

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 Tina and Michael
Jay 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 October 26, 2011, at the Morrison County Government Center, 213 First Avenue S.E., Little Falls, Minnesota 55345. The OAH record closed on October 26, 2011, at the end of the hearing.

Brian Middendorf, Esq., Morrison County Attorney, appeared on behalf of Crow Wing County Social Services (the County) and the Minnesota Department of Human Services (the Department). Patricia A. Aanes, Esq., Erickson & Aanes Law Offices, PLLC, appeared on behalf of Tina and Michael Jay (Licensees).

STATEMENT OF THE ISSUE

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

The Administrative Law Judge concludes that there is not reasonable cause to believe that children in Licensees' 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 September 28, 2011, Licensees operated a family daycare center attached to their residential home in Brainerd, Minnesota.¹
2. Licensees have provided licensed family child care for over 31 years, beginning in 1980 in Iowa and have been continually licensed in Minnesota since 1990.²

¹ Testimony of Tina Jay and Gail Miller, Morrison County Social Worker; Order of Temporary Immediate Suspension.

3. Licensees live in their home with two teenage daughters, 15 and 17 years old.³ Until August 16, 2011, Licensees' 18-year-old son, Tyler Jay, also lived in the Licensees' residence. Tyler Jay has never been a caregiver and had rarely interacted with day care children. Tyler suffers from Fetal Alcohol Syndrome, ADHD, and reactive attachment disorder. He is a senior in high school who intends to join the United States military upon graduation.⁴

4. Tyler Jay has resided with his adult brother Cory and his partner since August 16, 2011. Mr. Cory Jay and his partner have no children.⁵

5. Licensees have a total of nine children, seven of which are adults ranging in age from 33 to 18. Their four youngest children, all siblings, were initially foster children in their care and were adopted in 1991. Licensee Michael Jay discovered the four adopted siblings, as they were living in a car parked behind a strip club. They were surviving by eating garbage and feces. Witnesses described them as close to being feral children at the time they became Licensees' foster children.⁶

Licensees' Licensing History

6. Licensees have had no licensing sanctions of any kind in the years they have been child care and foster care providers until the current temporary immediate suspension of their family child care license.⁷

7. Licensees have also been licensed to provide child foster care since 1995 and have provided child foster care services to over 220 children.⁸

8. Licensees have cared for many children with special needs and many children that had been previously abused.⁹

9. One of the current special needs children that Licensees care for is a five-year-old girl who has epilepsy. Licensees and their two adult staff are trained and know exactly what to do in emergency situations involving epileptic children. Other day care programs in the area do not have the necessary training. Since the TIS, the child has been having seizures more frequently because her usual routine has been disrupted.¹⁰

10. Licensees care for another special needs child, a four-year-old girl with learning and developmental challenges. Prior to the TIS, she had been "thriving" in

² Test. T. Jay.

³ *Id.*; Test. of G. Miller, Jessica Sieling, Shaylea Obeidzinski, M. Jay, Marie Jay, and Cory Jay.

⁴ Test. of J. Sieling, Marie Jay, T. Jay and M. Jay.

⁵ Test. of G. Miller, Jessica Sieling, Shaylea Obeidzinski, T. Jay, M. Jay, Marie Jay, and Cory Jay.

⁶ Test. of M. Jay and T. Jay.

⁷ *Id.*

⁸ *Id.*; Test. of Mark Barta, Crow Wing County Child Protection Social Worker.

⁹ Test. of M. Jay.

¹⁰ Test. of M.J., mother of the child.

