left for the day, she locked the office. The staff had Ms. Ben's phone number and could reach her; she was rarely more than five minutes away.¹²⁷ The Facility was cited for the same violation in the Order of Conditional License.¹²⁸

Citations 13 and 14: Violation of Minn. Stat. § 245A.06, subd. 8: Failure to post Correction Orders and Conditional License; Violation of Minn. Stat. § 245A.07, subd.5: Failure to post order imposing a fine.

85. A license holder must post Correction Orders and an Order for Conditional License issued by the commissioner for two years, in a place that is conspicuous to the

¹²¹ Ex. 41 at DHS 405; Test. of Mears.

¹²² Test. of Ben.

¹²³ Ex. 1 at 15.

¹²⁴ Minn. Stat. § 245A.04, subd. 14 (c).

¹²⁵ Exs. 42, 43, 44.

¹²⁶ Test. of Szelicky.

¹²⁷ Test. of S. Ben; Test. of Szelicky; Test. of Mears.

¹²⁸ Ex. 1 at 16.

people receiving services and to visitors.¹²⁹ Similarly, an order imposing a fine must be posted for two years.¹³⁰

86. On October 7, 2011, the Correction Orders dated April 20, 2009, and February 16, 2010, were not posted, nor were they posted on January 14, 2011. The Order to Forfeit a Fine and Order of Conditional License dated September 10, 2010, was not posted on either October 7, 2010, or January 14, 2011.¹³¹

87. Ms. Ben gave inconsistent information about the required postings. She stated that the Conditional License was posted on the wall with the Correction Orders, but the pile was thick and frequently would fall off the wall. For a while, she kept Correction Orders in a binder labeled as Toddler Curriculum, but included a reference to the Correction Orders on the bottom of the cover. Ms. Ben admitted that she had taken the Order of Conditional License home so that she could read through it, and that she had also told the DHS licenser on one occasion that the Order to Forfeit a Fine and Order of Conditional License was with her attorney. When she had it, she posted it in the lobby under the Correction Orders. She also claimed that parents sometimes took down the Correction Orders, but she would replace them if they were missing.¹³² One of the teachers, Ms. Szelicky, was aware that the Correction Orders were posted in the lobby, but didn't recall many.¹³³

88. Ms. Ben removed the Order of Conditional License in June 2010, believing that she no longer had to post it, but then reviewed and re-posted it.¹³⁴

89. The Facility was cited for failing to post Correction Orders and a previous Order to Forfeit a Fine in the Order of Conditional License.¹³⁵

Citations 16 and 17: Violation of Minn. R. 9503.0140, subp. 7 D and E, and subp. 17.

90. Facilities must assure that medicines, insect repellents, sunscreen lotions, and diaper rash control products are stored in the original container and inaccessible to children. A product to control or prevent diaper rash, including remoistened commercial wipes that cannot be dispensed in a manner that prevents cross contamination of the product and container must be labeled with the child's name and used only for that child.¹³⁶ Sharp objects, medicines, plastic bags, and poisonous plants and chemicals, including household supplies, must be stored out of reach of children.¹³⁷

¹²⁹ Minn. Stat. § 245A.06, subd. 8.

¹³⁰ Minn. Stat. § 245A.07, subd. 5.

¹³¹ Ex. 66 at 9; Ex. 41 at DHS 405; Ex. 47 at DHS 424; Test. of Mears.

¹³² Test. of S. Ben; Test. of Mears.

¹³³ Test. of Szelicky.

¹³⁴ Test. of S. Ben.

¹³⁵ Ex. 1 at 13.

¹³⁶ Minn. R. 9503.0140, subp. 7 D and E.

¹³⁷ Minn. R. 9503.0140, subp. 17.

91. On October 7, 2010, one of the licensors saw diaper wipes on the shelves in both preschool bathrooms, and a bottle of bleach and water on a wire shelf in one of them, accessible to children.¹³⁸

92. Ms. Ben acknowledged that the diaper wipes were on a shelf about four feet above the floor and the bleach water was on a shelf about six feet above the floor. In her view, these were not accessible because there was always a staff person outside the bathroom near the door, and a staff member would see and be able to intervene if any child attempted to reach for either the diaper wipes or bleach water.¹³⁹

93. Ms. Szalicky stated that the kids wouldn't touch the diaper wipes and, if they reached for them, the bathroom door was never shut, and a staff member was nearby to intervene. As for the bleach water, the children weren't tall enough to reach it. Although she did not recall whether there was a stool in the bathroom, she opined that if one were there, it was not where a child could reach it.¹⁴⁰

94. The Facility was cited for a similar violation in the Correction Order dated July 21, 2009.¹⁴¹

Citation 18: Violation of Minn. R. 9503.0140, subp. 7 D; failure to label diaper rash control products with the child's first and last name.

