

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation
of the Family Child Care License of
Amber J. Schueler, License No. 1055607

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on June 1, 2012, at the Martin County Courthouse in Fairmont, Minnesota. The OAH record remained open until July 31, 2012, for a response to the Licensee's post-hearing submission. No response was received.

Troy Timmerman, Faribault County Attorney, appeared on behalf of Faribault County (the County) and the Minnesota Department of Human Services (the Department or DHS). Amber Schueler (Licensee) appeared on her own behalf, without counsel.

STATEMENT OF ISSUE

Should the Licensee's family child care license be revoked because she refused to allow a County licensing worker to enter her home during an investigation; did not provide adequate supervision to a child; did not ensure that hazardous materials were not accessible to children; did not maintain documentation of monthly crib safety inspections and annual recall checks; failed to ensure that her home was free of dirt, rubbish and clutter and that there were two means of escape; and failed to comply with a prior correction order?

The Administrative Law Judge finds that certain of the violations cited by the Department were not supported by the evidence. However, the Administrative Law Judge concludes that the Commissioner's order revoking the family child care license should be affirmed based upon several serious and substantiated violations of applicable rules and laws, particularly the Licensee's failure to allow the County licensing worker access to her child care home during its hours of operation, the Licensee's failure to provide adequate supervision to an infant in care, and the Licensee's failure to ensure that the licensed premises met health and sanitation standards.

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

FINDINGS OF FACT

1. The Licensee, Amber J. Schueler, lives in Fairmont, Minnesota with her husband and two children (a 3-year-old and a 1-year-old). She has been a licensed child care provider in her home in Fairmont, Minnesota, since September 1, 2009. She also has had a part-time position with REM Heartland, Inc., since March 7, 2003, working with adults with disabilities.¹

2. There are two main exits from the Licensee's home, one located in front of the house and one in the back. There is also a third exit to the outside that is located a few steps down from the kitchen. The latter exit is not identified as one of the exits to be routinely used for day care, but is part of the day care evacuation plan. The portion of the Licensee's home used for child care is over 500 square feet.²

3. Prior to her licensure as a family child care provider, the Licensee attended orientation and training sessions. The laws and rules that govern family child care providers were discussed during those sessions, including the requirement that providers must give County workers access to their home during the hours of operation of their day care program. The Licensee also received copies of the rules applicable to family child care providers.³

4. Denise Baruth is a licensing social worker employed by Human Services of Faribault and Martin Counties. Among other things, Ms. Baruth is responsible for licensing and re-licensing family child care providers and investigating complaints.⁴

5. The Licensee notified Ms. Baruth in early August 2010 that the water heater in her home was broken and the water temperature was approximately 135-140 degrees Fahrenheit. She ordered a new water heater on August 17, 2010. It was delivered on August 29, 2010, and installed the following week.⁵

6. On August 27, 2010, Ms. Baruth went to the Licensee's home for a relicensing visit. She noted a number of rule violations during the visit and discussed them with the Licensee during the visit. Her concerns included:

- Violations of crib safety requirements (failure to complete monthly inspections on a "Pack and Play"/crib in storage; using a changing pad on a "Pack and Play" that likely had been recalled; and planning to use a bassinet for her own child during day care hours);
- Violations of record-keeping requirements (failure to have admission form for one child, failure to have immunization forms for nine children, and failure to have child care reporting forms for seven children);

¹ Exhibits 4 and 9; Testimony of Amber Schueler.

² Exhibit 6; Testimony of A. Schueler, Nathan Schueler.

³ Testimony of Denise Baruth.

⁴ Testimony of D. Baruth.

⁵ Testimony of A. Schueler; Exhibits 11 and 13.