Licensees' care. Her prior day care in Brainerd was unwilling to work with her and help her develop.¹¹

11. Licensees care for a three-year-old girl with unique food allergies. She requires immediate access to epinephrine in case of emergencies. Licensees and their staff are careful to consult with her parents on all food provided to her. Licensees also care for her brother.¹²

Licensees Child Care and Preschool Programs

12. Licensees employ two qualified adult substitute caregivers. One of the Licensees, Michael Jay, cares for children full time together with one of the two adult substitute caregivers, and, when needed and available, Licensee Tina Jay. Licensees always have one adult caregiver in excess of the licensing minimums.¹³

13. As part of Licensees' program, policy and procedure documents are given to all parents. Licensees provide each parent with a child abuse reporting form, signed by each parent and a licensee, that provides the contact numbers for Crow Wing County Social Services Intake (for reporting suspected child maltreatment), Crow Wing County Social Services Child Care Licensing, the Minnesota Department of Human Services, Licensing Division, and contact information for local law enforcement.¹⁴

14. Licensees' day care, Preschool, School Age, Kindergarten Readiness, and Summer Programs have specific, structured times, and activities.¹⁵

15. Licensees have had a contract with the local school district for the past ten years to provide social skills for children that qualify for early intervention services and special education services prior to entering school. This contract provides the Licensees with school district resources for children that are not available to other child care licensees. School district personnel visit the Licensees facility frequently to observe children being served under the contract.¹⁶

16. Licensees often invite the local firefighters and law enforcement officers to visit and interact with the children so that they are aware of both fire safety and create comfort with police officers. Many foster children come to the program fearful of police officers. The firefighters regularly bring their machines to create smoke in the facility for fire drills. The police officers write tickets to children for wearing bicycle helmets that entitle them to free ice cream cones.¹⁷

¹¹ Test. of Shawna Lazorik.

¹² Test. of Angela Jessen.

¹³ Test. of J. Sieling, S. Obeidzinski, T. Jay and M. Jay.

¹⁴ Test. of T. Jay; Ex. 4.

¹⁵ Test. of M. Jay; Ex. 15.

¹⁶ Ex. 22, Aff. of J. Vukelich; Test. of M. Jay.

¹⁷ Test. of M. Jay.

Licensees' Program Conditions

17. Licensees do not care for infants because the level of care required for infants would diminish the attention given to the children enrolled in their preschool and day care programs. Either Licensees, or one of their adult substitutes, transports the school age children to and from school.¹⁸

18. The child care wing attached to Licensees' home, where Licensees provide family child care and preschool services, is devoted exclusively to providing child care. Licensees' residence is attached, but not utilized for licensed child care. The family child care wing was designed and constructed by Licensee Michael Jay exclusively for operation of Licensees' child care program.¹⁹

19. Entrance to the child care wing is gained by entering the front door or the rear door into the kitchen. There is also a patio door for ingress and egress to the yard outside. The wing contains half-walls between most of the rooms to enable the caregivers to see and hear the children at all times. There are no bedrooms. Two rooms²⁰ have full walls: one is utilized as Licensee's office; the other is a storage room used exclusively to store a large amount of craft materials.²¹

20. Each craft project is unique. No two craft projects have been the same during the past ten years.²²

21. The yard attached to the child care wing contains: two swing sets, bars for pull-ups, a merry go round, a small plastic slide, two play houses, a "Jungle Gym" type unit with a metal slide and other features, two children's picnic tables, a small space shuttle, and is surrounded by an enclosed chain-link fence. The ground with most of the active play apparatus is covered with high impact absorbing commercially ground up rubber tires for child safety. That safety feature exceeds federal standards and contributes to the fact that there have been no injuries of any kind to day care children playing in the yard. The small remainder of the yard area covering is grass.²³

22. The kitchen is modern and designed exclusively for the needs of children. For safety purposes, there is no stove or oven. Features include a refrigerator, microwave, dishwasher, a stainless steel sink, a fire extinguisher, a large First Aid cabinet, hardwood cabinets for dishes and storage, two child-size tables accommodating 12 children, and a white board with emergency numbers, including poison control.²⁴

¹⁸ Test. of Shawna Lazorik and M. Jay.

¹⁹ Test. of Michael and Tina Jay; Exs. 13 and 14.

²⁰ Both are shown as bedrooms on Ex. 13.

²¹ *Id.*

²² Test. of Kelly Ahmann and M. Jay.

