

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 Angela Brandt To Provide  
Family Day Care

**FINDINGS OF FACT,  
CONCLUSIONS  
AND RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on January 13, 2012, at the Wright County Human Services Building, 1004 Commercial Drive, Buffalo, Minnesota 55313. The OAH record closed on January 13, 2011, at the end of the hearing.

Greg T. Kryser, 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). The Licensee, Angela Brandt, 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 infants in Licensee's care are at imminent risk of harm, and the temporary immediate suspension of Licensee's family child care license should be continued.

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

**FINDINGS OF FACT**

1. Angela Brandt (herein "Licensee") is licensed to provide family child care services at her residence in Monticello, Minnesota ("the home").<sup>1</sup> She lives in the home with her husband and two daughters who are two and four years old respectively.<sup>2</sup>

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<sup>1</sup> Testimony of Angela Brandt and Lisa Gertken, Family Child Care Licensor for Wright County Human Services Agency (the "County").

<sup>2</sup> Test. of A. Brandt.

## Licensee's History

2. Licensee has had no licensing sanctions of any kind in the years she has been a family child care provider, until the current temporary immediate suspension (TIS) of her license.<sup>3</sup>

3. Licensee had one incident that was investigated in March of 2011. A four-year-old boy who was in potty training slipped and fell when urinating in the toilet, bumping his face. There was no finding of neglect, failure of supervision or other fault on Licensee's part.<sup>4</sup> Licensee was very forthcoming and cooperative during the investigation. The result of the report was a determination of inconclusive, in part because of the length of time and number of persons in contact with the child between the date of the incident and the report to the County by the parent.<sup>5</sup>

## Licensee's Program Conditions

4. Licensee regularly cares for six children during the day, including her two daughters. In addition to her two and four-year-old daughters, there is another two-year-old girl, a three-and one-half-year-old boy, and two brothers. One of the brothers is two years old and the other one is a three-month-old infant. Licensee has been caring for both brothers since their births. After school is dismissed in the afternoon, Licensee also cares for an eight-year-old boy.<sup>6</sup>

5. Licensee provides family child care in both the lower and upper levels of the split entry residence. The home is not devoted exclusively to providing child care, as it is also the residence of Licensee and her family.<sup>7</sup> Among other areas, the upper level contains a living room and a kitchen where the day care children receive meals and snacks.<sup>8</sup> The lower level contains a large play room that contains toys, cabinets and shelves for toys, a play kitchen, child table and chairs, and an infant/toddler swing that operates with an electric motor.<sup>9</sup>

6. Licensee suffers from an extreme and chronic form of eczema on the palms of her hands and fingers. This condition causes the areas on her hands to bleed if subjected to even modest pressure.<sup>10</sup> Licensee handles children, and particularly infants, very carefully.<sup>11</sup>

7. Licensee's day care and family rules on discipline include only timeouts.<sup>12</sup> Children are given timeouts equal to one minute for each year of their age. In the event

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<sup>3</sup> *Id.*; Test. L. Gertken; Exhibit 5.

<sup>4</sup> *Id.*

<sup>5</sup> Test. of L. Gertken.

<sup>6</sup> Test. of A. Brandt; Ex. 1.

<sup>7</sup> *Id.*; Exs. 16-20.

<sup>8</sup> Test. of A. Brandt; Exs. 16 – 18.

<sup>9</sup> Test. of A. Brandt; Exs. 6, 19 – 22.

<sup>10</sup> Test. of A. Brandt, Mr. Brandt.

<sup>11</sup> Test. of A. Brandt.

