

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Order of a  
Conditional License and Order to Pay a  
Fine Against the License of Kari  
Rowland

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came on for an evidentiary hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) on August 2, 2012. The hearing was held in the Olmsted County Attorney's Office, Rochester, Minnesota. The hearing record closed on August 24, 2012 upon receipt of the parties' Statement of Issues, Statement of Undisputed Facts, and Licensee's post-hearing brief. No post-hearing brief was filed on behalf of the Department.

Geoffrey A. Hjerleid, Assistant Olmsted County Attorney, appeared on behalf of Olmsted County Human Services (County) and the Minnesota Department of Human Services (Department).

Andrea B. Niesen, Attorney at Law, appeared on behalf of Kari Rowland (Licensee).

**STATEMENT OF ISSUES**

1. Did the Department prove by a preponderance of the evidence that the Licensee committed serious maltreatment or physical abuse of a child (A.C.) on May 23, 2011?
2. Did the Department demonstrate reasonable cause to support the Order of Conditional License against the Licensee?
3. Did the Department demonstrate reasonable cause to support the Order to Pay a Fine in the amount of \$1,000.00 against the Licensee?
4. If the Department demonstrated reasonable cause to support the conditional license and fine, did Licensee demonstrate by a preponderance of the

evidence that she had complied with the applicable laws and rules the Department alleged were violated?

The ALJ finds that the Department did not meet its burden of proof by a preponderance of evidence that Licensee committed serious maltreatment of A.C. on May 23, 2011. Because the Department has not established a maltreatment violation, and no other violations have been alleged, the Department has not established reasonable cause for the imposition of a conditional license or fine against Licensee.

The ALJ recommends that the Commissioner take no adverse licensing action against Licensee and that this matter be **DISMISSED**.

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

### STATEMENT OF UNDISPUTED FACTS

1. The Licensee, Kari Rowland, has been a licensed family child care provider, operating a daycare program out of her home since December 11, 2006.<sup>1</sup> She currently holds a Class C2-Group Family Child Care license.<sup>2</sup> With the exception of the issues which are presented in this hearing, Licensee has had no complaints or licensing sanctions while she has been a family child care provider.<sup>3</sup>

2. Licensee has changed diapers thousands of times without injuring the children being changed; including her own children, one of whom is difficult to diaper because he is disabled and has often physically resisted having his diaper changed.<sup>4</sup>

3. In the months before and after May 23, 2011, Licensee cared for an average of five children in diapers. She changed the diapers on each of them three or four times per day. None of the children have been injured by Licensee during a diaper change or otherwise.<sup>5</sup>

4. Licensee began caring for a 7-month-old female infant, A.C., on May 16, 2011. Licensee cared for A.C. on May 16, 17, 18, and 19, 2011. Licensee reported that as A.C.'s mother was dropping her off each of those mornings, she would place A.C. on the floor and A.C. would take off crawling.<sup>6</sup>

5. Licensee testified that she was just beginning to learn about A.C. during her first four days in Licensee's care. Licensee also testified that A.C. appeared happy, normal, and showed no signs of discomfort during those first four days. Licensee

<sup>1</sup> Exs. 1-4, 6, 7, 9, 11; Testimony (Test.) of Rowland in Ex. M (audio recording of testimony).

<sup>2</sup> Ex. 11.

<sup>3</sup> Test. of Hale and Rowland in Ex. M; Test. of Bausman, Hale, and Rowland on August 2, 2012 at hearing.

<sup>4</sup> Test. of Rowland in Ex. M; Ext. F.

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

<sup>6</sup> *Id.*; Ex. 13.

reported that A.C. woke up on her own from naps and that her diaper changes were uneventful, except for two things. First, when her diapers were removed, A.C. pulled her legs up into a fetal position.<sup>7</sup> Second, A.C. tended to get fecal matter on her heels when the diaper contained a bowel movement before she could be cleaned. Thereafter, Licensee stated that she removed A.C.'s booties before diaper changes. With wet-only diapers, Licensee testified that she held onto A.C.'s feet by the ankles with one hand while she cleaned A.C. with her other hand. After a bowel movement, Licensee testified that she would hold onto one leg, straightening it out, clean A.C, and then she would hold the other leg in a similar fashion and complete the cleaning of A.C.<sup>8</sup>

6. Licensee reported that A.C.'s mother described A.C. as "wiggly" during diaper changes.

7. On Friday, May 20, 2011, A.C.'s father called Licensee and informed her that A.C. would not be coming to day care. He said that A.C. was going in for a doctor's visit that day because she was stuffy and coughing the previous night.<sup>9</sup>

8. According to the Licensee, on Monday, May 23, 2011, A.C.'s mother dropped A.C. off with Licensee at approximately 7:10 a.m. As A.C.'s mother took her out of her car seat, A.C. was smiling at Licensee. Licensee asked how A.C. was feeling. Her mother stated that she had "another" sinus infection, but that she was doing better.<sup>10</sup>