²³ *Id.*; Ex. 7.

²⁴ Ex. 14.

23. There is one bathroom, devoted exclusively for the children. There is a locker room for the children that contains shelves and cubicles for each child in Licensees' programs.²⁵

24. The child care center has two adjacent rooms devoted to play and activities. One of those rooms houses an extraordinary amount of children's toys and materials for activities. There is a staircase that connects to a set of French doors that provide entrance into the dining room of Licensees' residence. The dining room is utilized exclusively for the Licensees' residents and family, as is the remainder of the residence.²⁶

25. Because of the high quality of care delivered to children by Licensees, their program is popular and there is a long waiting list of families desiring that their children be allowed in Licensees' programs.²⁷ They are highly recommended by local school personnel and social service agencies.²⁸

Licensee Tina Jay's Experience and Training

26. Licensee Tina Jay is employed as a Guardian Ad Litem for the State of Minnesota and works with the Ninth Judicial District Courts in Crow Wing County. She has been employed in that capacity since 1998. She is a mandated reporter of child maltreatment, abuse, and neglect.²⁹

27. Because of her extensive experience as a Guardian Ad Litem, Licensee Tina Jay works on the most difficult and high profile cases, mostly those involving sexual abuse of children. Licensee is entirely familiar with indicators, signs, and symptoms of child abuse. She is characterized as "tenacious" on behalf of children.³⁰

28. A small sample of her relevant education and training follows:

Custody Evaluator, Mediation under Rule 114 and Visitation Expeditor Training; Early Neutral Evaluator; National Accreditation Validator (for caregivers/preschool programs wishing to become accredited); ITTI Certified Trainer for Infant Toddler Training Intensive (training for caregivers of infants and toddlers, Modules 1-4); Volunteer for Crow Wing County Jail: Facilitator for circle of Parents Program and Anger Education Programming; Project Exceptional trainer (training for caregivers providing care to children with special needs); American Sign Language 1 - 4 and Deaf Culture (Central Lakes College, Brainerd, MN); Deaf Studies Certificate; Foster care and shelter provider for Crow Wing County; Lakes Area Restorative Justice Project Facilitator; Bachelor of Arts in Social

²⁵ *Id.*; Test. of M. Jay.

²⁶ *Id.*

²⁷ Test. of G. Miller.

²⁸ *Id.*; Exs. [?]; Test. of M. Barta.

²⁹ Test. of T. Jay.

³⁰ *Id.*; Test. of M. Barta.

Work; Associates in Science Degree – Young Child Education; Training at over 150 conferences and training sessions on a multitude of relevant topics between 1990 and the present, including:

- Child Development; Sex Offender Specific Training; Fire Safety; Child Abduction; Children at Risk; Chemical Dependency; Supporting Children with Disabilities; First Aid for Children; CPR; Child Maltreatment; Reducing Sexual Abuse; Fetal Alcohol Syndrome; Physical and Sexual Abuse in Childhood; Child Passenger Safety; Impact of Abuse and Neglect; ADHD; Attachment, Separation & Placement; Interviewing Children; Reducing Risks of SIDS; Clandestine Drug Labs: Risk, Recognition, Response; School Readiness; Brain Development.³¹

August 15, 2011 Incident Involving Tyler Jay

29. On August 15, 2011, Licensees' 18-year-old son, Tyler Jay, was at work at Paul Bunyan Land in his job as Assistant Manager. One of his duties was to escort visitors through the "Murder House." Three boys came into the house and stood in the black light room with Tyler. He showed them how the band of boxer underwear shorts glowed. Another boy stated "look my underwear glows too." The third boy unsnapped his pants and exposed his underwear as well. While helping the third boy snap his shorts and zip them back up, Tyler's finger touched the boy's penis. The incident was reported to law enforcement the night of August 15, 2011.³²

