

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

In the Matter of the Order of Conditional License and Order to Pay a Fine Against the Family Child Care License of Jaime Mellesmoen

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge (ALJ) M. Kevin Snell on May 11, 2012, and June 1, 2012, at the Washington County Law Enforcement Center, 62nd Street, Stillwater, Minnesota. Maura J. Shuttleworth, Assistant Washington County Attorney, Stillwater, Minnesota appeared on behalf of the Department of Human Services (the "Department"). Jon Geffen, Arneson & Geffen PLLC, Minneapolis, Minnesota, appeared on behalf of Ms. Jaime Mellesmoen (the "Licensee"). The Office of Administrative Hearings' record closed on June 11, 2012, upon receipt of all post-hearing submissions of the parties.

STATEMENT OF THE ISSUES

1. Was Licensee in compliance with all family child care laws and regulations at all times?
2. If Licensee violated family child care laws or rules, did certain violations support the imposition of fines for those violations?
3. If Licensee violated family child care laws or rules, did the severity, chronicity or repetition of the violations support imposition of a conditional license?

The ALJ concludes that two of the three citations resulting in a \$600.00 fine are supported by the evidence, but that the overall fine should be reduced by \$200.00 because one citation was unsupported by the evidence. The ALJ concludes that the seriousness and chronicity of Licensee's violations of family child care rules on capacity require the imposition of a two-year conditional license.

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

FINDINGS OF FACT

1. Licensee has been licensed to provide family child care services since April 2003, most recently at her home in Oakdale, Minnesota (“the home”).¹

Licensed Capacity

2. Licensee’s C-3 license permits her to care for a maximum of 14 children when another qualified adult assists her. No more than 10 of those children may be under kindergarten age. No more than four of those children may be under the age of two. Of the four under the age of two, no more than three may be infants. When operating her day care alone, licensee is permitted to operate under the capacity limitations of a C1 or C2 license.²

3. A C-1 license permits a licensee to care for a maximum of 10 children. No more than eight may be under kindergarten age. No more than three of those children may be under the age of two. Of the three under the age of two, no more than two may be infants.³

4. A C-2 license permits a licensee to care for a maximum of 12 children. No more than 10 may be under kindergarten age. No more than two of those children may be under the age of two. Of the two under the age of two, no more than one may be an infant.⁴

Licensing History

5. Since she was first licensed, Licensee has utilized what she characterizes as a “clean plate club.” If a child does not eat breakfast, Licensee throws away the uneaten food. If a child does not eat lunch, the uneaten food is saved and re-served to the child at the afternoon snack time. That child does not receive the snack food that the other children receive. Parents are advised of the “clean plate club” at the time of enrollment of their children in Licensee’s program. If the parents are uncomfortable with the “clean plate club” concept, they are encouraged to seek alternative child care.⁵

6. On March 31, 2004, the County received a complaint against Licensee regarding improper physical discipline. The complaint was investigated and no determination was made whether or not the acts complained of did or did not occur.⁶

7. On August 11, 2005, Licensee required a child to sit in the kitchen all morning until lunch was served because the child didn’t eat what was served for breakfast. The County investigated an August 12, 2005 complaint and issued a

¹ Testimony of Jaime Mellesmoen, Rebecca Knighton, Washington County (“County”) Child Care Licensor, and Ann Walton, County Child Care Licensor.

² Test. of Rebecca Knighton and Annie Walton.

³ Ex. 17; Minn. R. 9502.0367.

⁴ *Id.*

⁵ Test. of J. Mellesmoen.

⁶ Ex. 4.

Correction Order to Licensee for a violation of Minn. R. 9502.0395 on August 17, 2005. Licensee admitted to the violation and agreed to correct it as follows:

I will limit my time outs to appropriate time limits & not make in [sic] manitory to eat all food served.⁷

8. At lunchtime on December 28, 2005, two children, brothers, ignored Licensee's request to pick up the toys they had been playing with and come upstairs to eat lunch with the other children. The lunch being served consisted of chicken sandwiches, potatoes and oranges. Licensee left the lunches on the kitchen counter and allowed the boys to continue playing. Licensee's dog then ate the chicken sandwiches.⁸ When the boys sought snacks at snack time after nap, Licensee served them the potatoes and oranges from the uneaten lunches. Licensee refused to make them chicken sandwiches or serve them the snacks that the other children received. Licensee then required the boys to sit in the kitchen together and read books from just after nap time until their mother arrived hours later to pick them up.⁹

9. On December 29, 2005, the mother of the two boys filed a complaint with the County and removed her boys from Licensee's care. The County licensor met with Licensee on December 30, 2005, and issued Licensee a correction order on January 3, 2006, for violating Minn. R. 9502.0395 regarding behavior guidance.¹⁰

10. Licensee requested reconsideration of the January 3, 2006 correction order by the Department. The Department affirmed the correction order in its entirety by letter dated January 9, 2008.¹¹

11. On August 10, 2007, two licensors from the County conducted an unannounced visit to Licensee's home, when most of the children were napping. Two infants, unrelated to Licensee, were sleeping in pack and play cribs that had been placed in a windowless closet. In addition, Licensee's three-year-old son was sleeping in his windowless bedroom on the main floor.¹²

12. Also on August 10, 2007, Licensee had a "book nook" for her own children located under the stairs in the basement near where day care children play. The book nook had a small "library" of books and was a cute and inviting place. Children would be able to sit and read, but would be unable to completely stand up under the stairs. No children were in the book nook on August 20, 2007.¹³

13. On September 26, 2007, the County issued Licensee a correction order for violating Minn. R. 9502.0425, subp. 4, regarding necessary two means of escape. The correction order contained three citations: one for the two infants sleeping in a

⁷ Exs. 23, 24.

⁸ *Id.*

⁹ Ex. 9; Test. of R. Knighton and J. Mellesmoen.