95. As noted above, diaper rash control products must be labeled with the child's name and used only for that child.¹⁴² The Department's policy is to require both first and last names to appear on the products.¹⁴³ The Facility was cited for a similar violation, improperly labeling infant bottles, in the Order of Conditional License.¹⁴⁴

96. The Facility labeled the products with first names and only used last names when more than one child had the same first name.¹⁴⁵

Other Considerations

97. Ms. Ben admitted that she never requested or reviewed a copy of the Department's licensing rules for child care facilities, even after receiving the Order of Conditional License, but also stated that the licensing staff had not provided her with a copy. She attempted to comply with the rules, but the sheer number of rules complicated her efforts. She pointed to Exhibit 3, the Full Review Checklist for Child Care Centers, with its 26 pages of items to be checked, as support for the difficulty of meeting all of the standards.

¹³⁸ Test. of Mears; Ex. 41 at 404-405

¹³⁹ Test. of S. Ben.

¹⁴⁰ Test. of Szalicky.

¹⁴¹ Ex. 61 at 3.

¹⁴² Minn. R. 9503.0140, subp. 7 D.

¹⁴³ Test. of Mears.

¹⁴⁴ Ex. 1 at 16.

¹⁴⁵ Test. of S. Ben; Test. of Szalicky.

98. Ms. Ben stated that she now has a better understanding of the licensing rules and would comply with them.

99. Some parents offered their support for the Facility. Mike and Lisa Rademacher highly recommended Tikes n Tots because it provided “stability, structure, challenge, a wonderful learning environment, a fun place for kids to be when away from their parents, and a loving atmosphere.” They praised the meals, special events and classes, and the growth in their children’s character and self-esteem.¹⁴⁶

100. Todd and Pamela Callahan praised the Facility’s “open door policy,” and the information about meals, daily activities and nap schedules, all readily available to the parents. They specifically offered praise for Ms. Ben and Ms. Szalicky.¹⁴⁷

101. Citations to the testimony or hearing exhibits in these Findings of Fact are not inclusive all applicable evidentiary support in the record.

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

CONCLUSIONS

1. The Department and the Administrative Law Judge have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, subds. 1 and 3, 245A.08.

2. Tikes n Tots received proper and timely notice of the hearing and the Department complied with all procedural requirements of law.

3. At a hearing to impose a fine or for revocation, the burden of proof is on the Department to demonstrate reasonable cause for its action. The Department may demonstrate reasonable cause by submitting statements, reports or affidavits to substantiate the allegations. If the Department demonstrates that reasonable cause exists, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that it was in full compliance with the laws or rules that the Department alleges were violated.¹⁴⁸

Fines

4. The Commissioner may impose a fine of \$200 on a license holder for each occurrence of a violation of law or rule governing matters of health, safety or supervision, \$1000 for each determination of maltreatment, and \$100 for each violation that is not subject to a \$200 or \$1000 fine.¹⁴⁹

¹⁴⁶ Ex. 72.

¹⁴⁷ Ex. 74.

¹⁴⁸ Minn. Stat. § 245A.08, subd. 3

¹⁴⁹ Minn. Stat. § 245A.07, subd. 3 (c)(4).

5. Citation 1: The Department demonstrated that it had reasonable cause to fine the Facility \$600 for failure to provide continuous direct supervision of staff pending the outcome of a background study, in violation of Minn. Stat. § 245C.13, subd. 2, and the Facility failed to demonstrate that it was in full compliance with the statute.

6. Citation 2: The Department demonstrated that it had reasonable cause to fine the Facility \$200 for failure to maintain staff distribution requirements, in violation of Minn. R. 9503.0040, subp. 2 D, and 9503.0034, subp. 1, and the Facility failed to demonstrate that it was in full compliance with the rules.