- Violations of sanitation and cleanliness requirements (home very cluttered with too much furniture and other miscellaneous items in a small house; carpet was dirty, had large stains, and had not been vacuumed for a while; kitchen and bathrooms needed to be cleaner);
- Violations of requirements relating to outdoor play space (fenced-in play area in backyard had no grass and was all dirt; rubbish (oven grate) and loose bricks in play area);
- Violation of water temperature requirements (hot water was 135 degrees F. rather than 120 degrees F. or lower; hot water heater was missing an overflow pipe); and
- Violation of emergency requirements (lacked batteries for emergency radio).⁶

7. Due to the demands of her caseload, Ms. Baruth did not issue a written Correction Order regarding the violations she observed during her visit on August 27, 2010, until January 30, 2011.⁷

8. The Licensee did not request reconsideration of the Correction Order.⁸ She returned the Correction Order to the County on February 8, 2011, with notations regarding how each item had been corrected. The Licensee indicated that she had corrected the sanitation and cleanliness violations by rearranging furniture to give children more open space to play, vacuuming the carpet every day, cleaning on a daily basis and more often when possible, and removing appliances other than the microwave from the kitchen counters. She stated that they “now have tons of batteries” and had placed some in the radio; her husband had planted grass seed in the backyard and the grass had grown; and they had corrected the water temperature and overflow pipe issues by installing a new water heater. The Licensee indicated that she had corrected the violation relating to crib safety by September 25, 2010. She indicated that there was no need to inspect the crib because it had been taken apart in December 2009 and was kept in storage and not accessible to children in care. She also said that the Pack and Play had not been used until October 3, 2010; she had never used the changing pad; and the bassinet was in a portion of the house that was not licensed or used for daycare and would be used only for the Licensee’s own child during non-daycare hours. The Licensee stated that the paperwork violations had been corrected for children including drop-ins by October 10, 2010.⁹

9. On or about October 8, 2012, the Licensee began to clean out the garage located in her backyard in order to make it possible for the garage roof to be repaired. The garage contained items that had been removed from the home by the mortgage company after foreclosure proceedings involving the prior owner. The Licensee did not

⁶ Testimony of D. Baruth; Exhibit 1.

⁷ Exhibit 1; Testimony of D. Baruth.

⁸ Testimony of D. Baruth.

⁹ Exhibits. 1, 11; Testimony of A. Schueler.

complete the clean-up process until approximately 1½ weeks later. During that time, she did not allow the children in her child care to play in the backyard and instead took them to a park located two blocks away. She and her husband did, however, allow their own children to play on the blue swing set located in the backyard (which was not adjacent to the items taken out of the garage) for about 20 minutes on October 11, 2011, after day care hours. The Licensee and her husband were both outside in the yard with their children at the time.¹⁰

10. On October 12, 2011, the County received a complaint from a member of the community, who indicated that the Licensee's backyard was filled with garbage and other junk and expressed concern because children had been observed playing in the backyard. County child protection workers determined that the complaint did not meet their requirements for immediate action and referred the complaint to Ms. Baruth.¹¹

11. During the afternoon of October 19, 2011, the Licensee was caring for her two children and one day care child, an 8-month-old infant ("M").

12. At approximately 1:45 p.m. on October 19, 2011, Ms. Baruth made an unannounced visit to the Licensee's home to investigate the complaint. She knocked on the front door when she arrived at the Licensee's home, but no one came to the door. As Ms. Baruth stood on the front porch, she heard M start to cry. She could partially see M, who was in a "Pack and Play," through the front window of the home, but could not tell how old he was. Ms. Baruth called the Licensee's home and cell phone numbers, but no one answered. She left a message telling the Licensee that she needed to come to the door. Ms. Baruth remained on the front porch knocking and waiting for a response from the Licensee for approximately 10 minutes. M continued to cry the entire time. Ms. Baruth did not know if an adult caregiver was present in the home and became concerned about M's safety.¹²

13. Ms. Baruth then walked around to the backyard area and stood outside the fence. She did not see anyone in the backyard. She observed the condition of the backyard and took pictures of the yard and the back porch. The door of the detached garage located in the back of the house was open. Inside and in front of the garage, there were numerous garbage bags, construction debris, boards with protruding nails, and other items which would have been accessible to anyone in the yard. These items were immediately adjacent to a play area with a children's climber and playhouse. The ground surrounding a swing set and slide in the backyard was simply dirt, with no grass or other covering. In addition, electronic equipment and other objects were on the back porch in front of and adjacent to the back door of the home.¹³

14. After observing the backyard, Ms. Baruth returned to the front door and knocked several more times. M was no longer crying, and Ms. Baruth could see that he was no longer in the Pack and Play. No one answered the door and Ms. Baruth went

¹⁰ Testimony of A. Schueler.

