

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 Mandi M. Elken

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

This matter came before Administrative Law Judge Jim Mortenson on September 14, 2016, for an evidentiary hearing. The hearing was held at the Wright County Human Services Building, Buffalo, Minnesota. The hearing record closed at the conclusion of the hearing.

Karen L. Wolff, Assistant Wright County Attorney, appeared on behalf of the Minnesota Department of Human Services (department). Terri S. Thorson, Central Minnesota Legal Services, appeared on behalf of Mandi Elken (licensee).

Nine documents were offered by the department and all were admitted into the record. Eight documents were offered by the licensee and all were admitted into the record. Four witnesses testified: the licensee, the county social worker, and two parents of children who attended the licensee's day care.

STATEMENT OF THE ISSUE

Should the temporary immediate suspension (TIS) of Ms. Elken's family child care license remain in effect pending the investigation and final order of the commissioner regarding a possible licensing sanction?

SUMMARY OF RECOMMENDATION

The TIS should be lifted because there is no imminent risk of harm to the health, safety, or rights of the persons served by Ms. Elken's day care.

Based upon the evidence in the hearing record, the judge makes the following:

FINDINGS OF FACT

1. Licensee Mandi Elken has operated a family day care in Wright County since May 2007.¹

¹ Testimony (Test.) of Mandi Elken.

2. In June 2016, Ms. Elken moved to a new home at 11583 79th Street Northeast, in Otsego, Minnesota.² Ms. Elken's family child care license was renewed for July 5, 2016 through June 1, 2018, for her new address.³

3. Ms. Elken obtained family day care travel and activity authorization forms from the Wright County website.⁴

4. B.B. is a school-age child who attended Ms. Elken's day care.⁵ B.B. was born March 7, 2008.⁶

5. On October 9, 2015, a parent of B.B. signed a travel and activity form for B.B.⁷ The form states, in relevant part: "I give permission for my school-age child, [B.B.], to participate in Park (name of activity), outside the residence. I understand that my child will not be under the supervision of the day care provider, substitute, or helper."⁸

6. C.M. is a school-age child who attended Ms. Elken's day care.⁹ C.M. was born March 27, 2009.¹⁰

7. On April 28, 2016, a parent of C.M. signed a travel and activity form for C.M.¹¹ The form states, in relevant part: "I give permission for my school-age child, [C.M.], to participate in neighbor friends homes & park (name of activity), outside the residence. I understand that my child will not be under the supervision of the day care provider, substitute, or helper."¹²

8. In July 2016, Ms. Elken permitted some of the school-age children whose parents had provided written permission, including B.B. and C.M. and her son, C.E., to go to the neighborhood park at least three times.¹³

9. On August 9, 2016, a new child, M.C., began attending Ms. Elken's day care.¹⁴ M.C. was born on August 13, 2009.¹⁵

² Test. of M. Elken; DHS Exhibit (Ex.) 1.

³ *Id.*

⁴ *Id.*; Licensee Exs. 6, 7.

⁵ Test. of M. Elken; Test. of Thomas Buelow; DHS Ex. 3.

⁶ DHS Ex. 3 at 2. (A school-age child is "a child who is at least sufficient age to have attended the first day of kindergarten, or is eligible to enter kindergarten within the next four months, but is younger than 13 years of age." Minn. Stat. § 245A.02, subd. 16 (2016).)

⁷ Test. of M. Elken; Test. of T. Buelow; Licensee Exs. 1, 6.

⁸ Licensee Ex. 6 (The underlined portions of the form were filled in by the signer).

⁹ Test. of M. Elken; Test. of Melissa Manicke; DHS Ex. 3 at 2.

¹⁰ DHS Ex. 3 at 3.

¹¹ Test. of M. Elken; Test. of M. Manicke; Licensee Exs. 1, 6.

¹² Test. of M. Elken; Licensee Exs. 1, 6 (The underlined portions of the form were filled in by the signer).

¹³ Test. of M. Elken.

¹⁴ *Id.*

¹⁵ *Id.*; DHS Ex. 3 at 2.