9. Also according to the Licensee, during both the May 24, 2011 and June 10, 2011 interviews, as had been done the previous week, A.C. was transported into Licensee's home in her car seat. [On May 23, 2011,] Her mother removed her from the car seat and placed her on the floor. Licensee reported that A.C. took one crawl and started crying and whimpering, so Licensee picked her up and she immediately stopped crying. Licensee stated that she attributed A.C.'s crying to a sinus infection, with A.C.'s discomfort stemming from the pressure on her face from the sinus infection.<sup>11</sup>

10. The Child Protection worker testified that A.C.'s mother reported to her that when she dropped A.C. off at daycare she was fine, although she had a sinus infection over the weekend and was on antibiotics. She did not see the child take one crawl and cry.<sup>12</sup>

11. Licensee reported that A.C. was fussy every time Licensee put her down and did not want to crawl or play as she had the previous week and that she did not want to sit on her bottom on the floor or in the outside sandbox as she had the previous week. Licensee further reported that A.C. was content when being held by Licensee or

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<sup>7</sup> Licensee described the fetal position as bees in the air and heel to the infant's bottom. Test. of Rowland in Ex. M.

<sup>8</sup> *Id.*, Ex. 16.

<sup>9</sup> Ex. 12; Test. of Rowland in Ex. M.

<sup>10</sup> Test. of Rowland in Ex. M; Exs. F, 16.

<sup>11</sup> *Id.*

<sup>12</sup> Test. of Bausman, Ex. M and Ex. 16.

sitting in a high chair, so Licensee held her and carried her around most of A.C.'s waking hours that day. Licensee reported that A.C. took her bottles and ate cereal normally, although she ate less than the days of the previous week. A.C. slept much more than she had the days of the previous week.<sup>13</sup>

12. On May 23, 2011, Licensee reported that A.C. first had three wet diapers and her last diaper change at 3:05 p.m. which was both wet and contained a bowel movement.<sup>14</sup>

13. Licensee reported that when A.C.'s father picked her up that day she explained to him that A.C. had been fussy all day and just wanted to be held. She stated that she also explained that A.C. had slept more than she had the previous week.<sup>15</sup> The Child Protection worker stated that the father reported that the Licensee stated that A.C. had been fine in the morning but fussy and clingy and didn't want to be set down in the afternoon.<sup>16</sup>

14. A.C.'s parents are first time parents. A.C. and her parents live in a home with an 85-pound black Labrador retriever. A.C. appeared normal to the parents during the weekend of May 21 and 22, 2011.<sup>17</sup>

15. One of A.C.'s parents recorded a video of A.C. on a cell phone, standing up without discomfort some time during the evening of May 22, 2011.<sup>18</sup>

16. A.C.'s father picked her up from Licensee's care at 4:10 p.m. on May 23, 2011. He took her home and put her down for a nap at 4:40 p.m. Her mother came home at 5:40 p.m. A.C. awoke from her nap at 6:30 p.m. Her mother gave her a bottle and then laid her on the floor.<sup>19</sup>

17. When A.C. tried to crawl towards a toy, she made a crying or moaning noise. Her father tried to stand her up, but she was not willing to place any weight on her left leg.<sup>20</sup>

18. A.C.'s parents took her to the St. Mary's Hospital emergency room (ER) that evening.<sup>21</sup>

19. The ER physician who examined AC found nothing and concluded she could be released. A.C.'s father insisted that A.C. be X-rayed. The ER physician

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<sup>13</sup> Test. of Rowland in Ex. M; Exs. F, 16.

<sup>14</sup> *Id.*; Ex. 12.

<sup>15</sup> Ex. 16, Test. of Rowland in Ex. M.

<sup>16</sup> Test of Bausman in Ex. M.

<sup>17</sup> Ex. 14.

<sup>18</sup> Test. of Bausman in Ex. M. (The video is not part of the record.)

<sup>19</sup> *Id.*; Ex. 13.

<sup>20</sup> *Id.*

<sup>21</sup> Exs. 13, 14.

agreed to have X-rays taken of A.C. The X-rays revealed that A.C. had a fracture of the femur of her left leg.<sup>22</sup>

20. A.C. was given a complete skeletal survey and a CT scan of her head. Except for the leg fracture, the X-rays were negative. She was kept overnight so that an ophthalmology examination could be completed in the morning.<sup>23</sup>

21. On May 23, 2011 at about 11:50 p.m., County Child Protection was notified of A.C.'s injury. Law enforcement was notified at about 12:15 a.m., May 24, 2011.<sup>24</sup>

22. On May 24, 2011, A.C.'s father arrived at Licensee's home without A.C. at the usual drop off time. He retold Licensee about the ER examination, his insistence that A.C. be X-rayed, and the discovery of her leg fracture.<sup>25</sup>

