OAH 71-1801-38145

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Kimberly Opay of the Order of Temporary Immediate Suspension License No. 1063173 (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 on March 15, 2022, conducted by video conference via Microsoft Teams. The record closed on that date at the conclusion of the hearing.

Rockwell Wells, Assistant Crow Wing County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department) Kimberly Opay (Appellant) appeared on her own behalf and without legal counsel.

STATEMENT OF THE ISSUE

Should the temporary immediate suspension (TIS) of Appellant's 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 Appellant's 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 issued on February 7, 2022 (TIS Order).

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

FINDINGS OF FACT

1. Appellant operates a family child care program in her home at 5201 Jordan Road in Baxter, Minnesota.[1] She has been a licensed child care provider for over ten years.[2]

[1] Exhibit (Ex.) 7 at 1; Testimony (Test.) of Ronda Kline; Test. of Kimberly Opay.
[2] Test. of K. Opay.

2. Crow Wing County Community Services (CWCCS) oversees Appellant's child care program and contracts with an outside service, Sourcewell, to act as the licensor.[3]

3. In early February 2022, CWCCS received two police reports describing calls for service by the Baxter Police Department to Appellant's home.[4]

4. On February 2, 2022, Appellant's husband, Jerry, called law enforcement reporting that Appellant was having a "manic episode and will not leave him alone."[5] When law enforcement officers arrived, both Appellant and Jerry described issues indicating turmoil within their household, including fighting, yelling, abusive behaviors, and breaking household items.[6] They also reported intense disagreements about parenting issues and care for their minor child, O.[7] Both Appellant and her husband stated an interest in leaving their marriage.[8] Though no actual or threatened physical violence had occurred that day, Jerry was concerned that Appellant was manic and was not taking her medication.[9] The officers found Appellant to be agitated and irate, and felt that Appellant was having a mental health episode.[10]

5. One of the officers spoke with O., who was in her room crying, and she told the officer that she was afraid of Appellant.[11] O. reported that her parents had an argument about a school form, which she brought to her father for a signature, and that during the argument Appellant dumped water on Jerry and O.[12] O. also told the officer that, at one point, Appellant pushed O.'s head.[13]

6. Appellant reported several issues related to conditions in the home and child care operation, including that there were mice in the residence and that she had to move the day care children to another area of the house because the area designated for the day care was unclean.[14] One of the officers noted concerns that Appellant's behavior was not conducive to operation of a healthy day care environment, and that he was aware of an instance in which parents arrived for pick up when Baxter police were on a call for service to the residence under similar circumstances.[15]

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[3] Test. of R. Kline. Michelle Tautges acts as Appellant's licensor. *Id.* Ms. Kline is the Family Services Supervisor with CWCCS. *Id.*
[4] *Id.*; Exs. 2-3.
[5] Ex. 2 at 2.
[6] *Id.* at 2-3.
[7] *Id.*
[8] *Id.* at 2, 4.
[9] *Id.* at 3.
[10] *Id.* at 2-3.
[11] *Id.* at 4.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 2.
[15] *Id.* at 4.

7. According to records of calls for service, Baxter police had responded to 10 to 15 calls for service related to domestic disputes and Appellant's mental health issues in 2021.[16]

8. The officers provided information regarding available supports and resources to the couple.[17] Appellant told them that she "would like to speak to a social worker, but the county will not assign her one."[18]

9. During the time leading up to this incident, and particularly as a result of the COVID-19 pandemic, Appellant and her family experienced social isolation.[19] Appellant and Jerry also had financial difficulties stemming from Jerry's inability to work consistently and the amount of the disability payments he received, which were not enough to sustain the family financially.[20] Adding to their financial troubles, a group of children left the child care program when they became school-aged, depleting Appellant's census by about half.[21] These stressors exacerbated the level of conflict in the home.[22]

10. Additionally, Appellant experienced physical and mental health problems associated with medication management and dosing, and medication interactions.[23] Following a significant weight loss, and in the absence of a corresponding medication adjustment, Appellant was drastically overmedicating a thyroid condition.[24] In December 2021, Appellant took a medication for back pain that interacted negatively with another medication she was taking.[25] Appellant was home alone and did not have access to a vehicle.[26] Appellant called the police department, but she was difficult to understand and hung up, and when an officer called her back, she "sounded lethargic, talked about taking medicine, then stopped responding."[27] An officer responded to Appellant's home, and Appellant was "unable to communicate exactly how much medication she took," and she was transported to receive medical services.[28]

11. Appellant had received mental health services in the past related to post traumatic stress disorder, bipolar disorder, anxiety and depression.[29] During the pandemic, Appellant was unable to readily obtain mental health services.[30] During the time leading up to February 2022, Appellant was actively seeking mental health services

