

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Temporary
Immediate Suspension of the Family
Child Care License of Mary L.
Anderson To Provide Family Day Care
under Minn. R. pts. 9502.0300 to
9502.0445

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on September 20, 2011, at the Wright County Human Services Building, 1004 Commercial Drive, Buffalo, Minnesota 55313. The OAH record closed on September 20, 2011, at the end of the hearing.

Anne L. Mohaupt, Assistant Wright County Attorney, appeared on behalf of Wright County Health and Human Services Agency (the County) and the Minnesota Department of Human Services (the Department). Stephen R. Conroy, Conroy Law Office, Ltd., appeared on behalf of Mary Anderson (Licensee).

STATEMENT OF THE ISSUE

Has the Department established that there is reasonable cause to believe that a failure by Licensee to comply with applicable law or rule, the actions of Licensee or other individuals, or conditions in the program, poses an imminent risk of harm to the health, safety or rights of children served by Licensee?

The Administrative Law Judge concludes that there is not reasonable cause to believe that children in Licensee's care are at imminent risk of harm.

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

FINDINGS OF FACT

1. Until August 31, 2011, Licensee operated a daycare center in a residential home in Monticello, Minnesota.¹ Ms. Anderson's license allows her to provide care for up to 12 children at any one time.²

¹ Testimony of Mary L. Anderson; Exhibit 5, Order of Temporary Immediate Suspension.

² Test. of M. Anderson and Kathy DeMars, Case Aide and licenser for Wright County Human Services Agency (the "County").

Licensee's History & General Program Conditions

2. Licensee provided licensed family child care for 24 years in her residence in Anoka County. She has provided licensed family child care in the Monticello home (the "home") since June of 2000.³

3. Licensee has had no licensing sanctions of any kind in the 34 years she has been a family child care provider until the current temporary immediate suspension of her license.⁴

4. There was one previous complaint about an inoperable child gate that was remedied.⁵

5. The home where Licensee provides family child care is recent construction and is devoted exclusively to providing licensed child care. Licensee resides elsewhere.⁶

6. The home property backyard contains an elaborate swing set/fort/slide "Jungle Jim" type unit and is surrounded by an enclosed chain-link fence.⁷ The kitchen is modern, immaculate and contains all necessary appliances.⁸ The dining area next to the kitchen contains two tables, each with four chairs, together with four high chairs.⁹

7. There is at least one bathroom, immaculate, devoted exclusively for the children.¹⁰ One bedroom is a designated napping room that contains four toddler beds and one crib.¹¹ Another bedroom designated for infants contains two cribs.¹²

8. The home has three rooms devoted to play and activities.¹³ One of those rooms is devoted to structured play and houses an extraordinary amount of children's toys and materials for activities.¹⁴ Another room contains more toys, a television and a couch for watching the television.¹⁵

9. Licensee is attentive to the children in her care. They are well cared for.¹⁶ Licensee's child care program is organized and highly structured with consistent routines.¹⁷ Licensee keeps the children busy and happy all day. Parents, many being

³ Test. M. Anderson.

⁴ *Id.*; Exs. 8 and 9.

⁵ *Id.*; Exs. 1 and 12.

⁶ Test. of M. Anderson; Exs. 6-16.

⁷ *Id.*; Ex. 7.

⁸ Ex. 13.

⁹ Ex. 16..

¹⁰ Ex. 13A; Test. of M. Anderson.

¹¹ Exs. 10 and 11; Test. of M. Anderson.

¹² Ex. 12; Test. of M. Anderson.

¹³ Exs. 6, 14 and 15.

¹⁴ Ex. 6; Test. of M. Anderson.

¹⁵ Ex. 15.

¹⁶ Test. of Annette Doeblor, Joshua Iaquinto, K. DeMars; Exs. 18 - 20, 21 - 33.

