

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

In the Matter of the Appeal by Pamela Jo
Lang of the Order of Temporary Immediate
Suspension

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

License No. 1076367 (Family Child Care)

This matter came before Administrative Law Judge James E. LaFave upon an appeal by the Licensee, Pamela Jo Lang, from an Order imposing a Temporary Immediate Suspension of her family childcare license.

Emily E. Adel, Assistant Wabasha County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department). Kurt K. Knuesel, Knuesel Law Firm, appeared on behalf of Pamela Jo Lang (Ms. Lang or Appellant).

An evidentiary hearing was held in Jury Assembly Room of the Wabasha County Criminal Justice Center in Wabasha, Minnesota, on June 24 and June 28, 2022. The hearing record closed on June 28, 2022, following the adjournment of the evidentiary hearing.

STATEMENT OF THE ISSUE

Did the Department demonstrate that reasonable cause exists to believe that there is an imminent risk of harm to the health, safety, or rights of the persons in Appellant's care?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the Department did not demonstrate that there is reasonable cause to believe that Ms. Lang's actions, or the conditions of her daycare program, pose an imminent risk of harm to the health, safety, or rights of persons served by the program. And Ms. Lang demonstrated that the present conditions of the program do not now pose an imminent risk of harm to persons served by the program.

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

FINDINGS OF FACT

I. Background

1. Ms. Lang operated a family childcare program in Plainview, Minnesota.¹ She has been operating “Pamela Jo’s Day Care” since October 21, 2014.²

2. Ms. Lang held a C-3 daycare license, which allowed her to care for up to 14 children and required the presence of a second adult caregiver.³

3. There were three birds in the daycare home.⁴ Two stayed in their cages on the second level, but one, a 45-year-old Cockatoo, had free run of the house.⁵ The Cockatoo was trained to go to the bathroom on mats located on both levels of the home.⁶ When the birds went to the bathroom on the mats, caregivers quickly cleaned it up.⁷

II. May 13, 2022

4. Wabasha County Social Services received a complaint regarding Ms. Lang’s daycare on May 13, 2022.⁸ There were many allegations, but only two of the claims were screened in, meaning they were worthy of further investigation.⁹ First, that there were bird feces throughout the home in areas where children played and slept. And second, that an assistant caregiver force-fed an infant by plugging the child’s nose and forcing milk into the child’s mouth causing the child to choke and aspirate.¹⁰

5. Bases on the seriousness of the charges a multi-disciplinary screening team was assembled.¹¹ The multi-disciplinary team (the team) included members of the Wabash County Social Services, the County Attorney’s office, and law enforcement.¹² The team determined the claims merited an investigation of Ms. Lang’s day care home.¹³

¹ Testimony (Test.) of Pamela Jo Lang.

² *Id.*

³ Minn. R. 9502.0367 (2021) provides that a C-3 license allows for the care of 14 children with no more than four toddlers or infants and not more than three infants. A second adult caregiver is required when there is more than one infant or toddler present. An “adult” is defined as “a person at least 18 years of age, Minn. R. 9502.0315, subp. 2 (2021), and a “caregiver” is defined as a “provider, substitute, helper, or another adult giving care in the residence.” Minn. R. 9502.0315, subp. 6 (2021).

⁴ Test. of Pamela Jo Lang

⁵ *Id.*

⁶ *Id.*; Test. of Jennifer Day.

⁷ Test. of P. Lang, Test. of Adolescent 1.

⁸ Test. of Danielle Biedermann.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

6. Later on, May 13th, three members of Wabasha County Social Services and two members of the Plainview Police Department went to investigate Ms. Lang's daycare home.¹⁴

7. On May 13, 2022, Ms. Lang went to a funeral, so she was not there.¹⁵ Bobbie Jo Sievers and Katlin Bauer were the adult caregivers that day and they were assisted by a helper, Adolescent 1.¹⁶ Ms. Sievers, Ms. Bauer, and Adolescent 1 cared for the children outside on May 13.¹⁷

8. When the investigative team arrived at the daycare home, they were greeted by Ms. Sievers.¹⁸ 17 children were present at the home.¹⁹

A. Bird Feces in the Home

9. There were two levels in Ms. Lang's daycare home.²⁰ Walking up the stairs, the investigators saw bird feces on the railing.²¹ On the second level, investigators observed bird feces on a blue blanket that was draped over a couch.²² Children in the daycare would have had access to that couch.²³

10. Investigators also observed two bird cages on the second level.²⁴ One was at the top of the stairs,²⁵ and the other was across the room.²⁶ Under both cages were plastic mats with bird feces on them.²⁷ There was also a bird cage on the first level and there was a plastic mat under that cage as well.²⁸ There were bird feces on the mat under the cage on the first level.²⁹

B. Force Feeding

11. Child 1 is an eight-month-old infant who was enrolled in Ms. Lang's childcare.³⁰ Child 1 started in Ms. Lang's care when he was 15 weeks old.³¹

¹⁴ *Id.*

¹⁵ Test. of Pamela Jo Lang.