<sup>12</sup> Test. of A. Brandt, M. Brandt.

of unacceptable behavior, Licensee gets down on the child's level so that they are face-to-face and calmly explains why the behavior is unacceptable. Then the time out is imposed. No child is subjected to corporal punishment of any kind.<sup>13</sup>

8. Licensee's two-year-old daughter has recently become angry and violent on occasion, where she acts out by biting on her pacifier, hitting things and throwing objects.<sup>14</sup> With regard to people, this behavior had only involved her four-year-old sister, whose hair she has pulled, whom she has attempted to bite, and whom she has scratched and hit with a toy. Usually Licensee's daughters' physical interaction involves wrestling, where the four-year-old had taught the two-year-old wrestling techniques.<sup>15</sup> Licensee has considered enrolling her two-year-old in some type of therapy.<sup>16</sup> Licensee asked her family physician about her daughter's anger issues and he said it was typical for toddlers to get angry and that Licensee should just utilize more timeouts and talk to her about acceptable behavior.<sup>17</sup>

### **December 1, 2011**

9. On December 1, 2011 Licensee was caring for the children. After she and the children had completed the afternoon snack in the upper level kitchen, Licensee directed all of the children to go down to the lower level and said she would be along directly with the infant, who was on a blanket in the center of the living room. Before Licensee could pick up the infant, the infant's mother knocked on the door and Licensee walked down the stairs to greet her. When the infant's mother came in Licensee moved up the stairs two steps so that she could see the infant. Licensee then called downstairs to the infant's brother and advised him that his mother was there.<sup>18</sup> Except for the brief moment when Licensee greeted the infant's mother, Licensee was within sight and hearing of the infant at all times. During this period Licensee was within hearing of the children on the lower level.

### **December 2, 2011**

10. Licensee cared for the children the morning of December 2, 2011. The father of the brothers dropped them off at Licensee's home at 7:30 a.m.<sup>19</sup> He placed the infant on the floor of the split-level entry and told Licensee that the infant had just eaten and would probably be asleep soon, and that he could be left in the car seat to sleep.<sup>20</sup>

11. Licensee took the infant's brother down to the lower level to sit with him and have quiet time. Between 7:45 a.m. and 8:00 a.m., Licensee met her husband at the split-entry landing as he was getting his coat on and exiting to the garage from the

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<sup>13</sup> Test. of A. Brandt.

<sup>14</sup> *Id.*; Test. of L. Gertken.

<sup>15</sup> Test. of A. Brandt.

<sup>16</sup> Test. of L. Gertken.

<sup>17</sup> Test. of A. Brandt.

<sup>18</sup> *Id.*; Exs. 16-18.

<sup>19</sup> Test. of L. Gertken, A. Brandt, and M. Brandt.

<sup>20</sup> Test. of A. Brandt; Ex. 15.

landing to go to the garage and drive to work. At that time Licensee took the infant out of the car seat because he was awake and making noises.<sup>21</sup>

12. The infant had been ill recently and his mother told Licensee that he was not eating very well and was fussy. For these reasons the mother had switched nipples for his baby bottle. Licensee agreed that the infant had been fussy with her also and not eating well with her either. The infant's mother said that she understood, that the situation was "OK" and that Licensee should just try and feed him as best as she could.<sup>22</sup>

13. Between 8:45 a.m. and 9:00 a.m., Licensee started feeding the infant a bottle as she cradled him in her arm while sitting on the couch on the lower level.<sup>23</sup> He accepted about one to two ounces during a 10-minute period and Licensee then sat him up and burped him for five minutes. He ate a little more but became fussy and began sticking his tongue out around the nipple. Licensee tried to tickle his mouth with the nipple but he didn't want it and pushed it away again. Licensee did not try to burp him again because he had eaten so little. She got up with the infant and buckled him into the infant/toddler swing near the couch.<sup>24</sup> She then walked 15 feet to the laundry room to rinse out the bottle in the sink. Approximately one minute from the time she stepped away from the infant and the swing, she heard the infant crying and immediately returned to the infant.<sup>25</sup>

14. Upon her return, Licensee found her two-year-old daughter standing at the swing with a plastic block in her hand. Inside the plastic block is a solid wooden block.<sup>26</sup> The infant's mouth was injured and was bleeding. Licensee immediately took the infant out of the swing, wiped his mouth with a wet cloth, retrieved an icepack wrapped in a paper towel and placed ice on his upper lip.<sup>27</sup>

15. Licensee's two-year-old daughter likes to swing often in the infant/toddler swing.<sup>28</sup> Licensee's daughter was probably jealous of the infant being in the swing.<sup>29</sup>

16. The infant's lip started to swell and turn purple so Licensee called his mother at approximately 9:30 a.m., informed her about the incident, and suggested that she come and pick up the infant. His mother said she would come as soon as she could.<sup>30</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; Ex. 19.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; Exs. 20, 21.