¹⁰ *Id.*

¹¹ Exs. 9.

¹² Test. of R. Knighton, A. Walton and J. Mellesmoen.

¹³ Test. of A. Walton and J. Mellesmoen.

windowless walk-in closet; one for her son sleeping in his windowless bedroom; and one for the existence of the book nook.¹⁴

14. Licensee requested reconsideration of the September 26, 2007 correction order by the Department. The Department affirmed the correction order in its entirety by letter dated March 24, 2008.¹⁵

15. In February of 2008, the County received two complaints against Licensee regarding improper behavior guidance by using food as punishment. The complaints were investigated and no determination was made whether or not the acts complained of did or did not occur.¹⁶

16. On March 26, 2008, the County received a complaint against Licensee regarding improper behavior guidance by requiring a child to eat food he didn't want until he would throw up. The parent removed her child from Licensee's care. The complaint was investigated and no determination was made whether or not the act complained of did or did not occur.¹⁷

17. In response to an 8:30 a.m., May 29, 2008, parent complaint regarding overcapacity, two County licensors made an unannounced visit to Licensee's home at 2:50 p.m. Licensors found a substitute caregiver caring for 10 children, five of whom were under two years of age. Licensors also discovered an infant sleeping in his car seat. The car seat containing the sleeping infant had been placed in a pack n play in the windowless closet of the master bedroom. The County issued Licensee a correction order on June 9, 2008 for violations of: Minn. Stat. § 245A.1435, regarding the requirement that infants must be placed directly in cribs for sleeping; Minn. R. 9502.0367, regarding licensed capacity; and Minn. R. 9502.0425, subp. 4, regarding necessary means of escape.¹⁸ The County also sent a June 9, 2008 cover letter with the correction order that stated, among other things:

This is the fourth correction order that has been issued within the last three years. This is a cause of concern because Washington County does not like to see continual rule violations. To help better monitor the situation, more frequent drop in visits will occur to ensure compliance with the child care regulations.¹⁹

Licensee neither completed nor signed and returned the correction order with a stated date that she corrected the violations or how she corrected the violations. On June 24, 2008, Licensee faxed the County a note from the infant's mother

¹⁴ Ex. 10.

¹⁵ Test. of J. Mellesmoen.

¹⁶ Ex. 4.

¹⁷ Ex. 11.

¹⁸ *Id.*; Ex. 12; Test. of R. Knighton & A. Walton.

¹⁹ Ex. 12.

indicating that the mother had asked Licensee to have her son sleep in his car seat when he is congested, so that he could breathe easier.²⁰

18. In response to a March 12, 2009 over capacity complaint from a prospective day care parent, two County licensors made an unannounced visit to Licensee's home at 11:30 a.m., on March 17, 2009. Licensors found a substitute caregiver caring for 12 children. Those children included one infant and four toddlers. Licensee had admitted to the prospective parent that she was always over capacity on Tuesdays. Licensee arrived at the home at 11:50 a.m., reporting that she had been to her chiropractor. The Licensors required Licensee to call the parent of the infant to come and pick up the child so that Licensee would be within her licensed capacity.²¹

19. Also on March 17, 2009, the Licensors observed a ferret running loose in a child care area. The ferret's box was overflowing with excrement and there was ferret excrement all over the carpet. The room where the ferret and excrement were located had a toxic smell. The County issued Licensee a correction order on March 25, 2009 for violations of: Minn. R. 9502.0367, regarding licensed capacity; and Minn. R. 9502.0435, subs. 4 and 8.²²

20. In response to an August 27, 2010 parent complaint regarding overcapacity, a County licensor made an unannounced visit to Licensee's home at 10:30 a.m., on August 31, 2010. Licensors found Licensee caring for 12 children: five school age; four preschoolers, one toddler, and two infants. Licensee misrepresented the age of the toddler as a preschooler. The toddler had been attending Licensee's day care for four months. Licensee did not have admission or arrangement documentation for the toddler. The Licensor also discovered that Licensee was utilizing a substitute caregiver, Mr. Jan Caballero, who had not had a background check completed. The County issued Licensee a correction order on September 3, 2010 for violations of: Minn. R. 9502.0367, regarding licensed capacity; Minn. R. 9502.0405, subp. 4, regarding required documentation; and Minn. Stat. § 245C.03, for utilizing a substitute caregiver that had not had a background study requested or completed.²³

21. On September 3, 2010, the County received a complaint against Licensee regarding improper behavior guidance by holding the heads of a two-year-old and a one-and one-half-year-old and placing her fingers over their mouths in an attempt to quiet them down because they were crying. The parent removed her three children from Licensee's care. The complaint was investigated and no determination was made whether or not the acts complained of did or did not occur.²⁴

22. On August 3, 2011, Licensee called a County licensor and advised that she would be undergoing back surgery in early August and planned to close her child care program until October 2011. Licensee's day care was actually closed the first

²⁰ *Id.*

²¹ Ex. 13; Test. of R. Knighton and A. Walton.

²² *Id.*

²³ Ex. 15; Test. of R. Knighton, A. Walton, and Jan Caballero.