¹⁶ Test. of D. Biedermann. A "helper" is "a person at least 13 years of age and less than 18 years of age who assists the provider with care of children. Minn. R. 9502.0315, subp. 14 (2021).

¹⁷ Test. of Bobbi Jo Sievers.

¹⁸ Test. of D. Biedermann.

¹⁹ *Id.*

²⁰ Test. of Elizabeth Thiel.

²¹ Test. of D. Biedermann.

²² *Id.*, Ex. 3.

²³ Test. of E. Thiel.

²⁴ *Id.*

²⁵ *Id.*, Ex. 4.

²⁶ Test. of E. Thiel.

²⁷ *Id.*, Exs. 5 and 7.

²⁸ Test. of E. Theil; Test. of Adolescent 1.

²⁹ Test. of E. Thiel.

³⁰ Test. of Katie Doane.

³¹ *Id.*

12. Child 1 was a fussy eater and often would not eat when at Pamela Jo's Day Care.³² Child 1's mother and Ms. Lang talked and texted over a period of months working on strategies to get Child 1 to eat while he was at the daycare.³³

13. On May 13, when the children were outside, Adolescent 1 was holding Child 1.³⁴ She handed Child 1 to Ms. Sievers.³⁵ Ms. Sievers laid Child 1 down on a mat and the child began crying.³⁶ Ms. Sievers gave Child 1 a bottle, but he would not take it and the child continued crying.³⁷ Ms. Sievers then placed the infant's hands around the bottle and the child still would not eat and was screaming.³⁸

14. Ms. Sievers then pinch Child 1's nose and squeezed the bottle forcing milk into Child 1's mouth.³⁹ Child 1 spit the milk out and screamed.⁴⁰ Child 1 did not make any choking sounds and the milk was not pooling inside the back of his mouth.⁴¹ This feeding incident lasted approximately one minute.⁴²

15. Ms. Sievers then flipped Child 1 over on to its stomach, Adolescent 1 believed Ms. Sievers was frustrated.⁴³

16. Ms. Lang informed Wabasha County Social Services and testified under oath that she would bar Ms. Sievers from the daycare until the investigation was complete and a final order issued regarding the forced feeding allegation. Ms. Lang also pledged to keep the birds in their cages while children were present in the daycare, and she consented to unannounced visits by the County to ensure these conditions were met.⁴⁴

III. Procedural History

17. On May 16, Wabasha County Social Services recommended that the Commissioner of the Department (Commissioner) issue an order for temporary immediate suspension to Licensee.⁴⁵

18. The Commissioner issued an Order of Temporary Immediate Suspension on May 17, 2022, suspending Ms. Lang's license to provide family childcare.⁴⁶

³² *Id.*

³³ *Id.*, Test. of P. Lang; see Ex. 101.

³⁴ Test. of Adolescent 1.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Test. of P. Lang.

⁴⁵ Test. of D. Biedermann.

⁴⁶ Ex. 1 (Order of Temporary Immediate Suspension) (May 17, 2022).

19. Ms. Lang timely appealed the Order of Temporary Immediate Suspension.

20. Any findings of fact contained in the following Memorandum are hereby adopted as such.

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 (2020).

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

3. At all times relevant to these proceedings, Ms. Lang was a licensed family childcare provider.

4. The Commissioner shall impose a temporary immediate suspension of a childcare license “[i]f the license holder’s actions or failure to comply with applicable law or rule . . . pose an imminent risk of harm to the health, safety, or rights of persons served by the program.”⁴⁷

5. The temporary immediate suspension shall “remain in effect pending the Commissioner’s final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension” if the Commissioner demonstrates “that reasonable cause exists to believe that the license holder’s actions or failure to comply with applicable law or rule poses . . . an imminent risk of harm to the health, safety, or rights of persons served by the program.”⁴⁸

6. “Reasonable cause” means that there are specific articulable facts or circumstances which provide the Commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.⁴⁹

7. “Imminent danger” means a child or vulnerable adult is threatened with immediate and present abuse or neglect that is life-threatening or likely to result in abandonment, sexual abuse, or serious physical injury.⁵⁰

⁴⁷ Minn. Stat. § 245A.07, subd. 2.

⁴⁸ Minn. Stat. § 245A.07, subd. 2(a).

⁴⁹ *Id.*

⁵⁰ Minn. R. 9543.0020, subp. 11 (2021).

8. The record does not include specific articulable facts or circumstances that would lead the Commissioner to reasonably suspect that the daycare children continue to be threatened with immediate and serious physical injury.⁵¹

9. The hearing record does not include evidence that reasonably suggests that events like those which occurred on May 13, 2022, will recur.

