

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Katie Pieh
and Clarissa Sparkl of the Order of
Temporary Immediate Suspension
License No. 1090226 (Family Child Care)

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

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a hearing held by telephone on June 23, 2021. The record closed on that date.

Matthew Haugen, Chippewa County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department). Katie Pieh and Clarissa Sparkl (Appellants) appeared on their own behalf and without counsel.

STATEMENT OF THE ISSUE

Should the temporary immediate suspension (TIS) of Appellants' family child care license be affirmed?

SUMMARY OF RECOMMENDATION

The Department established that reasonable cause exists to believe that there is an imminent risk of harm to individuals served by Appellants' child care program and that the TIS should remain in place until the Department's investigation is complete. Therefore, the Commissioner of Human Services (Commissioner) should **AFFIRM** the Order of Temporary Suspension (TIS Order) issued on May 25, 2021.

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

FINDINGS OF FACT

I. Background

1. Appellants are licensed to operate a family child care program, Wildwood Montessori (Wildwood), located at 215 South 5th Street in Montevideo, Minnesota.¹

¹ Testimony (Test.) of BreeAnn Bothun, Clarissa Sparkl, Katie Pieh; Exhibit (Ex.) 4. Please note that there are three recordings of this hearing. The first recording primarily contains proceedings from the morning session of the hearing, and it records the testimony of Kelly Quigley, Patrick Moore, Karen Kling, Kirsten Lindstrom, Mary Saeger, and Taylor Patton Holien. After a break, the hearing resumed with testimony

Ms. Pieh has been licensed to operate the program since 2017, and Ms. Sparkl became licensed in relation to the program in 2019.²

2. BreeAnn Bothun of Chippewa County Family Services (CCFS) is the licensor for the program.³ In that capacity, she conducted five pre-licensing visits at Wildwood and three annual inspections.⁴

3. Prior to the events at issue here, Wildwood received one correction order in July 2020, related to missing items of paperwork and the water temperature for the facility.⁵ All cited items were corrected within the time allowed.⁶

4. Wildwood's facility is a large house that previously was a personal residence, but has been modified into a child care facility.⁷ The basement and first floor of the facility are licensed, but the remaining floors are not.⁸

5. Appellants plan to convert Wildwood from a family child care program into a child care center.⁹ Wildwood has a board of directors who are assisting with this transition. Board members have conducted fundraising efforts, drafted new policies and procedures, and worked to ensure compliance with child care center regulations.¹⁰

6. Wildwood has leased a new space in which to operate the child care center,¹¹ and its child care program has vacated the facility on 5th Street.¹² Wildwood's lease for the 5th Street location expired on June 30, 2021, and Wildwood does not plan to continue operating in that building.¹³

7. Appellants intend to use the same staff at the new center, with additional staff to be hired because the center will have additional capacity.¹⁴

from BreeAnn Bothun. A portion of Ms. Bothun's testimony is captured in the first recording, but the recording system used by the Office of Administrative Hearings experienced a technical issue during her testimony. The second recording, which is just over 5 minutes long, contains a short portion in which Ms. Bothun begins to reprise her testimony. The recording program experienced another technical issue at that time. The third recording contains the entirety of Ms. Bothun's testimony, reprised under oath, and the testimony of Appellants, who were also readministered the oath.

² Test. of B. Bothun.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; see also Ex. 1 (containing a photograph of the front of the facility).

⁸ Test. of B. Bothun.

⁹ Test. of C. Sparkl, K. Pieh, P. Moore.

¹⁰ Test. of P. Moore, K. Kling, K. Lindstrom, M. Saeger.

¹¹ The new facility is a commercial space that was formerly a dental office. Test. of K. Kling; see also Ex. 100 (containing a photograph of the playground at the new site).

¹² Test. of C. Sparkl, K. Pieh.

¹³ Test. of C. Sparkl, P. Moore, M. Saeger.

¹⁴ Test. of K. Kling, M. Saeger.

8. Appellants have not yet secured a license to operate the child care center.¹⁵ Appellants had anticipated obtaining the license by July 1, 2021, but the process has been on hold due to the pendency of this matter.¹⁶

II. Injury of a Child at Wildwood on May 24, 2021

9. Taylor Patton Holien is a teacher at Wildwood and has worked there since 2019.¹⁷ Ms. Patton Holien has completed required training courses for child care workers, including Supervising for Safety.¹⁸

10. On the morning of May 24, 2021, Ms. Patton-Holien was watching five children, ranging from 13-14 months to three years old, outside the facility.¹⁹ Among the children was A.C., a 17-month-old child.²⁰

11. Ms. Patton Holien was the only child care provider in the yard with the children.²¹ Ms. Patton Holien understood that she needed to be aware of her surroundings and to be within sight or hearing of the children to supervise them adequately and to avoid accidents or injuries.²²

12. The facility's front yard is separated from a side yard by a short, black metal fence with a gate.²³ In the side yard, beyond the fence, there is a wooden play structure.²⁴ Bushes and other greenery grow alongside the front porch and the fence, obscuring the view of the portion of the side yard containing the play structure from the facility's front steps.²⁵

13. Ms. Patton Holien and the children can be seen in video footage captured by a camera at a nearby home.²⁶ The video shows the children playing in the front and side yard,²⁷ riding wheeled toys, and running the toys up and down the sidewalk.²⁸

¹⁵ Test. of B. Bothun, K. Pieh, P. Moore.

