

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 Serena Brolsma 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 March 22, 2012, at the Mower County (the "County") Courthouse, 201 Second Avenue N.E., Austin, Minnesota 56912. The OAH record closed at the end of the hearing on March 22, 2012.

Aaron Jones, Assistant Mower County Attorney, Austin, Minnesota, appeared at the hearing for the Minnesota Department of Human Services (the "Department") and Mower County Human Services. Michael D. Schatz, Adams, Rizzi & Sween, P.A., Austin, Minnesota, appeared on behalf of Ms. Serena Brolsma ("Licensee").

**STATEMENT OF THE ISSUE**

The issue is whether the Department of Human Services' order of temporary immediate suspension of Licensee's family day care license should be continued.

The Administrative Law Judge concludes that the temporary suspension should not be continued.

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

**FINDINGS OF FACT**

1. Until a Temporary Immediate Suspension ("TIS") of Licensee's license to provide family child care services, she provided such services for children in her home in Austin, Minnesota ("the home").<sup>1</sup>

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<sup>1</sup>Testimony of Sherry Bibus, Mower County Family Child Care Licensor, & Serena Brolsma.

## Licensee's Licensing History

2. Other than the current matter and one unsubstantiated complaint, Licensee has had no incidents, violations or complaints about her or her child care in the 34 years she has been providing day care.<sup>2</sup>

## Program Conditions

3. Licensee currently has at least 17 children enrolled in her program.<sup>3</sup> However, they attend on varying schedules and days, and some school age children attend only when there is no school and/or during summers.<sup>4</sup>

4. Because of the high quality of care delivered to children by Licensee, her program is popular and recommended by others.<sup>5</sup> One family has been utilizing Licensee for child care for 25 years.<sup>6</sup> Another family was on a waiting list for six months before they could enroll their child.<sup>7</sup>

5. Licensee's hours of operation are from 5:00 a.m. to 5:30 p.m., Monday through Friday. Normal nap time for the children begins at 12:30 p.m. If the children are not already awake, Licensee wakes them up no later than 3:30 p.m.<sup>8</sup>

6. Up until February 14, 2012, Licensee utilized a 4' by 7' foyer near the kitchen as a napping room for toddlers because it is away from the three other rooms in the home where children typically play. Those three rooms are the living room, dining room and a play room. Licensee utilized two pack & play type cribs for the toddlers to sleep in when they are in the foyer.<sup>9</sup>

## Monday, February 13, 2012

7. On February 13, 2012, in addition to other children, Licensee was caring for a male toddler.<sup>10</sup> The toddler is a "drop in" child and is not a regular, full-time enrollee in Licensee's program. The toddler's mother is a friend of Licensee's daughter and recently began utilizing Licensee on an irregular basis because she recently ended a period of unemployment. When in care, the toddler's mother would typically drop him off at 1:00 p.m. His grandmother would pick him up at 4:00 p.m. This would occur usually on Mondays only. Sometimes it occurred on Wednesdays and Fridays.<sup>11</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> Test. of Robin Losee, Lauren Kasak, Kretta Menuey, Diane Petrik, Xiuhong Zhai; Exs. 8, 9, 11-13.

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

<sup>5</sup> *Id.*

<sup>6</sup> Test. of R. Losee.

<sup>7</sup> Test. of X. Zhai.

<sup>8</sup> Test. of S. Brolsma.

<sup>9</sup> *Id.*

<sup>10</sup> Test. of S. Brolsma & S. Bibus.

<sup>11</sup> Ex. 1; Test. of S. Brolsma.

8. On Monday, February 13, 2012, the toddler was dropped off by his mother at 1:00 p.m. He wasn't tired and did not nap while the other children were napping.<sup>12</sup>

9. He went down for a nap at 4:00 p.m. in a pack & play in the toddler foyer. There were no toys, blankets or other objects in the pack & play with the child. Licensee checked on him at 4:10 p.m. Two feet away from the toddler's pack & play was a space heater that was turned on. The space heater had been approved by the local Fire Marshall, Mr. Wilson, within the previous two years.<sup>13</sup>

10. At approximately 5:15 p.m., Lauren Kasak picked up her son from Licensee's care and, when pulling away from the home in her car, saw the toddler's grandmother at the front door to the home.<sup>14</sup>

11. Also at approximately 5:15 p.m., Licensee's daughter arrived to pick up Licensee to go exercise by walking at the local mall. Licensee, incorrectly thinking that the Kasak child was the last child in care, went out the back door to the house and got into her daughter's car at 5:18 p.m. Licensee's daughter then drove them to the mall.<sup>15</sup>

12. The toddler's grandmother knocked but did not receive a response.<sup>16</sup> At that time there was no front door bell and Licensee didn't hear the grandmother knocking at the front door.<sup>17</sup> From the front door the grandmother could see the toddler's diaper bag hanging on a stairway wall.<sup>18</sup>

13. The toddler's grandmother then called his mother on her cell phone and explained that the front door was locked and she was getting no response by knocking.<sup>19</sup>

14. The toddler's mother then called Licensee's daughter's cell phone at 5:25 p.m. When Licensee saw the call on her daughter's phone, she then remembered that the toddler was still asleep in the home. Licensee told the toddler's mother that the back door was unlocked and that she could go in that door.<sup>20</sup>

15. Licensee immediately left the mall to return home, arriving at 5:33 p.m.<sup>21</sup>

16. The toddler was found unharmed by his mother. She woke him up.<sup>22</sup>

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<sup>12</sup> Test. of S. Brolsma.