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[16] *Id.* at 3 (noting "about 15" calls), 4 (noting 10 calls for service since March 2021).
[17] *Id.* at 2-4.
[18] *Id.* at 2.
[19] Test. of K. Opay.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Ex. 1.
[28] *Id.*; Test. of K. Opay.
[29] Test. of K. Opay.
[30] *Id.*

and supports for herself and her family from several different organizations.[31] She had difficulty finding available appointments, or could only obtain services through telehealth appointments or appointments during the hours when she was operating the child care program.[32]

12. CWCCS received the police report regarding the incident on February 2, 2022.[33] On February 3, 2022, staff reviewed the report and screened it out for a child protection investigation.[34] Staff determined instead that Appellant should instead receive a referral for the Parent Support Outreach Program.[35]

13. On February 5, 2022, Baxter police responded to a 911 call related to a domestic incident at Appellant's home.[36] Appellant and Jerry had an argument around the time O. was to be taken to a dance recital.[37] At one point, all three of them were in one vehicle, but Jerry and O. got out approximately one block from the house.[38] Jerry and O. entered their other vehicle, with O. sitting on the passenger side.[39] When Jerry began to back out of the driveway he saw a blur, and then the other vehicle, now driven by Appellant, struck Jerry's vehicle on the side where O. was sitting.[40] The collision resulted in minor damage to both vehicles.[41] Jerry and O. were not injured.[42] After the collision, both Appellant and Jerry parked their vehicles, with Appellant's vehicle behind Jerry's, and continued arguing until officers arrived.[43]

14. Based on her behavior at the scene, the officers observed that Appellant was having a mental health episode.[44]

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[31] *Id.*
[32] *Id.*
[33] Test. of R. Kline.
[34] *Id*.
[35] *Id.*
[36] Ex. 3 at 3.
[37] *Id.*; Test. of K. Opay.
[38] Ex. 3 at 3; Test. of K. Opay.
[39] Ex. 3 at 3; Test. of K. Opay.
[40] Ex. 3 at 3. The police report contains information about how Appellant may have been driving the vehicle just prior to the crash, including statements by the officers that she was driving in a way that was "erratic and unsafe," and that she was "driving aggressively, spinning tires, fish tailing, and at one point going into a snow bank" *Id.* at 3-4. As the officers did not witness Appellant driving the vehicle, their impressions are opinion evidence based on what the officers saw at the scene when they arrived. The police reports do not detail the training and experience each officer had that would allow them to formulate these opinions. The officers did not testify at the hearing and were not subject to cross examination regarding the basis for their statements. Therefore, the record is insufficient to allow the Administrative Law Judge to credit this opinion evidence for the purposes of this inquiry. Minn. R. Evid. 701-702. It is also unnecessary to do so to reach a result.
[41] Ex. 3 at 4.
[42] *Id.* at 3.
[43] *Id.* at 4.
[44] *Id.* at 5.

15. Appellant was arrested and charged with misdemeanor domestic assault and disorderly conduct.[45] Criminal proceedings related to these charges remain pending at this time.[46]

16. Upon receiving the police report related to the incident on February 5, 2022, CWCCS reviewed the information and determined that the report should be screened in for a child protection investigation.[47] This investigation is ongoing.[48] As a result of the investigation, CWCCS was unable to make a referral for parental support services to Appellant, as it had planned to do.[49]

17. On February 7, 2022, CWCCS recommended that the Department issue a TIS of Appellant's family child care license based upon the police reports, which described incidents occurring at the day care home, though during non-operating hours.[50]

18. The Department issued the TIS Order on February 7, 2022, stating that it could not "ensure the health and safety of the children served by your program at this time," and that the Department had determined that an imminent risk of harm existed for children in the program.[51]

19. Appellant timely appealed.[52]

20. Currently, the conditions of Appellant's release and a Domestic Abuse No Contact Order bar Appellant from going to her home on Jordan Road, which is also the location of her child care program.[53]

21. At this time, Appellant has arranged for appointments with providers to address both her physical and mental health concerns.[54] She is also seeking therapeutic supports for her family and her marriage.[55]

22. Any Conclusion of Law more properly considered to be a Finding of Fact is incorporated herein.

23. Any portion of the accompanying Memorandum that is more properly considered to be a Finding of Fact is incorporated herein.

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[45] Ex. 3 at 5; Ex. 5.
[46] Test. of R. Kline.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Ex. 6 at 2.
[51] Ex. 7 at 1.
[52] Ex. 10.
[53] Exs. 8-9.
[54] Ex. 100; Test. of K. Opay.
[55] Ex. 100; Test. of K. Opay.

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).

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.[56]

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.[57]

5. The Department has the burden to 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.[58]

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.[59]

7. The Department has met its burden to show that, at this time, an imminent risk of harm exists to persons served by Appellant's child care program.