7. Citation 3: The Department demonstrated that it had reasonable cause to fine the Facility \$200 for failure to comply with required staff-to-child ratios and maximum group size, in violation of Minn. R. 9503.0040, subp. 1, and the Facility failed to demonstrate that it was in full compliance with the rules.

8. Citation 4: The Department demonstrated that it had reasonable cause to fine the Facility \$200 for failure to maintain documentation of fire drills, in violation of Minn. R. 9503.0110, subp. 3 D and E, and subp. 4, and the Facility failed to demonstrate that it was in full compliance with the rule.

9. Citation 5: The Department failed to demonstrate that it had reasonable cause to fine the Facility \$200 for failure to properly use high chair safety straps, in violation of Minn. R. 9503.0140, subp. 17. It is not reasonable to interpret “sharp objects, medicines, plastic bags, and poisonous plants and chemicals including cleaning supplies” to include improper use of a high chair safety strap.

10. Citation 6: The Department demonstrated that it had reasonable cause to fine the Facility \$200 for failure to follow the behavior guidance policy that prohibits certain disciplinary action, in violation of Minn. R. 9503.0055, subp. 3 A, B and F, and the Facility failed to demonstrate that it was in full compliance with the rule.

11. Citation 7: The Department demonstrated that it had reasonable cause to fine the Facility \$200 for failure to properly post diaper-changing procedures, in violation of Minn. R. 9503.0140, subp. 12, and the Facility failed to demonstrate that it was in full compliance with the rule.

12. Citation 8: The Department demonstrated that it had reasonable cause to fine the Facility \$100 for failure to provide meals and snacks that meet the requirements of the USDA, in violation of Minn. R. 9503.0145, subp. 2, and the Facility failed to demonstrate that it was in full compliance with the rule.

13. Based on the violations, the Department demonstrated that a fine of \$1700 is appropriate.

Order of Revocation

14. The commissioner may suspend or revoke a license if a license holder fails to comply fully with applicable laws or rules.

15. Citation 1: The Department demonstrated that it had reasonable cause to believe that the Facility knowingly gave false or misleading information to the Commissioner concerning completion of a fire drill, in violation of Minn. Stat. § 245A.07, subd. 3 (a), and the Facility failed to demonstrate that it did not.

16. Citation 2: The Department demonstrated that it had reasonable cause to believe that the Facility fully complied with the requirement for reducing the risk of sudden infant death syndrome, in violation of Minn. Stat. § 245A.1435 (b), and the Facility failed to demonstrate that it was in full compliance with the statute. The Department failed to demonstrate that it had reasonable cause to believe that seating a child in a “boppy” or bouncy seat was in violation of Minn. R. 9503.0045, subp. 1 F, which requires the facility to have stated goals and objectives to promote the physical, intellectual, social and emotional development of a child.

17. Citation 3: The Department demonstrated that it had reasonable cause to believe that the Facility failed to provide continuous, direct supervision of a staff member pending receipt of a background study, in violation of Minn. Stat. § 245C.13, subd. 2, and the Facility failed to demonstrate that it was in full compliance with the statute.

18. Citation 4: The Department demonstrated that it had reasonable cause to believe that the Facility failed to properly supervise children at all times, in violation of Minn. Stat. § 245A.02, subd. 18, and Minn. R. 9503.0045, subp. 1 A, and the Facility failed to demonstrate that it was full compliance with the statute and rule.

19. Citation 5: The Department demonstrated that it had reasonable cause to believe that the Facility failed to comply with the required staff-to-child ratios, in violation of Minn. R. 9503.0040, subp. 1, and the Facility failed to demonstrate that it was in full compliance with the rule.

20. Citation 6: The Department demonstrated that it had reasonable cause to believe that the Facility failed to comply with required staff distribution requirements, in violation of Minn. R. 9503.0040, subp. 2 D, and the Facility failed to demonstrate that it was in full compliance with the rule. The Department failed to demonstrate that the Facility’s failure to comply with the required staff distribution requirements violated Minn. R. 9503.0034, subp. 1, since there was no evidence that there were aides under age 18 who were not directly supervised, and no evidence that there were aides age 18 or over who were not under the supervision of a teacher or assistant teacher.

21. Citation 7: The Department demonstrated that it had reasonable cause to believe that the Facility failed to properly group children by age, in violation of Minn. R. 9503.0040, subp. 3 B (1), and the Facility failed to demonstrate that it was in full compliance with the rule.

