
William Young, Assistant Attorney General, appeared on behalf of the Department of Human Services (Department). Jon Geffen, Arneson & Geffen, PLLC, and Jill Dunkley, General Counsel, appeared on behalf of New Horizon Academy (New Horizon).

On February 21, 2017, New Horizon filed a Motion to Seal Record. Also on that date, the Department filed a Motion to Seal Certain Evidence. On February 24, 2017, the Department filed a response to New Horizon’s motion. On March 6, 2017, the undersigned Administrative Law Judge issued Order Sealing Portions of the Record.

On February 24, 2017, New Horizon filed a color copy of the first page of Exhibit 100. On March 9, 2017, New Horizon filed color copies of the remaining pages of Exhibit 100. The record closed on March 9, 2017, with the filing of the full color copy of Exhibit 100.

STATEMENT OF THE ISSUES

1. Did the Department properly determine that New Horizon was responsible for maltreatment of a minor by neglect under Minn. Stat. § 626.556, subds. 2(g), 10e(e), and 10e(f) (2016)?

2. Did the Department properly issue a $1,000 fine based on the maltreatment determination against the facility, under Minn. Stat. § 245A.07 (2016)?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge recommends that the Department’s determination that New Horizon is responsible for maltreatment of a child by neglect pursuant to Minn. Stat. § 626.556, subds. 2(g), 10e(e), and 10e(f) be **AFFIRMED**. The Administrative Law
Judge also recommends that the Department’s order directing New Horizon to pay a $1,000 fine for maltreatment of a child by neglect be **AFFIRMED**.

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

**FINDINGS OF FACT**

1. New Horizon operates a child care center located at 586 Carlton Street, Maplewood, Minnesota.\(^1\) This facility is licensed for 168 children.\(^2\) As of February 15, 2017, there were 110 children enrolled at the facility.\(^3\)

2. J.P. is a child who attended New Horizon’s child care center in Maplewood.\(^4\) J.P. started at that facility in 2013 and attended until approximately mid-November 2016.\(^5\)

3. J.P. is an active child, who likes to join into activities and enjoys sports.\(^6\) J.P. has always been an active child.\(^7\)

4. The staff at New Horizon were aware that J.P. likes to engage in play and is an active child.\(^8\)

5. During the summer of 2016, J.P. was in the school-age classroom at New Horizon.\(^9\)

I. **New Horizon Staff and Staff Responsibilities During Summer 2016**

6. Two teachers worked in the school-age classroom during the summer of 2016: Kara Neutkens and Victoria “Tori” Ostman.\(^10\) Ms. Neutkens arrived early in the morning and typically left by noon.\(^11\) Ms. Ostman generally worked from 9:00 a.m. to 6:30 p.m.\(^12\)

7. Part of the job description of a teacher at New Horizon is to “[b]e responsible for the welfare, health, and safety of the children in the group.”\(^13\)

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1 Exhibit (Ex.) 1 (Department Investigative Memorandum listing address).
2 Testimony (Test.) of Kari Schmitz.
3 Id.
4 Test. of Tammy Hamilton.
5 Id.; Test. of K. Schmitz.
6 Test. of T. Hamilton; Test. of Deborah Bock; Test. of K. Schmitz.
7 Test. of T. Hamilton; Test. of D. Bock.
8 Test. of T. Hamilton; Test. of K. Schmitz.
9 Test. of T. Hamilton; Test. of K. Schmitz.
10 Test. of T. Hamilton; Test. of K. Schmitz.
11 Ex. 10 (Beth Virden notes of interview with Kara Neutkens); Test. of T. Hamilton.
12 Ex. 32 (recording interview with Victoria Ostman). Exhibit 32 contains audio recordings of seven interviews conducted by the Department, as well as a recording of a voicemail.
13 Ex. 25 at DHS000168.
8. The Center Director and Assistant Director are also responsible for the health, safety, and welfare of the children at the child care center.\textsuperscript{14}

9. Kari Schmitz was the Center Director during the time that J.P. attended New Horizon.\textsuperscript{15} Angel Arnett was the Assistant Director.\textsuperscript{16}

10. Ms. Schmitz has been the Center Director at that location since it opened 11 years ago.\textsuperscript{17} She has been with New Horizon for 16 years.\textsuperscript{18}

11. Ms. Schmitz has directed her staff to inform her of any instructions, oral or written, provided by a parent regarding a medical condition.\textsuperscript{19} New Horizon maintains all written documentation that a parent provides about a child’s medical condition and how to care for that child.\textsuperscript{20}

12. Typically, if a parent tells a classroom teacher that a child has a medical condition that needs to be cared for in a particular manner, the classroom teacher passes that information on to the Center Director, Ms. Schmitz, so she can communicate the information to the other teachers and staff working with the child.\textsuperscript{21} Similarly, if a parent gives a doctor’s note to a classroom teacher, the teacher is instructed to give the note to the Center Director.\textsuperscript{22}