¹⁷ Test. of Annette Doeblor, Mark Thompson, Jenna Dechaine, L. Hughes; Ex. 21, 28, 29, 31, 32.

on flexible schedules, often drop in unannounced and always find all children happy, engaged and well behaved as a matter of course.¹⁸

10. The food prepared and served to the children by Licensee is above average and popular with the children to the extent that some children critique what is fed them by their parents, with Licensee's recipes being preferred.¹⁹

Licensed Capacity

11. Because of the high quality of care delivered to children by Licensee, her program is popular and nearly always is running at licensed capacity.²⁰ Families are placed on waiting lists because of a high demand and there are often no openings for their children.²¹

12. Licensee works from a detailed weekly schedule that lists what days and hours children will be attending her program.²² Seventy percent of Licensee's day care children attend part time on varying schedules.²³ Thirty percent of Licensee's day care children attend full time, Monday through Friday.²⁴ In 2010 Licensee cared for 34 different children at different times.²⁵

13. Parents wanting to drop their child or children off outside of the schedule have always been routinely told that by Licensee that she cannot accept their child(ren) because to do so would put her over licensed capacity.²⁶ Sometimes children are turned away more often than they are allowed to attend.²⁷

14. The children of one of Licensee's families entered school in the fall of 2010 and no longer needed day care.²⁸ This allowed the children of another family to enroll in Licensee's day care program.²⁹

15. In November 2010, Licensee was considered renting the basement of the home to an individual that has an eight-year-old child. She inquired of the County whether or not doing so would affect her licensed capacity. The County advised Licensee that the renter's child would be counted in the licensed capacity if the child was ever present during day care hours. The County explained to Licensee that she

¹⁸ *Id.*; Test. of Laura Hughes, Beth Oelkers.

¹⁹ Test. of M. Thompson; Exs. 28, 32.

²⁰ Test. of M. Anderson.

²¹ Test. of Kate Dietel, L. Hughes.

²² Test. of M. Anderson.

²³ Ex. 3.; Test. of M. Anderson.

²⁴ *Id.*

²⁵ Ex. 3.

²⁶ Test. of A. Doeblner, L. Hughes, B. Oelkers, M. Anderson; Exs. 17, 18, 21, 31.

²⁷ Test. of A. Doeblner.

²⁸ Ex. 28.

²⁹ Ex. 21.

could apply for a variance from the Department for such a situation. Licensee declined to rent the basement to that individual.³⁰

16. Licensee uses a scheduling chart to be sure she is within her licensed capacity.³¹

August 18, 2011 Licensing Complaint and Unannounced Licensing Visit

17. On August 18, 2011 the County received a complaint that Licensee may be over her licensed capacity because of the number of children listed on Licensee's Fall Enrollment 2011 list that was given to day care parents.³²

18. On August 18, 2011 the County made an unannounced licensing visit. Licensee was not over her licensed capacity. The licensor cited the Licensee for five alleged licensing violations:

- a. A fire extinguisher that needed servicing;
- b. Emergency numbers that were not posted properly;
- c. Combustibles that were located on a furnace vent;
- d. A crib safety checklist was out of date; and
- e. A child was napping on the floor without bedding.³³

August 31, 2011 Licensing Visit

19. On August 31, 2011 Licensee had 12 children scheduled to be in care in the morning. None were infants.³⁴

20. On August 31, 2011 Licensee's daughter had scheduled to care for three of Licensee's grandchildren and another part-time day care child in her home when she was unexpectedly required to go in to her work in the first part of the morning.³⁵ Licensee's daughter asked and Licensee agreed to care for the four children until 11:00 a.m. when the daughter would return from work and collect the four children and return to her home.³⁶

³⁰ Test. of K. Demars.

³¹ *Id.*; Test. of M. Anderson.

³² Exs. 1 and 2.

³³ Ex. 4.

³⁴ Test. of M. Anderson; Ex. 1.

³⁵ Test. of J. Dechaine.

³⁶ *Id.*; Test. of M. Anderson.