²⁴ Ex. 15.

week in August when Licensee was in the hospital. Licensee reopened her day care program gradually after the first week in August, and utilized Mr. Caballero as a substitute caregiver during that month.²⁵

23. On August 15, 2011, the Oakdale Police Department received a complaint about a group of unsupervised juveniles in the middle of the street in front of Licensee's home. The investigating officer found a group of school age children (7 to 14 years of age), including two of Licensee's children, involved in a lemonade stand. They were not in the street impeding traffic. On August 16, 2011, Licensee called a County licenser and reported the August 15, 2011 incident and police visit.²⁶

24. On August 24 or 25, 2011, Licensee and Mr. Caballero transported day care children to the Minnesota zoo. One set of parents of other day care children also transported their children to the zoo that day. Licensee and Mr. Caballero had seven children in Licensee's Suburban: five day care children and two of Licensee's children. Licensee had placed the car seats in the Suburban and she also placed and buckled all of the children into their car seats – both going to and returning from the zoo. Licensee was not allowed to drive because of the medications she was taking as a result of her surgery. Mr. Caballero drove the Suburban to and from the zoo. Licensee was a passenger. At the time of the zoo field trip, Licensee had taken the required child restraint transportation training three times. Mr. Caballero had not taken the training.²⁷

25. On August 30, 2011, two County licensers made an unannounced visit to Licensee's home to follow-up about the August 15, 2011 police report regarding the lemonade stand. They saw one of Licensee's sons playing in the yard with two of his school age friends. When he saw the Licensers he went inside the house. After the licensers knocked on the door, the son answered. They asked if day care children were present and he said no. He said that Licensee was upstairs in bed. The licensers left a sheet regarding an upcoming training session for Licensee with her son and they left.²⁸

26. On August 30 or 31, 2011, the County received information that Licensee and Mr. Caballero had been at a local park with 12 children on August 30, 2011.²⁹ At 8:50 a.m., on August 31, 2011, two County licensers parked two houses away from Licensee's home so that they could observe. The licensers saw a red car pull up to Licensee's home and the man driving the car drop off a toddler at Licensee's home. He then drove away. Another vehicle parked in Licensee's driveway and a woman went into Licensee's home alone.³⁰

27. At 9:05 a.m., the licensers knocked on Licensee's front door. Licensee answered the door, came outside and closed the door. The Licensers asked to come into the home and check on the safety and number of any day care children that may be

²⁵ Test. of J. Mellesmoen and J. Caballero.

²⁶ Ex. 1; Test of J. Mellesmoen.

²⁷ Ex. 3; Test. of J. Mellesmoen and J. Caballero.

²⁸ Ex. 2; Test. of R. Knighton and A. Walton.

²⁹ Test. of J. Mellesmoen.

³⁰ Ex. 2; Test. of R. Knighton and A. Walton.

there because it appeared that Licensee was engaged in providing care for children. Licensee refused and became very angry with one of the Licensors and refused to look at or talk to her. Licensee would only speak with the other Licensor. Licensee denied that she was conducting day care and denied that the child that had arrived in the red car was even there. The licensor explained several times that the licensing rules require Licensee to grant access to the home during day care hours. Licensee repeatedly refused access, citing her right to privacy and that a friend was helping her clean house before she and her family left for the weekend.³¹

28. Licensee claimed she was not conducting day care on August 30, 2011. However, she billed the County for at least one child on the child care assistance food program for that day.³²

29. During the period of discussion with Licensee about getting access to the home, another father dropped off a child and asked Licensee how much he owed her for the field trip. Licensee replied that it was \$5.00 and that he could pay her later.³³

30. The Licensors eventually left Licensee's home because of her denial of access. At 9:27 a.m., Mr. Caballero arrived in front of Licensee's home. He advised one of the licensors that he was there to take Licensee's children out for the morning.³⁴

31. On August 31, 2011, Mr. Caballero took Licensee's children and other children on a field trip to the Pinz bowling center in Oakdale, Minnesota.³⁵

32. On September 15, 2011, two County licensors made an unannounced visit to Licensee's home. Licensee was caring for eight children: four preschoolers; two toddlers; and two infants. All of the children were located on the lower level of the home. Five of the children were playing in the lower level playroom while one child watched television. The two infants were each in pack-n-plays and were crying.³⁶

33. Also present in Licensee's home was Licensee' mother-in-law, who was sitting in the upper level living room, knitting. Licensee's mother-in-law was staying with Licensee's family while waiting for or recuperating from heart surgery. Licensee considered her as "back up" for Licensee. The mother-in-law did not interact with the day care children at any time while the licensors were present in the home. The mother-in-law advised the licensors that she had not taken the required training for SIDS/SBS to qualify her to care for infants. She agreed to complete the forms for a background check, which she had not previously done.³⁷

34. On September 20, 2011 the County received a complaint regarding behavior guidance related to "the clean plate club" from the mother of children that

³¹ *Id.*

³² Test. of R. Knighton.

³³ *Id.*

³⁴ *Id.*

³⁵ Test. of J. Caballero and J. Mellesmoen.

³⁶ Ex. 2; Test. of R. Knighton, A. Walton and J. Mellesmoen.

³⁷ *Id.*

Licensee had terminated from her care the previous month. The children had behavioral problems. One child liked to urinate in inappropriate locations, like a garbage can and on the floor. He thought it was funny. One child stole and lied. Both children caused problems with other day care children and their parents. The complaint was investigated and no determination was made whether or not the acts complained of did or did not occur.³⁸

35. On October 15, 2011, the County issued Licensee a correction order for violations of: Minn. Stat. § 245A.50 for lack of SIDS/SBS training for Licensee's mother-in-law on September 15, 2011; and Minn. Stat. § 245A.50 for lack of child passenger safety restraint training for Mr. Caballero related to the August zoo field trip.³⁹

Procedural Findings

36. On October 4, 2011, the County recommended to the Department that Licensee be placed under a conditional license for two years under the following conditions:

1. Ms. Mellesmoen will comply with all applicable Minnesota rules and laws.
2. Ms. Mellesmoen will be reduced from a C-3 license to a C-2 license.
3. Ms. Mellesmoen will send monthly attendance sheets to licensor.
4. Ms. Mellesmoen will have unannounced visits from child care licensing staff to monitor compliance.
5. No variances to age distribution or capacity will be granted.
6. An additional 4 hours of training in the area of behavior guidance be taken by December 31, 2011. This is in addition to the annual training requirements.⁴⁰

37. On October 20, 2011, the County notified Licensee by letter that it: had recommended an unspecified negative licensing action to the Department on October 12, 2011; and was requesting that a Family Child Care Placement List for all children in care be returned within 10 days.⁴¹

38. On December 23, 2011, the Department issued its Order to Pay a Fine and Order of Conditional License (Order) for Licensee's family child care license. The Order to Pay a Fine listed \$200.00 fines for each of the following three citations:

³⁸ *Id.*; Ex. 3.