¹¹ Testimony of D. Baruth.

¹² Testimony of D. Baruth.

¹³ *Id.*; Exhibit 2.

back to her car. Shortly thereafter, a boy (who was the Licensee's brother) came to the house to deliver the newspaper. He went inside the home and then came back outside. Ms. Baruth asked him whether anyone was home, and he told her that the Licensee was home. He asked if Ms. Baruth wanted to speak to the Licensee, and Ms. Baruth indicated that she did. As the Licensee's brother went back inside the Licensee's home, Ms. Baruth returned to the front porch. Ms. Baruth overheard the Licensee tell her brother that she did not want to talk to Ms. Baruth.¹⁴

15. The Licensee did eventually come to the door. By that time, approximately 15 minutes had elapsed since Ms. Baruth first started knocking on the Licensee's door. The Licensee told Ms. Baruth that she had been upstairs going to the bathroom and doing some laundry. At first, she said she did not hear Ms. Baruth knocking or M crying; later, she said she could hear M crying but had just fed and changed him and laid him down for a nap. When Ms. Baruth mentioned that she had also called her on the phone and asked why she hadn't picked up her calls, the Licensee did not respond. The Licensee asked Ms. Baruth why she had come, and Ms. Baruth informed her that a complaint had been filed that she needed to discuss with her. She asked the Licensee if she could come into the house, and the Licensee refused to allow her to come in. The Licensee initially said that Ms. Baruth could not come in because the children inside the home were sick. Ms. Baruth assured the Licensee that she was not sick and did not mind being exposed and again asked to come into the home. The Licensee then said her house was not clean enough, and mentioned that the house was not up to Ms. Baruth's standards the last time she visited, and she was sure it wouldn't be this time, either. Ms. Baruth explained that the licensing rules require access to the licensed premises and expressed the need to make sure that the children were safe. She explained that, if the Licensee refused to allow her access, she would contact the Department of Human Services and the Department might decide to impose a temporary immediate suspension or a negative licensing sanction. She warned the Licensee that she could lose her license if she did not allow Ms. Baruth access to the home, and the Licensee responded that she did not care. Ms. Baruth also informed the Licensee that she might have to notify child protection of the situation as well.¹⁵

16. Ms. Baruth returned to her office, communicated with the Department of Human Services, and prepared a request for the temporary immediate suspension of the Licensee's child care license. The Department issued the Order for Temporary Suspension the same day.¹⁶

17. Ms. Baruth returned to the Licensee's home at approximately 5:50 p.m. on October 19, 2011, to serve the Order for Temporary Immediate Suspension. The Licensee answered the door. The Licensee's mother-in-law, Ruth Schueler, and her sister, Kimberly Reeves, and Ms. Reeve's two daughters were also present in the home. Ms. Baruth did not ask the Licensee if she could come into the home at that time, but merely requested enrollment information. The Licensee brought copies of her

¹⁴ Testimony of D. Baruth.

¹⁵ Testimony of D. Baruth.

¹⁶ Exhibit 12; Testimony of D. Baruth.

child care enrollment forms to Ms. Baruth. While Ms. Baruth was on the front porch copying down the names and phone numbers of the children in care, the Licensee's husband, Nathan Schueler, came home. After receiving permission from the Licensee, Ms. Baruth discussed the situation with Mr. Schueler. The parent of the child in care arrived to pick up her child at approximately 6:00 p.m. while Ms. Baruth was talking with the Licensee and Mr. Schueler at the front door.¹⁷