<sup>26</sup> Test. of A. Brandt and L. Gertken; Exs. 7, 19.

<sup>27</sup> Test. of A. Brandt; Exs. 7, 19.

<sup>28</sup> Test. of A. Brandt.

<sup>29</sup> Test. of Luella Mosher, mother of Licensee.

<sup>30</sup> Test. of A. Brandt; Ex. 15.

17. Licensee then reported the incident to the County licensur.<sup>31</sup>

18. Prior to this incident, Licensee's two-year-old daughter had always been nice to the infant and liked to touch his feet gently with her hands.<sup>32</sup>

19. Just prior to the incident, the other children were either by the television or playing in the play kitchen.<sup>33</sup>

### **Investigations by County Licensing, Child Protection and Law Enforcement**

20. The County received another report of the December 2, 2011 incident on December 5, 2011.<sup>34</sup>

21. On December 8, 2011 Licensee received an unannounced visit by the Licensur, a County Child Protection worker and a County deputy Sheriff.<sup>35</sup> Licensee was welcoming and completely cooperative with the investigators.<sup>36</sup> Licensee reported the events essentially as stated in Findings 10 through 14, and 16.<sup>37</sup>

22. The parents of the infant and his brother did not return their children to Licensee's care.<sup>38</sup>

### **Additional Findings and Parent Support and Opinions**

23. Licensee is willing to take any measures deemed necessary by the Department in order for the TIS to be lifted.<sup>39</sup>

24. Licensee has not yet taken any remedial measures concerning her two-year-old daughter's behavior to prevent an event such as occurred on December 2, 2011 from reoccurring.

25. Licensee has the confidence and support of seven current and former day care parents, representing eight children that have been in Licensee's care. The consistent themes in the Affidavits and testimony of the parents refer to Licensee's kindness, compassion and patience. This support does not include the parents of the infant injured on December 2, 2011. These parents, all knowing about the December 2, 2011 incident, trust the Licensee to maintain the safety of their children while in her care. One of those parents is a child care provider in a commercial child care center. The parents are anxious to return their children to Licensee's care and routines. They

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<sup>31</sup> Test. of L. Gertken.

<sup>32</sup> Test. of A. Brandt.

<sup>33</sup> *Id.*; Exs. 19, 21, 22.

<sup>34</sup> Ex. 1.

<sup>35</sup> Ex. 2; Test of L. Gertken.

<sup>36</sup> Test. of L. Gertken.

<sup>37</sup> *Id.*; Ex. 2.

<sup>38</sup> Test. of A. Brandt; Ex. 2.

<sup>39</sup> *Id.*

have all been subjected to difficulties of missing work and in obtaining substitute child care.<sup>40</sup>

### **Procedural Findings**

26. On December 9, 2011, the County recommended to the Department that a temporary immediate suspension (“TIS”) of Licensee’s license be issued.<sup>41</sup>

27. The Department issued an Order of Temporary Immediate Suspension on December 9, 2011, and it was served on Licensee that same day.<sup>42</sup>

28. 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.<sup>43</sup>

29. The Department issued a Notice of and Order for Hearing on December 15, 2011, scheduling the contested case hearing on January 13, 2012. The Notice and Order for Hearing contained neither a statement of the allegations against the Licensee nor any alleged violations of statute or rule.<sup>44</sup>

30. After several telephone calls to the Department and the County, on January 5, 2011 Licensee received a copy of the County’s recommendation for the TIS that contained factual allegations and statutes and rules alleged to have been violated.<sup>45</sup>

31. The status of any law enforcement or child protection investigations was unknown at the time of the hearing, as no evidence was offered or introduced as to whether any such investigations are continuing or concluded, except for the fact that law enforcement and child protection investigations were opened on December 9, 2011.<sup>46</sup>

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

### **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.<sup>47</sup>

2. The Department of Human Services gave proper and timely notice of the hearing in this matter, except as stated in Finding 29.