³⁹ Exs. 11-13.

⁴⁰ Ex. 4.

⁴¹ Ex. 5.

- A. Violation of Minn. Stat. § 245A.07, subd. 3, for the transportation of children by a substitute caregiver that had not received child passenger safety restraint training; and
- B. Violation of Minn. Stat. § 245A.50, subd. 5, for utilizing a substitute caregiver that had not completed the required training on Sudden Infant Death Syndrome (“SIDS”) and Shaken Baby Training; and
- C. Violation of Minn. Stat. § 245C.03, subd. 1, for utilizing a substitute caregiver for which Licensee had not submitted an application for a background study.

The Order of Conditional License stated the reasons for the conditional license were for Licensee’s violations of Minn. Stat. §§ 245A.1435 (Reduction of risk of SIDS); 245A.50, subds. 5 and 6 (SIDS training and child passenger restraint training, respectively); 245C.03 (required background studies for caregivers and helpers); Minn. R. 9502.0335 (access to day care residence by Department licensors during day care hours); 9502.0365 and 9502.0367 (regarding capacity limits and child/adult ratios); 9502.0395 (regarding behavior guidance); 9502.0405, subp. 4 (regarding required records and reporting); 9502.0425, subp. 4 (regarding means of escape); and 9502.0435, subp. 4 (regarding toxic substances).

The terms of the Order of Conditional License, in substance, provide that Licensee must conduct her day care program as follows, under these conditions:

- 1. Follow and comply with all applicable Minnesota Rules and Laws.
- 2. No variances to age distribution or capacity will be granted during the conditional period.
- 3. Child to adult ratio and age distribution restrictions of a Class C-2 license.
- 4. Utilization of written parent and caregiver sign in and sign out records, to be submitted monthly to the County licensor.
- 5. Six additional hours of training for the Licensee on children’s safety and health, including positive behavior guidance, all approved in advance by the County.
- 6. Provide all parents with a copy of or access to the Order of Conditional License and secure the signatures of all parents that they have received that access or copy, and submit the parent signatures to the County.⁴²

39. Licensee filed a timely appeal of the Orders and requested an appeal hearing pursuant to Minn. Stat. §§ 245A.07 and 245A.08.

⁴² Ex. 6.

40. On January 9, 2012, the Department issued a Notice of and Order for Hearing in this matter, and this contested case proceeding ensued.⁴³

41. On February 21, 2012, an ALJ issued a Protective Order, which was served upon the parties by mail.

42. On April 27, 2011, an ALJ issued an order for hearing to commence on May 11, 2012. By agreement among the parties and Order of the ALJ, the hearing was concluded on June 1, 2012.

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

CONCLUSIONS

Jurisdiction

1. The ALJ and the Commissioner of Human Services have jurisdiction to consider the appeal of a family child care license decisions, pursuant to Minn. Stat. §§ 245A.07, subd. 3(a), 245A.08, and 14.50.

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

Burdens of Proof

3. Pursuant to Minn. Stat. § 245A.08, subd. 3, the commissioner may demonstrate reasonable cause for the proposed licensing sanction by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules occurred.

Scope of the Family Child Care Laws and Regulations

4. Minn. Stat. § 245A.03, regarding who must be licensed by the Commissioner of Human Services, provides in relevant part:

Subdivision 1. **License required.** Unless licensed by the commissioner, an individual . . . must not:

- (1) operate a residential or a nonresidential program;

⁴³ Notice of and Order for Hearing.

...

- (4) advertise a residential or nonresidential program.

Subd. 2. **Exclusion from licensure.** (a) **This chapter does not apply to:**

- (1) **residential or nonresidential programs that are provided to a person by an individual who is related** unless the residential program is a child foster care placement made by a local social services agency or a licensed child-placing agency, . . . (emphasis added)

5. Minn. R. 9502.0315 provides, in applicable part:

Subd 9. **Day Care.** "Day care" means the care of a child in a residence **outside the child's own home** for gain or otherwise, on a regular basis, for any part of a 24 hour day.

...

Subd 11. **Family Day Care.** "Family day care" means day care for no more than ten children at one time of which no more than six are under school age. **The licensed capacity must include all children of any caregiver when the children are present in the residence.** (emphasis added)

...

Subd 18. **Licensed Capacity.** "Licensed capacity" means the total number of children ten years of age or younger permitted at any one time in the residence. **The licensed capacity includes all children of any caregiver when the children are present in the residence.** (emphasis added)

Family Child Care Law and Rules Alleged to Have Been Violated

Licensed Capacity

6. Minn. R. 9502.0365, regarding **LICENSED CAPACITY, CHILD/ADULT RATIOS, AGE DISTRIBUTION RESTRICTIONS** provides in relevant part as follows:

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. (emphasis added) . . .

Subp. 4. **Helpers.** A helper may be used in place of a second adult caregiver when there is no more than one infant or toddler present.

Subp. 5. **Supervision and use of substitutes.** A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute caregiver must be limited to a cumulative total of not more than 30 days in any 12-month period.

7. Minn. R. 9502.0367, regarding child/adult ratios and age distribution restrictions provides that a C(3) Group Family Day Care license permits two adults to have 14 total children, only 10 of whom may be under school age. Of the total children under school age, a combined total of no more than four may be infants and toddlers. Of the combined total of infants and toddlers, no more than three of the four may be infants.