¹⁶ Test. of P. Moore.

¹⁷ Test. of B. Bothun, T. Patton Holien.

¹⁸ Test. of T. Patton Holien.

¹⁹ *Id.*; see also Ex. 2.

²⁰ Test. of T. Patton Holien; Ex. 3 (noting A.C.'s birthdate).

²¹ Ex. 2; Test. of T. Patton Holien, C. Sparkl.

²² Test. of T. Patton Holien.

²³ Exs. 1-2.

²⁴ Exs. 1-2.

²⁵ Ex. 1-2; Test. of B. Bothun.

²⁶ Test. of B. Bothun; Ex. 2. Exhibit 2 is a video that is 28 minutes and 37 seconds long. The front yard of Wildwood's facility and the portion of the side yard close to the street can be seen in the video. The camera was trained on the yard and driveway of another property, however, so the video does not offer a full and unobstructed view of Wildwood's yard. In the standard view, Ms. Patton Holien and the children are visible in the background in the upper right of the frame. By using the "zoom to fill" function of the video recording, the image can be enlarged and events that occurred in the front yard are more visible. By using the function that allows the video to be played as a 360 degree view, the front yard of the facility is further enlarged and can be placed at the center of the screen. Using these additional functions to view the video provides greater detail of the events the morning of May 24, 2021.

²⁷ At times, children can be seen moving around in the side yard beyond the black fence. Ex. 2.

14. That morning, for the most part, Ms. Patton Holien moved around the front yard and onto the steps of the facility while the children played.²⁹ At one point, Ms. Patton Holien sat in the grass at the edge of the sidewalk with her cell phone out and in front of her while children played around her.³⁰

15. A few minutes later, after getting up from her seat in the grass, Ms. Patton Holien exited the front yard to go to her car parked on the street in front of the facility.³¹ Ms. Patton Holien leaned into the vehicle with her back to the facility front yard, and at one point was almost entirely inside her car.³² While Ms. Patton Holien was at her car, at least two children from the facility left the front yard to join her at the street while other children remained in the front yard of the facility playing on the sidewalk.³³ After a few minutes, Ms. Patton Holien finished at her car and re-entered the front yard.³⁴

16. Approximately one minute after she re-entered the yard, Ms. Patton Holien took a call lasting around two minutes on her cell phone while standing in front of Wildwood's front steps and moving around the facility's front yard.³⁵

17. A few minutes later, while Ms. Patton Holien stood in the front yard toward the street, A.C. entered the side yard of the facility.³⁶ Ms. Patton Holien moved to the front steps of the facility, where she sat for shortly under one minute.³⁷ Ms. Patton Holien was aware A.C. was in the side yard, but Ms. Patton Holien could not see the play structure in the side yard from her seat on the steps.³⁸ After getting up from the

²⁸ *Id.*

²⁹ *Id.*

³⁰ Ex. 2 at 10:25. Note that this can best be viewed using the 360 degree function and adjusting the frame so that the front yard of the facility is in the middle of the screen. This offers an enlarged view of Ms. Patton Holien and the children. Ms. Patton Holien sits with her arms propped on her knees holding a phone in front of her. At the 12:12-12:13 mark, Ms. Patton Holien can be seen getting up from the grass with her cell phone in her right hand.

³¹ *Id.* at 12:24; Test. of T. Patton Holien.

³² Ex. 2. Ms. Patton Holien's car is obscured by a tree located between her car and the camera, but the front passenger side can be seen showing Ms. Patton Holien at the car with the car door open. This view can best be seen using the 360 degree view feature, shifted to place Ms. Patton Holien's car at the center of the screen. She opens the car door at approximately 12:29 and leans fully into the car at 13:20.

³³ See *id.* at 12:42, 12:54, 13:06, 14:07. These images can best be seen using the 360 degree function and moving the view between the street to the sidewalk.

³⁴ *Id.* at 14:10-14:40.

³⁵ *Id.* at 15:22-17:21. At 17:13-17:14, Ms. Patton Holien can be seen walking to the side of the front yard toward the camera with her phone at her ear. Wildwood does not have a landline and staff used their phones for emergency calls and to take pictures of children to send to their parents during the day. Test. of T. Patton Holien. Ms. Patton-Holien acknowledged taking a phone call while supervising the children, though she testified that it was a spam call and lasted only 30 seconds to one minute. *Id.* The video footage shows Ms. Patton Holien with her arm bent and the phone at her ear for a slightly longer period. Ex. 2 at 15:22-17:21.