13. Usually when a child comes with a cast or medical device, the parent will provide a note with instructions from the doctor.\textsuperscript{23} In addition, if a child attending the daycare arrives with a cast or medical device, staff at New Horizon are trained to ask for information from the parent.\textsuperscript{24} The New Horizon Enrollment Agreement also states that parents are to keep the facility informed about a child’s medical needs.\textsuperscript{25}

14. If a child were to tell a teacher that the child no longer needed a brace, the staff would not be permitted to rely on the child’s statement under New Horizon policy.\textsuperscript{26} Instead, the child’s comment might prompt a discussion with the parent about how to care for the child’s medical situation.\textsuperscript{27}

\textsuperscript{14} See Test. of K. Schmitz; Test. of Angela Arnett.
\textsuperscript{15} Test. of K. Schmitz.
\textsuperscript{16} Test. of A. Arnett.
\textsuperscript{17} Test. of K. Schmitz.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.; Test. of A. Arnett.
\textsuperscript{21} Test. of K. Schmitz.
\textsuperscript{22} Id.; Ex. 32 (recording of Kara Neutkens interview).
\textsuperscript{23} Test. of A. Arnett; Ex. 32 (recording of A. Arnett interview).
\textsuperscript{24} Ex. 32 (recording of second K. Schmitz interview).
\textsuperscript{25} Test. of K. Schmitz; Ex. 1 at DHS002 (Department investigation memorandum).
\textsuperscript{26} Test. of K. Schmitz.
\textsuperscript{27} Id.
II. J.P.’s Knee Surgery and Use of the Knee Immobilizer

15. On July 8, 2016, J.P. underwent surgery to remove a lesion on his knee. At the time, he was eight years old.

16. The doctor put a cast on J.P.’s leg on the day of the surgery to allow the wound to heal.

17. J.P. was allergic to the packing in the cast and developed a rash under the cast. On July 18, 2016, a nurse practitioner removed the cast.

18. On that day, J.P. was fitted with a knee immobilizer to wear instead of the cast. A knee immobilizer is a brace with several Velcro straps that keeps the leg from bending. The knee immobilizer extended from J.P.’s ankle to mid-thigh and kept his knee from bending.

19. J.P. and his family were instructed to wash his leg with soap and water, pat dry, and apply an ointment twice daily to the affected area for a week to treat the rash. A bandage and elastic wrap were worn over the incision and under the immobilizer to protect the incision.

20. J.P. was to wear the immobilizer until told otherwise by the doctor. He was also told that he could have the immobilizer off if he was sitting down and he did not to bend his knee. Otherwise, he was to wear the knee immobilizer at all times.

21. J.P. returned to New Horizon on approximately July 19, 2016, about a week and a half after the surgery.

22. J.P. was the first child attending this New Horizon location with a knee immobilizer. Other children have attended with casts and slings.

23. J.P.’s mother generally dropped him off at New Horizon between 6:45 and 7:45 a.m.
24. J.P.’s mother spoke with his teacher, Ms. Neutkens, on the day of his return when she dropped J.P. off in the classroom. J.P. was wearing the immobilizer on his leg when she dropped him off.44 J.P.’s mother told Ms. Neutkens that J.P. was not allowed to bend his knee, he could not go down slides and was to take it easy.45 J.P.’s mother also recalls telling Ms. Neutkens that J.P. needed to have the immobilizer on his leg unless he was sitting down.46

25. According to J.P.’s mother, she told his teacher this every day when she dropped him off in the morning.47

26. J.P.’s mother spoke directly with Ms. Neutkens about his knee and use of the immobilizer.48 When other staff would ask how J.P. was doing, J.P.’s mother would respond that he needed to have the knee immobilizer on unless he was sitting down and being still.49

27. J.P.’s other teacher, Ms. Ostman, also understood that J.P. could not bend his knee and he could not go down slides.50 She was initially told that J.P. could not take the knee immobilizer off.51

28. On Friday, July 29, 2016, J.P. went back to the doctor. The doctor observed an infection at the surgical incision site.52 J.P. was prescribed an oral antibiotic, as well as an antibiotic ointment. The antibiotic ointment was to be applied three times per day for seven days.53 After the ointment was applied, the incision was to be covered with a bandage and wrapped with Coban, a self-adhering elastic support wrap. The wrap was applied to minimize bending of the knee.54

29. J.P.’s mother was told by the doctor that J.P. should have the knee immobilizer off at times to allow more circulation in the area.55 According to J.P.’s mother, J.P. was allowed by the doctor to walk without the knee immobilizer as long as he had the wrap on and kept the knee straight.56

30. On or about Monday, August 1, 2016, J.P.’s mother started bringing J.P. to New Horizon with just the bandage and Coban wrap on his knee.57 J.P. would walk