8. When operating with only one adult under Minn. R. 9502.0367, a C(3) license holder may operate under the C(2) license restrictions, which permit a combined total of two infants and toddlers. No more than one of the two may be an infant.⁴⁴

Background Studies Required for Caregivers

9. Minn. Stat. § 245C.03, subd. 1(2), requires that background studies be conducted regarding any individuals that may have access to children when the commissioner has reasonable cause to do so. Minn. Stat. § 245C.04, subd. 1(d), requires that all license holders submit to the commissioner completed background forms before anyone may have the opportunity for direct contact with day care children.

Training Required for Caregivers

10. Minn. Stat. § 245A.50, subd. 6, regarding training requirements for child passenger restraint systems, provides in relevant part as follows:

Subd. 6. **Child passenger restraint systems; training requirement.** (a) A license holder must comply with all seat belt and child passenger restraint system requirements under section 169.685.

(b) Family and group family child care programs licensed by the Department of Human Services that serve a child or children under nine years of age must document training that fulfills the requirements in this subdivision.

(1) Before a license holder, staff person, caregiver, or helper transports a child or children under age nine in a motor vehicle, **the person placing the child or children in a passenger restraint** must satisfactorily complete training on the proper use and installation of child restraint systems in motor vehicles . . . (emphasis added).

⁴⁴ Findings 3 and 4.

11. Minn. Stat. § 245A.50 regarding sudden infant death syndrome and shaken baby syndrome training, provides in relevant part as follows:

1) Subd. 5. **Sudden infant death syndrome and shaken baby syndrome training.** (a) License holders must document that before staff persons, caregivers, and helpers assist in the care of infants, they are instructed on the standards in section 245A.1435 and receive training on reducing the risk of sudden infant death syndrome. In addition, license holders must document that before staff persons, caregivers, and helpers assist in the care of infants and children under school age, they receive training on reducing the risk of shaken baby syndrome. The training in this subdivision may be provided as initial training under subdivision 1 or ongoing annual training under subdivision 7. . . .

Infant Sleeping Requirements

12. 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.

13. 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 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. (emphasis added)

Department Access to Day Care Residences

14. Minn. R. 9502.0335, subp. 13, provides as follows:

Access to residence. The provider shall give authorized representatives of the commissioner or agency access to the residence during the hours of operation to determine whether the residence complies with the standards of parts 9502.315 to 9502.0445. Access shall include:

- A. the residence **to be occupied** by children in care;
- B. any adjoining land or buildings owned or operated by the applicant or provider in conjunction with the provision of day care and designed for use by the children in care;
- C. **noninterference in interviewing all caregivers and household members present in the residence on a regular basis and present during the hours of operation;** and
- D. the right to view and photocopy the records and documents specified in part 9502.0405. (emphasis added)

Behavior Guidance Limitations and Requirements

15. Minn. R. 9502.0395, regarding behavior guidance provides, in relevant part:

Subpart 1. **Methods.** Caregivers shall give each child guidance that helps the child acquire a positive self-concept, self-control, and teaches acceptable behavior.

...

B. Behavior guidance used by caregivers must be constructive, positive, and suited to the age of the child. Methods of intervention, guidance, and redirection must be used.

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.

B. Food, light, warmth, clothing, and medical care shall not be withheld from the child.

...

D. The separation of a child from a group to guide behavior must be appropriate to the age of the child and circumstances requiring the separation.

...

F. A child shall not be separated from the group for a period longer than ten minutes.

Required Means of Escape

16. Minn. R. 9502.0425, regarding physical environment provides, in relevant part:

Subp. 4. **Means of escape.** From each room of the residence used by children, there must be two means of escape. One means of escape must be a stairway or door leading to the floor of exit discharge. The other must be a door or window leading directly outside. The window must be openable without special knowledge. It must have a clear opening of not less than 5.7 square feet and have a minimum clear opening dimension of 20 inches wide and 24 inches high. The window must be within 48 inches from the floor.

Required Provider Records

17. Minn. R. 9502.0405, subp. 4, regarding written records required to be kept by providers, provides in relevant part:

Subp. 4. **Records for each child.** The provider shall obtain the information required by items A to C from parents prior to admission of a child. The provider shall keep this information up-to-date and on file for each child.

Sanitation and Health Requirements

18. Minn. R. 9502.0435, regarding sanitation and health provides in relevant part:

Subp. 4. **Toxic substances.** All medicines, chemicals, detergents, poisonous plants, alcoholic beverages, and other toxic substances must be inaccessible to children. They must be stored away from food products. Equipment or toys which are mouthed or may be chewed must be free of lead-based paint. Toys and equipment with chipped, cracked, or peeling paint must be tested to verify the absence of lead or be replaced.

...

Subp. 12. **Pets.** All pets housed within the residence shall be maintained in good health and limited to dogs, cats, fish, guinea pigs, gerbils, rabbits, hamsters, rats, mice, and birds if the birds are clear of chlamydia psittaci. The provider shall ensure that:

...

E. play areas are free of animal excrement not confined to pet cages; . . .

No Violations Found by the Administrative Law Judge

19. Licensee's care of her own child is not "day care," as that term is defined in Minn. R. 9502.0315, subp. 9, and pursuant to Minn. R. 9502.0325, subp. 3A, care of one's own child is beyond the scope of the licensing rules. Licensee's care of her son is beyond the scope of Chapter 245A and the family child care licensing rules.

20. A Licensee's own child is included only for the purpose of determining the licensed capacity, as provided in Minn. R. 9502.0315, subp. 18. Therefore, the Department failed to demonstrate reasonable cause to believe that the Licensee violated Minn. R. 9502.0425, subp. 4, by allowing her son to sleep in his windowless bedroom on August 10, 2007. However, because Licensee requested reconsideration of the correction order arising from August 10, 2007, the violation stands by operation of Minn. Stat. 245A.06, subd 2. The Department's March 24, 2008, decision upholding the September 26, 2007 correction order is final.

