

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Karen Buboltz

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came before Administrative Law Judge Eric L. Lipman upon an appeal by the Licensee, Karen Buboltz, from an Order imposing a Temporary Immediate Suspension of her family day care license.

David J. Torgelson, Renville County Attorney, appeared on behalf the Minnesota Department of Human Services and Renville County Human Services (County and Department). Thomas W. Van Hon, Attorney at Law, appeared on behalf of the Licensee, Karen Buboltz.

An evidentiary hearing was held in the Renville County Government Center on May 3, 2012. The hearing record closed at the adjournment of the hearing.

STATEMENT OF THE ISSUE

Did the Department demonstrate that reasonable cause exists to believe that the Licensee's actions pose an imminent risk of harm to the health, safety or rights of persons served by her child care program?

The Administrative Law Judge concludes that reasonable cause does not exist to believe that the Licensee's actions pose an imminent risk of harm to the health, safety or rights of children in care and that the order of temporary immediate suspension should be rescinded.

Based upon the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ms. Buboltz operates a child day care out of her home in Fairfax, Minnesota.¹

¹ Testimony of Karen Buboltz; Exhibit 1.

2. Ms. Buboltz holds DHS License Number 102024-R2 and has been a day care provider for 31 years.²

3. Ms. Buboltz has a strong reputation as a day care provider, and, given her length of service, has a modest record of regulatory discipline. In 1993, Ms. Buboltz received a Correction Order for deficiencies in some of the records that day care providers are required to maintain. In 2000, after having been advised in a training session that food could be used to redirect problem behavior, Ms. Buboltz received a Correction Order for having given spicy barbeque sauce to a child that was chronically biting other day care children.³

4. On the first floor of the Buboltz home there are six rooms. As one moves clockwise from the northwest corner of the home, one passes through a den; a living room; the kitchen; a toy room; a bedroom and the first floor bathroom.⁴

5. The rooms in the eastern half of the day care home – which includes the living room, the kitchen and the toy room – are separated from each other by an enclosed center staircase. Ms. Buboltz's practice is to place a plastic gate in one of the doorways of the toy room or the living room so as to prevent these rooms from, as she describes it, "becoming a race track." In her experience, she found that children under care enjoy running through the rooms that circle the enclosed staircase – and that without a barrier, this play can become raucous and unsafe.⁵

6. On February 27, 2012, the plastic doorway gate that she uses to impede traffic between these three rooms was resting against the eastern wall of the toy room.⁶

7. In the early afternoon that day, Ms. Buboltz placed a seven-month-old infant, C.K., in the toy room to play. After placing C.K. on the toy room carpet, she stepped a few feet away to insert a movie into a disc player that was in the living room. As Ms. Buboltz was preparing the movie player, C.K. was alone in the toy room, and the other day care children had assembled behind Buboltz to watch the movie.⁷

8. In February of 2012, C.K. was able to move on the floor by crawling. While Ms. Buboltz prepared the disc player, C.K. grabbed onto the plastic doorway gate and pulled it down on to himself. Hearing C.K. cry out, Ms. Buboltz turned from the movie player and came to C.K.'s aid.⁸

² *Id.*

³ See, Exs. A and H; Testimony of Patti Hemmingsen; Test. of K. Buboltz; Minn. R. 9502.0395 ("Behavior Guidance") and Minn. R. 9502.0405 ("Admissions, Provider Records and Reporting").

⁴ Exs. I, J, K, M, N, O and P.

⁵ Test. of K. Buboltz; Exs. I, J, K, L and M.

⁶ *Id.*

⁷ Test. of K. Buboltz.