August 16, 2011

30. Tyler was interviewed by law enforcement at 1:45 p.m. on August 16, 2011 when he was working at Paul Bunyan Land. He admitted to the incident, stated that the touch was unintentional, and was remorseful. The child he touched indicated that the touch could have been accidental.³³

31. Licensee Tina Jay was contacted by law enforcement after Tyler's interview. She immediately went to the Crow Wing County Sheriff's Department and learned of the incident involving Tyler. From her training and experience she knew that Tyler had to be immediately removed from their home. She called her adult son Cory Jay, told him about the situation and asked if Tyler could immediately reside with him. Cory agreed that his brother could live with him and his partner.³⁴

32. Tina Jay called her husband, informed him about the situation and asked him to begin collecting all of Tyler's personal belongings. Tina Jay returned home and Licensees collected and moved all of Tyler's personal belongings to the home of Cory

³¹ Ex. 3; Test. of T. Jay. Licensee Tina Jay stopped listing similar training items in 2006.

³² Ex. 1.

³³ *Id.*

³⁴ Test. of T. Jay.

Jay. This was all accomplished before Tyler finished his shift at Paul Bunyan Land on August 16, 2011.³⁵

33. Cory Jay picked up Tyler from work on August 16, 2011 and transported Tyler to the Cory Jay home. Tyler Jay has lived at Cory Jay's home continuously since he got off of work on August 16, 2011. Tyler has not returned to Licensees' home to live, and has returned to visit only once. The single visit was during his sister's wedding reception on September 17, 2011, when he was continuously supervised by two adults.³⁶

34. One of the day care families lives directly across the street from Cory Jay. The mother in that family has seen Tyler Jay at Cory's house every day since August 16, 2011.³⁷

Department Licensing Investigation Beginning September 1, 2011

35. Because of Licensee Tina Jay's position as a Guardian Ad Litem in Crow Wing County, the Department licensing investigation was conducted by Morrison County, beginning September 1, 2011, to avoid any appearance of a conflict of interest.³⁸

36. Morrison County confirmed that: Tyler Jay is not and has never been a helper in Licensees' child care programs; and there are no other alleged victims involving Tyler.³⁹

37. Morrison County made an unannounced visit to Cory Jay's home on September 8, 2011. Tyler Jay greeted the Social Worker at the door. Cory Jay was not present, but his partner Kari Albright was present and provided a written statement that Tyler lived there. The Social Worker inspected Tyler's bedroom and found his personal effects, including mail and a paycheck belonging to Tyler Jay.⁴⁰

38. Morrison County contacted all 12 families of all children enrolled in Licensees' family child care program. None of the parents either reported any concerns regarding the care their children have received or have any concerns with Licensees. The common response from the parents with regard to safety concerns was "absolutely not." Parents reported as follows:

- a. They [Licensees] do outstanding work; and
- b. My children were on their waiting list for years; and

³⁵ *Id.*; Test. of M. Jay.

³⁶ *Id.*; Test. of G. Miller, Marie Jay, Cory Jay, Shaylea Obeidzinski and Kelly Ahmann.

³⁷ Test. of K. Ahmann.

³⁸ Test. of G. Miller; Ex. 1.

³⁹ *Id.*; Test. of M. Jay.

⁴⁰ Ex. 2.

- c. When I arranged bussing for my children to daycare I was told, “You have the best daycare in town,” and
- d. They are just phenomenal; and
- e. They provide such a happy atmosphere and I feel good as a parent taking my children there; and
- f. I waited to take my child to a day care until they could talk and communicate any concerns and my child doesn’t have any.⁴¹

39. The Morrison County Social Worker that conducted the investigation opined that there is no risk of harm to children in Licensees’ care. She is in favor of Licensees’ license being immediately reinstated.⁴²

Morrison County Recommendation for a Conditional License

40. Morrison County recommended that Licensees’ license be reinstated on a Conditional License for one year, with the following conditions:

