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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0763**

In the Matter of the Appeal by
Open Arms Christian Learning Childhood Center
of the Determination of Maltreatment and Order to Pay a Fine.

**Filed March 25, 2019
Affirmed
Worke, Judge**

Minnesota Department of Human Services
File No. 34463

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Keith Ellison, Attorney General, Nicholas W. Anderson, Assistant Attorney General, St. Paul, Minnesota (for respondent commissioner of human services)

Considered and decided by Worke, Presiding Judge; Schellhas, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Relator-childcare-center challenges a determination of maltreatment by neglect arising out of an incident in which a young child fell off a climber, arguing that the determination erroneously relies solely on the age recommended by the manufacturer for a child using the climber. We affirm.

FACTS

In September 2016, a new director began at relator Open Arms Christian Learning Childhood Center (Open Arms). While touring the facility, the director noticed a climber located in the large muscle room, which has wall-to-wall carpet, and added two-inch thick mats underneath it. While familiar with the climber because there was one at the facility where she previously worked, the director had not reviewed any written information related to the climber. The equipment located in the large muscle room was accessible to all children at Open Arms, including mobile infants, ages 12-24 months.

On March 13, 2017, a 19-month-old child (the child) fell off the climber. The child lost, but quickly regained, consciousness. The child's parents were notified immediately, and they took her to the emergency room. The child suffered a minor head injury and was allowed to go home after the hospital visit.

Open Arms reported the incident to the Minnesota Department of Human Services (the DHS). An investigator conducted a site visit, interviewed staff, reviewed Open Arms' policies and procedures, and examined documentation related to the climber. Based on information that the climber was intended for outdoor use by children ages two years and older, and Open Arms had the climber indoors with children as young as 12 months using it, the DHS found maltreatment by neglect—failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health when reasonably able to do so—under Minn. Stat. § 626.556, subd. 2(g)(2) (2018). Open Arms was ordered to pay a \$1,000 fine. *See* Minn. Stat. § 245A.07, subd. 3(c)(4)(i) (2018). Open Arms challenged the determination and requested a hearing.

At a hearing before an administrative-law judge (ALJ), the investigator testified that Open Arms' policies require equipment to be age and size appropriate. Open Arms' policies state that climbers are to be placed over an impact-absorbing surface with at least a six-foot fall zone in all directions. Its policies provide that carpet is not adequate protection and indicate that indoor climbers are not recommended due to difficulty meeting fall zone with the appropriate fall-protection material.

The investigator testified that she accessed the website for the climber. The manufacturer provides safety instructions and warnings, including that the climber is for outdoor use by children ages two and older. The instructions provide that the climber should not be used indoors without appropriate fall protection and warn that a fall to a hard surface could result in serious injury or death. The instructions state that the climber should not be installed over a hard surface, such as carpet, and should be used outdoors over nine inches of compressed loose-fill, such as recycled rubber, sand, pea gravel, wood mulch, or wood chips.

The investigator testified that she also interviewed Open Arms' staff. Staff expressed that they had concerns that a child would fall off the climber. One teacher reported that she was worried about younger children using the climber, but assumed it was age appropriate because the younger children had access to it.

The ALJ recommended that the DHS rescind the determination of maltreatment by neglect because the climber does not present a serious danger to the physical health of children. Respondent Commissioner of Human Services (the commissioner), however, affirmed the maltreatment determination and fine. The commissioner concluded that Open

Arms failed to abide by the rule of law requiring equipment to be age appropriate, failed to follow its own policies regarding indoor climbers, and failed to adhere to the manufacturer's age restriction for the climber. Open Arms sought review of the commissioner's decision by writ of certiorari.

DECISION

We presume that agency decisions are correct and will reverse only when they “are arbitrary and capricious, exceed the agency’s jurisdiction or statutory authority, are made upon unlawful procedure, reflect an error of law, or are unsupported by substantial evidence in view of the entire record.” *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003). Substantial evidence is: “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011) (quotation omitted). We defer to the agency’s factual findings, but review de novo the interpretation and application of statutes to the undisputed facts. *Mattice v. Minn. Prop. Ins. Placement*, 655 N.W.2d 336, 340 (Minn. App. 2002), review denied (Minn. Mar. 18, 2003). “The relator has the burden of proof when challenging an agency decision” *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 433 (Minn. App. 2003).

The commissioner decided that the DHS proved by a preponderance of the evidence that Open Arms committed maltreatment by neglect. Open Arms argues that the

commissioner erred by relying *solely* on the manufacturer's recommended age for the climber.