10. The hearing record does not include evidence of conditions at the Licensee's daycare which currently present a significant risk of harm to children.

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

RECOMMENDATION

The Commissioner should **RESCIND** the Order of Temporary Immediate Suspension of the Family Child Care License of Pamela Lang (License No. 1076367 FCC).

Dated: July 12, 2022


JAMES E. LAFAVE
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Human Services (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making 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.

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 Administrative Law Judge of the date the record closes. 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 (2020). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to

⁵¹ See Minn. Stat. § 245A.07, subd. 2a (a).

determine the discipline to be imposed.

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

MEMORANDUM

I. Regulatory Standards

Minn. Stat. § 245A.07 sets forth the standards that must be met to initially impose, and ultimately sustain, a temporary immediate suspension order. The statute reads in part:

The commissioner shall act immediately to temporarily suspend the 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 . . .⁵²

. . .

The scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the commissioner's final order under section 245A.08, regarding a licensing sanction issued under subdivision 3 following the immediate suspension. For suspensions under subdivision 2, paragraph (a), clause (1), the burden of proof in expedited hearings under this subdivision shall be limited to the commissioner's demonstration that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses, or the actions of other individuals or conditions in the program poses an imminent risk of harm to the health, safety, or rights of persons served by the program. 'Reasonable cause' means there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.⁵³

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

While the term "imminent harm" is not defined in either statute or rules, the Commissioner has defined the term "imminent danger" in the Family Day Care and Foster Care rules. This definition is instructive. "Imminent danger" includes circumstances in

⁵² Minn. Stat. § 245A.07, subd. 2(a).

⁵³ Minn. Stat. § 245A.07, subd. 2a(a).

which a child is threatened with immediate and present neglect that is likely to result in serious physical injury.⁵⁴

The Administrative Law Judge must determine if the evidence shows that the license holder's actions, at the time of the hearing, continue to pose an imminent risk of harm.⁵⁵ This determination is made to inform the Commissioner as to whether the suspension should continue pending final determination of any appropriate licensing sanction.⁵⁶

II. Analysis

The two grounds cited in the order immediately suspending Ms. Lang's childcare license, and the primary grounds argued at hearing to continue the suspension of the license were: (1) children had access to animal feces; and (2) children were subject to corporal punishment, including force feeding.⁵⁷

Adolescent 1 testified credibly in describing how Ms. Sievers force-fed Child 1 on May 13, 2022. She provided specific details on where the incident happened, how Ms. Sievers placed the bottle in the child's hands and how Ms. Sievers ultimately forced the milk into Child 1's mouth.

It is important to note that Ms. Lang was not present at the daycare on May 13, and there were no allegations that she was involved or participated in the forced feeding. Ms. Lang acknowledges that the allegation was very serious.⁵⁸

Bird feces in the home and in areas accessible to children was well documented by the pictures taken by the investigators during their visit on May 13.⁵⁹ It is worth noting however, that having a bird in a daycare home is not, per se, against the daycare rules.⁶⁰ But the daycare provider must ensure that "play areas are free of animal excrement not confined to pet cages."⁶¹ Testimony at hearing established that the daycare providers at Pamela Jo's Day Care normally "quickly" cleaned up the bird feces.

On May 13, the children and the caregivers were outside all day.⁶² The Cockatoo was by itself in the house with no one available to clean up after it. That the investigators found bird feces in the house is not surprising. But it is unclear in this circumstance whether the children in care had access to the bird feces.

⁵⁴ See Minn. R. 9543.0020, subp. 11.

⁵⁵ See *In the Matter of the Temporary Immediate Suspension of the Family Child Care License of Angie Mattison*, 2016 WL 2946022, slip op. at *3 (Minn. Ct. App. May 23, 2016) (unpublished).

⁵⁶ Minn. Stat. § 245A.07, subd. 2a(a) ("The scope of the hearing shall be limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the commissioner's final order under section 245A.08, regarding a licensing sanction issued under subdivision 3").

⁵⁷ Ex. 1 at 1 (Order of Temporary Immediate Suspension).

⁵⁸ Test. of P. Lang.

⁵⁹ See Exs. 3,4,5,6,7,11, and 12.

⁶⁰ See Minn. R. 9502.0435, subp. 12 (2021).

⁶¹ *Id.* at (E).

⁶² Test. of B. Sievers, Test. of K. Bauer, Test. of Adolescent 1.