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43 Id.; Ex. 100 (New Horizon Daily Connect entries for J.P.)
44 Test. of T. Hamilton.
45 Ex. 32 (recording of K. Neutkens interview); Test. of T. Hamilton.
46 Test. of T. Hamilton; Ex. 32 (recording of K. Neutkens interview).
47 Test. of T. Hamilton.
48 Id.; Test. of K. Schmitz; Test. of A. Arnett.
49 Test. of T. Hamilton.
50 Test. of B. Virden; Ex. 7; Ex. 32 (recording of V. Ostman interview).
51 Ex. 7; Ex. 32 (recording of V. Ostman interview).
52 Ex. 19 at DHS000306 (J.P. medical record from July 29, 2016).
53 Id.; Test. of T. Hamilton.
54 Ex. 19 at DHS000306 (J.P. medical record from July 29, 2016); Ex. 1 at DHS003 (Department investigative report describing Coban).
55 Test. of T. Hamilton.
56 Id.
57 Id.; Ex. 10 (B. Virden notes of interview with K. Neutkens).
into New Horizon without the knee immobilizer on his knee.\(^{58}\) J.P. was able to keep his leg straight while doing so.\(^{59}\)

31. At this point, J.P. had two knee immobilizers. One was kept at home and the other was in his locker in the school-age room at New Horizon.\(^{60}\)

32. J.P.’s mother informed the teachers at New Horizon that it was okay for J.P. to have the knee immobilizer off to allow his knee time to “breathe” so long as he did not bend his knee.\(^{61}\)

33. J.P. knew how to put the immobilizer on his leg, but he needed help tightening the Velcro straps on the brace.\(^{62}\) J.P.’s mother never instructed anyone at New Horizon about how to put the immobilizer on J.P.\(^{63}\) No staff ever asked J.P.’s mother about how to put the immobilizer on J.P.’s leg.\(^{64}\)

34. J.P.’s teacher, Ms. Neutkens, observed him entering New Horizon without the immobilizer on his leg on a number of occasions.\(^{65}\) On the first morning that he arrived not wearing the immobilizer, Ms. Neutkens asked J.P.’s mother whether he still needed to wear the brace. J.P.’s mother told Ms. Neutkens that J.P. “was not really wearing” the immobilizer at home.\(^{66}\) She said that she brought it “just in case” and she would put it in his locker.\(^{67}\) She also told Ms. Neutkens that as long as J.P. was not bending his knee, she was not concerned about him not wearing the knee immobilizer.\(^{68}\)

35. After J.P. started coming to school without the knee immobilizer on his leg, his teacher, Ms. Neutkens, let J.P. go out on the playground in the mornings without his knee immobilizer.\(^{69}\) She never put the knee immobilizer on him.\(^{70}\) She said she did not put it on him because he was doing well not bending his knee. She never saw him bend his knee when he was on the playground.\(^{71}\)

36. Starting on Monday, August 1, 2016, J.P.’s grandmother and an adult babysitter, Courtney Whalen, took turns coming to New Horizon to change J.P.’s bandage because he needed the antibiotic ointment applied three times per day.\(^{72}\)

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\(^{58}\) Test. of T. Hamilton.  
\(^{59}\) Id.  
\(^{60}\) Id.  
\(^{61}\) Id.  
\(^{62}\) Id.  
\(^{63}\) Id.  
\(^{64}\) Id.  
\(^{65}\) Test. of B. Virden; Ex. 32 (recording of K. Neutkens interview).  
\(^{66}\) Ex. 32 (recording of K. Neutkens interview).  
\(^{67}\) Id.  
\(^{68}\) Id.  
\(^{69}\) Id.  
\(^{70}\) Id.  
\(^{71}\) Id.  
\(^{72}\) Test. of D. Bock; Ex. 9 at DHS00124 (B. Virden notes of Courtney Whalen interview).
J.P.’s mother was told New Horizon staff were not allowed to change the bandage.\textsuperscript{73} J.P.’s mother sent a note giving Ms. Whalen permission to do so.\textsuperscript{74}

37. J.P.’s teacher, Ms. Ostman was there in the afternoons when either J.P.’s grandmother or Ms. Whalen came to change his bandage.\textsuperscript{75}

38. On August 1, 2016, J.P.’s grandmother came to change his bandage around lunch time.\textsuperscript{76} When she arrived, J.P. had the immobilizer on his leg.\textsuperscript{77} J.P.’s grandmother took his knee immobilizer off and let him keep it off because his leg was sweating.\textsuperscript{78} J.P.’s grandmother told Ms. Ostman that J.P. could keep it off as long as his leg was straight.\textsuperscript{79}

39. After that day, Ms. Ostman did not see J.P. wearing the immobilizer.\textsuperscript{80} He did have his leg wrapped with a sticky self-securing Ace-type bandage.\textsuperscript{81} Ms. Ostman was also aware that the immobilizer was in J.P.’s locker at New Horizon.\textsuperscript{82}