It is the public policy of this state to protect children whose health or welfare may be jeopardized through maltreatment, including neglect. Minn. Stat. § 626.556, subd. 1(a) (2018). In furtherance of this public policy, the legislature requires reporting of maltreatment of children, including neglect, which occurs in schools and community settings. *Id.*, subd. 1(b)(1). Under the statute for mandatory reporting of maltreatment, and relevant to the facts here, “[n]eglect” is the “failure to protect a child from conditions or actions [other than by accident] that seriously endanger the child’s physical or mental health when reasonably able to do so.” *Id.*, subd. 2(g)(2). An accident is a “sudden, not reasonably foreseeable, and unexpected occurrence” that is unlikely to occur and which “could not have been prevented by exercise of due care,” and, if occurring in a facility, happens when the facility is compliant with the laws and rules relevant to the occurrence. *Id.*, subd. 2(a).

When maltreatment is determined involving a facility, such as Open Arms, a determination must be made as to whether individuals, the facility, or both were responsible for the maltreatment. *Id.*, subd. 10e(e). In evaluating a facility’s responsibility for maltreatment by neglect, a determination must be “based on the facility’s compliance with the regulatory standards for policies and procedures, training, and supervision as cited in Minnesota Statutes and Minnesota Rules.” *Id.*, subd. 10e(i).

The record shows that the commissioner did not rely solely on the manufacturer’s recommended age for the climber. The commissioner also relied on Open Arms’ policies

and checklists. The commissioner correctly concluded that the child's fall was not an accident because it was reasonably foreseeable. Open Arms has a Risk Reduction Plan, which states: "Children can fall off the climber," and requires "[o]ne staff person [to be] stationed by the climber to supervise the children . . . at all times." Additionally, staff reported to the investigator being concerned that children could fall off the climber and that younger children were using the climber. One teacher reported that there had actually been "a couple of close calls" with children falling. Based on the record, a fall off the climber was not an accident because it was reasonably foreseeable.

Additionally, the fall could have been prevented by the exercise of due care by Open Arms, including following its internal policies. Open Arms' policy states that equipment must be age appropriate. The policy requires equipment to be installed over approved material with appropriate fall zone and states that "[i]ndoor climbers are not recommended due to the difficulty of meeting fall zones with appropriate absorbency material." Open Arms' Injury Prevention Daily Checklist requires a climber to be placed over an impact-absorbing surface with at least a six-foot fall zone in all directions and notes that carpet is not adequate protection. Like the policy, the daily checklist indicates that climbers are not recommended for indoor assembly due to the difficulty of meeting the surface criteria. Open Arms' Safety Self-Inspection Checklist requires surfaces underneath play equipment to be "covered with 10 to 12 inches of impact-absorbing material such as sand, wood chips, pea gravel or with a manufactured energy-absorptive surface."

Despite Open Arms' policies and checklists, the climber was accessible to all mobile children in the large muscle room. The climber was installed indoors over carpet that was

covered with a two-inch thick mat. Based on the record, an incident involving the climber could have been prevented by Open Arms exercising due care in following its internal policies.

Further, the fall was not an accident because when it happened, Open Arms was not compliant with the administrative rule that all equipment be age appropriate. Minn. R. 9503.0060, subp. 1 (2017). The manufacturer indicates that the climber is appropriate for children ages two years and older. While there is no rule requiring Open Arms to follow the manufacturer's age-appropriateness designation, it is a standard that should be referenced in determining what equipment is appropriate for the different age groups. More importantly, the climber was located in a room that was accessible to all mobile children. The record shows that the room was used by "all the age groups" and that "mobile infants up to about 16 months" sometimes used the climber with teacher assistance. Therefore, even if Open Arms believes that it should not have to rely on the manufacturer's age criterion, it is still responsible for abiding by the rules and ensuring that the equipment is age appropriate.

Based on the record, the commissioner appropriately determined that Open Arms was responsible for maltreatment by neglect because it failed to protect a child from a condition that seriously endangered the child's physical health when reasonably able to do so. *See* Minn. Stat. § 626.556, subd. 2(g)(2). Open Arms exposed the child to a dangerous condition that it could have reasonably prevented. By exercising reasonable judgment and following its own policies and the manufacturer's recommendations, Open Arms could have properly installed the climber and restricted younger children's access to it. Indeed,

the record shows that the director conducted an internal review following the report to the DHS and determined that the climber should not have been in a room used by children under the climber's age rating, and that staff should have been trained on the age rating, which should have been posted on or near the climber. The evidence sufficiently supports the commissioner's decision that Open Arms was responsible for maltreatment by neglect.

Affirmed.