

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 Kimberly Landherr 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 November 21, 2011, at the Mower County (County) Courthouse, 201 Second Avenue N.E., Austin, Minnesota 56912. The OAH record closed at the end of the hearing on November 21, 2011.

Aaron Jones, Assistant Mower County Attorney, Austin, Minnesota, appeared at the hearing as attorney for the Minnesota Department of Human Services (the "Department") and Mower County Human Services. The licensee, Kimberly Landherr, appeared at the hearing on her own behalf, without legal counsel.

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, pose an imminent risk of harm to the health, safety or rights of children served by Licensee?

The Administrative Law Judge concludes that there is reasonable cause to believe that children in Licensee's care are at imminent risk of harm, and the temporary immediate suspension of Licensee's family child care license should continue.

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

FINDINGS OF FACT

1. Kimberly Landherr (Licensee) is licensed to provide family child care services at her residence in Rose Creek, Minnesota (home).¹ She has been providing

¹ Testimony of K. Landherr and Sherry Bibus, Mower County Family Child Care Licensor.

day care for 23 years.² The home is located near a commercial area which includes a hardware store and a grain elevator.³

2. The County issued Licensee a Correction Order on March 16, 2007 for several rule violations, including failure to have a gate or barrier on the stairway to the basement when children six months to 18 months of age were present.⁴

3. On October 6, 2011, Licensee was caring for a number of children. After lunch Licensee set them all down for naps, including a one-year-old boy whom she placed in a pack and play in the lower level of the home at approximately 1:45 p.m. Although she usually does not place that child on the lower level, she did that day. She did not turn on the available baby monitor. Licensee does not utilize a gate at the bottom of the lower level that would prevent children from climbing up the stairs on their own.⁵

4. After placing the one-year-old in the pack and play, Licensee went upstairs to attend to an infant who was crying. While attending to the infant she heard the back door to the home open. Licensee went to the door and looked out because she was expecting a delivery from United Parcel Service. Not seeing anything, Licensee returned to care for the infant.⁶

5. After being placed in the pack and play, the one-year-old boy climbed out, went up the stairs, and out the back door. He walked one-half block down the alley to a hardware store where he was found and returned by the owner of the hardware store.⁷

6. Across a busy intersection from the hardware store is a grain elevator. On October 6, 2011, the local farm harvest was in full swing and many grain trucks were entering and exiting the grain elevator property.⁸

7. The elapsed time from the child's departure to his recovery by the hardware store owner and return to Licensee was approximately two to three minutes. The child was unharmed. Licensee did not know the child was gone until the moment he was returned by the hardware store owner.⁹

8. Licensee did not report the incident to the County licenser.¹⁰

² Ex. 4.

³ Test. of K. Landherr and S. Bibus; Ex. 1.

⁴ *Id.*; Ex. 3.

⁵ Test. of K. Landherr; Exs. 1, 4.

⁶ *Id.*

⁷ *Id.*

⁸ Test. of K. Landherr.

⁹ Ex. 1; Test. of K. Landherr.

¹⁰ *Id.*, test. of S. Bibus.

9. The County received a report of the October 6, 2011 incident on October 18, 2011. The County investigated the report by speaking with Licensee and the hardware store owner.¹¹

10. Licensee understands that she made errors in judgment by not utilizing the available baby monitor and not having the required gate at the bottom of the stairs.¹²

11. Licensee is willing to take any measures deemed necessary by the Department in order for the TIS to be lifted.¹³

12. Licensee has not yet taken any remedial measures to prevent an event such as occurred on October 6, 2011 from reoccurring.

13. Licensee has the confidence and support of nine current day care parents, representing 10 children in Licensee's care. This includes the mother of the child that escaped the home on October 6, 2011. These parents, all knowing about the October 6, 2011 incident, trust the Licensee to maintain the safety of their children while in her care. The parents are anxious to return their children to Licensee's care and routines. They have all been subjected to difficulties of missing work and in obtaining substitute child care.¹⁴

Procedural Findings

14. On October 19, 2011, the County recommended to the Department that a TIS of Licensee's license be issued.¹⁵

15. The Department issued an order of temporary immediate suspension on October 19, 2011, and it was served on Licensee that same day.¹⁶

16. Licensee filed a timely appeal from the order of temporary immediate suspension and requested an appeal hearing, pursuant to Minn. Stat. § 245A.07, subd. 2a.¹⁷

17. The Department issued a Notice of and Order for Hearing on October 25, 2011, scheduling the contested case hearing on November 21, 2011.

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

¹¹ Ex. 1; Test of S. Bibus.

¹² Ex. 2 at page 4. At the hearing, AJ denied making this statement.