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

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

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[56] Minn. Stat. § 245A.07, subd. 2(a)(1) (2020).
[57] *Id.*, subd. 2a(a).
[58] *Id.*
[59] *Id.*

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

RECOMMENDATION

The Commissioner should **AFFIRM** the TIS Order.

Dated: March 24, 2022

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

By law, the scope of this proceeding is very narrow. The only issue under consideration is whether the TIS Order should remain in place pending completion of the Department's investigation and the determination as to whether a final licensing sanction should be imposed.[60] As a result, the Administrative Law Judge has confined the findings and analysis in this recommendation to matters that are material to this case.

To be clear, this proceeding does not include any consideration of whether a final licensing sanction would be warranted,[61] or a determination as to the appropriate outcome of the child protection investigation. It also does not require a determination of disputed facts that are ultimately within the jurisdiction of the district court conducting the pending criminal proceeding.

As to the latter point, the Administrative Law Judge has reviewed the police reports submitted into evidence with some degree of caution. While the reports are admissible hearsay under Minn. R. 1400.8607, subp. 1 (2021), these reports contain the officers' opinions and impressions regarding Appellant's actions and intent. Appellant disputes some of that information, and the evidence in the record contains some inconsistencies.[62]

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[60] Minn. Stat. § 245A.07, subd. 2a(a). The Commissioner must make a decision as to the imposition of a final licensing sanction within 90 days after issuance of a final order on a temporary immediate suspension. Minn. Stat. § 245A.07, subd. 2a(b).

[61] Appellant expressed that she is not seeking to operate as a child care provider at this time, and has found employment in another setting. Test. of K. Opay. She indicated that her goal is to prevent imposition of a licensing sanction that would prevent her from working in another job that provides services to children. This proceeding does not allow for determinations as to those ultimate questions.

[62] For example, the Application for Judicial Determination of Probable Cause states that Appellant "travelled at a high rate of speed" and "rammed" her vehicle into Jerry's, but each vehicle only suffered minor damage according to observations at the scene. *See* Ex. 3 at 4; Ex. 4 at 1. The police report recounts the statements Jerry made at the scene, which were adopted in the Findings of Fact here, indicating only that Appellant's

The officers did not testify, so the information contained in the police reports is not otherwise supported by the record and was not subjected to cross examination. Ultimately, however, it is not necessary to definitively determine exactly what happened at Appellant's home in either incident or whether Appellant's actions violated the laws identified in the criminal charges.

It is sufficient that the record shows that Appellant and her family had an extreme degree of instability in their home, which is also the site of Appellant's childcare program. Appellant suffered severe mental health episodes, and she engaged in behaviors that caused her daughter, then ten years old, to be afraid of her. Appellant and her husband had repeated domestic incidents that required intervention by law enforcement. Appellant is the subject of an open child protection investigation and has pending criminal charges. At this time, Appellant is barred from entering the home where she operated her day care program.

As noted in the TIS Order, the Department is unable to ensure the health and safety of children in the program due to concerns about Appellant's mental health and conduct. In connection with childcare licensing, the Department has a duty to "ensure that minimum levels of care and service are given and the protection, proper care, health, safety, and development of the children are assured."[63] Children in a day care setting are "uniquely vulnerable," in that they are "small children, often infants, left by their working parents in a home other than their own, and left in the care of another person."[64] To uphold the TIS, it is not necessary to establish a specific harm exists to children in the program. Rather, the Department needs only to show that it has a reasonable suspicion of an imminent risk of harm. The Department has met its burden.

The Administrative Law Judge notes that she has sympathy for Appellant's circumstances. The Administrative Law Judge does not doubt that various aspects of the pandemic caused a worsening of Appellant's mental health condition or that she had difficulty locating available mental health services in her area. It should also be noted that while Appellant was emotional and tearful at the hearing, she was not inappropriately so given the serious subject matter, and she did not exhibit any behaviors suggesting she was experiencing a mental health crisis or severe emotional dysregulation. Rather, Appellant was articulate in expressing herself, and she candidly discussed her need for mental health services and the steps that she is taking in that regard. The Administrative Law Judge encourages Appellant to continue engaging with providers to address these concerns.

At this time, however, the record clearly establishes that there is a basis for the TIS Order, and that Appellant should remain subject to a suspension pending a final

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vehicle struck his and that he saw a white blur before the crash. Ex. 3 at 3. At the hearing, Appellant testified that it was snowing, causing slippery conditions, and that she was attempting to pull her vehicle into the parking space just beyond Jerry's vehicle when Jerry's vehicle began backing toward her and they collided. Test. of K. Opay, *see also* Ex. 101. Appellant's testimony regarding how the accident occurred is consistent with the statement she provided to police at the scene. Ex. 3 at 4.

[63] Minn. R. 9502.0325, subp. 1 (2021).

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

determination as to her license. Therefore, the Commissioner should **AFFIRM** the TIS Order.

J. P. D.