40. J.P.’s babysitter, Ms. Whalen, saw J.P. without the immobilizer on his leg when she went to change his bandages around lunch time on both August 2 and August 4, 2016.\textsuperscript{83} On one day, he was laying on the floor and reading. On the other day, he was eating at a table.\textsuperscript{84} She stated that the staff person who was in the room told her that he did not need to have the immobilizer on at that time. Ms. Whalen told the person that she was pretty sure that J.P. needed to have his leg immobilizer on at all times.\textsuperscript{85} Ms. Whalen had not been told that J.P. could have the immobilizer off at times if he kept his leg straight.\textsuperscript{86}

41. On August 2, 2016, J.P. went on a field trip to a local park where there is a playground.\textsuperscript{87} The staff brought an iPad, coloring materials, and magnet tiles for J.P.\textsuperscript{88} J.P.’s mother gave New Horizon permission for J.P. to go on the field trip.\textsuperscript{89}

\textsuperscript{73} Test. of T. Hamilton; Test. of D. Bock; Ex. 9 at DHS00124 (B. Virden notes of interview with C. Whalen).
\textsuperscript{74} Ex. 103 (handwritten note from T. Hamilton); Test. of T. Hamilton.
\textsuperscript{75} See Ex. 9; Ex. 10; Test. of D. Bock.
\textsuperscript{76} Ex. 32 (recording of V. Ostman interview).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Ex. 32 (recording of C. Whalen interview); Test. of B. Virden.
\textsuperscript{84} Ex. 32 (recording of C. Whalen interview); Test. of B. Virden; Ex. 9 (B. Virden notes of C. Whalen interview).
\textsuperscript{85} Ex. 32 (recording of C. Whalen interview); Ex. 9 (B. Virden notes of C. Whalen interview).
\textsuperscript{86} Ex. 32 (recording of C. Whalen interview); Ex. 9 (B. Virden notes of C. Whalen interview).
\textsuperscript{87} Test. of K. Schmitz.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
42. On or about August 3, 2016, Ms. Ostman saw J.P. bending his leg. She told J.P. that he is not supposed to bend his leg, and he responded that the doctor told him he can bend it now.90

43. The Assistant Center Director also saw J.P. not wearing immobilizer on some occasions.91 The Assistant Center Director knew that J.P. had a knee immobilizer and was instructed not bend his knee or go down slides. J.P. told the Assistant Director that his doctor said he can bend his knee now.92

44. The Center Director knew J.P. came back to New Horizon wearing a knee immobilizer after his surgery. She also saw J.P. not wearing his immobilizer on some occasions at New Horizon.93 On those occasions, Ms. Schmitz recalls J.P. was sitting on the floor playing with Legos when she saw him without it on his leg.94 During these times, the immobilizer was in his locker.95 Ms. Schmitz was also told by other staff that J.P.'s mother was bringing him to New Horizon without the immobilizer on his leg.96

45. J.P.'s mother never gave specific directions about how to care for J.P.'s knee to the New Horizon Center Director or Assistant Center Director prior to August 5, 2016.97 J.P. typically arrived before either the Director or Assistant Director arrived for the day.98

46. New Horizon has a web-based system known as “Daily Connect” to communicate with parents.99 The Daily Connect system has entries during the day from New Horizon about the child’s activities.100 Parents can also provide information to New Horizon using the messaging feature on the Daily Connect system.101

47. J.P.'s family members did not provide any written instructions to New Horizon about care for J.P.'s knee using the Daily Connect system.102

48. No staff recalls receiving a doctor’s note or any other written instructions regarding caring for J.P.'s knee or the use of the immobilizer prior to August 5, 2016.103 The only instructions New Horizon staff recall receiving were oral instructions from J.P.'s mother and grandmother.104

90 Ex. 32 (interview with V. Ostman).
91 Test. of A. Arnett; Test. of B. Virden; Ex. 8 (B. Virden notes of A. Arnett interview).
92 Test. of A. Arnett; Test. of B. Virden; Ex. 8 (B. Virden notes of A. Arnett interview).
93 Test. of K. Schmitz.
94 Id.
95 Id.
96 Ex. 32 (recording of K. Schmitz interview).
97 Test. of T. Hamilton; Test. of K. Schmitz; Test. of A. Arnett.
98 Test. of A. Arnett; Test. of K. Schmitz.
99 Test. of K. Schmitz.
100 Id.
101 Id.
102 Ex. 100 (J.P.’s Daily Connect pages).
103 Ex. 32 (recordings of interviews with staff).
104 Id.
49. Neither the Center Director nor the Assistant Director ever asked J.P.’s mother for instructions on how to care for J.P.’s knee or about the use of the immobilizer.  

50. According to Ms. Schmitz, all staff knew that J.P. could not bend his knee because it was healing. Ms. Schmitz did not ask J.P.’s mother for more specific instructions regarding J.P.’s knee because J.P.’s mother was always very forthcoming about J.P.’s care at the facility. She stated that in other instances, J.P.’s mother provided notes about his medical care. 