³⁶ Ex. 2 at 19:10; Test. of T. Patton Holien.

³⁷ Ex. 2 at 20:07-20:57.

³⁸ Test. of B. Bothun; Ex. 2 and 20:07-20:57 (showing the front steps and the view beyond, in which the play structure cannot be seen).

steps, Ms. Patton Holien walked into the front yard and then into the side yard to look for A.C.³⁹

18. A.C. had been in the side yard by herself for approximately two minutes.⁴⁰ During that time, A.C. became entangled in a jump rope tied to the wooden play structure, with the rope around her neck.⁴¹

19. The rope was secured to the play structure in two locations approximately 18 to 24 inches apart and was approximately one-half inch thick.⁴² The rope was on the far side of the structure when viewed from the front yard.⁴³

20. The jump rope was tied to the play structure sometime before May 24, 2021.⁴⁴ Appellants do not know who tied the rope to the play structure or how long it had been there.⁴⁵

21. Appellants and Ms. Patton Holien were aware that the jump rope was affixed to the play structure and that the children were sitting within the slack area of the rope to use it as a swing.⁴⁶

22. As of May 24, 2021, Wildwood's policies and procedures handbook addressed suffocation hazards.⁴⁷ The policy stated:

Suffocation. Staff members will ensure that all program equipment does not pose a risk of entrapment because of narrow openings. Any and all cords/strings will be secured to walls out of reach of children.⁴⁸

23. Appellants and Ms. Patton Holien did not recognize the rope as a hazard and did not remove the jump rope from the play structure.⁴⁹

24. Ms. Patton Holien found A.C. entangled in the rope underneath the play structure.⁵⁰ A.C. was not breathing.⁵¹

25. Ms. Patton Holien disentangled A.C. and ran into the front yard with A.C. in her arms, where Ms. Patton Holien began performing cardiopulmonary resuscitation

³⁹ Test. of T. Patton Holien; Ex. 2 at 20:58-21:27.

⁴⁰ Ex. 2 at 19:10-21:22. These time stamps span from the time A.C. entered the side yard until the time Ms. Patton Holien entered the side yard to look for A.C.

⁴¹ Ex. 3.

⁴² Test. of T. Patton Holien.

⁴³ *Id.*

⁴⁴ Test. of B. Bothun, C. Sparkl, K. Pieh.

⁴⁵ Test. of B. Bothun, C. Sparkl, K. Pieh.

⁴⁶ Test. of B. Bothun, C. Sparkl, K. Pieh, T. Patton Holien; Ex. 3.

⁴⁷ Ex. 103 at 20.

⁴⁸ *Id.*

⁴⁹ Test. of B. Bothun, C. Sparkl; Ex. 3.

⁵⁰ Test. of T. Patton Holien.

⁵¹ *Id.*; Ex. 3.

(CPR).⁵² She performed compressions for approximately 30 seconds,⁵³ and then ran into the facility carrying A.C. and calling to Ms. Sparkl to call 911.⁵⁴ Ms. Patton Holien continued performing compressions on A.C.⁵⁵

26. Law enforcement officers and emergency medical personnel responded to the call.⁵⁶

27. Law enforcement officers arrived on the scene first.⁵⁷ Kelly Quigley, an EMT, arrived between two and five minutes after the 911 call; Ms. Quigley was the first EMT team member on site because she responded to the call from a nearby location.⁵⁸ Ms. Quigley observed that A.C. was not moving or making sounds and did not appear to be breathing.⁵⁹ Ms. Quigley assessed A.C. and used a sternal rub on A.C. to stimulate breathing.⁶⁰ Ms. Quigley used the sternal rub technique twice, and after the second time, A.C. began breathing and then crying.⁶¹

28. A.C. was transported by ambulance to the emergency room at the hospital in Montevideo, with Ms. Sparkl accompanying her.⁶² While at the hospital, a discernable red mark remained on A.C.'s neck showing where the rope had been wrapped.⁶³ A.C. was released from the emergency room later the same day.⁶⁴

29. Ms. Patton Holien prepared a Serious Injury Reporting Form that was submitted to CCFS by Ms. Pieh.⁶⁵ In her report of the incident, Ms. Patton Holien represented that:

⁵² Ex. 2 at 21:54-22:29.

⁵³ *Id.* at 21:59-22:29.

⁵⁴ Ex. 2 at 22:30-22:34; Ex. 3; Test. of T. Patton Holien, C. Sparkl.