- a. Licensees and all caregivers attend an extra four hours of training within the next six months, specific to warning signs of sexual abuse, with prior approval from Crow Wing County Social Services; and
- b. Licensees make arrangements for Tyler Jay to reside out of the home permanently. Treatment recommendations, if any, shall be followed; and
- c. Tyler Jay shall not be allowed on the licensed property during child care hours.⁴³

41. Tyler Jay permanently resides out of the Licensees’ home and has done so since August 16, 2011.⁴⁴

42. Licensees and both adult caregivers have taken the recommended training, all completed by October 25, 2011.⁴⁵

43. Tyler Jay has not and will not be allowed on Licensees’ property during day care hours. He has been allowed only one visit since August 15, 2011. That visit was on September 17, 2011.⁴⁶

⁴¹ *Id.*
⁴² Test. of G. Miller.
⁴³ *Id.*; Ex. 2.
⁴⁴ Finding 33.
⁴⁵ Exs. 6 – 11.
⁴⁶ Test. of T. Jay and M. Jay.

September 17, 2011 Wedding

44. Licensees closed the day care on Thursday, September 15, 2011 through Monday, September 19, 2011, because of their daughter's wedding on September 17, 2011. Licensees had considered not allowing participation in the wedding or reception by their son Tyler. However, on the advice of a Crow Wing County Child Protection Worker and the insistence of the Jays' daughter, Tyler Jay was a groomsman for his sister's wedding.⁴⁷

45. The wedding reception was held at Licensees' home. Children were present. Tyler Jay was supervised constantly by Licensee Michael Jay's brother and sister and remained exclusively in Licensees' garage.⁴⁸

Additional Impact of the TIS on the Day Care Families

46. The parents of two day care children, one four-year-old and one eight-year-old, have lost time from employment because of the suspension of Licensees' license. They have had to send their four-year-old to spend 10 days in Iowa with relatives because of lack of day care, and now have to transport their children to a day care in Breezy Point, Minnesota.⁴⁹

47. The four-year-old girl with learning and developmental challenges has an eight-year-old brother who is also enrolled in Licensees' program. He has been forced to miss three weeks of school because of lack of bus transportation since the TIS. Previously, the Licensees or one of their staff always transported him to school. This family grew with the birth of twin boys in February 2011. The family's needs of having to juggle three different child care situations (transportation and before and after school care for the school age child, care for infant twins, and care for the special needs four-year-old daughter) have completely depleted the parents' available time off from their employment.⁵⁰

48. The mother of the five-year-old girl with epilepsy has never seen Tyler Jay at the day care center.⁵¹ The mother of the twin infants, eight-year-old boy and four-year-old daughter with special needs has not seen Tyler Jay since late spring or early summer of 2010. Her four-year-old child has now missed several weeks of preschool.⁵²

49. The inability to be cared for by Licensees, with their unique skill sets, has been harmful to the special needs children that Licensees have been serving.⁵³

⁴⁷ Test. of T. Jay and M. Barta.

⁴⁸ *Id.*; Test. of P. Jay and M. Jay.

⁴⁹ Ex. 18 Affidavit.

⁵⁰ Test. of M. Jay.

⁵¹ Test. of K. Ahmann.

⁵² Test. of S. Lazorik; Ex. 25, Affidavit of Paul Lazorik.

⁵³ Findings 9-11.

Opinions of Crow Wing and Morrison County Social Workers

50. Both the Morrison County Social Worker and the Crow Wing County Child Protection Worker believe that the TIS should be lifted immediately. Neither has any concerns about the safety of children in Licensees' care. Both social workers share the unconditional opinion that there is no imminent risk of harm to children in Licensees' care.⁵⁴

Parent Confidence in Licensees' Program Conditions and the Safety of Their Children in Licensees' Care

51. Licensees have the confidence and unconditional support of 15 current and former day care parents, representing 28 children. They universally believe that Licensees are devoted to child safety and are kind, caring, organized, and exceptionally skilled family child care providers. These parents, all knowing about the August 15, 2011 incident, have no concerns for the safety of children while in Licensees' care. The parents are anxious to return their children to Licensees' care.⁵⁵