III. J.P.’s Injury on August 4, 2016

51. On August 4, 2016, J.P. was on the playground at New Horizon without the knee immobilizer on his leg. J.P. did have the Coban wrap around his leg at the time. Ms. Ostman recalls that the wrap was not as big or as tight on that day as other days. 

52. While on the playground that afternoon, J.P. kicked a soccer ball, fell on his knee, and the incision on his knee split open. The incident occurred around 5 p.m. J.P.’s knee immobilizer was in his locker at the time. 

53. No staff from New Horizon saw J.P. injure his knee. Just before the injury, Ms. Ostman was walking around the playground, observing the children. After she finished her loop around the playground, she went and stood by the door. One of the other children came up to her and told her that J.P. fell and hurt his knee. She went to J.P. He told her that his knee hurt. She opened up the wrap on J.P.’s knee and saw it was bleeding. 

54. Ms. Ostman saw J.P. shortly before the injury when she was walking around the playground. He was not playing soccer at the time. 

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105 Test. of T. Hamilton; Test. of A. Arnett; Test. of K. Schmitz; Ex. 3 (Department investigative report); Ex. 32 (recordings of interviews with staff).
106 Test. of K. Schmitz.
107 Id.
108 Ex. 32 (recording of J.P. interview).
109 Test. of T. Hamilton.
110 Ex. 32 (recording of V. Ostman interview).
111 Ex. 32 (recording of J.P. interview); Ex. 11 (Incident Report); Ex. 17 at DHS000277 (medical record dated August 8, 2016).
112 Ex. 11 (Incident Report).
113 Ex. 32 (recording of J.P. interview).
114 Test. of A. Arnett; Ex. 7 (B. Virden interview notes with V. Ostman).
115 Ex. 32 (recording of V. Ostman interview).
116 Id.
117 Id.
118 Id.
119 Id.
Ms. Ostman, she would never have let J.P. kick a ball or play soccer because of his knee surgery.\footnote{Ex. 32 (interview with V. Ostman).}

55. Ms. Arnett, the Assistant Director, was also at the facility at the time of the injury.\footnote{Test. of A. Arnett.} Usually in the evenings, she walks around to see how everyone is doing. On August 4, 2016, when Ms. Arnett went out to the preschool/school-aged playground to check on the school-age class, she saw J.P. crying. Ms. Ostman told her that J.P.’s knee was bleeding. Ms. Arnett did not see J.P. kicking the ball or fall and injure himself.\footnote{Test. of A. Arnett; Ex. 8 (B. Virden notes of interview with A. Arnett); Ex. 32 (recording of A. Arnett interview).}

56. Ms. Arnett assisted J.P. inside and looked at his knee. She saw the incision was open and bleeding. She put some gauze on the wound.\footnote{Test. of A. Arnett.} Ms. Arnett then called J.P.’s mother to tell her that J.P. was injured and she needed to come to the child care center.\footnote{Test. of A. Arnett; Ex. 8 (B. Virden notes of interview with A. Arnett); Ex. 32 (recording of A. Arnett interview).} Ms. Arnett had J.P. sit with his leg elevated.\footnote{Ex. 8 (B. Virden notes of interview with A. Arnett); Ex. 32 (recording of A. Arnett interview).}

57. A short time later, J.P.’s grandmother arrived.\footnote{Test. of A. Arnett.} J.P.’s mother had called J.P.’s grandmother.\footnote{Ex. 8 (B. Virden notes of interview with A. Arnett); Ex. 32 (recording of A. Arnett interview).} J.P. was then transported to the hospital by ambulance at the request of his grandmother.\footnote{Test. of A. Arnett; Test. of K. Schmitz.}

58. Ms. Neutkens had left for the day by the time the children went out on the playground that afternoon.\footnote{Test. of B. Virden.} The Center Director, Ms. Schmitz, also was gone for the day when the injury occurred.\footnote{Test. of K. Schmitz.}

59. It did not surprise the Center Director that J.P. wanted to engage in play because he is an active, playful boy.\footnote{Test. of K. Schmitz; Ex. 32 (recording of K. Schmitz interview).} Ms. Schmitz was aware J.P. liked active play, not only because he was enrolled at New Horizon, but also because he is friends with her son who is the same age.\footnote{Test. of K. Schmitz.}

60. She also stated that any child on a playground might want to join in play.\footnote{Id.} She also recognized that children can make rash decisions and can be impulsive at times.\footnote{Id.}
61. After the incident occurred, the Assistant Center Director, Ms. Arnett, talked to both of J.P.’s classroom teachers, Ms. Ostman and Ms. Neutkens. They both understood from J.P.’s mother that J.P. could not bend his knee.  