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<sup>40</sup> Exs. 10-14; Test. of Jeff Lenz, Jennifer Murphy, and Michael Murphy.

<sup>41</sup> Test of L. Gertken; Ex. 2.

<sup>42</sup> Ex. 5; Test of L. Gertken and A. Brandt.

<sup>43</sup> Notice of and Order for Hearing.

<sup>44</sup> *Id.*; Minn. R. 1400.8550, C.

<sup>45</sup> Ex. 15.

<sup>46</sup> Ex. 3.

<sup>47</sup> Minnesota Statutes are cited to the 2010 Edition.

3. The Department has complied with all relevant substantive and procedural requirements of law and rule, as the deficiencies in the Notice and Order for Hearing were cured on January 5, 2012.<sup>48</sup>

4. The purpose of family child care licensure statutes and rules is to protect the care, health and safety of children.<sup>49</sup>

### **Temporary Immediate Suspension Standards and Reasonable Cause**

5. 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.

6. 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.

7. "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.<sup>50</sup>

### **Family Child Care Law and Rules Alleged to Have Been Violated**

8. 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.<sup>51</sup>

9. Minn. R. 9502.0425, subp. 9 provides:

**Infant and newborn sleeping space.** There must be a safe, comfortable sleeping space for each infant and newborn. A crib, portable crib, or playpen with waterproof mattress or pad must be provided for each infant

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<sup>48</sup> Finding 30.

<sup>49</sup> Minn. Stat. § 245A.07, subd. 1; Minn. R. 9502.0325.

<sup>50</sup> Minn. Stat. § 245A.07, subd. 2.

<sup>51</sup> Minn. R. 9502.0315, subp. 29a. Minnesota Rules are cited to the 2011 Edition.

or newborn in care. The equipment must be of safe and sturdy construction that conforms to volume 16, parts 1508 to 1508.7 and parts 1509 to 1509.9 of the Code of Federal Regulations, its successor, or have a bar or rail pattern such that a 2-3/8 inch diameter sphere cannot pass through. Playpens with mesh sidings must not be used for the care or sleeping of infants or newborns.

10. Minn. Stat. § 245A.1435 providing for REDUCTION OF RISK OF SUDDEN INFANT DEATH SYNDROME IN LICENSED PROGRAMS, provides as follows:

(a) When a license holder is placing an infant to sleep, the license holder must place the infant on the infant's back, unless the license holder has documentation from the infant's parent directing an alternative sleeping position for the infant. The parent directive must be on a form approved by the commissioner and must include a statement that the parent or legal guardian has read the information provided by the Minnesota Sudden Infant Death Center, related to the risk of SIDS and the importance of placing an infant or child on its back to sleep to reduce the risk of SIDS.

(b) The license holder must place the infant in a crib directly on a firm mattress with a fitted crib 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. The requirements of this section apply to license holders serving infants up to and including 12 months of age. Licensed child care providers must meet the crib requirements under section 245A.146.

11. Minn. R. 9502.0395, subp. 2 regarding guidance provides in relevant part:

Subp. 2. Standards. The following shall apply to all caregivers when guiding behavior in children.

A. No child shall be subject to corporal punishment or emotional abuse. "Corporal punishment" means the nonaccidental infliction of physical pain on a child by a caregiver. Corporal punishment includes, but is not limited to, rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, pinching, hitting, and spanking. "Emotional abuse" means the infliction of verbal or psychological abuse on a child by a caregiver. Emotional abuse includes, but is not limited to, name calling, ostracism, shaming, derogatory remarks about the child or child's family, and threats which threaten, humiliate, or frighten the child.

## **No Violations Found**

12. Licensee was capable of intervening to protect the health and safety of the all of the children in her care on December 1, 2011, during the time she was standing on the stairs when the infant and another child were on the upper level of the home and the other children were on the lower level. During that brief time, the brothers' mother was present to intervene on behalf of her infant child in the event Licensee was immediately needed to intervene on the lower level to protect one of the older children. This brief situation was not a violation of Minn. R. 9502.0315, subp. 29a.