23. A Child Protection worker spoke with A.C.'s parents while they were at the hospital and then notified law enforcement.<sup>26</sup>

24. On May 24, 2011 at about 1:30 p.m., a Rochester police officer and a Child Protection worker went to the hospital to view A.C. and to interview A.C.'s parents and medical staff. Medical staff stated that due to A.C.'s age, the child's injury could not be the result of anything that she had done to herself. By this time, A.C.'s father had gone home and her mother was outside. At about 2:10 p.m., the police officer and Child Protection worker interviewed A.C.'s mother. The interview was digitally recorded. Ms. Bausman testified that the medical staff felt the parents' statements were consistent throughout the hospital stay and that they felt the injury occurred at daycare.<sup>27</sup>

25. At 2:30 p.m. on May 24, 2011, a Rochester police officer, a Child Protection worker and a substitute County Child Care Licensor arrived unannounced at Licensee's home to interview her. Licensee's assigned County Licensor was on leave. Licensee was very busy caring for children as they awoke from naps, were diapered, and prepared for the afternoon snack. Because of the activity, the substitute Licensor stayed with the daycare children while the officer and Child Protection worker interviewed Licensee.<sup>28</sup>

26. During the interview, the police officer stated that they were concerned that the injury occurred at the daycare. The mother said that in the morning before A.C. got to daycare on May 23, she was crawling and playing.<sup>29</sup> However, after that

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<sup>22</sup> Exs. 13, 14; (Specifically a non-angulated oblique fracture through the proximal left femoral metaphysis).

<sup>23</sup> Ex. 13.

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

<sup>25</sup> Exs. F, 16; Test of Rowland in Ex. M.

<sup>26</sup> Ex. 1.

<sup>27</sup> Ex. 13, Ex. M. (The recording of the interview is not part of the hearing record).

<sup>28</sup> Exs. 13, 14; Test. of Bausman and Hale in Ex. M.

<sup>29</sup> Ex. 16.

interview, the police officer told the County Licenser that at that time she was convinced the injury did not occur at Licensee's daycare.<sup>30</sup>

27. Upon interview, the Licensee stated that A.C. always pulled her legs in and it was different than any kid she ever had and that A.C. did that every time she changed her, including during the four changes on May 23, 2011.<sup>31</sup>

28. Beginning on May 24, 2011, Child Protection assigned a third-party to monitor and supervise A.C.'s parents 24 hours per day, seven days per week. That supervision was still in place on June 10, 2011.<sup>32</sup>

29. In a Supplemental Report from Officer Bush, she stated that "The case will be turned over to Social Services in which services will be open with the family and Olmsted County licensing will be working with the daycare."<sup>33</sup>

30. On June 10, 2011, the child protection worker had a telephone conversation with the emergency room physician that examined and treated A.C. This conversation occurred before Licensee was interviewed that day. The doctor opined that A.C.'s leg could have been broken:

- a. during an accident such as a car accident; or
- b. during an accident such as having her left foot slammed into an object when being pushed in a stroller; or
- c. when she was taken out of or put in her car seat; or
- d. during the final diaper change by Licensee on May 23, 2011.

The doctor said A.C. would not have been injured by a fall.<sup>34</sup>

31. During the June 10, 2011 interview with Licensee, the Licensee stated that nothing significant happened in any of the diaper changes. She then stated that A.C. would pull her legs up in fetal position really hard and Licensee would straighten A.C.'s legs out to complete the diaper change. Also during the interview, the Child Protection investigator and the Licenser told Licensee that they both believed that A.C.'s injury was accidental and was not caused intentionally by anyone. The police officer stated that they had not come up with anything that would lead them to know where or how A.C.'s leg was broken. She also stated that A.C.'s broken leg could have happened during one of Licensee's diaper changes or by something that the parents did. The Licenser told the Licensee that a complaint log would be done and that it would state that there was

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<sup>30</sup> Test. of Hale in Ex. M.

<sup>31</sup> Ex. 16.

<sup>32</sup> Ex. 16; Test. of Bausman in Ex. M.

<sup>33</sup> Ex. G.

<sup>34</sup> Ex. 16; Test. of Bausman on August 2, 2012.

an unexplained injury to a child, but that it would be listed as unable to be determined. The Licensor said the complaint log would not affect her license.<sup>35</sup>

32. During that same interview, the Child Protection investigator informed the Licensee that she was unable to determine a maltreatment finding at that time, and child protective services were not needed. The Licensor informed Licensee:

Sherry explained to Kari and Jay that there is a child with a broken femur and somehow that bone was broken between Monday morning 5/23/11 and Monday early evening 5/23/11. Sherry explained to Kari that no one is admitting to doing this and that after interviews with the child care provider and the family there is no explanation as to how this could have happened and therefore, the determination on the police position is that there is no determination. Christy explained to Kari and Jay that she would need to take this back and staff it with her team, but that she was unable to determine a maltreatment finding at this time and that Child Protection Services were not needed for either family.