⁸ *Id.*

9. After having comforted C.K., Ms. Buboltz did not notice anything remarkable about his appearance or condition. She did not notice any bleeding, swelling or bruising, or any other sign that indicated C.K. had suffered a trauma.⁹

10. Later that same evening, C.K.'s parents noticed that C.K. was increasingly fussy and avoided putting any pressure on his right leg. Concerned, they took C.K. to the emergency room of a local hospital for an evaluation.¹⁰

11. As a result of the hospital evaluation, C.K.'s physicians diagnosed him as a having a "slightly oblique fracture of the mid-shaft of the right femur."¹¹

12. In February, March and April of 2012, C.K. was returned to Ms. Buboltz's care by C.K.'s parents. They trust Ms. Buboltz and believe in the care that she provides to their children.¹²

13. Following the incident on February 27 through April 3, Ms. Buboltz stored the doorway gate behind a couch at times when the gate was not in use.¹³

14. On the grounds that the bone fracture signified risks of imminent harm to the children under care, the Department issued an Order of Temporary Immediate Suspension on April 3, 2012.¹⁴

15. Ms. Buboltz timely appealed the Order of Temporary Immediate Suspension.¹⁵

16. Following the issuance of the Order of Temporary Immediate Suspension, C.K.'s parents gave Ms. Buboltz access to C.K.'s medical records so as to assist Ms. Buboltz in her defense.¹⁶

17. At the evidentiary hearing, the County conceded that the report of possible maltreatment of C.K. could not be substantiated.¹⁷

⁹ Test. of K. Buboltz; see *also*, Ex. B at 4 (C.K. has "no swelling in his right thigh. There is no skin bruising or skin break").

¹⁰ Ex. A.

¹¹ Ex. E; Test. P. Hemmingsen; Testimony of Staci Haney.

¹² Ex. H; Test. P. Hemmingsen.

¹³ Test. of K. Buboltz.

¹⁴ Ex. 1.

¹⁵ Notice and Order for Hearing, OAH 8-1800-22764-2 at 1 (April 4, 2012).

¹⁶ Test. of K. Buboltz; Exs. B, C and Q.

¹⁷ Test. of S. Haney; see *also*, Ex. D.

18. At the close of the hearing, the dispute between the parties devolved to whether resting a child safety gate on a wall when the gate is not in use poses an imminent risk of harm to the health, safety or rights of children under care.

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, subd. 2a, and 245A.08.

2. The County and the Department have complied with all of the substantive and procedural requirements of law and rule.

3. At all times relevant to these proceedings, Ms. Buboltz was a licensed child care provider.

4. The Commissioner of Human Services shall impose a temporary immediate suspension of a child care license “[i]f the license holder’s actions or failure to comply with applicable law or rule . . . pose an imminent risk of harm to the health, safety, or rights of persons served by the program.”¹⁸

5. The scope of the hearing is limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the Commissioner’s final order regarding a licensing sanction.

6. The temporary immediate suspension shall “remain in effect pending the commissioner’s final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension” if the Commissioner demonstrates “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 of persons served by the program.”¹⁹

7. While the Licensee’s failure to keep her playroom free from a potential hazard to a young infant is misconduct,²⁰ the Commissioner has failed to demonstrate

¹⁸ Minn. Stat. § 245A.07 (2).

¹⁹ Minn. Stat. § 245A.07 (2a) (a).

²⁰ *Compare*, Minn. R. 9502.0415, subp. 4 ("Newborn or infant activities") ("The provider shall ... provide freedom of movement to the infant or newborn during a large part of the waking day to the extent that safety and weather permits.... Give the infant or newborn opportunity to stimulate the senses by providing a variety of activities and objects to see, touch, feel, smell, hear, and taste.") with Minn. R. 9502.0435, subp. 6 ("Hazardous activity materials") ("Knives, matches, plastic bags, and other potential hazards must be kept out of the reach of infants, toddlers, and preschoolers. The use of potentially hazardous materials and tools must be supervised").

MEMORANDUM

I. Regulatory Standards

Minn. Stat. § 245A.07, subds. 2 and 2a establish the standard of proof that must be met to sustain a temporary immediate suspension order. The statute reads in pertinent part:

If the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program, the commissioner shall act immediately to temporarily suspend the license.