⁵⁵ Test. of T. Patton Holien. The Administrative Law Judge finds credible Ms. Patton Holien's testimony that she performed compressions on A.C. in the front yard and again inside the facility. Ms. Quigley, the first responding Emergency Medical Technician (EMT) on scene, was asked whether she believed CPR had been performed on A.C. Ms. Quigley testified she was not made aware on scene that CPR had been performed and she opined as to whether CPR had likely been performed. Test. of K. Quigley. The Administrative Law Judge does not credit this opinion testimony because it is speculative, the Department did not qualify Ms. Quigley as an expert under Minn. R. Evid. 702, and, because it would be based upon specialized knowledge, the testimony is not properly considered opinion testimony by a lay witness under Minn. R. Evid. 701. Most importantly, Ms. Quigley's testimony suggesting that CPR had not been performed is contradicted by the video footage in which Ms. Patton Holien can be seen administering CPR to A.C. and performing compressions. See Ex. 2 at 21:59-22:29.

⁵⁶ Exs. 2-3; Test. of B. Bothun, C. Sparkl, T. Patton Holien.

⁵⁷ Test. of K. Quigley.

⁵⁸ *Id.*

⁵⁹ *Id.* It is possible that A.C. had taken small breaths before Ms. Quigley arrived, but Ms. Quigley deemed A.C. to be unresponsive until after she performed the sternal rub. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Ex. 3, Test. of B. Bothun, C. Sparkl.

⁶³ Test. of B. Bothun; Ex. 1.

⁶⁴ Ex. 3.

⁶⁵ Test. of B. Bothun.

Teacher saw [A.C.] on the playground while attending to another child across the playground. After attending to the other child, a moment later the teacher went to check on [A.C.]. Teacher saw that she had a jump rope that children had used as a swing caught around her neck. . . . [A.C.] was breathing but still lethargic when paramedics arrived.⁶⁶

30. Ms. Patton Holien's statements in the Serious Injury Reporting Form did not accurately reflect how the injury to A.C. occurred or A.C.'s condition at the time Ms. Quigley arrived.⁶⁷

31. Wildwood did not sanction Ms. Patton Holien as a result of the incident, such as by placing her on a leave, imposing discipline, or requiring her to complete retraining before resuming child care work.⁶⁸

III. CCFS Licensing Inspection on May 25, 2021

32. In response to the incident, Ms. Bothun conducted an inspection of Wildwood's facility on May 25, 2021.⁶⁹ Wildwood was open and staff, including Ms. Patton Holien, were providing care to children.⁷⁰

33. When Ms. Bothun performed her inspection, the jump rope had been cut from the play structure by law enforcement, but Ms. Bothun observed other safety hazards within the facility that she found alarming.⁷¹

34. Ms. Bothun observed clean diapers within reach of children. Diapers may not be stored in a manner that provides children with access to them because if a child eats the material of the diaper, it will expand in the child's stomach and cause harm.⁷²

35. In the kitchen, the counters were very cluttered, and two tubs of disinfecting wipes were out on the counter. These wipes are hazardous and should not have been left out within reach of the children.⁷³

36. The cabinet under the kitchen sink was unlocked and dishwashing soap and a fire extinguisher were stored within the cabinet. These items are hazardous to children.⁷⁴

⁶⁶ Ex. 3.

⁶⁷ Exs. 2-3; Test. of T. Patton Holien.

⁶⁸ Test. of T. Patton Holien, B. Bothun.

⁶⁹ Test. of B. Bothun.

⁷⁰ Test. of B. Bothun, C. Sparkl, T. Patton Holien, K. Pieh.

⁷¹ Test. of B. Bothun.

⁷² *Id.*

⁷³ *Id.*; Ex. 1 (containing photographs of the kitchen counters and depicting two yellow tubs with red lids). The amount of material on the kitchen counters exceeds what would be expected during a busy time in a child care setting; it appears to be an accumulation that developed over some time and not just on the day of the inspection. There was also no evidence that cleaning was underway at the time of the inspection in a manner that would have explained the presence of cleaning supplies on the counter. Ms. Pieh acknowledged that she was embarrassed at the state of the facility and that additional cleaning was required. Test. of K. Pieh.

37. Ms. Bothun also discovered several electrical outlets without covers and two unsecured extension cords, one of which was at least six feet long and lying across the floor. Uncovered outlets are unsafe for children because children may be shocked if they insert materials into the outlet. Unsecured extension cords are a fire hazard and they represent a strangulation hazard for children.⁷⁵

38. Ms. Sparkl was not present at Wildwood on the day of Ms. Bothun's inspection,⁷⁶ but Ms. Pieh was there.⁷⁷ That morning, a parent brought in fans to use for increased air circulation and to cool the home.⁷⁸ When the fans were unplugged, outlet covers were not replaced.⁷⁹ Ms. Pieh had not noticed the extension cords were in use and unsecured.⁸⁰ Ms. Patton Holien was aware of one extension cord in use in the facility.⁸¹