13. Licensee was capable of intervening to protect the health and safety of the infant on December 2, 2011 during the time she was cleaning the infant's bottle in the laundry room 15 feet away from the infant. At that time Licensee did not have reason to believe that her two-year-old daughter would hit the infant with a plastic block. This situation was not a violation of Minn. R. 9502.0315, subp. 29a.

14. Licensee did not inflict corporal punishment on the infant on December 2, 2011 in violation of Minn. R. 9502.0395, subp. 2.

## **Violations Found**

15. Licensee violated Minn. Stat. § 245A.1435 and Minn. R. 9502.0425, subp. 9. on December 2, 2011, when she allowed the infant to sleep in the car seat for 15 to 30 minutes.

## **Reasonable Cause Conclusions**

16. When the Order was issued on December 9, 2011, there were specific articulable facts and circumstances indicating that an infant was seriously injured while in Licensee's care. This provided the Department with a reasonable suspicion to believe that any or all of the children in Licensee's care were at imminent risk of harm.

17. The December 2, 2011 incident, together with Licensee's prior knowledge of her two-year-old daughter's anger/behavioral problems, required Licensee to take some type of remedial action involving her daughter's behavior and make reasonable assurances in the area of supervision to preclude injury to infants in her care in the future. No such actions or assurances were established at the hearing. These 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.

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

19. 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:

- 1) The temporary immediate suspension of the family day care license of Angela Brandt be continued; and
- 2) The December 28, 2011 Protective Order of the Administrative Law Judge shall remain in effect.

Dated: January 27, 2012

s/M. Kevin Snell

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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

### **Burden of Proof**

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. 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 circumstances.

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, must determine whether there is enough evidence to maintain the suspension.

### **Articulable Facts Establishing a Reasonable Suspicion of Imminent Risk of Harm**

The Commissioner was entitled to make a preliminary determination, relying on law enforcement, child protection and licensing interviews, to indicate that an infant in Licensee's care was seriously injured, there may have been two lapses of supervision in two days, and an infant may have been left in a sleeping arrangement that violated licensing rules and SIDS training. This combination of factors posed an imminent risk of harm 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.

It is important to understand that the issue in this matter is whether or not there is an imminent risk of harm at the time of the hearing. The determinative facts that remain unchanged at the time of the hearing drive this decision. First, Licensee has known that her two-year-old daughter has recently developed anger issues and throws objects at other children. She also knows that the two-year-old fights with her older sister and roughhouses with the sister and other children. Much of that is normal child's play. Those facts alone do not suggest an imminent risk of harm to the other children. Nor does that suggest that Licensee violated the supervision requirement for infants on December 2, 2011, when she left the infant in the swing briefly while she washed its bottle. Under normal or typical circumstances, being 15 feet away from an infant will still allow her to intervene to protect the infant. However, additional facts suggest that Licensee should now know that her two-year-old daughter presents a risk of harm to infants.

The first and principal fact is the injury to the infant was caused by Licensee's daughter. Second is that Licensee and her husband have considered therapy for their daughter. The third fact is that her daughter likes to play in the swing and may have been jealous of the infant being there. The Licensee did not introduce evidence that she has chosen what special steps she will take for supervision of her daughter and any infants in care, or given assurances that such an event as happened on December 2, 2011 will not occur in the future. Finally, Licensee's testimony suggested that she does not completely understand the minimum rules of supervision for infants and toddlers in her care. Although no supervision violations have been found, this issue should be addressed. Being within sight or hearing is not enough. Those are just two of the three factors in the rule. The third factor is the principal factor and is the reason for the first two. Licensee must understand that she must be in a position to intervene to protect those children at all times. She may not be able to do that when some children are on the upper level and some are on the lower level or when her two-year-old daughter is not closely supervised in the presence of infants. Although Licensee was in a position to intervene on December 1, 2011, the situation would be entirely different at another time where a parent, helper or substitute caregiver was not also present.