18. The Licensee's husband ultimately invited Ms. Baruth to come in to inspect the house. Ms. Baruth did a quick walk-through of all levels of the house. She found the house to be cluttered and disorganized, with dirty and stained carpets in need of vacuuming, small toys on the floors that could be choking hazards, and piles of clothing and miscellaneous items that made it difficult to walk through the home. There were piles of clothes on the steps to the only bathroom located in the house, which Ms. Baruth determined could be a trip or fall hazard. The Licensee's own children and their cousins were eating at the dining room table, and there was an unguarded space heater, which was hot to the touch, located nearby. There also were household cleaning products on the kitchen counters. Ms. Baruth did not attempt to walk outside onto the back porch but, based on her earlier observation, believed that that exit was blocked. Boxes and other items were stored within 36 inches of the furnace.¹⁸

19. The cleaning products on the kitchen counter were non-toxic, vinegar and water solutions.¹⁹

20. The Licensee appealed the Order of Temporary Immediate Suspension. A hearing was held on November 17, 2011. Prior to the hearing, the Licensee and her husband removed the debris from the back porch and backyard areas. Administrative Law Judge Linda F. Close issued Findings of Facts, Conclusions, and a Recommendation on November 30, 2011, in which she recommended that the Commissioner of Human Services affirm the temporary immediate suspension.²⁰ On December 27, 2011, the Commissioner of Human Services upheld the Temporary Immediate Suspension Order.²¹

21. On March 23, 2012, the Department issued an Order of Revocation with respect to the Licensee's child care license. The Department alleged that revocation of the license is appropriate based upon the Licensee's failure to provide access to her home on October 19, 2011; failure to provide adequate supervision to a child; repeated failure to ensure that hazardous materials were not accessible to children; failure to maintain documentation of monthly crib safety inspections and annual recall checks; repeated failure to assure her home was free of dirt, rubbish, and clutter; failure to ensure that there were two means of escape from the kitchen when the exit door was blocked with items; failure to comply with a previous correction order; and in order to

¹⁷ Testimony of D. Baruth, A. Schueler, and N. Schueler; Exhibits 9 and 10.

¹⁸ Testimony of D. Baruth; Exhibit 3 at 6.

¹⁹ Testimony of A. Schueler, N. Schueler; Exhibit 13.

²⁰ Exhibit 8.

²¹ Testimony of D. Baruth.

protect the health, safety, and rights of children receiving services in DHS-licensed programs.²²

22. The Licensee appealed the Order of Revocation, resulting in the initiation of the present contested case hearing.

23. The Licensee's mother-in-law, Ruth Schueler, provided a letter in which she indicated that the Licensee genuinely loves her children and uses discipline that has always been gentle. She said that she has never seen the Licensee be inappropriate with her children in any way.²³

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have authority to consider and rule on the issues in this contested case proceeding pursuant to Minn. Stat. § 245A.08.²⁴

2. The Notice of and Order for Hearing was proper in all respects, and the County and DHS have complied with all procedural requirements.

3. The Commissioner is authorized by state statute to impose a fine and order other licensing sanctions if the license holder has not corrected violations specified in a correction order.²⁵ The Commissioner also has authority to "suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules" or "knowingly withholds relevant information from or gives false or misleading information to the commissioner in connection with an application for a license . . . or during an investigation."²⁶ The statute further provides that, "[w]hen applying sanctions authorized under this section, 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."²⁷

4. At a hearing regarding a licensing sanction, the Commissioner has the burden of proof to demonstrate that reasonable cause existed for the adverse action taken against the Licensee's family child care license. The Commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the Licensee failed to comply fully with applicable law or rule. When such a showing is made, the burden of proof shifts to the Licensee to demonstrate by a preponderance of the evidence that she is in full

²² Exhibit 3.

²³ Exhibit 9.

²⁴ Unless otherwise noted, all references to Minnesota Statutes are to the 2010 edition and all references to Minnesota Rules are to the 2011 edition.

²⁵ Minn. Stat. § 245A.06.

²⁶ Minn. Stat. § 245A.07, subd. 3.