39. In the past, Ms. Pieh cleaned the facility each evening to prepare for the next day. Ms. Pieh had a child in November 2020 and went on maternity leave. Since returning to work she has been unable to do as many evening cleanings at the facility.⁸²

40. Ms. Bothun was extremely concerned to find so many hazardous conditions at the facility the day after a child in Wildwood's care suffered a serious injury.⁸³ Ms. Bothun was particularly concerned to find the extension cords in use because they constitute a suffocation hazard, which is the same type of injury A.C. experienced just the day before.⁸⁴ Ms. Bothun would have expected the facility to close briefly to reassess whether there were hazards and to address any additional issues, and she would have expected Wildwood to place Ms. Patton Holien on leave or require retraining before she began caring for children again.⁸⁵

41. Ms. Bothun interviewed Appellants and Ms. Patton Holien.⁸⁶ Appellants did not see A.C.'s injury occur, and they relied on information Ms. Patton Holien relayed

⁷⁴ Test. of B. Bothun; Ex. 1 (containing a photograph showing the contents of the cabinet under the sink).

⁷⁵ Test. of B. Bothun; Ex. 1 (containing images of two extension cords, one black and one white). Ms. Bothun is qualified as a fire marshal and determined that the extension cords represented a fire hazard. Test. of B. Bothun.

⁷⁶ Test. of C. Sparkl.

⁷⁷ Test. of K. Pieh.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Test. of T. Patton Holien.

⁸² Test. of K. Pieh.

⁸³ Test. of B. Bothun.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

to them.⁸⁷ Ms. Patton Holien provided Ms. Bothun with the same information contained in the Serious Injury Reporting Form.⁸⁸

42. Ms. Bothun obtained the video footage, however, showing that Ms. Patton Holien had been at her car, on the phone, and sitting on the front steps out of sight of the play structure, and that Ms. Patton Holien was not on the playground with the children when A.C. was injured.⁸⁹

43. Further, in addition to the licensing investigation conducted by Ms. Bothun, law enforcement opened an investigation into A.C.'s injury, which has not yet concluded.⁹⁰ CCFS also began a child protection facility investigation, which resulted in a determination that maltreatment occurred.⁹¹

44. On May 25, 2021, CCFS sent a letter to the Department requesting that it issue a temporary immediate suspension of Appellants' child care license.⁹² CCFS advised the Department that the program violated supervision standards, leading to A.C.'s injury, and allowed access to a play item, the jump rope attached to the play structure, that was not an appropriate or safe toy for children in the program.⁹³

45. On May 25, 2021, the Department issued the TIS Order.⁹⁴

IV. Appellants' Actions in Response to A.C.'s Injury

46. Following A.C.'s injury, Wildwood created addenda to its policies regarding cell phone usage, playground supervision, and hazards in the facility.⁹⁵

47. Wildwood's revised policy states that cell phones may be accessible in the event of an emergency and may be used to take photographs of students working on curriculum materials, but that "[c]ell phones may NOT be used for pleasure as they could cause a distraction."⁹⁶

48. The new policy requires that two or more adults supervise the playground at any given time. One adult is to accompany the class outside and remain with the children, while the other adult is available to go for help in the event of an emergency or

⁸⁷ Test. of B. Bothun, C. Sparkl, K. Pieh. Ms. Pieh was not at the facility on May 24, 2021, and Ms. Sparkl was inside the building with her own class and did not see the events in the front yard herself. Test. of C. Sparkl, K. Pieh.

⁸⁸ Test. of B. Bothun.

⁸⁹ *Id.*; Ex. 2.

⁹⁰ Test. of B. Bothun.

⁹¹ *Id.* At the hearing, Ms. Bothun testified that the child protection investigation has recently concluded, and that maltreatment determination letters had been sent out. The letters and the details of the determination are not in the record.

⁹² Ex. 5.

⁹³ *Id.*

⁹⁴ Ex. 4.

⁹⁵ Ex. 102.

⁹⁶ *Id.*

to accompany a child to the restroom. The policy states that “[s]upervisors on duty **must** give their full attention to the immediate supervision needs of the playground.”⁹⁷

49. The revised policy institutes a daily hazards inspection. The policy states: “Staff will conduct a daily inspection of potential hazards in the facility and on the outdoor playground play area, and remove and/or report any concerns immediately to their supervisor, and/or the person in charge of maintenance.”⁹⁸

50. Appellants ensured that the 5th Street facility was clean and all hazards removed.⁹⁹ In particular, the kitchen cabinet under the sink was secured with a lock, the kitchen counters were cleaned, and all cleaning products were stored out of reach of children.¹⁰⁰

51. Wildwood has now vacated the 5th Street facility; there is no option to renew the lease and continue operating the program in that location.¹⁰¹ The new location in which Wildwood would operate as a child care center is a modern facility with adequate outlets, such that extension cords would no longer be used. Wildwood would be subject to the regulations for child care centers, including having a risk reduction policy and additional staff.¹⁰²

52. Appellants and Ms. Patton Holien have all registered to take additional supervision training.¹⁰³

53. Ms. Sparkl and Ms. Patton Holien found the incident traumatic and have both sought counseling to assist them in dealing with the event.¹⁰⁴

54. Any Conclusion of Law more properly considered as a Finding of Fact is incorporated herein.

55. Any fact identified in the accompanying Memorandum is incorporated herein as a Finding of Fact.

Based on these Findings of Fact, 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. 2a, .08 (2020).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Test. of C. Sparkl, K. Pieh.