22. Citation 8: The Department demonstrated that it had reasonable cause to believe that the Facility failed to provide each infant’s feeding schedule in the food

preparation area, in violation of Minn. R. 9503.0145, subp. 7 B, but the Facility demonstrated that it was in full compliance with the rule.

23. Citation 9: The Department demonstrated that it had reasonable cause to believe that the Facility failed to assure that each child's records contained required information about the names and telephone numbers of persons authorized to take the child from the child care center, in violation of Minn. R.9503.0125 D, and the Facility failed to demonstrate that it was in full compliance with the rule.

24. Citation 10: The Department demonstrated that it had reasonable cause to believe that the Facility failed to assure that each child's records included documentation of a current immunization record, in violation of Minn. R. 9503.0125 G and 9503.0140, subp. 5, and the Facility failed to demonstrate that it was in full compliance with the rules.

25. Citation 11: The Department demonstrated that it had reasonable cause to believe that the Facility failed to assure that each child's records included documentation of a current physical examination, in violation of Minn. R. 9503.0125 G, and 9503.0140, subp. 3, and the Facility failed to demonstrate that it was in full compliance with the rules.

26. Citation 12: The Department demonstrated that it had reasonable cause to believe that the Facility failed to keep program policies and procedures readily accessible to staff, in violation of Minn. Stat. § 245A.04, subd. 14 (c), and the Facility failed to demonstrate that it was in full compliance with the statute.

27. Citation 13: The Department demonstrated that it had reasonable cause to believe that the Facility failed to conspicuously post Correction Orders for two years, in violation of Minn. Stat. § 245A.06, subd. 8, and the Facility failed to demonstrate that it was in full compliance with the statute.

28. Citation 14: The Department demonstrated that it had reasonable cause to believe that the Facility failed to conspicuously post an Order to Forfeit a Fine and Order of Conditional License, in violation of Minn. Stat. § 245A. 07, subd. 5, and the Facility failed to demonstrate that it was in full compliance with the statute.

29. Citation 15: The Department demonstrated that it had reasonable cause to believe that the Facility failed to document the date that background studies for three staff persons were submitted to the commissioner of human services, in violation of Minn. Stat. § 245C.20, and the Facility failed to demonstrate that it was in full compliance with the statute.

30. Citation 16: The Department demonstrated that it had reasonable cause to believe that the Facility failed to store diaper wipes so that they were inaccessible to children, in violation of Minn. R. 9503.0140, subp. 7 E, and the Facility failed to demonstrate that it was in full compliance with the rule.

31. Citation 17: The Department demonstrated that it had reasonable cause to believe that the Facility failed to store a bottle of bleach water so that it was inaccessible to children, in violation of Minn. R. 9503.0140, subp. 17, and the Facility failed to demonstrate that it was in full compliance with the rule.

32. Citation 18: The Department failed to demonstrate that it had reasonable cause to believe that the Facility failed to properly label products to control diaper rash, in violation of Minn. R. 9503.0140, subp. 7 D.

33. Tikes n Tots failed to demonstrate that it fully complied with the statutes and rules governing its license. Several of the Facility's violations were repeated violations.

34. In determining the appropriate licensing sanction, 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."¹⁵⁰

35. Before revoking a license, the commissioner "shall consider 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...license holder."¹⁵¹

36. The Department demonstrated that Tikes n Tots' license to provide child care should be revoked, based on the nature, chronicity and severity of its violations of law and rule and the effect of the violations on the health, safety, or rights of the children served by the program.

37. Any Findings of Fact more properly designated as Conclusions are hereby adopted as such.

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

RECOMMENDATION

The Administrative Law Judge recommends that:

1. The fine of \$200 for violation of Minn. R. 9503.0140, subp. 17, regarding proper use of high chair safety straps, be RESCINDED;

2. The fines of \$1700 for the remaining violations included in the Order to Forfeit a Fine be AFFIRMED;

¹⁵⁰ Minn. Stat. § 245A.07, subd. 1.

¹⁵¹ Minn. Stat. § 245A.04, subd. 6 and the Facility failed to demonstrate that it was full compliance with the rule.