²⁷ Minn. Stat. § 245A.07, subd. 1.

compliance with the laws and rules that the Commissioner alleges were violated at the time the alleged violations occurred.²⁸

Access to Child Care Residence

5. Applicable Minnesota law requires that individuals licensed to provide family day care give the Commissioner of Human Services (who acts through County licensing workers) access to the licensed program during its hours of operation:

[T]he commissioner must be given access to the physical plant and grounds where the program is provided, documents and records, . . . persons served by the program, and staff whenever the program is in operation and the information is relevant to inspections or investigations conducted by the commissioner. The commissioner must be given access without prior notice and as often as the commissioner considers necessary if the commissioner is investigating alleged maltreatment, conducting a licensing inspection, or investigating an alleged violation of applicable laws or rules. . . . Failure or refusal of an applicant or license holder to fully comply with this subdivision is reasonable cause for the commissioner to deny the application or immediately suspend or revoke the license.²⁹

The rules adopted by the Department also emphasize that child care providers “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 9502.0315 to 9502.0445.”³⁰ The rules go on to state:

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. . . .³¹

6. The Department demonstrated that reasonable cause exists to take adverse action against the Licensee’s license by providing testimony and reports substantiating its allegation that the Licensee failed to provide access to her child care home on October 19, 2011, in violation of Minn. Stat. § 245A.04, subd. 5, and Minn. R. 9502.0335, subp. 13. The Licensee has failed to demonstrate by a preponderance of

²⁸ Minn. Stat. § 245A.08, subd. 3.

²⁹ Minn. Stat. § 245A.04, subd. 5.

³⁰ Minn. R. 9502.0335, subp. 13.

³¹ *Id.*

the evidence that she was in full compliance with the applicable statute and rule on that date.

Supervision of Children in Care

7. The rules of the Department that apply to child care providers require that “[c]hildren in care must be supervised by a caregiver.”³² The term “supervision” is defined to mean 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.”³³

8. The Department demonstrated that reasonable cause exists to take adverse action against the Licensee’s license by providing testimony and reports substantiating its allegation that the Licensee was not within sight or hearing of the infant who was in her care on October 19, 2012, at all times so that she was capable of intervening to protect the child’s health and safety, in violation of the supervision requirements set forth in Minn. Stat. § 245A.04, subd. 5, and Minn. R. 9502.0335, subp. 13. The Licensee has failed to demonstrate by a preponderance of the evidence that she was in full compliance with the applicable laws and rules on that date.

Sanitation and Health Requirements

9. The Department’s child care licensing rules require that family child care residences “must be free from accumulations of dirt, rubbish, or peeling paint,” and that “indoor and outdoor garbage and rubbish containers must not be accessible to infants and toddlers.”³⁴

10. The Department demonstrated that reasonable cause exists to take adverse action against the Licensee’s license by providing testimony and reports substantiating its allegations that there were dirty and stained carpets in the Licensee’s home on August 27, 2010, and October 19, 2012, and there were accumulations of rubbish in her backyard on October 19, 2012, in violation of Minn. R. 9502.0436, subp. 1, and the Licensee has failed to demonstrate by a preponderance of the evidence that she was in full compliance with that rule. The Department failed to substantiate its allegation that infants and toddlers in care had access to the outdoor garbage and rubbish containers; accordingly, no violation of Minn. R. 9502.0436, subp. 2, was shown.

11. The Department’s rules require that “[a]ll medicines, chemicals, detergents, poisonous plants, alcoholic beverages, and other toxic substances must be inaccessible to children.”³⁵

³² Minn. R. 9502.0365, subp. 5.

³³ Minn. R. 9502.0315, subp. 29a.

³⁴ Minn. R. 9502.0436, subps. 1 and 2.

³⁵ Minn. R. 9502.0435, subp. 4.

12. The Department provided testimony and reports substantiating its allegation that cleaning products were on the kitchen counter and accessible to children on October 19, 2012, in violation of Minn. R. 9502.0435, subps. 4 and 6. However, the Licensee demonstrated by a preponderance of the evidence that the cleaning products at issue were non-toxic, vinegar and water solutions; as a result, she did not violate the cited rules.