I explained to everyone about our complaint log and that this complaint would be listed on the log, but with the outcome of the police and child protection, that the findings on the complaint would be unable to be determined. Kari asked if her license was going to be in jeopardy and I told her that it shouldn't.<sup>36</sup>

33. After the interview with the Licensee on June 10, 2011, the Child Protection worker collected no other evidence.<sup>37</sup>

34. Also during the June 10, 2011 interview, the Child Protection worker stated that Child Protection would continue to monitor the parents until A.C.'s broken leg healed. A.C.'s cast was scheduled to be removed on or about June 20, 2011.<sup>38</sup>

35. The law enforcement investigation concluded that:

- a. A.C.'s injury was accidental;
- b. There was no evidence indicating or supporting abuse or negligence;
- c. The investigation could not determine how the injury occurred or where it occurred; and
- d. The finding of the investigation was "indeterminate/inconclusive."<sup>39</sup>

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<sup>35</sup> Ex. 16.

<sup>36</sup> Ex. 17.

<sup>37</sup> Test. of Bausman in Ex. M.

<sup>38</sup> Ex. 16.

36. In the case note created by the Child Protection worker on August 11, 2011, she indicated that she spoke with Dr. Broughton from Mayo Clinic two months earlier, on June 10, 2011, regarding A.C.'s broken leg:

This worker spoke to Dr. Broughton about possibilities with the leg getting broke during a diaper change and if it was broke prior to coming to day care that day, whether or not [A.C.] would have been physically able to or had the strength to pull her legs up to her chest and cross them or not. Dr. Broughton felt that if [A.C.'s] leg was broken prior to getting dropped off at the day care home, she would not have had the physical strength and it would have been too painful for her to pull that leg up to her chest and hold them tightly together crossed.

Dr. Broughton agreed that if [A.C.] was a child who pulled her legs up to her chest and crossed them tightly during diaper changes as the child care provider described, that she would have had to use force to uncross them for wiping her bottom.

The day care provider's log shows that [A.C.] had had four diaper changes the day her leg got broken, the first three were wet diapers and the fourth diaper was wet and had a bowel movement in it as she described and she said that for bowel movements with [A.C.] she had to pull her legs apart and push them down in order to properly clean her.

Dr. Broughton said that a rough diaper change could definitely [have] been the cause of the break to [A.C.'s] leg.<sup>40</sup>

37. The Child Protection worker testified that Dr. Broughton informed her that the break in the femur was most likely caused by the child's leg being forcefully put down or a forceful diaper change, and that in his opinion it could have occurred at the last diaper change of the day.<sup>41</sup>

38. The Child Protection worker informed Dr. Broughton that:
- a. A.C. crossed her legs during diaper changes with Licensee,<sup>42</sup>
  - b. Licensee had to pull A.C.'s legs apart during diaper changes; and
  - c. Licensee had to separate and put A.C.'s legs down to properly clean her.

It was based on those facts and viewing A.C. that Dr. Broughton was able to form his opinion that the injury could have occurred during a diaper change.<sup>43</sup>

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<sup>39</sup> Exs. F, G, 16.

<sup>40</sup> Ex. 18.

<sup>41</sup> Test. of Bausman in Ex. M.

<sup>42</sup> Test. of Bausman and Hale in Ex. M.

39. On October 17, 2011 at the TIS hearing, the Child Protection worker testified that: it was possible that Licensee did not state that A.C. had crossed her legs during diaper changes; she does not remember Licensee ever saying that she had to push A.C.'s legs down, but did recall Licensee telling her that she never used force during diaper changes.<sup>44</sup>

40. On October 17, 2011 at the TIS hearing, the Licensor testified that Licensee never said that she forced A.C.'s legs apart during diaper changes.<sup>45</sup>

41. By letter dated August 12, 2011, the County notified the Licensee:

Based on a preponderance of the evidence, we determined that abuse occurred, for which you were responsible, but that child protective services are not needed. The reasons for the determinations are based on the time line of events completed by conducting interviews which law enforcement including yourself, the child's parents, and medical professionals.

42. The County informed the Licensee that the "maltreatment determination may result in a licensing action." The County informed the Licensee of her right to request reconsideration of the "abuse or neglect determination."<sup>46</sup>

43. Social Services based the maltreatment determination on the consistency of the interviews with the mother, the father and medical staff; and some of the inconsistencies in the timeline that occurred in the interviews with the Licensee. The Child Protection worker testified that things seemed to contradict one another as far as the child being fussy and her diaper changes and the sheet that she fills out for parents regarding how the child's day went. The Child Protection worker stated that the doctor discussed with her whether the child would have been physically able to behave the way she did through diaper changes all day long if she had a broken femur when she arrived at the daycare home.<sup>47</sup>

44. On September 8, 2011, the County recommended to the Commissioner of Human Services that a temporary immediate suspension be issued on Licensee's child care license. The Olmsted County Community Services Licensor informed the Commissioner:

Kari reports that there had been four diaper changes throughout the day and at each change, the infant had pulled her legs toward her body in a crossed manner. Kari reported that at each of these changes, she had to pull the legs apart in order to clean her.