<sup>13</sup> Test. of S. Brolsma.

<sup>14</sup> *Id.*; Ex. 1.

<sup>15</sup> *Id.*

<sup>16</sup> Ex. 1.

<sup>17</sup> Test. of S. Brolsma.

<sup>18</sup> Ex. 1.

<sup>19</sup> *Id.*

<sup>20</sup> Test. of S. Brolsma.

<sup>21</sup> *Id.*; Ex. 1 at 3.

<sup>22</sup> Ex. 1.

17. Law enforcement was dispatched to Licensee's home at 5:32 p.m., arriving at 5:36 p.m. Law enforcement searched the home for other children. None were found. Law enforcement spoke with the toddler's mother, grandmother and Licensee.<sup>23</sup>

18. One of the law enforcement officers tipped over the space heater. Its power turned off, with the heating elements gradually cooling down, as it is designed to do.<sup>24</sup> Law enforcement cleared the scene at 5:53 p.m.<sup>25</sup>

19. Licensee called her County Licensur at 6:30 p.m. and reported the incident.<sup>26</sup>

### **Remedial Measures Taken After February 14, 2012**

20. The County Licensur provided Licensee with a "supervision packet" for her to complete and return to the Licensur.<sup>27</sup> Licensee completed the packet but was unable to contact the Licensur and deliver it until the hearing.<sup>28</sup> The County Licensur was attending a conference from March 13, 2012 through March 16, 2012.<sup>29</sup>

21. With the approval of the County Licensur, Licensee changed the toddler napping from the foyer to a central area located between two pocket doors that can be partially closed to provide quiet for napping. A hot water radiator that operates on the home's overall system heats the area.<sup>30</sup>

22. Licensee took the following additional remedial measures after the incident:

- a. A door bell has been installed at the front door. It can be heard anywhere in the house; and
- b. An alarm has been installed at the back door that operates whenever the door is opened; and
- c. A system of two separate check-in, check-out procedures has been implemented. Parents are required to sign their children in and out each day. In addition, Licensee has a separate "white board" that she uses to check the children in and out each day; and

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<sup>23</sup> Ex. 1.

<sup>24</sup> *Id.*; Test. of S. Brolsma.

<sup>25</sup> Ex. 1.

<sup>26</sup> Test. of S. Bibus and S. Brolsma.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Test. of S. Bibus.

<sup>30</sup> Ex. 2; Test of S. Brolsma.

- d. Licensee will not leave the home prior to 5:30 p.m. on any day that children are in care, even if they have already been picked up.<sup>31</sup>

### **Additional Findings**

23. Licensee has no memory problems. There is no history in her family of dementia or Alzheimer's disease.<sup>32</sup>

### **County Recommendation for a Conditional License**

24. The County Licensur recommends that Licensee be placed on a conditional license. She is confident that Licensee can meet the conditions. The Department has stated that it will not offer Licensee a conditional license until this proceeding is completed.<sup>33</sup>

25. Licensee and the County Licensur still need to complete a "safety plan" and the County Licensur will re-inspect the home. The County Licensur is unaware of anything that would prevent implementation of a safety plan other than the fact that she is leaving her position with the County on April 10, 2012.<sup>34</sup>

### **Additional Impact of the TIS on the Day Care Families**

26. The parents of 17 children, who all had children in Licensee's care up to the incident, have no concerns about Licensee's continued care of their children.<sup>35</sup> They know about the February 13, 2012 incident and are all anxious to return their children to Licensee's care as soon as possible. Parents of 22 current and former children in Licensee's care have complete confidence in Licensee and recommend her to others seeking child care without hesitation.<sup>36</sup>

27. Licensee feels terrible about the incident, accepts full responsibility for it, agrees that the incident that should never have occurred, has given her word that it will never happen again, has been fully cooperative and honest throughout the investigation and all proceedings, and is willing to take any steps recommended or required by the County and/or the Department, including a conditional license.<sup>37</sup>

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<sup>31</sup> Exs. 3 –6; Test of S. Brolsma.

<sup>32</sup> Test. of S. Brolsma.

<sup>33</sup> Test. of S. Bibus.

<sup>34</sup> *Id.*

<sup>35</sup> Test. of R. Losee, L. Kasak, K. Menuey, D. Petrik, X. Zhai; Exs. 8, 9, 11-13.

<sup>36</sup> *Id.*

<sup>37</sup> Test. of S. Bibus and S. Brolsma.