....

The scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the commissioner's final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension. The burden of proof in expedited hearings under this subdivision shall be 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, or if the actions of other individuals or conditions in the program poses an imminent risk of harm to the health, safety, or rights of persons served by the program. 'Reasonable cause' means there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.

These are modest standards. They are intended to assure that children are protected until there can be a more complete evaluation process, a thorough hearing and a final determination.

Indeed, this risk of harm analysis has been likened to the burden to establish probable cause in a criminal proceeding.²¹ The analysis begins with a presumption of innocence and requires the admission of probative evidence to overcome that presumption. At a minimum, an order of temporary immediate suspension must be supported by some substantial evidence of "imminent harm."²²

²¹ See, e.g., *State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976).

²² See generally, Minn. Stat. § 14.69 (e) (2006); *In the Matter of the Temporary Immediate Suspension of the License of Laura Ellingson to Provide Family Child Care*, OAH Docket No. 3-1800-15905-2 (2004) (<http://www.oah.state.mn.us/aljBase/180015905.rt.htm>).

While the term “imminent harm” is not defined in either statute or rules, the Commissioner has defined the term “imminent danger” in the Family Day Care and Foster Care rules. This definition is instructive. “Imminent danger” includes circumstances in which a child is threatened with immediate and present neglect that is likely to result in serious physical injury.²³

The Administrative Law Judge must also determine if the license holder’s actions, at the time of the hearing, continue to pose an imminent risk of harm. This determination is made so as to inform the Commissioner as to whether the suspension should continue pending a final determination of any appropriate licensing sanction.²⁴

II. Analysis

In this case, it is not clear how the injury to C.K. occurred – a matter that complicates the search for “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.”²⁵

There is some suggestion in the record that a falling plastic doorway gate would not, ordinarily, occasion the kind of injury that C.K. received.²⁶ The implication is that unless the gate fell “just right,” C.K.’s bone fracture must have followed from physical abuse. While this concern prompted the initial report to child protection officials, the evidentiary record has not advanced significantly from that date. Following a thorough investigation, there is no evidence that Ms. Buboltz, or anyone else, abused C.K.

Pointing to a letter that was written on the eve of the evidentiary hearing, the Licensee argues that C.K.’s physicians now believe him to be more susceptible to bone fractures than other children.²⁷

Regrettably however, neither of one of these potential explanations for the fracture was advanced by qualified opinion testimony, or tested under questioning, at the evidentiary hearing. Thus, at the close of the hearing record, we have potential lines for further inquiry but not “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.”

In the view of the Administrative Law Judge, that distinction is significant. When selecting a “specific articulable facts or circumstances” standard, the

²³ See, Minn. R. 9543.0020 (11).

²⁴ See, *In the Matter of the Temporary Immediate Suspension of the License of Sandra Julkowski*, OAH Docket No. 6-1800-21321-2 (2010) (<http://www.oah.state.mn.us/aljBase/180021321%20rt%20bjh.htm>).

²⁵ Minn. Stat. § 245A.07, subd. 2a.

²⁶ Ex. F at 8.

²⁷ Ex. Q.

Legislature insisted that government officials do more than describe possible sources of abuse or injury, in order to maintain a suspension order. To maintain a suspension order pending the final decision by the Commissioner, the law requires that the Department advance a specific claim, grounded in the record, as to a risk of harm that is imminently present.

Here, the only theory advanced with any specificity is that C.K. was injured by pulling a plastic doorway gate onto himself. Assessing that set of circumstances against the statutory standards, it is clear that the Order of Temporary Immediate Suspension should be rescinded.

While the Licensee's failure to clear this potential hazard from the playroom is misconduct, that fleeting "condition," long since remedied, does not present imminent harm today. On this record, there are not "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."

E. L. L.