¹⁰⁰ Ex. 100; Test. of C. Sparkl, Test. of K. Pieh.

¹⁰¹ Test. of C. Sparkl, K. Pieh, Ex. 100 (containing a photograph of the entry of the 5th Street facility blocked off from use).

¹⁰² Test. of K. Kling, K. Lindstrom, M. Saeger, C. Sparkl, K. Pieh.

¹⁰³ Test. of T. Patton Holien, C. Sparkl, K. Pieh.

¹⁰⁴ Test. of T. Patton Holien, C. Sparkl.

2. The Department has complied with all substantive and procedural requirements of law and rule and this matter is properly before the Administrative Law Judge and the Commissioner.

3. The Commissioner shall act immediately to temporarily suspend a license 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.¹⁰⁵

4. The scope of a hearing regarding an order for a temporary immediate suspension is limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the Commissioner's final order as to a licensing sanction.¹⁰⁶

5. The Department must demonstrate that reasonable cause exists to believe that 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.¹⁰⁷

6. "Reasonable cause" means specific, articulable facts or circumstances exist that 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.¹⁰⁸

7. The Department has met its burden to show that an imminent risk of harm exists to persons served by Appellants' child care program and that the TIS for Appellants' child care license should remain in place pending completion of the Department's investigation and issuance of a final order by the Commissioner.

8. Any Finding of Fact more properly considered as a Conclusion of Law is incorporated herein.

9. Any portion of the Memorandum below that is properly considered to be a Conclusion of Law is incorporated herein.

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

¹⁰⁵ Minn. Stat. § 245A.07, subd. 2(a)(1) (2020).

¹⁰⁶ *Id.*, subd. 2a(a) (2020).


¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

RECOMMENDATION

The Commissioner should affirm the TIS of Appellants' family child care license.

Dated: July 8, 2021


JESSICA A. PALMER-DENIG
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. 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 ten 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 ten working days to issue a final decision. Parties should contact Administrative Law Office staff at DHS_AdminLaw@state.mn.us to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1 (2020), the agency is required to serve the final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Facts

On May 24, 2021, 17-month-old A.C. suffered a severe injury at Appellants' child care program when she became entangled in a jump rope tied to the facility's play structure.¹⁰⁹ Appellants do not know how the jump rope came to be tied to the structure or how long it had been there.¹¹⁰ Appellants knew that the children were using the jump rope as a swing, and despite having a policy addressing suffocation hazards, Appellants did not see the jump rope as a hazard and remove it.¹¹¹

At the time of her injury, A.C. and four other young children were being supervised by a staff member, Ms. Patton Holien, in the front and side yard of the facility.¹¹² After A.C. was injured, Ms. Patton Holien completed a Serious Injury

¹⁰⁹ Test. of T. Patton Holien; Exs. 1, 3.

¹¹⁰ Test. of C. Sparkl, K. Pieh.

¹¹¹ Ex. 103 at 20; Test. of C. Sparkl, K. Pieh.

¹¹² Test. of T. Patton Holien; Exs. 2-3.

Reporting Form representing that she was supervising children on the playground and turned to assist another child, and then “a moment later,” she went to check on A.C., finding her with the jump rope around her neck.¹¹³ She also reported that A.C. was breathing, but still lethargic, when emergency personnel arrived.¹¹⁴ These statements are not accurate. Video footage from a nearby residence shows that Ms. Patton Holien was not on the playground with the children when A.C. was injured.¹¹⁵ Instead, A.C. was in the playground area by herself for several minutes while Ms. Patton Holien was in the front yard with the other children.¹¹⁶ For a portion of the time when A.C. was on the playground alone, Ms. Patton Holien was sitting on the facility’s front steps, where she could not see A.C. or the play structure.¹¹⁷ Further, Ms. Quigley, the first responding EMT, assessed A.C. on her arrival and found that she was unresponsive and not breathing, and so A.C.’s condition was more serious than indicated in Ms. Patton Holien’s statements.¹¹⁸