## Procedural Findings

28. On February 14, 2012, after consultation with the Department, Mower County Social Services Department recommended that Ms. Brolsma's day care license be immediately suspended.<sup>38</sup>

29. The Department issued an order of temporary immediate suspension on February 14, 2012.<sup>39</sup>

30. 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>40</sup>

31. On February 17, 2012, the Department's Division of Licensing executed a Notice of and Order for Hearing scheduling a contested case hearing March 22, 2012.<sup>41</sup>

32. On March 1, 2012, the Administrative Law Judge issued a Prehearing Order and Protective Order, which was served upon the parties that day.

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.

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

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

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

5. "Reasonable cause" for the purpose of a temporary immediate suspension means:

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<sup>38</sup> Test. of S. Bibus.

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

<sup>40</sup> Notice and Order for Hearing.

<sup>41</sup> Notice and Order for Hearing.

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>42</sup>

6. 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>43</sup>

7. Licensee was neither within sight nor hearing of the toddler on February 13, 2012, from the time she left the home at 5:18 p.m. until the time she returned at 5:33 p.m.

8. When a temporary immediate suspension is appealed, the scope of the appeal hearing is limited solely to the issue of whether the temporary immediate suspension “should remain in effect” pending a final order issued on a subsequent licensing sanction. Further, the burden of proof is limited to the Commissioner’s demonstration that reasonable cause “exists” to believe that the license holder’s actions or failure to comply with applicable law or rule “poses” an imminent risk of harm to the health, safety, or rights to those served by the licensee. Thus, the Administrative Law Judge is required to address the current situation and not only whether the temporary immediate suspension was properly issued at the time and not just whether reasonable cause existed at the time the temporary immediate suspension was issued.

9. When the Order was issued on February 14, 2012, there was reasonable cause to believe that all of the children in Ms. Brolsma’s care were at imminent risk of harm.

10. At the hearing, Licensee and the testimony of the Mower County licensor demonstrated that Licensee has taken all necessary steps and is willing to take further remedial measures to prevent any future similar situations. No reasonable cause now exists to believe that the children in Licensee’s care would be at imminent risk of harm.

11. There is a lack of specific articulable facts or circumstances which would provide the commissioner with a reasonable suspicion to conclude that Licensee presents a current, imminent risk of harm to the children in her program. The Department has failed to demonstrate that “reasonable cause” now exists to continue the immediate suspension of Ms. Brolsma’s day care license.

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<sup>42</sup> Minn. Stat. § 245A.07, subd. 2.

<sup>43</sup> Minn. Rule 9502.0315, subp. 29a.

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

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

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

### **RECOMMENDATION**

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that:

The temporary immediate suspension of the family day care license of Serena Brolsma be immediately withdrawn and rescinded.

Dated: March 30, 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 Jesson, 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 Licensees' care are at imminent risk. This is a modest standard, intended to insure that vulnerable children are protected until there can be a full hearing and final determination on the underlying charges.

### **Permitted Evidence**

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 (or any person present during the hours that children are in care) to an act that puts children at risk of imminent harm. The Administrative Law Judge, at this stage of the process, is not required to assess the relative credibility of conflicting testimony or statements, but rather is to determine whether there is enough evidence to maintain the suspension. In this case, there was little conflicting testimony or statements regarding the material facts. The Licensee accepts and believes that the temporary immediate suspension of her license was justified and appropriate.

### **Necessity of Current "Imminent Risk of Harm"**

However, as serious as the Licensee's lapse in supervision was, and even when the evidence offered by the Commissioner is reviewed in light of the modest "reasonable cause" standard of proof, it is concluded that the evidence is not sufficient to establish reasonable cause to continue the temporary immediate suspension. The Commissioner was entitled to make a preliminary determination, relying on interviews and a law enforcement report, to indicate a serious lapse of supervision by being away from the day care home for 15 minutes. This lack of supervision might extend into other contexts, thereby posing a continuing risk of harm and requiring an immediate temporary suspension of the child care license.

However, the evidence submitted by Ms. Brolsma and the licensor regarding the unusual situation then, the normal situation now, the complete lack of adverse history or any chronicity of licensing or other violations, rise to the level where the Administrative Law Judge is convinced that the February 13, 2012, episode was a one-time event that is very unlikely to reoccur.

## **Opinions of Parents of Licensee's Day Care Children**

The evidence from every witness, including the parents of the 11 families whose children are in Licensees' care, overwhelmingly shows that Licensee provides excellent child care, exceeding the minimum standards of law and rule. The Minnesota Court of Appeals has determined that the knowledge and opinions of day care parents is relevant and desirable in TIS cases.<sup>44</sup>

## **Conclusion**

Based on the foregoing reasons, there is no imminent risk of harm to the health, safety, or rights of the children served by Ms. Brolsma at this time. The Administrative Law Judge respectfully suggests to the Commissioner that the Department no longer has reasonable cause to continue the suspension.

**M.K.S.**

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<sup>44</sup> *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).