13. The licensing rules require that the water temperature must not exceed 120 degrees Fahrenheit in sinks and tubs accessible to children, in order to prevent scalding.³⁶

14. The Department provided testimony substantiating its allegation that the hot water temperature in the Licensee's home exceeded 120 degrees on August 27, 2010. The Licensee did not demonstrate by a preponderance of the evidence that she was in full compliance with the relevant rule on that date; however, she did show that she reported the issue with the water heater to the County prior to the relicensing visit and had installed the new water heater by early September, 2010.

Recordkeeping Requirements

15. Licensing rules require providers to obtain specified information from parents prior to the admission of a child and keep this information up to date and on file for each child.³⁷ Licensing rules also require providers to keep immunization records up to date and on file.³⁸

16. The Department provided testimony and documents substantiating its allegation that, on August 27, 2010, the Licensee lacked an admission and arrangement form for one child and immunization forms for nine children. The Licensee has failed to prove by a preponderance of the evidence that she was in full compliance with the applicable rules on that date.

Crib Safety

17. Minnesota law requires that license holders annually check all their cribs' brand names and model numbers against the United States Consumer Product Safety Commission website listing of unsafe cribs,³⁹ perform inspections of "every crib used by or that is accessible to any child in care" on "at least a monthly basis," and maintain documentation.⁴⁰

18. The Department has not substantiated its allegation that the Licensee violated the crib safety requirements in August 2010 since there is no evidence that the

³⁶ Minn. R. 9502.0435, subp. 15(A).

³⁷ Minn. R. 9502.0405, subp. 4(A).

³⁸ Minn. R. 9502.0405, subp. 4(C).

³⁹ Minn. Stat. § 245A.146, subd. 3.

⁴⁰ Minn. Stat. § 245A.146, subd. 4.

cribs at issue were actually used by the Licensee for the children in her day care or were accessible to those children.

Physical Environment

19. The Department's rules specify that a minimum of 35 square feet of usable indoor space is required per child. Bathrooms, closets, space occupied by major appliances, and other space not used by children may not be counted as usable space. However, if adult furniture is used by children in care, it may be counted as usable space.⁴¹

20. The Department provided testimony and documents to substantiate its allegation that the Licensee failed to ensure that a minimum of 35 square feet of usable indoor space that was free of hazards was available for each child. However, the Licensee demonstrated by a preponderance of the evidence that her home is of sufficient size for her licensed capacity and that she was in full compliance with the applicable rules.

21. The Department's rules state that there must be an outdoor play space of at least 50 square feet per child in attendance, adjacent to the residence, for regular use, or a park, playground, or play space within 1,500 feet of the residence. The rules indicate that "[t]he area must be free of litter, rubbish, toxic materials, . . . [and] machinery"⁴² The applicable statutes and rules do not require that grass or any other specified material be used on the surface of the outdoor play space.

22. The Department provided testimony and pictures to substantiate its allegation that the outdoor play space in the Licensee's backyard was not free of rubbish or machinery on October 19, 2011. However, the Licensee demonstrated by a preponderance of the evidence that she took the children in her care to a nearby park to play rather than using her backyard during the weeks in October 2011 during which she was cleaning out her garage. No violation of the outdoor play space rule has been shown.

23. The rules of the Department require that there be two means of escape from each room of the residence used by children in care. One means of escape must be a stairway or door leading to the floor of exit discharge, and the other must be a door or window leading directly outside.⁴³

24. The Department provided testimony and pictures to substantiate its allegation that the exit out of the kitchen onto the back porch was partially obstructed by several items. However, the Licensee demonstrated by a preponderance of the evidence that there was an additional means of escape available from the kitchen and that she was in full compliance with the cited rule.

⁴¹ Minn. R. 9502.0425, subp. 1.

⁴² Minn. R. 9502.0425, subp. 2.

⁴³ Minn. R. 9502.0425, subp. 4.