When Appellants’ licensor, Ms. Bothun, inspected the facility the next day, she found other hazards: diapers and cleaning products within reach of children, uncovered outlets, and two unsecured extension cords in use.¹¹⁹ Ms. Bothun was alarmed at the state of the facility, and was particularly concerned that she found extension cords out around children just the day after a child in the program nearly suffocated and could have died.¹²⁰ Ms. Bothun had been acting as a licensor for approximately nine years, and she had never seen a program in the condition she found at Appellants’ facility.¹²¹ Ms. Bothun also determined that Appellants were aware that the jump rope was tied to the play structure, but did not know who put it there or how long it had been there, and that they had not identified it as a hazard.¹²²

Ms. Bothun was also concerned that the program was open and providing care to children the day after A.C.’s injury, without a pause, and without any discipline or consequence for Ms. Patton Holien.¹²³ She obtained a copy of the video footage of Ms. Patton Holien, which shows Ms. Patton Holien had her cell phone out in front of her while she sat in the yard with the children, took a call lasting several minutes, and at one point went to her car, leading some of the children to join her by the street.¹²⁴ Ms. Bothun determined that Ms. Patton Holien was not adequately supervising the

¹¹³ Ex. 3.

¹¹⁴ *Id.*

¹¹⁵ Ex. 2.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Test. of K. Quigley; Ex. 3.

¹¹⁹ Test. of B. Bothun; Ex. 1. Ms. Patton Holien and Ms. Pieh acknowledged that they were aware of some of the issues with uncovered outlets and unsecured extension cords. Test. of T. Patton Holien, K. Pieh.

¹²⁰ Test. of B. Bothun.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Ex. 2.

children in her care, and that the report Ms. Patton Holien prepared regarding A.C.'s injury was not accurate.¹²⁵

Based on Ms. Bothun's concerns, CCFS immediately requested that the Department temporarily suspend Appellants' child care license.¹²⁶ The Department issued the TIS Order on May 25, 2021.¹²⁷

II. Analysis

To continue the TIS, the Department must demonstrate that reasonable cause exists to believe that Appellants' 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.¹²⁸ "Reasonable cause" means that there are specific articulable facts or circumstances providing a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.¹²⁹

Appellants maintain that they have abated the hazards Ms. Bothun found at the 5th Street facility during her inspection, and evidence in the record supports this claim.¹³⁰ Appellants contend that they have adopted new policies addressing cell phone usage, playground supervision, and daily hazardous items inspections, and this is also true.¹³¹ In some instances, adoption of new policies and remediation of hazardous conditions could be enough to show that there is not a reasonable suspicion that an imminent risk of harm exists.

The circumstances of this case, however, are more complicated than that. Appellants have taken no action regarding Ms. Patton Holien.¹³² Initially after A.C.'s injury, Appellants relied on Ms. Patton Holien's description of her supervision of A.C. and the way A.C.'s injury occurred.¹³³ The evidence now shows that the report Ms. Patton Holien drafted did not accurately describe the events on May 24, 2021.¹³⁴ While Appellants believe that Ms. Patton Holien did not intend to provide false information in the report, the Department is not required to share that view as it continues its investigation.

Further, a thorough review of the video footage taken May 24, 2021, shows Ms. Patton Holien with her phone in her hand or at her ear while supervising the

¹²⁵ Test. of B. Bothun.

¹²⁶ Ex. 5.

¹²⁷ Ex. 4.

¹²⁸ Minn. Stat. § 245A.07, subd. 2a(a).

¹²⁹ *Id.*

¹³⁰ Test. of C. Sparkl; Ex. 100 (showing the locked cabinet, clean counters, and stored cleaning supplies).

¹³¹ Test. of C. Sparkl; Ex. 102.

¹³² Test. of T. Patton Holien, B. Bothun.

¹³³ Test. of B. Bothun.

¹³⁴ Ms. Patton Holien testified she did not intend to falsify the report, but that the events were traumatic, she did not remember what happened moment by moment, and she sought to explain what happened based on what she did remember. Test. of T. Patton Holien.

children, and that she was engaged in some activity at her car while some of the children followed her down to the side of the street.¹³⁵ This footage suggests Ms. Patton Holien's supervision of the children was distracted and not sufficiently focused in the lead up to A.C.'s injury.¹³⁶ Critically, Ms. Patton Holien was aware that A.C. was in the side yard by herself, but she left the area of the yard where she could have maintained a view of A.C. and sat on the stairs.¹³⁷ From that vantage point, Ms. Patton Holien could not see A.C. and was not aware that she had become entangled in the jump rope.¹³⁸ Ms. Patton Holien also knew that the jump rope was tied to the play structure in the side yard and that the children had been using it as a swing.¹³⁹ She did not remove it or provide A.C. with closer supervision while A.C. had access to the rope.