3. Tikes n Tots' license to provide child care be REVOKED.

Dated: April 9, 2012

s/Beverly Jones Heydinger

Beverly Jones Heydinger
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. 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. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul, MN 55164-0998, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

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 Administrative Law Judge of the date the record closes. 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.

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

Admission of Hearsay

The Facility objected to the admission of the exhibits that were notes recorded by the licensing workers during interviews of Facility staff, except for Ms. Ben and Ms. Szalicky, on the basis that they were hearsay.¹⁵²

¹⁵² Exs. 7, 9, 14, 17, 20, 21, 23, 24, 26, 27, 42, 43, 44, 50, 53, 54, and 57.

The rules of the Office of Administrative Hearings, specifically Minn. R. 1400.7300, allow hearsay evidence to be admitted:

The judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.

The Facility's objection was overruled and the notes were accepted because the licensing staff who recorded the notes were available for cross-examination, and the notes were contemporaneously recorded as part of their normal practice when conducting licensing visits and investigations. However, none of the violations were based solely on the interview notes. The notes were examined for consistency with what the licensing staff observed, for their similarity to each other, and for similarity to the statements made by Ms. Szalicky and Ms. Ben, who testified on the Facility's behalf. In particular, the statements were noteworthy for their consistency concerning some of the more significant violations, including the Facility's practice of allowing aides to work alone in a room, moving children to a lower age group in order to meet ratios, and the widespread lack of knowledge about where the Facility procedures were kept.

The Facility most strenuously objected to the statements made by Holly Bongert, who it claimed was a discontented, intemperate former employee. Ms. Bongert's statements were given little weight.

For many other violations, the dispute was not about the facts but about the application and interpretation of the Department's rules. Because the findings of fact fully explain many of the conclusions, the discussion below will focus only on the violations that required interpretation of the rule or statute or required weighing conflicting evidence.

False or misleading information concerning completion of a fire drill

On October 7, 2010, the Department licensing staff interviewed two staff about the fire drill that was logged for October 5, 2010. One staff member worked with infants; the other with preschool children at the time of the reported fire drill; both denied any knowledge of the drill. Ms. Ben's defense was that the infants were not included in the fire drill because they were sleeping, which was consistent with the note on the fire drill log, referencing just the toddlers and preschoolers. The explanation was not supported by a preponderance of the evidence. The staff member working with the infants would have noticed the toddlers filing out, since the entrance to the toddler room was directly across the hall from the infant room.¹⁵³ All staff stated that the doors were left open during naps. Casting further doubt on Ms. Ben's explanation, one of the staff who denied that the drill occurred was a preschool teacher. No staff member testified in support of Ms. Ben's explanation.

¹⁵³ See Ex. 80.

Staffing violations

Ms. Ben did not directly deny that she had failed to meet the Department's staffing requirements. She seemed to confuse staff ratios with staff distribution. Several staff reported that aides were alone in rooms without a teacher and that Ms. Ben would check in periodically. Ms. Ben believed that aides over 18 did not require supervision at all times. However, she did not seem to comprehend that a teacher must be the first person assigned to meet the staff ratio for each age group; that both the staffing ratio and the staff level requirements must be met. At hearing, she stated that she was prepared to comply with the rule going forward and was staffed with five teachers and two aides.

The statements of the staff also supported the licensors' observations and conclusions that age groups were often combined but the staffing for the combined group did not meet the ratio for the youngest child in the group, as the rule requires.

Ms. Ben admitted that she did not consistently supervise employees while their background studies were pending, but she attempted to minimize the risk by claiming that an approved supervisor was always in the Facility and there are windows into all of the classrooms.

Ms. Ben denied that children were ever left alone when napping, but also admitted that there was "usually" an aide in the room, and the door was always open.

Use of aides

The Department contended that all aides, regardless of age, must be under the direct supervision of a teacher or assistant teacher at all times. The applicable rule does not support the Department's claimed violation.¹⁵⁴ The rule states that aides under 18 years old must be "directly supervised by a teacher or assistant teacher at all times," with certain exceptions. In contrast, an aide is a "staff person who carries out child care program activities under the supervision of a teacher or assistant teacher." In order to give meaning to the full language of the rule, it must be interpreted to allow less than direct supervision at all times for aides who are 18 years of age or older. The Department's interpretation renders the age distinction meaningless. Its interpretation would also lead to the conclusion that an aide required more supervision than a volunteer, which is also an illogical conclusion.¹⁵⁵ Nonetheless, a teacher must be the first staff person assigned to each age group; the supervision requirement should not be confused with the staff distribution requirement.