62. On August 17, 2016, about two weeks later, Ms. Arnett called J.P.’s mother in response to an e-mail J.P.’s mother had sent to her about the incident. Ms. Arnett called to see how J.P. was doing and because she was feeling bad about the incident. Ms. Arnett left the following voicemail, stating in part:

I still feel horrible about [J.P.’s] knee. I did talk to both Tori and Kara about his knee and you know, [they said that you] did talk with us every day and it was in paperwork for us also about ‘the not bending.’ And we give [J.P.] a lot of leeway. [J.P. told us], ‘No. No. The doctor said I can walk now. It’s going to be ok.’ We did talk about when [J.P.] comes back and when we go outside we are going to have to put it in the immobilizer just to make sure, you know, and take some bigger actions than ... we did before. And you were right, you did tell us every day and you did text [J.P.] every day. And even Kara said, ‘Oh yea, she said that [J.P.] hasn’t had to use it but that it’s in his locker.’ She did acknowledge you had it. She was just [thinking that J.P.] is doing so great. We just gave [J.P.] more leeway than we should have. Again, we are very sorry that has happened.

63. At the evidentiary hearing, Ms. Arnett stated she “went too far” when she left the voicemail message. She was trying to make J.P.’s mother feel better about what had happened and misspoke when she referred to “paperwork” given to New Horizon. She thought there was a note from the doctor but she personally never saw one.

64. New Horizon did an internal review of the incident. The New Horizon review report indicates J.P. was injured when he kicked a soccer ball. The report states that J.P. was not participating in a group activity, but the injury was the result of spontaneous behavior from J.P. The report also notes that J.P. came without his immobilizer on, and J.P.’s mother never informed the Center Director of any restrictions.

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135 Test. of A. Arnett.
136 Ex. 32 (recording of A. Arnett interview).
137 Test. of A. Arnett; Ex. 1 at DHS0004; Ex. 32 (recording of voicemail left by A. Arnett).
138 Ex. 32 (audio recording of voicemail left by A. Arnett); see also Ex. 1 at DHS004 (quoting from the recording but the quote contains a few minor transcription errors).
139 Test. of A. Arnett.
140 Id.
141 Id.
142 Ex. 12 (New Horizon internal review report).
143 Id.
for J.P. relating to his knee. 144 The report indicates that the classroom teachers received “very basic verbal instructions on how to care for his knee.” 145

65. J.P. returned to New Horizon on August 18, 2016. 146 When he returned, J.P.’s mother provided a note to New Horizon from his doctor dated August 17, 2016, stating that J.P. must wear the immobilizer at all times and was to refrain from physical activity while at daycare and school until he is cleared for increased activity. 147

66. J.P. was enrolled at New Horizon until mid-November 2016. 148

67. As of February 15, 2017, J.P.’s knee had not healed. 149 There are ongoing problems with the incision not closing properly due to the fall. 150 The scar on J.P.’s knee will be widened as a result of the fall. 151 In addition, J.P. currently cannot play contact sports and has some anxiety issues related to the injury. 152

IV. Department Investigation of Alleged Maltreatment

68. On August 10, 2016, the Department received a call of alleged maltreatment relating to J.P.’s injury on August 4, 2016 at New Horizon. 153

69. After receiving the call, the Department opened an investigation of the circumstances surrounding J.P.’s injury. 154 Beth Virden, a Senior Investigator, conducted the investigation. 155

70. As part of the investigation, Ms. Virden conducted seven interviews, including J.P.’s two teachers at New Horizon, the Center Director, the Assistant Center Director, J.P.’s mother, J.P., and J.P.’s adult babysitter. 156 Ms. Virden also spoke with J.P.’s grandmother but did not record the conversation. 157

144 Id.
145 Id. at DHS000132.
146 Ex. 6 (B. Virden notes of K. Schmitz interview); Ex. 32 (recording of K. Schmitz interview).
147 Test. of K. Schmitz; Ex. 13; Ex. 6 (B. Virden notes of interview of K. Schmitz); Ex. 32 (recording of K. Schmitz).
148 Test. of K. Schmitz; Ex. 6 (B. Virden notes of K. Schmitz interview); Ex. 32 (recording of K. Schmitz interview).
149 Test. of T. Hamilton; Test. of D. Bock.
150 Test. of T. Hamilton; Test. of D. Bock.
151 Ex.17 at DHS000277 (medical record dated August 8, 2016).
152 Test. of T. Hamilton.
153 Test. of B. Virden; Ex. 5 (Intake log).
154 Test. of B. Virden; Ex. 3 (Investigative Strategy Report).
155 Test. of B. Virden.
156 Test. of B. Virden; Ex. 32 (recordings of the interviews).
157 Test. of B. Virden.
71. Ms. Virden visited the facility twice. In addition, Ms. Virden reviewed New Horizon’s internal review report and other documents provided by New Horizon. Ms. Virden also obtained records from J.P.’s medical providers.\footnote{Test. of B. Virden.}