21. The Department failed to demonstrate reasonable cause to believe that the Licensee violated Minn. R. 9502.0425, subp. 4, in August of 2007, by allowing her own children to utilize the "book nook" under the basement stairs.

22. The evidence in the record fails to establish that the "book nook" under the stairs in the basement is a "room" separate from the remainder of the basement. The Department failed to demonstrate reasonable cause to believe that the Licensee violated Minn. R. 9502.0425, subp. 4 in August 2007, by allowing access by children to the "book nook" under the basement stairs. However, because Licensee requested

reconsideration of the correction order arising from August 10, 2007, the violation stands by operation of Minn. Stat. 245A.06, subd 2. The Department's March 24, 2008, decision upholding the September 26, 2007 correction order is final.

23. On August 31, 2011, Licensee placed and secured all children in their car seats both ways for the trip to the Minnesota Zoo. Licensee was properly trained in the utilization of child passenger restraint systems. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. Stat. § 245A.50, subd. 6, on August 31, 2011. Licensee proved by a preponderance of the evidence that she and her substitute caregiver were in full compliance with Minn. Stat. § 245A.50, subd. 6, on the August 31, 2011 field trip to the Minnesota zoo.

Violations Found by the Administrative Law Judge to Have Occurred

Licensed Capacity Violations

24. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0367 on September 26, 2011, when she was operating under C2 capacity restrictions, with a second adult untrained in SIDS and SBS, and was caring for two infants, two toddlers, and four preschoolers. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0367 on September 26, 2011, as alleged by the Department.

25. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0367 on August 31, 2010, when she was operating alone under C2 capacity restrictions, without a second adult, and was caring for 12 children, including two infants and one toddler. By admitting to caring for one toddler more than allowed under the circumstances, Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0367 on August 31, 2011, as alleged by the Department.

26. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0367 on March 17, 2009, when a substitute caregiver was operating alone under C2 capacity restrictions, without a second adult, and was caring for 12 children, including one infant and four toddlers. By admitting she knew that two toddlers should not have been there, Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0367 on March 17, 2009, as alleged by the Department..

27. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0367 on May 29, 2008, when a substitute caregiver was operating alone under C2 capacity restrictions, without a second adult, and was caring for 10 children, including five children under two years of age, including two infants and three toddlers. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0367 on May 29, 2008, as alleged by the Department..

Additional Violations Found

Denial of Access Violation

28. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0335, subp. 13 on August 31, 2011, when she refused to allow the County licensors access to her residence during day care hours when the licensors had reason to believe children were in care. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0335, subp. 13 on August 31, 2011, as alleged by the Department.

Required Records Violation

29. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0405, subp. 4 on August 31, 2010, when she failed to have an admission and arrangement form for a toddler in her care. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0405, subp. 4 on August 31, 2011, as alleged by the Department.

Background Study Violations

30. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. Stat. § 245C.03, subd. 1(3), because she failed to request a background study completed on her mother-in-law before utilizing her as a caregiver on August 15, 2011. Licensee has failed to demonstrate by a preponderance of the evidence that she was in full compliance with Minn. Stat. § 245C.03, subd. 1(3), as alleged by the Department.

31. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. Stat. § 245C.03, subd. 1(3), because she failed to request a background study completed on Jan Caballero before he cared for day care children in the summer of 2010. Licensee has failed to demonstrate by a preponderance of the evidence that she was in full compliance with Minn. Stat. § 245C.03, subd. 1(3), as alleged by the Department.

Sanitation and Health Violation

32. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0335, subps. 4 and 12 on March 17, 2009, when she allowed a pet ferret to run loose in a children's sleeping area where ferret excrement was on the carpet of the area and the room had a toxic smell to it. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0335, subps. 4 and 12 on March 17, 2009, as alleged by the Department.

Infant Sleeping Violations

33. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. Stat. § 245A.1435 and Minn. R. 9502.0425, subp. 9 on May 29, 2008, by placing an infant to sleep in a car seat that had been placed in a crib. Licensee has failed to demonstrate by a preponderance of the evidence that she was in full compliance with Minn. Stat. § 245A.1435 and Minn. R. 9502.0425 subp. 9, as alleged by the Department.

34. The Department demonstrated reasonable cause to believe that Licensee violated Minn. Stat. § 245A.1435 on May 29, 2008, by placing an infant to sleep in a windowless walk-in closet. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. Stat. § 245A.1435, as alleged by the Department.

35. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0425, subp. 4 on August 8, 2007, by placing two infants to sleep in a windowless walk-in closet. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.0425, subp. 4, as alleged by the Department.

Behavior Guidance Violations

36. The Department demonstrated reasonable cause to believe that the Licensee violated Minn. R. 9502.0395, subps. 1B and 2F on August 8, 2005, by requiring a child to sit all morning in the kitchen for refusal to eat his breakfast. Licensee has failed to demonstrate by a preponderance of the evidence that she was at all times in full compliance with Minn. R. 9502.035, subps.1B and 2F, as alleged by the Department.

37. Under Minn. Stat. 245A.06, subd 2, the Department's January 9, 2008 decision upholding the January 3, 2006 correction order is final. Licensee violated Minn. R. 9502.0395, subp. 1B, and 2A and F, by withholding food from children as impermissible behavior guidance.

SANCTIONS

38. Minn. Stat. § 245A.07, subd. 3, allows the Commissioner to suspend or revoke a license, or impose a fine if a license holder fails to comply with the applicable laws or rules.

Violations Requiring Imposition of Fines

39. Minn. Stat. § 245A.07, subd. 3(c)(4), provides in applicable part

(4) Fines shall be assessed as follows: . . . the license holder **shall forfeit \$200 for each occurrence of a violation** of law or rule governing matters of health, safety, or supervision, including but not limited to the **provision**

of adequate staff-to-child or adult ratios, and failure to submit a background study; and the license holder shall forfeit \$100 for each occurrence of a violation of law or rule other than those subject to a \$1,000 or \$200 fine above. For purposes of this section, "occurrence" means each violation identified in the commissioner's fine order. (Emphasis added.)