25. Under the Department's rules, combustible items must not be located within 36 inches of the furnace or other heating sources. In addition, whenever space heaters are in use, they must be protected by guards to prevent burns.⁴⁴

26. The Department provided testimony and documents to substantiate its allegation that the County licensing worker observed on October 19, 2011, that **boxes** and other items were stored within 36 inches of the furnace in the Licensee's home, and an unguarded space heater, which was hot to the touch, was located near the Licensee's two children and their cousins who were eating at the dining room table a short time after the last day care child was picked up. The Licensee has failed to prove by a preponderance of the evidence that she was in full compliance with the applicable rules on that date.

27. Licensing rules require that stairways be "free of clutter and obstructions."⁴⁵

28. The Department provided testimony and documents to substantiate its allegation that the stairway in the Licensee's home leading to the only bathroom was not free of clutter on October 19, 2012. The Licensee failed to prove by a preponderance of the evidence that she complied fully with the relevant rule provision.

Summary

29. As noted in Conclusions 10, 12, 18, 20, 22, and 24, some of the violations alleged by the Department were not supported by the evidence. However, based upon the violations discussed in Conclusions 6, 8, 10, 14, 16, 26, and 28 above, it is concluded that the Commissioner has shown a proper basis for the revocation of the Licensee's license.

30. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

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

RECOMMENDATION

The Administrative Law Judge recommends that the Order revoking Amber Schueler's license to provide child care be AFFIRMED.

Dated: August 30, 2012

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

⁴⁴ Minn. R. 9502.0425, subp. 7(C) and (D).

⁴⁵ Minn. R. 9502.0425, subp. 10(D).

Reported: Digitally Recorded; No Transcript Prepared.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Office of the Commissioner of Human Services, P.O. Box 64941, St. Paul, MN 55164-0941, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon 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. 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.

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

Minn. Stat. § 245A.08, subd. 3(a), specifies that, once the Commissioner demonstrates reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable laws or rules, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that he or she was in full compliance with the laws and rules alleged to have been violated.

As set forth in the Findings and Conclusions above, the evidence as a whole failed to support some of the alleged violations relating to access to outdoor garbage, toxic chemicals, crib safety, square footage, the outdoor play space, and sufficient means of escape. However, the Department did demonstrate that the Licensee committed a number of serious and repeated violations of the licensing rules and statutes, and the Licensee did not bear her burden to show that she was in full compliance with those rules and statutes. The most serious violation occurred when the Licensee failed to provide access to the County licensing worker during the afternoon of October 19, 2011, and failed to provide adequate supervision to an infant in care on that date. The applicable statute and rules clearly specify that individuals licensed by the Department must give the Commissioner's agents access to the licensed premises during the hours of operation of the licensed program. It is critical that County workers be able to enter licensed family child care homes in order to receive assurance that day care children are receiving adequate care and supervision in safe surroundings.

Moreover, the County worker here had ample reason to be concerned about the situation after observing the condition of the Licensee's backyard, receiving no response to her phone calls and knocks on the door, and hearing and seeing an infant continuing to cry for 10 minutes or more without response by a caregiver. The Licensee's allegation that she felt threatened and "bullied" when the licensing worker bluntly explained the possible consequences of denying access do not excuse her serious violation of the access requirement.

The Licensee's attempts to minimize her serious violation of the supervision requirement are also unavailing. The applicable rules require that the caregiver be within sight or hearing of an infant at all times so that the caregiver is capable of intervening to protect the child's safety. The Licensee initially informed the licensing worker that she was upstairs going to the bathroom and doing laundry and did not hear the infant crying. Moreover, there is no evidence that the Licensee ever checked on the infant during the ten minutes the licensing worker stood on the front porch.

The Licensee's serious and chronic problems with sanitation and health and physical environment violations are also of significant concern. The accumulation of rubbish on the premises, the use of an unguarded space heater, the storage of combustible items within 36 inches of the furnace, the presence of obstructions on the stairway, the chronic problems with clutter and dirty carpets, and the history of water temperature and widespread recordkeeping violations suggest not only that the Licensee has been lax in complying with the licensing rules and statutes, but also that she does not appreciate the seriousness of the hazards posed by these violations to the health and safety of the children in her care.

Under all of the circumstances, the Administrative Law Judge recommends that the revocation of the Licensee's child care license be affirmed.

B.L.N.