21. Licensee knew she was over her licensed capacity by four children.³⁷ The 16 children consisted of four toddlers, six pre-school and eight school age children.³⁸

22. By 9:45 a.m. all of the children had been fed, toileted, and the toddlers diapered. Some of the children were doing puzzles or playing in a playroom. Some of the older girls were playing "house" in a bedroom. Licensee knew where all of the children were and what they were doing.³⁹

23. At 9:45 a.m. a County licensor arrived at the home and advised Licensee that the County had received a complaint and that she needed to count the number of children in care. Licensee observed her grandchildren scatter and disappear because they were afraid after they overheard the County licensor, whom they call Licensee's "boss." Licensee did not suggest that they do so.⁴⁰

24. The licensor counted twelve children and went to look in the bedroom closets.⁴¹ Licensee went to search for her grandsons and found them in a bedroom closet and told them that they couldn't hide.⁴² The County licensor found Licensee's nine-year old granddaughter in the closet of another bedroom.⁴³

25. The County licensor advised Licensee that she was returning to her office to discuss the situation with a licensing team and that Licensee should wait until she returned in 30 minutes.⁴⁴

26. Licensee's daughter returned between 11:00 and 11:30 a.m., and collected the three grandchildren and the other child as planned.⁴⁵

27. The morning of August 31, 2011, is the only time Licensee has been over her licensed capacity.⁴⁶

28. At 5:30 p.m., the County investigator and the County licensor returned to the home and hand-delivered to Licensee the Order of Temporary Immediate Suspension of her family child care license.⁴⁷

29. Also at 5:30 p.m., one parent was there picking up her three children. The parent was told by one of the County employees, who did not identify who she was or why she was there, that she couldn't leave until she talked to her. The parent took her children outside to put them in their car seats when the other County employee asked

³⁷ Test. of M. Anderson.

³⁸ Ex. 1.

³⁹ Test. of M. Anderson.

⁴⁰ *Id.*

⁴¹ Ex. 1.

⁴² Test. of M. Anderson.

⁴³ Ex. 1.

⁴⁴ *Id.*; Test. of M. Anderson.

⁴⁵ Test. of M. Anderson and J. Dechaine.

⁴⁶ Test. of M. Anderson.

⁴⁷ *Id.*

her if she had received her letter. The parent inquired what was going on and the County employee handed her a letter that stated that “Mary Larson” was receiving a license suspension.⁴⁸

30. The parent was further advised by one of the County employees that she would be criminally charged with a misdemeanor if she returned her children to Licensee’s care.⁴⁹

31. As the County licensors were heading for their cars, another parent arrived with his two children to attempt to drop them off, unannounced.⁵⁰ He was also given a letter advising him that “Mary Larson” was receiving a license suspension. He was further advised by one of the County employees that he would be criminally charged with a misdemeanor if he returned his children to Licensee’s care.⁵¹

Parent Confidence in Licensee’s Program Conditions and the Safety of Their Children in Licensee’s Care

32. Licensee has the confidence and unconditional support of over a dozen current day care parents, as well as former day care parents. They universally believe that Licensee is a kind, loving, caring, organized and exceptionally skilled family child care provider.⁵² These parents, knowing that Licensee was over capacity on August 31, 2011, have no concerns for the safety of children while in Licensee’s care.⁵³ The parents are anxious to return their children to Licensee’s care.⁵⁴

33. Licensee admitted her mistake, is committed not to go over licensed capacity again, and is willing to operate under a conditional license, if necessary.⁵⁵

Procedural Findings

34. On August 31, 2011, the County sent the Department a letter recommending a temporary immediate suspension of Licensee’s license.⁵⁶

35. On August 31, 2011, the Department issued Licensee an Order of Temporary Immediate Suspension (TIS).⁵⁷

⁴⁸ Ex. 21.

⁴⁹ *Id.*

⁵⁰ *Id.*; Ex. 1; Test of M. Anderson.

⁵¹ Ex. 21.

⁵² Test. of J. Dechaine, K. Dietel, A. Doebler, L. Hughes, J. Iaquinto, B. Oelkers, G. Thompson, M. Thompson; Exs. 17-33.

⁵³ Test. of G. Thompson; Exs. 21, 28, 29, 31, 32, 33,

⁵⁴ Test. of J. Dechaine, K. Dietel, A. Doebler, L. Hughes, J. Iaquinto, B. Oelkers, G. Thompson, M. Thompson; Exs. 17- 19, 21, 25, 28-33.