Labeling of Individual Products

The Department's rule requires that a product to control or prevent diaper rash, including premoistened commercial wipes, must be labeled with the child's name.¹⁵⁶

¹⁵⁴ Minn. R. 9503.0034, subp. 1.

¹⁵⁵ *Id.*, compare subp. 1 and subp. 2.

¹⁵⁶ Minn. R. 9503.0140, subp. 7 D.

The Department acknowledged that the products were labeled with the child's first name, but it interpreted the rule to require labeling with both the child's first and last name. The Facility credibly stated that it used last names or initials if necessary, but that there was no confusion caused by use of first names on the label. The Department offered no evidence that there were two products labeled with the same first name for different children, and its interpretation is a hyper-technical interpretation of the rule that does not increase the health or safety of the children in care.

Access to Diaper Wipes and Bleach Water

The Department's rule requires that diaper wipes and chemicals, including household cleaners, must be stored where they are inaccessible to children. The Facility acknowledged that in the preschool bathroom, diaper wipes were on a shelf four feet above the floor and the bleach water was on a shelf about six feet above the floor. Ms. Ben and Ms. Szalicky did not believe that the shelves were accessible to children because the bathroom doors were always open and the children were not in the bathrooms without supervision. Also, none of the children were tall enough to reach the six-foot shelf.

The Department's rule clearly states that the listed items should not be accessible, regardless of whether the children are typically supervised. One can safely assume that a staff member who saw a child reach for one of the items would intervene; the purpose of the rule is to store the items where access is not possible. For preschool children, the ratio of adults to children is 1 to 10; for school-age children it is 1 to 15. It is not realistic to assume that every child, including preschool and school-age children, is under visual observation at every moment.

Ms. Ben's credibility

Ms. Ben testified about many of the violations. She admitted that she had failed to consistently comply with several of the rule provisions, including allowing aides to work with a group without a teacher present, failing to conduct fire drills, and missing required records for some children. She denied other violations. Her denials were not entirely credible because, overall, she demonstrated a lack of knowledge about the details of the licensing rules and she failed to offer evidence that might have supported her position. For example, she claimed that she had conducted a fire drill on October 5, 2010, but she did not call any staff member who could attest to participating. Two staff members, including a preschool teacher, denied that there had been a fire drill. Ms. Ben also stated that she had videotapes of the activity in the Facility, but she did not offer the videotapes to substantiate that the fire drill occurred, even though the licensing staff questioned her just two days later.

In weighing the evidence of other violations, where the only evidence was Ms. Ben's own denial, it did not carry sufficient weight to outweigh the observations and contemporaneous notes of the licensing staff. For example, although she claimed that she had diaper-changing procedures posted, her failure to offer any evidence except her own testimony was unconvincing. Although she claimed that aides in the infant

room were within her sight or hearing when she was in the kitchen, the Facility's floor plan is such that the claim is not credible.

Ms. Ben's haphazard compliance with the rules that require documentation in the children's records and dates that background studies were submitted, as well as her admission that she was sometimes out of compliance with the staffing requirements and other rules, was also considered.

Thus, overall, when Ms. Ben's denial was the only evidence, it was not sufficient to prove that she was in full compliance with the statute or rule.

Revocation Is Warranted

The "nature, chronicity and severity" of the rule violations are sufficient to support the Department's Order of Revocation. The Correction Orders and the Order to Forfeit a Fine and Order of Conditional License were sufficiently detailed to put the Facility on notice that there were numerous violations that needed to be addressed. The staffing requirements are especially important to assure that sufficient qualified staff is working at all times to provide for the health, safety and development of the children in care. If Ms. Ben felt that the rules were not clear or too numerous, the burden was on her to get the help that she needed to fully comply. Given the number of violations and the period over which they occurred, she had ample opportunity to do so.

This is not to suggest that Ms. Ben does not care for children or attempt to provide a loving environment for them. However, when one undertakes to open a licensed child care facility, the rules must be followed. Her failure to do so led to a series of successively more serious penalties, culminating in the revocation. Although she may view some of the rules as "picky," the staffing violations were many and serious.

B.J.H.