72. J.P.’s medical records received by the Department do not contain any doctor’s notes to New Horizon regarding J.P.’s knee or use of the immobilizer that predates J.P.’s injury on August 4, 2016.\footnote{Test. of B. Virden; see also Exs. 17, 19, 21 (medical records).} Nor does New Horizon's file contain any note regarding his knee or the immobilizer that predates the August 4, 2016 injury.\footnote{Test. of K. Schmitz.} New Horizon’s file does contain other doctor’s notes for J.P. that were received prior to August 4, 2016 regarding other medical conditions.\footnote{Exs. 101, 104, 105 (notes from medical providers); Test. of K. Schmitz.}

73. Based on the results of its investigation, the Department concluded that that New Horizon was responsible for maltreatment by neglect for failing to supply necessary and reasonable care for J.P.\footnote{Test. of B. Virden; Ex. 1 (Department investigation memorandum).}

74. The Department concluded that neglect occurred because the facility did not obtain information or documentation regarding J.P.’s use of the knee immobilizer and allowable activities.\footnote{Id. at DHS006.} The Department noted that J.P. was not wearing his knee immobilizer at the time the injury occurred. The Department concluded that the injury would not likely have occurred if J.P. had been wearing the immobilizer.\footnote{Id.} The Department also concluded that the injury was not an unforeseen event and could have been prevented through due care.\footnote{Id.}

75. The Department found New Horizon responsible for the maltreatment, rather than the teacher who was on the playground at the time of the injury. The Department decided that New Horizon was responsible because staff at all levels, including the Director, knew J.P. had a knee immobilizer, but no staff took action to obtain clear instructions or documentation of the medical need.\footnote{Id. at DHS007.} In addition, the Department found that the staff as a whole failed to ensure that J.P. wore the immobilizer “in a manner consistent with the care plan provided by” J.P.’s mother.\footnote{Id.} For these reasons, the Department viewed the maltreatment as a systemic failure on the part of the facility.\footnote{Id.}

76. On September 27, 2016, the Department sent a letter to New Horizon by certified mail notifying the child care center of the maltreatment determination.\footnote{Ex. 29 (Determination of Maltreatment and Order to Pay Fine); Test. of B. Virden.} The
letter also ordered New Horizon to pay a fine of $1,000.\textsuperscript{170} The letter notified New Horizon that it could appeal both the maltreatment determination and the fine by requesting a contested case hearing within 15 days of receipt of the letter.\textsuperscript{171}

77. By a letter dated October 4, 2016, New Horizon requested a contested case hearing to appeal both the Department’s maltreatment determination and the fine.\textsuperscript{172}

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

**CONCLUSIONS OF LAW**

1. The Commissioner of the Department of Health (Commissioner) and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, 626.556, subd. 10i(f) (2016).

2. The Notice of Order for Prehearing Conference and Hearing are proper in all respects, and New Horizon received proper notice of the hearing. Accordingly, the Department has complied with all procedural requirements of statute and rule.

3. The Department has the burden of proving by a preponderance of the evidence that New Horizon staff were responsible for maltreatment of a child by neglect.\textsuperscript{173}

4. The term “maltreatment” is defined to include “neglect.”\textsuperscript{174}

5. “Neglect” is defined to include “failure by a person responsible for the child’s care to supply a child with necessary food, clothing, shelter, health, medical, or other care required for the child’s physical or mental health when reasonably able to do so.”\textsuperscript{175}

6. The Department has established by a preponderance of the evidence that New Horizon staff failed to supply J.P. with the necessary medical care required for his physical health when reasonably able to do so.

7. New Horizon staff were aware that J.P. had recently had surgery on his right knee and needed to keep his knee straight to allow the surgical site to heal. They were also aware that he had a knee immobilizer that would keep his knee straight. By failing to require J.P. to wear his knee immobilizer on the playground, New Horizon staff failed to provide J.P. with necessary medical care when they were reasonably able to do so.

\textsuperscript{170} Ex. 29; Test. of B. Virden.

\textsuperscript{171} Ex. 29.

\textsuperscript{172} Ex. 30.

\textsuperscript{173} Minn. Stat. §§ 256.045, subd. 3b, 626.556, subd. 10e(e) (2016); Minn. R. 1400.7300, subp. 5 (2015).

\textsuperscript{174} Minn. Stat. § 626.556, subd. 10e(f).

\textsuperscript{175} Minn. Stat. § 626.556, subd. 2(g)(1).
8. Under Minn. Stat. § 626.556, subd. 10e(e), when maltreatment is determined in an investigation involving a facility, the investigating agency is to determine whether the facility or an individual or both were responsible for the maltreatment.\(^{176}\)

9. The Department has established by a preponderance of the evidence that the facility, New Horizon, is responsible for the maltreatment of J.P. because facility staff at all levels failed to ensure that J.P. wore his knee immobilizer on the playground.

10. Minn. Stat. § 245A.07, subd. 3(c)(4), provides that a license holder shall forfeit a $1,000 fine for each determination that the license holder is responsible for maltreatment of a child pursuant to Minn. Stat. § 626.556 (2016).