Opinion of Service Learning Teacher

52. A teacher and state representative, who has known Licensees for many years, has placed many of his students as employees of the Licensees. He understands the situation and believes that there is no reasonable basis to conclude children are at risk of harm in Licensees' care and supports reinstating the Licensees' child care license as soon as possible.⁵⁶

Opinion of Central Lakes College Instructor

53. The Central Lakes College instructor that was Licensee Tina Jay's advisor for two degrees has taught Licensee in many courses. She understands the situation in this matter and believes that Tina Jay has a strong theoretical and practical background in child safety, as well as other areas. She supports reinstating the Licensees' day care license.⁵⁷

Opinion of Early Childhood Special Education Teacher

54. The Early Childhood Special Education teacher that has known Licensees for 15 years, and evaluated children in foster care and daycare, understands the situation in this matter and supports reinstating the Licensees' child care license as soon as possible.⁵⁸

⁵⁴ Test. of G. Miller and Mark Barta, Crow Wing County Child Protection Social Worker.

⁵⁵ Test. of Kelly Ahmann, Marie Jay, Angela Jessen, Shawna Lazorik, and ; Exs. 17- 21, 23, 25 - 28.

⁵⁶ Ex. 24, Aff. of John Ward.

⁵⁷ Ex. 16, Aff. of J. Rydberg.

⁵⁸ Ex. 22, Aff. of J. Vukelich.

No Charges Filed

55. As of October 25, 2011, no criminal charges have been filed against Tyler Jay.⁵⁹

Procedural Findings

56. Neither Crow Wing County Social Services nor Morrison County Social Services recommended a temporary immediate suspension of Licensees' license.⁶⁰

57. The Department concluded that there was no risk of imminent harm to children in Licensees' care and so advised Morrison County Social Services.⁶¹

58. On September 22, 2011, the Department reversed its determination on the risk of imminent harm to children in Licensees' care and advised Morrison County Social Services that an Order of Temporary Immediate Suspension (TIS) of Licensees' license would be issued.⁶²

59. On September 28, 2011, the Department issued Licensees a TIS that was personally served on Licensees that day.⁶³

60. Following an immediate appeal of the TIS by Licensees, on September 29, 2011 the Department issued a Notice of and Order for Hearing, scheduling a contested case hearing for October 26, 2011.⁶⁴

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.⁶⁵

⁵⁹ Test. of T. Jay.

⁶⁰ Order of Temporary Immediate Suspension dated September 28, 2011.

⁶¹ Test. of G. Miller; Ex. 5.

⁶² *Id.*

⁶³ Order of Temporary Immediate Suspension.

⁶⁴ Notice and Order for Hearing.

⁶⁵ Minn. Stat. § 245A.07, subd. 1; Minn. R. 9502.0325.

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

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 Licensees' 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 the Licensees.

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.⁶⁶

7. The Department failed to act immediately, as required by Minn. Stat. § 245A.07, subd. 2, when it suspended Licensees' license six weeks after the incident.

8. Licensees have committed no acts that either previously posed or now pose an imminent risk of harm to the health, safety, or rights of children served by Licensees.

9. No person has committed an act either at or near, related to, or involving children enrolled in Licensees' day care facility that either posed or now poses an imminent risk of harm to the health, safety, or rights of children served by Licensees.

10. Licensees have committed no violations of law or rule.

11. There exist no conditions in the past nor in the present in Licensees' family child care program that either posed or now pose an imminent risk of harm to the health, safety, or rights of children served by Licensees.

12. 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 Licensees.

⁶⁶ *Id.*

13. The Department has 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 Licensees.

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

15. 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 Licensees be immediately RESCINDED.

Dated: November 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 Licensees pose an imminent risk of harm to the health, safety, or rights of persons in the Licensees' care.