Children in a family child care program must be supervised by a caregiver at all times.¹⁴⁰ For infants, toddlers, and preschoolers, the term "supervision" means that a caregiver is within sight or hearing of the child at all times so that the caregiver is capable of intervening to protect the health and safety of the child.¹⁴¹ Ms. Patton Holien was not supervising the children in a manner that allowed her see or hear A.C. and protect her from harm. Appellants' lack of action related to Ms. Patton Holien, even as additional information has emerged calling her supervision of the children into question, validates the reasonable suspicion that a risk of imminent harm continues.

Appellants also maintain that there is no risk of imminent harm in this case because they have vacated the 5th Street facility and will be moving into a child care center setting to provide child care upon issuance of a new license.¹⁴² Ms. Sparkl testified that the lease for the 5th Street facility has expired and that Wildwood does not have an option to renew and recommence operations at that location.¹⁴³ The Department contends that there is no evidence in the record showing that Appellants will not seek to recommence providing child care until their current license expires.

This is a very unusual circumstance and it presents a close question. The Department must show that there is an imminent risk of harm to children served by Appellants' program. Appellants have ceased operations at the 5th Street facility and are not yet operating anywhere else. If Appellants are not providing care to children, there can be no imminent risk of harm. Under those circumstances, the Department could not meet its burden and, arguably, the TIS Order would be moot. Mootness addresses justiciability and requires that some interest by a party continue to exist throughout a case that can be addressed by an award of relief.¹⁴⁴

¹³⁵ Ex. 2.

¹³⁶ *Id.*

¹³⁷ *Id.*; Test. of T. Patton Holien.

¹³⁸ Ex. 2; Test. of T. Patton Holien.

¹³⁹ Test. of T. Patton Holien.

¹⁴⁰ Minn. R. 9502.0365, subp. 5 (2019).

¹⁴¹ Minn. R. 9502.0315, subp. 29a (2019).

¹⁴² When the TIS Order was originally issued on May 25, 2021, Appellants had more than one month left on the lease for the 5th Street facility and were actively operating.

¹⁴³ Test. of C. Sparkl.

¹⁴⁴ *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. Ct. App. 2007).

The record shows that the Department retains an interest in the temporary suspension of Appellants' license. First, Appellants intend to continue pursuing licensure so that they can operate Wildwood as a center.¹⁴⁵ Ms. Pieh testified that she believed that the new facility could be licensed for family child care, and that doing so would require coordination with Ms. Bothun.¹⁴⁶ However, Ms. Pieh testified that Appellants would be unlikely to continue providing care under their family child care license, and she stated that she believed Appellants would continue the process toward obtaining the center license.¹⁴⁷ If Wildwood were licensed as a center, it would provide child care in the new setting with its existing staff members, essentially continuing its program under a different license in another location. At present, the licensing process for the center is on hold due to the TIS Order.¹⁴⁸ Because the staff for the new facility would be the same, and issues related to Ms. Patton Holien remain unaddressed, the Department has an interest in continuing the status quo until it completes its investigation.

Second, the TIS Order does not relate only to Appellants' operation of the family child care program at the 5th Street location, but also prohibits Appellants "from operating as a legally unlicensed child care provider."¹⁴⁹ The Department has an interest in continuing the effect of the TIS Order to prevent Appellants from providing unlicensed child care while its investigation continues.

Appellants contend that they care deeply for children in the program and their safety. The Department does not disagree. The Department notes that Appellants are respected within the Montevideo community and that, in seeking to continue the temporary suspension, it does not intend to call their character into question.

At the same time, the Department has established that A.C. was seriously injured, and could have died, in Appellants' care due to a known hazard that Appellants failed to remove. The next day their licenser found numerous additional safety hazards at the program, including some hazards of the same type involved in A.C.'s injury the day before. To date, Appellants have taken no action related to Ms. Patton Holien, even to require that she undertake retraining regarding supervision before she cares for children again. The Department also points out that a law enforcement investigation is ongoing, and a child protection investigation recently resulted in a maltreatment determination. The Department asks that the TIS remain in place while its investigation continues.

The Minnesota Supreme Court has recognized that children entrusted to the care of a child care provider are particularly vulnerable.¹⁵⁰ The health and safety of children in regulated child care settings is among the Department's highest priorities. Consistent with the policy favoring protection of children, at this stage, the Department need only

¹⁴⁵ Test. of C. Sparkl, K. Pieh.

¹⁴⁶ Test. of K. Pieh.

¹⁴⁷ *Id.*

¹⁴⁸ Test. of P. Moore, C. Sparkl, K. Pieh.

¹⁴⁹ Ex. 4 at 1.

¹⁵⁰ *Andrade v. Ellefson*, 391 N.W.2d 836, 842 (Minn. 1986).

show that a reasonable suspicion of an imminent risk of harm exists. Considering all of the evidence in the record, the Department has established it has an ongoing interest in enforcement of the TIS Order and that it has met its burden. Therefore, the Commissioner should **AFFIRM** the TIS Order.

J. P. D.