⁵⁵ Test. of M. Anderson.

⁵⁶ Ex. 4.

⁵⁷ Ex. 5.

36. Following a timely appeal of the TIS by Licensee, on September 6, 2011, the Department issued a Notice of and Order for Hearing, scheduling a contested case hearing for September 20, 2011.⁵⁸

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have authority to consider and rule on the issues in this contested case proceeding pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper and timely notice of the hearing and has fulfilled all procedural requirements of law and rule.

3. The purpose of family child care licensure statutes and rules is to ensure that minimum levels of care and service are given and to protect the care, health and safety of children.⁵⁹

Temporary Immediate Suspension Standards and Reasonable Cause

4. Minn. Stat. § 245A.07, subd. 2. provides, in applicable part:

If the license holder's actions . . . 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.

5. In order to maintain a temporary immediate suspension under Minn. Stat. § 245A.07, subd. 2, the Department must show that reasonable cause exists to believe that Licensee's failure to comply with applicable law or rule or the actions of other individuals, poses a current imminent risk of harm to the health, safety, or rights of persons served by her.

6. "Reasonable cause" for the purpose of a temporary immediate suspension 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.⁶⁰

⁵⁸ Notice and Order for Hearing.

⁵⁹ Minn. Stat. § 245A.07, subd. 1; Minn. R. 9502.0325.

⁶⁰ *Id.*

Family Child Care Law and Rules Alleged to Have Been Violated

7. Minn. R. 9502.0365 regarding licensed capacity, child/adult ratios and age distribution restrictions provides in relevant part:

Subpart 1. **Capacity limits.** Family day care and group family day care providers shall comply with part 9502.0367, which limits the total number of children and the number of preschoolers, toddlers, and infants who may be in care at any one time, and provides for the number of adults who are required to be present.

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

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

8. Minn. R. 9502.0367 regarding child/adult ratios and age distribution restrictions provides that a C(2) Group Family Day Care license permits one adult to have 12 total children, only 10 of whom may be under school age, and of the total children under school age, a combined total of no more than 2 shall be infants and toddlers.

9. Licensee was over capacity by two toddlers and two school age children the morning of August 31, 2011, and therefore was in violation of Minn. R. 9502.0365 and Minn. R. 9502.0367 during that time.

10. There are no articulable facts or circumstances that would provide a reasonable, prudent person with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of children served by Licensee.

11. The Department has therefore failed to demonstrate reasonable cause to believe that there is a risk of imminent harm to the health or safety of children served by the Licensee.

12. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

13. The bases and reasons for these Conclusions are those expressed in the Memorandum that follows, and the Administrative Law Judge incorporates that Memorandum into these Conclusions.

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

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: the Order of Temporary Immediate Suspension suspending the family child care license of Licensee be RESCINDED.

Dated: October 3, 2011

s/M. Kevin Snell

M. KEVIN SNELL
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 her final decision. Parties should contact Lucinda Jesson, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, (651) 296-2701, St. Paul, MN 55101, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Burden of Proof

At this stage, the County, on behalf of the Department, must demonstrate the existence of circumstances sufficient to warrant a cautious person to reasonably suspect that the Licensee poses an imminent risk of harm to the health, safety or rights of persons in the Licensee's care. This is a modest standard, intended to insure that vulnerable children are protected until there can be a full hearing and final determination on the underlying circumstances.

Permitted Evidence

During an expedited hearing regarding a temporary immediate suspension, the Department must present reliable oral testimony and/or reliable documentary evidence

in support of a finding of reasonable cause. The Department and the Administrative Law Judge are entitled to rely on reliable hearsay evidence linking the license holder to an act that puts children at risk of imminent harm. The Department relied principally on hearsay evidence contained in a County report. The Department called one witness. At this stage of the process, the Administrative Law Judge's task is to determine whether there is enough reliable evidence to maintain the suspension.