40. Licensee's utilization of her mother-in-law as a caregiver on September 15, 2011 was a violation of Minn. Stat. § 245A.50, subd. 5, because the mother-in-law did not have SIDS or shaken baby training. Training on SIDS and SBS are health and safety issues. Under Minn. Stat. § 245A.07, subd. 3(c)(4), the Commissioner is required to impose a \$200.00 fine for that violation.

41. Licensee's August 31, 2010, utilization of a substitute caregiver that had not had a background study completed was a violation of Minn. Stat. §§ 245C.03, subd. 1 and 245C.04, subd. 1(d). Under Minn. Stat. § 245A.07, subd. 3(c)(4), the Commissioner is required to impose a \$200.00 fine for a background study violation.

Conditional License Sanction for Other Violations

42. Minn. Stat. § 245A.07, subd. 1, requires the Commissioner to consider "the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights" of those persons in a licensee's program before applying sanctions under Minn. Stat. § 245A.07.

43. Before ordering a conditional license, the commissioner shall evaluate the facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the license holder. The Department evaluated the chronicity of law and rule violations by Licensee, available consumer evaluations of the programs and information about the qualifications of the Licensee. The Department has shown that the continued operation of the program with special conditions is in the best interests of children served by Licensee.

44. The Commissioner should modify the third condition of the Conditional License to allow Licensee to retain her C3 license, but reduce the toddler and infant limitation to that of a C2 license, permitting Licensee to care for no more than one infant and no more than two children below the age of two.

Reduction of Fines

45. The Commissioner should reduce the total fines from \$600.00 to \$400.00 because one of the alleged violations of Minn. Stat. 245A.50, subd. 6, resulting in a \$200.00 fine was not established by reasonable cause.

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

47. The ALJ 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 ALJ makes the following:

RECOMMENDATION

Based upon these Conclusions, the ALJ recommends to the Commissioner of Human Services that:

- (1) the Order to Pay a Fine be **AFFIRMED**, but the fine be reduced to \$400.00;
- (2) the Order of Conditional License be **AFFIRMED**, but that the terms be modified ;
- (4) the Protective Order issued on February 21, 2012, shall remain in effect.

Dated: July 12, 2012

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 will issue a final decision after reviewing the administrative record, and she may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this recommended decision in which to file any exceptions to the report with the Commissioner.⁴⁵ Parties should contact the office of Lucinda Jesson, Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651)431-2907 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the

⁴⁵ Minn. Stat. § 14.61.

presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota law, the Commissioner of Human Services is required to serve her final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

Burden of Proof

The Department has the burden to demonstrate “reasonable cause” for the imposition of fines and a conditional license on the family child care license of Licensee. As set forth in statute, “the [Department] may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule.”⁴⁶ When such facts are shown that would support a conclusion that a violation occurred, the burden shifts to the license holder to demonstrate compliance with the applicable statute and rules. But if the Department fails to show reasonable cause, the burden does not shift, and the violation must be dismissed.

Scope of Licensing Statutes and Rules

The Department argues that Licensee’s own children must be considered day care children for all purposes under the applicable statutes and regulations. The Department cites the capacity limit regulations in support of its position.⁴⁷ This argument overlooks the plain language of Minn. Stat. § 245A.03 and Minn. R. 9502.0315, subd. 9.⁴⁸ The Licensee argues that neither her children nor those of her substitute caregivers or helpers are governed by day care laws or rules, except for including those children in the capacity limitations. Both the Department and the Licensee are incorrect in their interpretations of the interplay of the applicable law and rules. The Licensee also overlooks the plain language of Minn. R. 9502.0315, subd. 9.⁴⁹

The citations of Licensee by the County for allowing her son to be sleeping in his windowless bedroom and allowing her children to utilize the “book nook” extends the scope of Minn. R. 9502.0365, subp. 1A, beyond the plain language of its terms. The rule provides:

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.

⁴⁶ Minn. Stat. § 245A.08, subd. 3.

⁴⁷ Conclusion 5.

⁴⁸ *Id.*; Conclusion 4.

⁴⁹ Conclusion 5.

The second sentence speaks to one thing - including all children in the licensed capacity. There is no ambiguity in the language of this provision. When the language is clear, no further inquiry or construction is required or permitted.⁵⁰ The Department's public policy arguments fail in light of the plain language of the statute and rule.

The care of children of Licensee's substitute caregivers and helpers are subject to all day care laws and regulations. Licensee misinterprets the plain language of Minn. R. 9502.0315, which provides in applicable part:

Subd 9. **Day Care.** 'Day care' means the care of a child in a residence **outside the child's own home** for gain or otherwise, on a regular basis, for any part of a 24 hour day. (Emphasis added.)

There is no evidence in the record to suggest that any of Licensee's helpers or substitute caregivers reside in Licensee's home. Licensee's care of her own children is not "day care," as that term is defined by the plain language of applicable law and rule. Care of one's own child is beyond the scope of the licensing laws and rules. Except for including those children in the capacity limits, Licensee's care of her children is beyond the scope of Chapter 245A and the family child care licensing rules.

Licensing Violations

The ALJ concluded that Licensee committed a combination of 13 statutory and rule violations over the nine years that Licensee has been licensed. In determining an appropriate licensing action, "the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program."⁵¹

Capacity Violations

There is substantial evidence to conclude that there is a chronic problem with the Licensee's violations of the capacity limitations for infants and toddlers over a period of years. These four violations are particularly serious because they involve the two most vulnerable groups. The seriousness and chronicity of the capacity violations alone support the imposition of the conditional license.

The Licensee argues that imposition of a C2 license increases the child/caregiver ratio. Licensee further argues that this increases the risk of harm to children in care when one caregiver is caring for more total children than two caregivers under a C3 license. This argument has merit. It is better for two caregivers to care for 14 children than one caregiver caring for 12 children.