¹³ *Id.*

¹⁴ Exs. 5-10.

¹⁵ Ex. 1.

¹⁶ Ex. 2; Test of S. Bibus.

¹⁷ Notice of and Order for Hearing.

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter, pursuant to Minn. Stat. §§ 14.50 and 245A.07, subds. 2 and 2a.¹⁸

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

3. The Department has complied with all relevant substantive and procedural requirements of law and rule.

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

If the license holder's actions . . . 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 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.¹⁹

7. Supervision is defined to mean:

"Supervision' means a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child. For the school age child, it means a caregiver being available for assistance and care so that the child's health and safety is protected."²⁰

8. Licensee was neither within sight nor hearing of the one-year-old child from the time he [was placed in the pack and play and Licensee proceeded upstairs to attend the infant] left the day care property on October 6, 2011, during his absence when he was retrieved by the owner of the hardware store, and returned to Licensee.

¹⁸ Minnesota Statutes are cited to the 2010 Edition.

¹⁹ Minn. Stat. § 245A.07, subd. 2.

²⁰ Minn. Rule 9502.0315, Subp. 29a. Minnesota Rules are cited to the 2011 Edition.

9. Minn. Rule 9502.0425, Subp. 10 provides in relevant part:

All stairways must meet the following conditions. . . .

C. Gates or barriers must be used when children between the ages of 6 and 18 months are in care.

10. Licensee failed to use a gate or barrier at the bottom of the stairs when a one-year-old child was in care on October 6, 2011.

11. There are sufficient articulable facts and circumstances at this time 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.

12. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

13. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

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 to the Commissioner of Human Services that:

The temporary immediate suspension of the family day care license of Licensee continue.

Dated: December 1, 2011

s/M. Kevin Snell

M. Kevin Snell

Administrative Law Judge

Reported: Digitally recorded;
no transcript prepared.

NOTICES

This report is a recommendation, not a final decision. The Commissioner of Human Services (Commissioner) will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. §§ 14.61 and 245A.07, subd. 2a (b), the parties adversely affected have ten (10) calendar days to submit exceptions to this Report and request to present argument to the Commissioner. The record shall close at the end of

the ten-day period for submission of exceptions. The Commissioner then has ten (10) working days from the close of the record to issue her final decision. Parties should contact Lucinda Jessen, Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651) 431-2907, 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

At this stage, the Commissioner of Human Services is not required to prove that actions by individuals or violations actually occurred. Instead, at this stage, the Commissioner must only prove that there is reasonable cause to believe that the health, safety or rights of persons in the Licensee's care are at imminent risk of harm. This is a very modest standard, intended to insure that vulnerable children are protected until there can be a full hearing and final determination on the underlying charges.

During an expedited hearing regarding a temporary immediate suspension, the Commissioner must only 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 hearsay evidence linking the license holder to action or inaction that puts children at risk of imminent harm. The Administrative Law Judge, at this stage of the process, is not required to assess the relative credibility of conflicting testimony or evidence, but rather is to determine whether there is enough evidence to maintain the suspension. In this case, there was no conflicting evidence regarding material facts.

The Commissioner was entitled to make a preliminary determination, relying on interviews and a law enforcement report, to indicate a serious lapse of supervision, allowing a child to go missing for several minutes near very dangerous locations. This lack of supervision might extend into other contexts, thereby posing a continuing risk of harm and requiring an immediate temporary suspension of the child care license.

When the evidence offered by the Commissioner is reviewed in light of the modest "reasonable cause" standard of proof, the Administrative Law Judge concludes that the evidence is sufficient to establish reasonable cause to continue the temporary immediate suspension. The Commissioner was entitled to make a continuing risk of harm determination based upon: the fact that a one-year-old child was allowed to walk up a flight of steps, open a door and exit the residence, and wander away from the Licensee's care on a commercial street, in the vicinity of motor vehicle traffic and heavy equipment at a grain elevator during harvest.

Equally important are the facts that remain unchanged at the time of the hearing. First, there is no evidence in the record that Licensee has acquired a required gate for the lower level of the home that would prevent re-occurrence of small children from

walking up the stairs. The risks of those children falling down the stairs and/or exiting the home still exist. There is no evidence in the record to suggest that Licensee has installed a device on the doors to the home that would preclude small children from opening outside doors. Finally, the Licensee neither articulated a clear understanding of the minimum rules of supervision nor assured that such an event as happened on October 6, 2011 would not occur in the future. For these reasons the Administrative Law Judge finds that the Commissioner has a reasonable suspicion that children in Licensee's care are at imminent risk of harm. Reasonable cause to continue the suspension is present.

M.K.S.