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<sup>43</sup> Test. of Bausman in Ex. M.

<sup>44</sup> *Id.*

<sup>45</sup> Test. of Hale in Ex. M.

<sup>46</sup> Ex. 19.

<sup>47</sup> Test. of Bausman in Ex. M.

During the investigations with the police department and child protection, a Mayo Clinic Pediatric specialist, Dr. Broughton, told child protection assessor, Christie Bausman, that this fracture had to have taken place on the last diaper change as the infant would not have been able to cross her legs after the fracture. The parents of the infant reported that she did not cross her legs when they had ever changed her.

After investigations and interviews with child protection, the police department and child care licensing, a mixed conclusion was found. Due to the inconclusive evidence of both the child care provider and the parents of the infant, the police department was unable to make enough of a determination to charge either party in this matter. Child protection landed a different conclusion due to the final interview with Dr. Broughton from the Mayo Clinic. Child protection concluded that aggravated maltreatment occurred, due to the fracture [sic], and that the incident had taken place at the child care provider's home."<sup>48</sup>

45. On September 8, 2011, the Minnesota Department of Human Services issued an Order of Temporary Immediate Suspension (TIS) suspending Licensee's license to provide family child care.<sup>49</sup>

46. By letter dated September 8, 2011, the County notified the Licensee:

Based on a preponderance of the evidence, we determined that physical abuse occurred, for which you were responsible, but that child protective services are not needed. The reasons for the determinations are based on the interviews and contacts conducted by this worker and law enforcement investigator Sherry Bush.

The County informed the Licensee that the "maltreatment determination and disqualification may result in a licensing action." The County informed the Licensee of her right to request reconsideration of the "abuse or neglect determination" and "disqualification determination."<sup>50</sup>

47. By letter dated September 9, 2011, the Licensee requested reconsideration of the Order of Temporary Immediate Suspension.<sup>51</sup>

48. A hearing on the Order of Temporary Immediate Suspension was held before an Administrative Law Judge on October 17, 2011.<sup>52</sup> Testimony was taken

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<sup>48</sup> Ex. 21. The Licensor testified on October 17, 2011 at the TIS hearing that the final licensing determination was made due to final conversation the Child Protection worker had with Dr. Broughton. The Licensor had no conversations with Dr. Broughton. The Licensor understood that the maltreatment determination was made because Dr. Broughton believed "it had to have occurred at daycare somewhere during the day, more so with the last diaper change." Test. of Hale in Ex. M.

<sup>49</sup> Ex. 22.

<sup>50</sup> Ex. 23.

<sup>51</sup> Ex. 24.

regarding: Licensee's history, Licensee's experience in changing diapers, care of infant A.C. by Licensee, care of A.C. by her parents, May 23, 2011 emergency room visit, law enforcement and child protection investigations, opinion of former child protection worker and current daycare parent, parent confidence in Licensee's program conditions, and the safety of their children in Licensee's care.<sup>53</sup>

49. Cathy Burns is presently a social worker for the County. She was also a child protection worker for the County for 15 years. Ms. Burns has no safety concerns for children in Licensee's care, including her own youngest child, a seven-year-old daughter. Licensee previously cared for Ms. Burns' 11-year-old daughter. Ms. Burns considers Licensee an "exceptional" day care provider.<sup>54</sup>

50. The ALJ found: Licensee had the confidence and unconditional support of seven daycare parents who had children in Licensee's care at the time the maltreatment determination and disqualification were issued.<sup>55</sup> The ALJ also found: "They universally believe that their children are safe and happy in Licensee's "exemplary" care."<sup>56</sup> The ALJ further found: during the temporary immediate suspension of Licensee's license, "[t]he parents [were] anxious to return their children to Licensee's care."<sup>57</sup> Some children did return permanently to Licensee's care after the temporary immediate suspension was rescinded, some returned to Licensee's care on a back-up care basis, and some stay [sic] with the care providers they were using during the temporary immediate suspension.<sup>58</sup>

51. On October 31, 2011, the ALJ recommended to the Commissioner that "the Order of Temporary Immediate Suspension suspending the family child care license of Licensee be RESCINDED." The ALJ made findings of fact regarding Licensee's history, Licensee's experience in changing diapers, care of infant A.C. by Licensee, care of A.C. by her parents, the May 23, 2011 emergency room visit, law enforcement and child protection investigations, opinion of former child protection worker and current daycare parent, and parent confidence in Licensee's program conditions and the safety of their children in Licensee's care.<sup>59</sup>

52. On November 23, 2011, the Commissioner adopted the findings of fact and conclusions issued by the ALJ and ordered "that the temporary immediate suspension of Licensee's family child care license is RESCINDED."<sup>60</sup>

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<sup>52</sup> Ex. M.