10. On August 9, 2016, Ms. Elken sent one of M.C.'s parents a text message advising that the school-age children "go to a park a few blocks away. I need to know if you are with [M.C.] going or not. [C.E] has a phone."¹⁶ Following some questions from the parents and answers by Ms. Elken, the parent provided permission for M.C. to go the park with the other children without Ms. Elken in attendance.¹⁷

11. C.E. is Ms. Elken's school-age son.¹⁸ C.E. was born on April 27, 2008.¹⁹

12. On August 9, 2016, after lunch, at 12:30 p.m., Ms. Elken permitted C.E., B.B., C.M., and M.C. to go to Beaudry Park.²⁰ The park is less than a half-mile away in the subdivision.²¹

13. C.E. was sent with a cell phone, and all of the children had bottles of water with their names on them.²²

14. C.E. and B.B. argued about something at some point after the children arrived at the park. C.E. went home as a result of the argument, telling the other children not to follow him.²³

15. B.B., C.M., and M.C. walked a different direction, likely east out of the park, north on Large Avenue Northeast, west on 76th Street Northeast, and north on 77th Street Northeast/Lannon Avenue Northeast.²⁴

16. B.B., C.M., and M.C. were met by a woman and her son, who live at 75xx Langley Avenue Northeast, on 77th Street Northeast/Lannon Avenue Northeast where the road crosses a drainage that runs through the neighborhood.²⁵

17. The children were hot, scared, and at least one, M.C., was crying. They were willing to talk to the woman.²⁶ The woman obtained M.C.'s mother's phone number and called her.²⁷

¹⁶ Licensee Ex. 8.

¹⁷ *Id.* Ms. Elken was asked the age of the oldest child, to which she responded "9." It is not known if this refers to a nine-year-old child who may have gone with the group, but the oldest child in the group that actually went to the neighborhood park that day was B.B., who is eight years old.

¹⁸ Test. of M. Elken.

¹⁹ DHS Ex. 3 at 2.

²⁰ Test. of M. Elken; DHS Ex. 3 at 3.

²¹ *Id.*

²² Test. of M. Elken.

²³ Test. of M. Elken; DHS Ex. 5

²⁴ DHS. Exs. 4, 5, 6, 7.

²⁵ Test. of M. Elken; DHS. Exs. 3, 6, 7.

²⁶ DHS. Exs. 3, 4, 5, 6.

²⁷ Test. of M. Elken; DHS. Ex. 6.

18. At 1:05 p.m. C.E. arrived back at the day care without B.B., C.M., or M.C.²⁸ Ms. Elken asked C.E. where the other children were and C.E. refused to answer her.²⁹

19. Ms. Elken advised C.E. that he was in big trouble, that the children would no longer be permitted to go to the park alone, and took his iPad away from him.³⁰

20. Ms. Elken waited approximately ten minutes for B.B., C.M., and M.C. to arrive.³¹ When they did not arrive, Ms. Elken sent her twelve-year-old daughter and C.E. out to find them. Ms. Elken's daughter went west on their street, toward the park, and C.E. rode his bike east.³²

21. At approximately 1:15 p.m., the time Ms. Elken sent her children out to find B.B., M.C., and C.M., M.C.'s mother called Ms. Elken and advised her that a lady had found the children and the children could not find their way back to the day care.³³

22. C.E. found the children a short ways away from the daycare, down 77th Street Northeast.³⁴ The children would not follow C.E. back to the day care because they were upset with him.³⁵

23. Shortly thereafter, Ms. Elken's daughter arrived and the group walked together north and west on 77th Street Northeast.³⁶ When the group turned north to proceed toward where the east end of 79th Street begins, Ms. Elken reached the woman who was helping the children on the phone. The two spoke until the group reached 79th Street and Ms. Elken could see the group and waived the children down to the day care, the third house on the south side of the street.³⁷ This occurred between 1:20 and 1:30 p.m.³⁸ The children came to the day care home, the woman who had been accompanying them did not.³⁹

24. As soon as they had returned, Ms. Elken advised the children that they would no longer be permitted to go to the park without her.⁴⁰ Ms. Elken made this change in policy because she was worried about the children's safety.⁴¹

²⁸ Test. of M. Elken.

²⁹ *Id.*

³⁰ Test. of M. Elken; DHS Exs. 4, 6.

³¹ *Id.*

³² Test. of M. Elken; DHS Exs. 4, 6, 7.

³³ Test. of M. Elken.

³⁴ *Id.*

³⁵ *Id.*; DHS Ex. 6.

³⁶ DHS. Ex. 6.

³⁷ *Id.*; DHS Ex. 7; Test. of M. Elken.

³⁸ Test. of M. Elken.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

25. The children who had been lost were all unharmed and their parents were not overly concerned about the incident.⁴²

26. At 6:30 p.m. on August 9, 2016, the woman who came upon the three children made a complaint to the Wright County Sheriff's Office.⁴³ Deputy Robert Mossman responded to the complaint and immediately began investigating, speaking with the reporter, Ms. Elken, and the parents of B.B., C.M., and M.C.⁴⁴ The matter was referred to child protection for further investigation.⁴⁵

27. B.B. and C.M. returned to the day care on August 10, 2016.⁴⁶ M.C. was not scheduled to return to the day care until later in the month.⁴⁷

28. At 10:37 a.m. on August 10, 2016, the woman who came upon the three children made another complaint, this time with the Minnesota Department of Human Services.⁴⁸