### **No Reliable Articulate Facts in Evidence to Suggest that Licensee Injured the Infant**

The Department argues that Licensee injured the child by force feeding and that the injuries occurred by forcing the nipple of the bottle and the bottle into the infant's mouth. The only reliable fact in evidence to support this position is the injury to the infant. The Department's position relies entirely on the opinion of the County Licensur, whose training includes one week-long seminar on forensic interviewing at Cornerhouse in Minneapolis, and periodic training on child abuse and injuries through the County. The Licensur has no first hand knowledge of any incident that was force feeding by any licensee. The Licensee has neither committed an act nor said anything materially inconsistent that would lead a reasonable person to doubt Licensee's reports of the events of December 2, 2011. The Licensur concluded that, based upon pictures she had seen in past training, the infant's injuries were from force feeding by Licensee.

However, the Licensur's opinion testimony did not include any knowledgeable analysis of the specific injuries shown in the pictures of the infant's mouth that are in the record, such as how a bottle could make the infant's specific injuries. On the other hand, the Licensur gave unqualified testimony, based on no facts, that Licensee's two-year-old child could not have injured the infant with the plastic block. This testimony is not "the type of evidence on which reasonable, prudent persons are accustomed to rely on in the conduct of their serious affairs"<sup>52</sup> for several reasons. First, the Administrative Law Judge's examination of the Department's pictures of the inside of the infant's mouth suggest that the injury to the upper gum was made by a pointed object, such as the corner of a plastic block. Second, the Licensee would have to have seriously injured her hand or hands to force-feed the infant because of her permanent skin condition. The Administrative Law Judge observed the palms of Licensee's hands at the hearing.

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<sup>52</sup> Minn. R. 1400.8607, subp. 1.

Her hands were raw and red, particularly at the base of the fingers and thumbs where people typically develop callouses.

Although the infant was examined by the Midwest Children's Resource Center on December 6, 2011,<sup>53</sup> the resulting report, results and conclusions from that examination were not offered or introduced into the record by the Department. A physician's report with conclusions based on a reasonable medical certainty on the causation of the infant's injury, made by physicians specializing in identifying child abuse and neglect, would be relevant to the determination to be made in this proceeding. Without such a report stating it was more likely than not that Licensee injured the infant and not her two-year-old daughter, there is no reasonable basis to suggest that Licensee injured the infant through force-feeding. In such situations, the fact finder may appropriately conclude that the relevant evidence, not introduced by the party with access to the evidence, would be adverse to that party. In this case, the Administrative Law Judge concludes that the report would be adverse to the Department's position that Licensee injured the infant.

"The standard that the Commissioner [is] required to apply is belief based on reason."<sup>54</sup> The evidence in the record in this case suggests that the opinion adopted by the County and Department in suggesting that Licensee force-fed the infant was a belief based on speculation. There are insufficient articulable facts to warrant a cautious person to reasonably suspect that Licensee injured the infant by force-feeding.

### **Credibility of the Witnesses**

Licensee's demeanor throughout the hearing and the testimony of the parent witnesses suggest that Licensee is a kind and gentle provider, both by nature and necessity – as any harsh or forceful act involving Licensee's hands cause her serious injury. 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 injured the infant. The Minnesota Court of Appeals has determined that such evidence is relevant and desirable in TIS cases.<sup>55</sup>

In addition, the Licensor declined to answer simple and direct questions on cross-examination, and some answers given were inconsistent and unresponsive to appropriate questions. Licensee's testimony was responsive, candid, given without hesitation and without guile. Licensee's statements to the investigator about her two-year-old daughter's recent violent behavior, her statements and testimony about what she saw and heard on December 2, 2011, are credible and entirely believable. The Administrative Law Judge therefore concludes that Licensee's daughter, not Licensee, injured the infant on December 2, 2011.

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<sup>53</sup> Ex. 3.

<sup>54</sup> *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

<sup>55</sup> *Id.*.

## **Conclusion**

The risk of harm to infants posed by Licensee's two-year-old daughter still exists. For these reasons the Administrative Law Judge finds that the Commissioner would have 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.**