<sup>53</sup> Exs. 25, M.

<sup>54</sup> Test. of Burns in Ex. M; Ex. D.

<sup>55</sup> Ex. 25.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; Test. of Cratchy, Johnson, Tessler, Vite in Ex. M, Exs. A, E.

<sup>58</sup> Test. of Johnson, Burns, and Tessler on August 2, 2012.

<sup>59</sup> Ex. 25. Test. of Johnson, Burns, and Tessler on August 2, 2012. The findings of fact were based on the testimony of Ms. Hale, Ms. Bausman, Licensee, and exhibits all of which are again submitted by the parties for purposes of the hearing on August 2, 2012.

<sup>60</sup> Ex. 27.

53. On December 15, 2011, the County made a recommendation to the Commissioner "that Kari Rowland's license be placed on Conditional status" based on a "child protection maltreatment finding," and a fine of \$1,000 be assessed.<sup>61</sup> The only basis for the conditional license and fine was the maltreatment determination pertaining to the abuse which was alleged to have occurred in Licensee's care on May 23, 2011.<sup>62</sup>

54. By letter dated January 24, 2012, the County notified Licensee that "the maltreatment determination and the resulting disqualification [were] affirmed." A variance to the Licensee's disqualification was issued. The letter informed the Licensee of her appeal rights.<sup>63</sup> On February 16, 2012, the Licensee appealed the maltreatment determination and disqualification.<sup>64</sup>

55. On March 6, 2012, the Commissioner issued an Order of Conditional License and Order to Pay a Fine of \$1,000. The Commissioner cited the maltreatment of a child as determined [by] the County as the basis for the orders.<sup>65</sup>

56. On March 8, 2012, the Licensee appealed the Order of Conditional License and fine.<sup>66</sup>

57. The issues of maltreatment, disqualification, conditional license, and order to pay a fine were timely appealed by the Licensee and are properly before the Office of Administrative Hearings.

#### ADDITIONAL FINDINGS OF FACT

58. The parties stipulated to the record that had been created up to and including October 17, 2011, the date of the TIS hearing. This evidence included both the testimony and exhibits that were submitted to the ALJ who presided at the TIS hearing. This is the same evidence that was submitted to this ALJ.<sup>67</sup>

59. Following the rescission of the TIS, the Licensee reopened her daycare program on January 3, 2012. There were no adverse licensing incidents between that time and the hearing in this matter in August 2012.<sup>68</sup>

60. The County offered no additional substantive evidence on the issue of causation at the August 2, 2012 hearing.

61. The County was of the belief that the record before the TIS-ALJ, and now this ALJ, shows by a preponderance of the evidence, that maltreatment occurred and that A.C. was in Licensee's care when it happened.<sup>69</sup>

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<sup>61</sup> Ex. 28.

<sup>62</sup> Test. of Hale on August 2, 2012.

<sup>63</sup> Ex. 30.

<sup>64</sup> Ex. K.

<sup>65</sup> Ex. 29.

<sup>66</sup> Exs. 1, 2.

<sup>67</sup> Ex. M.

<sup>68</sup> Ex. M.

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62. The officer who conducted the investigation and who participated in all of the interviews of the Licensee and A.C.'s parents concluded the investigative information was inconclusive. She could not determine where the injury occurred or who caused it. The officer found the Licensee and A.C.'s parents equally credible.<sup>70</sup>

63. The TIS-ALJ, after hearing the live testimony and observing the demeanor of the Child Protection Worker, determined serious questions had been raised as to the reliability and accuracy of all the Child Protection reports and case notes. He gave little weight to the testimony.<sup>71</sup>

64. The Child Protection worker's conversation with Dr. Broughton on June 10, 2011 was not recorded. The County did not produce a written doctor's opinion on causation, but rather the Child Protection worker's recollection of the conversation which she reduced to writing two months after the conversation.<sup>72</sup>

65. The Child Protection worker's case note of the conversation with Dr. Broughton is dated August 11, 2011. The statements' focus is on the last diaper change performed by Licensee on May 23, 2011. It appears the doctor is responding to the Child Protection worker's leading question, to which Dr. Broughton replies, "that a rough diaper change could definitely [have] been the cause of the break to [A.C.'s] leg."<sup>73</sup>

66. After hearing the live testimony and observing the demeanor of the witnesses at the hearing, the TIS-ALJ accepted Licensee's version of the facts relative to:

- when A.C. arrived on the morning of May 23, 2011, she cried when she was initially placed on the floor and attempted to crawl;
- being fussy all day on May 23, 2011, and not as described by A.C.'s father; and

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<sup>69</sup> *Id.*

<sup>70</sup> Exs. G, 16, 17.