However, Licensee's chronic difficulty has been maintaining the maximum capacity of children under two years of age - the toddlers and infants. Therefore,

⁵⁰ Minn. Stat. § 645.16 (2006), *Owens v. Water Gremlin Co.*, 605 NW.2d 733,737 (Minn.2000).

⁵¹ Minn. Stat. § 245A.07, subd. 1.

because Licensee has been unwilling or unable to stay within the capacity limitations for infants and toddlers, the Administrative Judge respectfully suggests to the Commissioner that Licensee maintain her C3 license under a conditional license that limits her under two capacity to that of a C2 license – no more than one infant and no more than a total of two children under age two.

Denial of Access Violation

Licensors, the designees of the Commissioner, have the right and obligation to inspect day care homes during day care hours under Minn. R. 9502.0335, subp. 13. The regulation does not say this right and obligation may be exercised “only while the day care program is actually caring for children under a fee for service.”⁵² The purpose of the regulation is to ensure that any children that may be in care are safe and that licensees are operating within the laws and rules. Licensees may not refuse entrance to a licensed home during day care hours by having a licensee claim, falsely or otherwise, the she is not actually operating fee for service day care.

Having any license from the state is a privilege. Each licensee gives up some particular rights by asking to be granted a license to engage in some profession, service or business. Accountability to the public under applicable laws and rules supercedes some rights because the licensee has agreed to give up those rights by accepting the particular license, and agreeing to be bound by the laws and rules applicable to that particular license.

Licensee’s right to privacy is superceded by the right and obligation of the Department to have its designees inspect a licensed day care home during normal day care hours of operation. Although the record is unclear on Licensee’s precise regular hours of operation, the evidence in the record suggests that Licensee is open no later than 6:30 a.m. and operates throughout weekdays until some time after school children arrive at Licensee’s home. Licensee testified that she had been operating her day care in August 2011 beginning with the second week. Licensee took day care children to the Minnesota Zoo on the 24th. Reliable evidence from two sources suggests Licensee was open on the 30th. It is irrelevant whether or not Licensee was actually operating fee-for-service day care on Wednesday, August 31st. Licensee had operated fee-for-service day care on August 30th. A reasonable person would conclude that Licensee was operating on the 31st, after seeing day care age children arrive and a parent ask how much needed to be paid for a field trip. Licensee’s refusal to allow the licensors access to the residence on August 31, 2011, was a clear violation of Minn. R. 9502.0335, subp. 13.

Factors to Be Considered by the Commissioner in Determining the Sanction

When determining an appropriate sanction, in addition to considering “the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the

⁵² See *also*, Minn. R. 9502.0315, subd. 9. Day care means the care of a child in a residence outside the child's own home **for gain or otherwise**. (Emphasis added.)

health, safety, or rights of persons served by the program,” the Commissioner is required to consider:

[T]he facts, conditions, or circumstances concerning the program’s operation, the well-being of persons served by the program, **available consumer evaluations of the program**, and information about the qualifications of the personnel employed by the ... license holder.⁵³ (Emphasis added.)

The Department is concerned about Licensee’s history regarding appropriate behavior guidance. Between March 31, 2004 and September 21, 2011, the Department has received eight complaints against Licensee about improper behavior guidance.⁵⁴ Two of those complaints resulted in correction orders in 2004 and 2005. No determination was made regarding the others, including the most recent complaint.

Licensee argues that it is unfair for the Department to consider unsubstantiated complaints when determining the appropriate sanction for other violations. The Department concedes that this history of unsubstantiated complaints was a factor in the determination leading to the Order for Conditional License.⁵⁵

The parent complaints (whether substantiated, unsubstantiated or undetermined) are “consumer evaluations” of a program. It is not only appropriate, but also required by statute, for the Commissioner to consider all complaints when determining the appropriate sanctions for violations that have occurred.

The Minnesota Court of Appeals has also determined that the knowledge and opinions of day care parents are relevant and desirable in licensing cases.⁵⁶ The only evidence of “consumer evaluations” in this record is parent complaints. There is no evidence of confidence or support by Licensee’s day care parents.

It is noteworthy that one of the conditions contained in the Order for Conditional License refers directly to behavior guidance. Condition 5 requires Licensee obtain six hours of additional training “in the areas of positive behavior guidance and children’s health and safety.” However, the ALJ has previously concluded that the chronic capacity violations alone were a sufficient basis to impose a two-year conditional license.

Condition five refers to “children’s health and safety” as well as “behavior guidance.” Health and safety issues, including licensed capacity, comprise the bulk of Licensee’s many licensing violations. It could be expected that the bulk of the pre-approved extra six hours of training would be in areas other than behavior guidance – such as the reason for capacity limits. It would be appropriate for a suitable percentage

⁵³ Minn. Stat. § 245A.04, subd. 6.

⁵⁴ Ex. 4.

⁵⁵ Test. of Suzanne Pollack, County Supervisor for licensing of adult and child foster care and child care.

⁵⁶ See, *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

of the six hours of extra training to be allocated to behavior guidance training due to the two substantiated violations for utilization of improper behavior guidance by Licensee.

Although the Commissioner may do so, the ALJ did not consider the unsubstantiated complaints against Licensee in determining the appropriate sanction.⁵⁷

Conclusion

The ALJ concludes that the chronic and serious violations of the capacity limitations requires, in order to protect the well-being of the youngest children, imposition of a conditional license. Licensee's other violations, while serious, do not rise to the same level of chronicity as the capacity violations. The conditions and the duration of the Order for Conditional license are appropriate. For all of these reasons, the ALJ does recommend that two of the three fines be affirmed, and the Order of Conditional License be affirmed as modified.

M. K. S.

⁵⁷ See, Ex. 4.