29. Lisa Gertken, a Wright County social worker, investigated the complaint for Wright County Health and Human Services (agency).⁴⁹ Ms. Gertken went to the day care on August 11, 2016, and spoke with Ms. Elken, C.E., and C.M.⁵⁰

30. Ms. Gertken recommended a TIS be issued because she believed the children required greater supervision and because she believed Ms. Elken did not see the hazards in permitting the children to leave the day care without Ms. Elken.⁵¹

31. On August 11, 2016, the Mary Kelsey, Section Manager in the Office of Inspector General of the Minnesota Department of Human Services issued an order for TIS of Ms. Elken's family child care license because of the report "that children in [Ms. Elken's] care were found unattended in the community."⁵²

32. B.B.'s father would return him to Ms. Elken's day care if it were operating again.⁵³

33. C.M.'s mother would return her to Ms. Elken's day care if it were operating again.⁵⁴

⁴² Test. of M. Elken; DHS Ex. 3 at 3.

⁴³ DHS Ex. 3.

⁴⁴ DHS Ex. 3.

⁴⁵ *Id.*

⁴⁶ Test. of M. Elken

⁴⁷ *Id.*

⁴⁸ DHS Ex. 2.

⁴⁹ Test. of Lisa Gertken

⁵⁰ *Id.*; DHS Ex. 4.

⁵¹ Test. of L. Gertken.

⁵² DHS Ex. 9.

⁵³ Test. of T. Buelow.

⁵⁴ Test. of M. Manicke.

34. At the time of the hearing, Ms. Gertken did not know whether there was an imminent risk of harm to the children in Ms. Elken's day care at that time.⁵⁵ Ms. Gertken does retain concern that Ms. Elken may not pay attention to supervision rules because Ms. Elken refuses to, in her mind, "own up" to her error in permitting the children to go to the park without a care giver.⁵⁶

35. Any facts in the memorandum below not specifically found above are hereby incorporated into these findings of fact.

Based upon these findings of fact, and for the reasons explained in the memorandum below, the administrative law judge makes the following:

CONCLUSIONS OF LAW

1. The administrative law judge and the commissioner have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50; 245A.07, subd. 3(c); .08 (2016).

2. The department gave proper and timely notice of the hearing in this matter.

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

4. The commissioner must demonstrate "that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses, or 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."⁵⁷

5. The commissioner has not shown reasonable cause exists to believe that Ms. Elken's actions or any alleged failure to comply with applicable law or rule poses an imminent risk of harm to children in the day care.

Based upon the findings of fact, conclusions of law, record, and as explained in the memorandum below, the administrative law judge makes the following:

⁵⁵ Test. of L. Gertken.

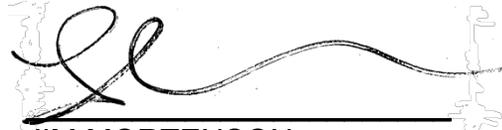
⁵⁶ *Id.*

⁵⁷ Minn. Stat. § 245A.07, subd. 2a(a) (2016); see also Minn. Stat. § 245A.07, subd. 2(a)(1) (2016).

RECOMMENDATION

The administrative law judge respectfully recommends that the order of temporary immediate suspension issued to Ms. Elken on August 11, 2016, be **RESCINDED**.

Dated: September 21, 2016

A handwritten signature in black ink, appearing to read 'JIM MORTENSON', is written over a solid horizontal line. The signature is stylized and cursive.

JIM MORTENSON
Administrative Law Judge

Reported: Digitally recorded.⁵⁸

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify these Findings of Fact, Conclusions of Law, and Recommendations. The parties have 10 calendar days after receiving this Report to file Exceptions to the Report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue the final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64254, St. Paul, MN 55164-0254, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1 (2014), 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.

⁵⁸ The digital recording of this matter malfunctioned and there may be no retrievable recording of the hearing.

MEMORANDUM

Arguments

The department argues that it has met its burden of proof in this case because: Ms. Elken failed to provide proper supervision to school-age children in her care; had opportunities to give assistance to the three lost children and did not do so; that the lost children were “damaged”; and that Ms. Elken’s assertion that she would no longer permit school-age children to leave her property without accompanying them was not based on concerns for the children.

Ms. Elken argues that the department has not met its burden of proof because: first, she had written permission from parents for their school-age children to go to the park without an adult; second, Ms. Elken kept in contact with the children through the cell phone she sent with them; third, she provided them with water for their outing to the park; and fourth, she complied with all rules for supervision. Thus, according to Ms. Elken, there is no imminent risk of harm to the children in her day care.

The administrative law judge agrees that the department has not shown there is an imminent risk of harm to the children Ms. Elken’s day care serves.