Necessity of "Imminent Risk of Harm"

The Department argues that one instance of over capacity alone indicates a continuing imminent risk of harm. Such a conclusion has no legal or factual basis. At a minimum, "imminent harm" means harm that is impending or about to occur,⁶¹ or ready to take place.⁶² This is not a case involving a Licensee with a long history of chronic or serious violations. There are no specific articulable facts or circumstances which could provide a cautious and prudent person with a reasonable suspicion that there is an imminent risk of harm in this matter.

As serious as the Licensee's single lapse in judgment was in agreeing to care for her grandchildren one time for a couple of hours, this evidence alone, without more, is not sufficient to establish reasonable cause to continue the temporary immediate suspension. As detailed below, there are insufficient articulable facts to warrant a cautious person to reasonably suspect that Licensee or the conditions of the day care home present a current risk of imminent harm to children in her care.

Analysis of Disputed Factual Evidence

There were only are only two factual issues with conflicting evidence. The Department's evidence was hearsay contained in the County investigator's initial report,⁶³ unsupported by affidavit or sworn testimony. The report was relied upon by the Department in issuing the TIS and suggested two things that did not hold up under the scrutiny of the hearing.

First, the report indicates that Licensee denied to the County licenser that she was over capacity. Second, the report indicates that Licensee prompted her grandchildren to hide.

However, the Licensee testified that she did not do so and did not attempt to mislead the investigator.⁶⁴ The Administrative Law Judge concludes that the hearsay listed in the report, disputed under oath by the declarant, is unreliable. Balanced against the credible testimony of the Licensee, the alleged prior inconsistent statements are not the type of evidence that reasonable, prudent persons are accustomed to rely on in the conduct of their serious affairs.⁶⁵ Those allegations were given little weight.

⁶¹ See, American Heritage College Dictionary (3d ed.).

⁶² See, Merriam-Webster Online Dictionary.

⁶³ Ex. 1.

⁶⁴ Findings 21 and 33.

⁶⁵ Minn. R. 1400.8607, subp. 1.

This conclusion was reached, in part, because the investigator who drafted the report was present at the hearing and did not testify to contradict the sworn testimony of the Licensee.

Analysis of the Undisputed Facts in Evidence

First, there is no evidence in the record that Licensee has been over capacity at any time other than the one time on August 31, 2011. Nor is there any evidence in the record to suggest that Licensee will go over her licensed capacity in the future.

Second, Licensee admitted she was over capacity. She has given assurances that it will not happen again.⁶⁶

Third, the evidence from day care parents and former day care parents, all who have extensive knowledge about Licensee and the daycare she provides, describe Licensee in terms that are, although different and unique, superlative and glowing. The fact that these parents believe Licensee provides a safe and loving environment for their children militates against a conclusion that a reasonable person could suspect that Licensee presents a risk of harm to children. The Minnesota Court of Appeals has determined that such evidence is relevant and desirable in TIS cases.⁶⁷

Fourth, the evidence submitted by the Department does not demonstrate that children in Licensee's care would be at imminent risk of harm if she were permitted to resume the operation of her family child care business while the Commissioner decides what final sanction would be appropriate for the single over capacity violation.

Conclusion

The reliable evidence in the record regarding the situations before August 31, 2011, on August 31, 2011, and now, including Licensee's re-commitment to always remain at or below her licensed capacity, all combine to rise to the level where the Administrative Law Judge is convinced that there is no imminent risk of harm to the health, safety, or rights of the children served by her. The purpose of family child care licensure statutes and rules (to ensure that minimum levels of care and service are given and to protect the health and safety of children)⁶⁸ is well served by Licensee. The evidence in the record suggests that Licensee provides well beyond the minimum levels of care and service.

Although Licensee appropriately awaits the imposition of an appropriate sanction for her admitted violation of the rules on licensed capacity, the ALJ finds that a suspicion of an imminent risk of harm is not present at this time and respectfully suggests to the Commissioner that the TIS be immediately rescinded.

M. K. S.

⁶⁶ Finding 33.

⁶⁷ *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

⁶⁸ Conclusion 3.