<sup>71</sup> Ex. 25, Memorandum.

The TIS-ALJ wrote, "During her conversations with the ER physician and the second interview with Licensee, the Child Protection worker suggested that Licensee pushed AC [sic] legs down during diaper changes. Licensee had explained that she "straightened" out AC's legs during the last diaper change in order to clean her. Towards the end of the second interview, the Licensor suggested that AC's leg could have been "slammed down" during the final diaper change on May 23, 2011.

Recitations of the Child Protection worker's statements written in her report and in her testimony at the hearing are inconsistent with her actual recorded statements in the June 10, 2011 interview of Licensee with regard to causation of AC's injuries and final disposition of the investigation. Although the ER physician discussed other possibilities for AC's injury, and the Child Protection investigator restated those other possibilities during the June 10, 2011 interview of Licensee, her written report omits the ER physician's list of possible causes for AC's broken leg. This casts doubt about the reliability and accuracy of all of the Child Protection reports and case notes."

<sup>72</sup> Ex. 18.

<sup>73</sup> *Id.*

- Licensee's description of how she handled A.C. by straightening her leg in order to clean her soiled diaper.

## CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge and the Commissioner authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations.<sup>74</sup>

2. The Department gave proper and timely notice of the hearing in this matter and has complied with all procedural requirements of Minnesota rule and law.

3. Minn. Stat. § 626.556 (f), "Neglect" means the commission or omission of any of the acts specified under clauses (1) to (9), other than by accidental means....

4. Minn. Stat. § 626.556 (g), "Physical abuse" means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67 or 245.825.

5. Minn. Stat. § 626.556 (q), "Accidental" means a sudden, not reasonably foreseeable, and unexpected occurrence or event which:

(1) is not likely to occur and could not have been prevented by exercise of due care; and

(2) if occurring while a child is receiving services from a facility, happens when the facility and the employee or person providing services in the facility are in compliance with the laws and rules relevant to the occurrence or event.

6. The evidence in this case does not support a finding of neglect or physical abuse; at best, the evidence supports a finding of an accidental injury.

7. Minn. Stat. § 245A.06, in relevant part, reads,

Subdivision 1(a) If the commissioner finds that the applicant or license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program, the commissioner may issue a correction order and an order of conditional license to the applicant or license holder. When issuing a conditional license, the commissioner shall consider the

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<sup>74</sup> Minn. Stat. §§ 14.50, 14.69, and 245A.07; subd. 3.

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....

8. Minn. Stat. § 245A.04, in relevant part, reads,

Subdivision 6. Before issuing, denying, suspending, revoking, or making conditional a license, the commissioner shall evaluate information gathered under this section. The commissioner's evaluation shall consider 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 applicant or license holder.

9. Minn. Stat. § 245A.07, subd. 1(a), reads:

In addition to making a license conditional under section 245A.06, the commissioner may suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When 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.

10. Minn. Stat. § 245A.07, subd. 3(a), in relevant part, reads:

The commissioner may suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules, if a license holder... has a disqualification which has not been set aside under section 245C.22, or if a license holder knowingly withholds relevant information from or gives false or misleading information to the commissioner... during an investigation, or regarding compliance with applicable laws or rules.

11. Minn. Stat. § 245A.08, subd. 3(a), reads,

At a hearing regarding a licensing sanction under section 245A.07, including consolidated hearings under subdivision 2a, the commissioner 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. 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.

12. Minn. Stat. 245C.02, subd. 18(a), reads,

"Serious maltreatment" means sexual abuse, maltreatment resulting in death, neglect resulting in serious injury which reasonably requires the care of a physician whether or not the care of a physician was sought, or abuse resulting in serious injury.

13. There is no credible evidence in the record that A.C. crossed her legs while in the fetal position prior to diaper changes, that the Licensee slammed down A.C.'s legs, or that she performed a rough diaper change.

14. The ALJ finds the Licensee's testimony credible and concurs with the findings of the TIS-ALJ relative to:

- when A.C. arrived on the morning of May 23, 2011, that she cried when she was initially placed on the floor and attempted to crawl;
- being fussy all day on May 23, 2011, not as described by A.C.'s father; and
- Licensee's description of how she handled A.C. by straightening her legs in order to clean her soiled diaper.

15. The ALJ concurs with the TIS-ALJ's determination to attribute little weight to the reliability and accuracy of the Child Protection reports, case notes, and testimony.

16. The ALJ concludes that the County did not meet its burden of proof by a preponderance of evidence that maltreatment occurred while under the care of Licensee.