Analysis

At hearing on an appeal of a TIS the initial burden of proof is on the commissioner to show “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.”⁵⁹ “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....”⁶⁰ In other words, the commissioner must show “the existence of circumstances sufficient to warrant a cautious person to reasonably believe” that the license holder, other persons in the program, or circumstances in general pose an imminent risk of harm to the safety of the children in the day care.⁶¹

Without reaching a judgment on whether there was a violation of law, it is clear that there are no articulable facts or circumstances to provide the commissioner with reasonable suspicion that there is an imminent risk of harm to the children in Ms. Elken’s day care. Immediately following the incident on August 9, 2016, when three school-age children in her care became lost while returning to the day care from the neighborhood park, Ms. Elken stopped her policy and practice of permitting school-age children to walk to the park without a caregiver.

⁵⁹ Minn. Stat. § 245A.07, subd. 2a(a).

⁶⁰ *Id.*

⁶¹ *In re Temporary Immediate Suspension of the Family Child Care License of Strecker*, 777 N.W.2d 41, 46 (Minn. Ct. App. 2010).

Ms. Gertken, the county social worker, testified that it was Ms. Elken's insistence that she had done nothing wrong that compelled her to recommend a TIS to the commissioner. Whether Ms. Elken insisted she did nothing wrong is not the standard to be applied when considering a TIS, however. If the statutory standard is not applied, the decision to apply a TIS has no basis in law and is arbitrary and capricious.⁶²

Ms. Elken continues to believe she did not violate the law when she permitted her son and the three other children to attend the neighborhood park without accompanying them in person because she sent a telephone with them and had written permission from the parents of the three other children to permit them to travel to the park unaccompanied. She used the permission form provided by the county agency which states that permission is provided for a specific school-age child to attend specific locations, including the park, and that the parent understands "that my child will not be under the supervision of the day care provider, substitute, or helper." No judgment is made as to whether this language is statutorily compliant because a determination about whether there was a violation of rule or statute is not necessary. Rather, the language was provided to Ms. Elken by the county agency to use for her day care. This explains why Ms. Elken holds the belief she did nothing wrong.⁶³

The critical fact, however, is that Ms. Elken changed her practice of permitting school-age children to walk to and play at the neighborhood park unattended on August 9, 2016. This occurred immediately because of Ms. Elken's concern for the safety of the children. Thus, even if a violation of law occurred, there are no circumstances sufficient to warrant a cautious person to reasonably believe there is an imminent risk of harm to the children.

There is no evidence to support a finding or conclusion that Ms. Elken is not sincere in her position on how she will provide supervision in the future, regardless of how she provided it in the past. Ms. Elken testified credibly. There is no evidence showing she was untruthful or inaccurate in her statements, which were consistent with what she relayed to the deputy sheriff and the social worker near the time of the event.

Ms. Gertken's numerous erroneous recordings of interviews and uncertain memory of certain facts leaves much of her testimony and records less credible when compared to the testimony of Ms. Elken and the deputy's report. For example, Ms. Gertken recorded the wrong names in her records of interviews. She also had only a belief about when she created her interview records, and was not certain. Counsel for the department attempted to have errors Ms. Gertken made in her investigative record corrected, and these are noted. However, the errors raise a pall over the factual assertions made by Ms. Gertken.

Finally, the department argues the lost children were harmed. This is based on the evidence primarily collected by Ms. Gertken, which was not substantiated. However, even

⁶² *Id.*

⁶³ For example, there appears to be an expectation that school-age children who can walk to school would do so without a caregiver present. Neither statute nor rule is explicit on this, however.

Ms. Gertken's recorded facts fail to show anything more than that the children were hot and scared. It was a summer day, and the kids were outside for at least 45 minutes when they were found by the neighbor woman. No reasonable person would conclude children playing outside on a Minnesota summer day for less than an hour are necessarily harmed. Further, and most compelling, is the department's evidence showing the deputy sheriff contacted the three children's parents on the day the incident happened, all of whom advised him their children were unharmed and "had no drastic concerns about the care that had been provided by Elken."⁶⁴ This was consistent with Ms. Elken's testimony, and contradicted only by Ms. Gertken's testimony of what at least one parent (M.C.'s father) told her. Remarkably, what Ms. Gertken testified to was not present in her purported summary of her interview with M.C. and her father.⁶⁵

Conclusion

The commissioner did not demonstrate reasonable cause to believe there is an imminent risk of harm to the children in Ms. Elken's day care. Ms. Elken addressed any risk immediately on August 9. Without reaching a determination on whether Ms. Elken violated the law with her previous supervision practices, it is respectfully recommended that the TIS of Ms. Elken's family child care license be rescinded.

J. R. M.

⁶⁴ DHS Ex. 3 at 3.

⁶⁵ See DHS Ex. 5.