There were other grounds listed in the Notice and Order for Hearing and argued at hearing for maintaining the suspension of Ms. Lang's daycare license. Specifically, that:

- Appellant spansks children in care and drags them around by the arm;⁶³
- Appellant threatened to force a child to show his genital to other children in care as punishment for shoving his genitals in another child's face;⁶⁴
- There are over 20 animals living in the home;⁶⁵
- Appellant was three children over the licensed capacity on May 13;⁶⁶
- There was a two-foot-long lizard in the outside play area for which no variance had been requested;⁶⁷

None of those allegations support maintaining the suspension of Ms. Lang's daycare license. No evidence was introduced to support the allegations that Ms. Lang threatened to force a child to show its genitals, that there were over 20 animals living in the home or that there was a two-foot lizard in the outside play area for which no variance was requested. If no evidence was introduced, those claims cannot for a basis for the Commissioner to conclude that the children in Ms. Lang's care are in imminent risk of harm.

At the hearing, Adolescent 1 testified that Ms. Lang slapped children and on other occasions dragged children around by the arm.⁶⁸ Her testimony as to those allegations was not credible. Unlike her testimony regarding the forced feeding, her testimony regarding the claims of slapping and dragging children around by the arm, contained few or no specifics. They were merely assertions. There were no facts or background sufficient to lend credibility to the claims. Further, Ms. Lang categorically denied the allegations.⁶⁹ The facts presented as to slapping and arm dragging are insufficient to allow the Commissioner to conclude that the children in Ms. Lang's care are in imminent risk of harm.

Ms. Lang admits that on May 13, 2022, she was operating over capacity.⁷⁰ But, that it was the result of an unforeseen circumstance. On the evening of May 12, 2022, a transformer in the school went out causing classes to be cancelled.⁷¹ And on the morning of May 13, two children who never attend the daycare on Fridays unexpectedly showed up.⁷² Ms. Lang admits she was wrong but asserts this was a unique circumstance that won't happen again.⁷³

⁶³ Notice of Order for Hearing at 2, Test. of Adolescent 1.

⁶⁴ Notice and Order for Hearing at 2.

⁶⁵ *Id.*

⁶⁶ *Id.*, Test. of D. Biedermann.

⁶⁷ Notice and Order for Hearing at 2.

⁶⁸ Test. of Adolescent 1.

⁶⁹ Test. of P. Lang.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

The Department alleges that Ms. Lang habitually operates over capacity. It did an analysis of Ms. Lang's attendance records to reach that conclusion.⁷⁴ Ms. Lang disputes the Department's conclusions. She points out that she remains within her operating limits by timing the coming and going of the children in her care. For example, when a child leaves for school, another arrives.⁷⁵ The result was, that while on any given day 15 or 16 children may have attended the daycare, there were never more than 14 children present at one time.⁷⁶

There is no question that on May 13, 2022, Ms. Lang was over capacity. She admits that was an error.⁷⁷ The Commissioner's recent Order, *In the Matter of the Temporary Immediate Suspension of the Family Child Care License of Katie Marie Fischer*,⁷⁸ is instructive. When rescinding the Order of Temporary Immediate Suspension in that case, the Commissioner took pains to distinguish two types of situations: Cases in which there was a pattern of regulatory noncompliance or continuing noncompliance by the Licensee, and those in which there was a significant lapse, but one that was confined to a particular day.⁷⁹ In the view of the Administrative Law Judge, that kind of line-drawing and reasoning applies here, and the most credible evidence supports the conclusion that the lapse was confined to a particular day.

The real dispute in this case is whether the allegations of forced feeding by an assistant caregiver and the bird feces in the house on May 13, 2022, continue to suggest an imminent risk of harm to the health, safety, or rights of persons served by the program. Ms. Lang informed Wabasha County Social Services and pledged under oath at the hearing that she would bar Ms. Sievers from the daycare home pending a final decision from the Commissioner. In addition, she pledged to keep all the birds in their cages while children were present. She also agreed to random, announced inspections by the County to ensure she was complying with those conditions.

The plan proposed by Ms. Lang fulfills the key purposes of the suspension order. The person alleged to have engaged in the maltreatment will not have access to the children. And, with the birds in their cages, children will not have access to bird feces. As such, the hearing record does not include "specific articulable facts or circumstances"⁸⁰ that indicate the children served by the program are in imminent risk of harm. While random, unannounced access by the County is already required by the licensing rules, Ms. Lang's acknowledgment that such a visit may occur at any time should ensure a smooth inspection of her program any time the County chooses.

In these circumstances, Ms. Lang should not be deprived of her livelihood and continuing the suspension comes at the very high cost of limiting the already scarce

⁷⁴ Test. of D. Biedermann.

⁷⁵ Test. of P. Lang.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Commissioner's Order, DHS No. 34859 (February 9, 2018).

⁷⁹ *Id.*, slip op. at 7 (citing cases).

⁸⁰ Minn. Stat. § 245A.07, subd. 2a(a).

options for childcare in Plainview area. The Commissioner should rescind the Order of Temporary Immediate Suspension pending a determination on a final licensing sanction.

J. E. L.