17. Given the maltreatment determination above, there is no reasonable cause to impose a conditional license or fine.

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

### **RECOMMENDATION**

**IT IS RECOMMENDED** that the Commissioner of the Department of Human Services **RESCIND** the Order to Forfeit a Fine and Order of Conditional License.

Dated: December 3, 2012

  
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MANUEL J. CERVANTES  
Administrative Law Judge

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. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Lucinda Jesson, Commissioner, Minnesota Department of Human Services, P. O. Box 64998, St. Paul, MN 55164-0998 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. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the 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 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

The procedural posture in this matter is unusual. The County relies on the same record that was relied upon at the August 2, 2011 Temporary Immediate Suspension (TIS) hearing. There was no further investigation after that time. In its opening

remarks, the County stated it is relying on the same arguments that it made in support of the TIS. Its position is that the existing record establishes, by a preponderance of evidence, that maltreatment occurred while A.C. was in Licensee's care. The ALJ disagrees.

The ALJ notes that there are statutory differences in the burden of proof between a TIS and a maltreatment hearing. The purpose of a TIS hearing is to determine whether a Licensee or conditions in his or her program pose an imminent risk of harm to program participants; the children in his or her care.<sup>75</sup> If the ALJ determines that the Department has established reasonable cause to believe so, the TIS should remain in place.

In contrast, in a maltreatment case the burden of proof is on the County to establish by a preponderance of the evidence that maltreatment occurred and that it occurred while in the care of Licensee. Causation is the crux of this case.

The County, through the Child Protection worker and law enforcement, conducted the maltreatment investigation. The Licensee and A.C.'s parents were interviewed multiple times. The police officer, who is trained in investigative techniques, and whose skills in detecting credibility are routinely called upon in the performance of her duties found the parents and Licensee equally credible. She concluded that the investigative data was inconclusive as to where the injury occurred or who caused it and reported this to Licensee at the conclusion of the June 10, 2011 interview.

On the other hand, the Child Protection worker wrote her explanation of causation two months later in a case note based on her recollection of the June 10, 2012 interview of Dr. Broughton.

The TIS-ALJ had the benefit of conducting the full-blown hearing and listening to the live testimony of the witnesses, observing their demeanor, and assessing their credibility. The undersigned ALJ did not. The TIS-ALJ accepted Licensee's explanation that she "straightened" out AC's legs during the last diaper change in order to clean her and her denial that she did anything to hurt A.C. He implicitly rejected the Child Protection worker's suggestion that Licensee pushed A.C.'s legs down or Licensor's suggestion that they were "slammed down" during the final diaper change on May 23, 2011. The ALJ adopts these findings given the fact that the TIS-ALJ was in the best position to assess credibility.

The TIS-ALJ also found Licensee's testimony to be credible on other controverted points in the case, specifically, on the morning of May 23, 2011, when A.C. arrived, that Licensee observed A.C. whimper when she was initially placed on the floor and attempted to crawl; and that Licensee had indicated that A.C. was fussy and sleepy all day because of a sinus infection, not only on that afternoon as described by A.C.'s father. Again, the ALJ adopts with these findings given the fact that the TIS-ALJ was in the best position to assess credibility.

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<sup>75</sup> Minn. Stat. § 245A.07, subd. 1, Minn. R. 9502.0325.

The TIS-ALJ also found the Child Protection worker's statements written in her report and in her testimony at the hearing were inconsistent with her actual recorded statements in the June 10, 2011 interview of Licensee relative to the cause of A.C.'s injury. Although Dr. Broughton discussed other possibilities for A.C.'s injury, and the Child Protection worker restated them during the June 10, 2011 interview with Licensee, she omitted them from her written report.

The TIS-ALJ gave little weight to the Child Protection worker because this omission cast doubt on her reliability and accuracy. There is little doubt that as time passes, memories fade. An interview with a contemporaneous case note is the best practice but is of particular significance in this case because it relates to the critical issue of causation, the major issue in this case. Moreover, contrary to the information provided to the ER doctor, there is no evidence in the record that Licensee slammed A.C.'s legs down or performed a rough diaper change. Given the circumstances in this case, the ALJ concurs with the TIS-ALJ's decision to give little weight to the Child Protection worker's explanation of the causation based on accuracy and reliability. This is not the type of evidence that reasonable prudent person could rely on in the conduct of their serious affairs.<sup>76</sup>

Given all the facts and circumstances in this case, the ALJ concludes that the County did not establish its burden of proof by a preponderance of the evidence that Licensee committed maltreatment on A.C. on May 23, 2011. The ALJ recommends that the Commissioner rescind the Department's maltreatment finding, rescind the disqualification, and rescind its order imposing a conditional license and fine on Licensee.

**M. J. C.**

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<sup>76</sup> Minn. R. 1400.7300, subd. 1..  
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