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 or another person that has access to day care children to an act that puts children at risk of imminent harm. The Department relied on hearsay evidence contained in a Crow Wing County Sheriff's Office written 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 children in Licensees' day care are at a continuing imminent risk of harm because a person that has been accused of a disqualifying act lives a few blocks away from the Licensees' day care, is still being supported financially by his parents, and theoretically could arrive at the Licensees' day care at some point in time and have unsupervised access to children in care. Such a conclusion has no legal or factual basis. At a minimum, "imminent harm" means harm that is impending or about to occur,⁶⁷ or ready to take place.⁶⁸ There was no immediacy or imminent risk involved at the time Licensees' license was suspended. Immediate means now, or within a matter of hours, not days or weeks.

This is a case involving Licensees that have no licensing violations of rule or law and no program conditions that present any risk of harm. Neither Licensees nor any person that lives in the day care or has access to day care children has committed an act that presents a risk of harm to program children. No witnesses provided any facts or opinions that suggest Licensees or the conditions of their programs present any risk of harm to children in their care. There are no documents in the record, except for the TIS order itself, to suggest Licensees or the conditions of their programs present a risk of harm to children in their care. There are no specific articulable facts or circumstances that could provide a cautious and prudent person with a reasonable suspicion that there is an imminent risk of harm to children in Licensees' care.

⁶⁷ See, American Heritage College Dictionary (3d ed.).

⁶⁸ See, Merriam-Webster Online Dictionary.

“The standard that the Commissioner [is] required to apply is a belief based on reason.”⁶⁹ The evidence in the record in this case suggests that the standard applied by the Department in issuing the TIS was a belief based on speculation. There were insufficient articulable facts to warrant a cautious person to reasonably suspect that Licensees, other persons (including their son), or the conditions of the day care facility presented a risk of imminent harm to children in their care at the time the TIS was issued.

Analysis of Factual Evidence

There are no disputed facts in this matter. There is no dispute that Licensees’ 18-year-old son inappropriately touched a child at his place of employment on August 15, 2011. There is no dispute that Licensees moved all of his belongings out of their home on August 16, 2011, as soon as they learned of the allegation that day. His belongings were moved out while he was at work, and he has not returned to live in the home attached to the day care facility. He has visited the residence once for his sister’s wedding reception that occurred on a weekend when the day care was closed. He was closely supervised at that time.

Morrison County Social Worker

The Morrison County Social Worker assigned to investigate this matter on September 1, 2011 reviewed all aspects of Licensees and their program and facilities, interviewed the parents of all 12 families, interviewed Licensees and conducted an unannounced visit to Cory Jay’s residence that verified that Tyler Jay resided there. She unequivocally has no concerns about the safety of children in Licensees’ care.

Crow Wing County Child Protection Worker

A Crow Wing County Child Protection Worker that has worked closely with Tina Jay, and known Michael Jay, since 1996 testified unequivocally that “the welfare of children is their number one priority.” He has no concerns at all about the safety of children in Licensees’ care. He summed this matter up succinctly when he testified that the [Licensees] “are the Poster Family for exactly how to respond” to a situation like this one.

Opinions of All Parents of Licensee’s Day Care Children

The evidence from every witness, including all of the parents of the 12 families whose children are in Licensees’ care, overwhelmingly shows that Licensees’ provide extraordinary child care, far and above the minimum standards of law and rule. The Minnesota Court of Appeals has determined that the knowledge and opinions of day care parents is relevant and desirable in TIS cases.⁷⁰

⁶⁹ *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

⁷⁰ *In Re Strecker*, *Supra*.

Conclusion

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)⁷¹ is served by Licensees in a fashion that is superior to most family child care Licensees. All of the evidence in the record suggests that Licensees provide well beyond the minimum levels of care and service and precludes a conclusion that a reasonable person could suspect that Licensees, conditions in their program, or other persons with access to the children for which they care, presents a risk of harm to children.

The ALJ finds that there are no relevant articulable facts to support a suspicion of an imminent risk of harm, and respectfully suggests to the Commissioner that the TIS be immediately rescinded.

M. K. S.

⁷¹ Conclusion 3.