11. The Department properly ordered New Horizon to pay a $1,000 fine for maltreatment of a child by neglect.

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

**RECOMMENDATION**

The Administrative Law Judge recommends that the Department’s determination that New Horizon is responsible for maltreatment of a child by neglect pursuant to Minn. Stat. § 626.556 be **AFFIRMED**. The Administrative Law Judge also recommends that the Department’s order directing New Horizon to pay a $1,000 fine for maltreatment of a child by neglect be **AFFIRMED**.

Dated: March 21, 2017

\[\text{JEANNE M. COCHRAN} \]
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

\(^{176}\) Minn. Stat. § 626.556, subd. 10e(e).
NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2016), 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 Debra Schumacher, Administrative Law Attorney, PO Box 64254, St. Paul, MN 55164-0254, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

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 (2016). 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 determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2016), the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The issue in this case is whether New Horizon committed maltreatment by neglect. Minnesota law defines maltreatment by neglect to include “failure by a person responsible for a child’s care to supply a child with necessary ... health, medical, or other care required for the child’s physical or mental health when reasonably able to do so.” This law is designed to protect children, who are of paramount concern.

In this case, the Department has demonstrated by a preponderance of the evidence that New Horizon committed maltreatment by neglect. The record shows that New Horizon was responsible for J.P.’s care while at the facility. The record also shows that New Horizon failed to provide J.P. with necessary health, medical, or other care when reasonably able to do so. New Horizon failed to ensure J.P. wore his knee immobilizer on the playground and, as a result, his knee was injured.

When J.P. returned to New Horizon after surgery, he had a knee immobilizer on his right leg to prevent his knee from bending. He needed to keep his knee straight to allow the incision on his knee to heal. J.P. was the first child at this New Horizon location to come to the facility with a knee immobilizer.

177 Minn. Stat. § 626.556, subds. 2(g)(1), 10e(f).
178 See Minn. Stat. § 626.556, subd. 1.
Upon his return, J.P.’s mother instructed his teacher that he needed to keep his knee straight and could not bend his knee. At some point later, J.P.’s mother did tell his teacher that he could have the immobilizer off if he kept his leg straight and did not bend his knee. On or around August 1, 2016, J.P. started coming to New Horizon with just the Coban wrap on his leg, and not wearing the immobilizer. J.P. had a knee immobilizer in his locker at New Horizon for use at the facility. According to his mother, J.P. was able to walk with his right leg straight from the car to the facility and did not need it on for that limited activity.

On or around August 2, 2016, both of J.P.’s teachers allowed J.P. to be on the playground without the immobilizer. Both the Director and Assistant Director were also aware that J.P. did not have the immobilizer on at times.

J.P.’s teachers, the Director, and Assistant Director at New Horizon all knew that J.P. was to keep his leg straight and not bend his knee. They were also aware that he had a knee immobilizer in his locker at the child care center. There is no dispute in this regard.

Neither the Director nor the Assistant Director ever asked J.P.’s mother about when he needed to wear the immobilizer or what type of limitations he had with respect to his knee. Nor did they ever ask for a note from the doctor regarding J.P.’s knee and use of the immobilizer. There is no evidence that J.P.’s mother ever told any staff at New Horizon that J.P. no longer needed the knee immobilizer while on the playground or in other situations where he might bend his knee. And, as noted above, all staff were aware that he was not to bend his knee.

On August 4, 2016, J.P. was on the playground at New Horizon. He kicked a soccer ball, fell on his knee, and split open his incision. J.P.’s knee was bleeding and required medical care. While on the playground, J.P. had the Coban wrap around his leg but he was not wearing the immobilizer. His knee immobilizer was in his locker at New Horizon.

179 Test. of T. Hamilton; Ex. 32 (recordings of interviews with staff).
180 Test. of T. Hamilton.
181 Test. of T. Hamilton; Ex. 32 (recordings of interviews).
182 Test. of T. Hamilton.
183 Ex. 32 (recordings of K. Neutkens and V. Ostman interviews).
184 Test. of K. Schmitz and A. Arnett.
185 Test. of K. Schmitz.
186 Ex. 32 (recordings of interviews with staff); Test. of A. Arnett; Test. of K. Schmitz.
187 Test. of K. Schmitz; Test. of A. Arnett.
188 Test. of K. Schmitz; Test. of A. Arnett.
189 See Test. of T. Hamilton; Test. of K. Schmitz; Test. of A. Arnett; Ex. 32 (recordings of interviews).
190 Ex. 32 (recording of J.P. interview).
191 Id.
192 Ex. 32. (recordings of V. Ostman and A. Arnett interviews); Test. of T. Hamilton.
193 Ex. 32. (recordings of V. Ostman and A. Arnett interviews); Test. of A. Arnett; Test. of T. Hamilton.
At the time of the injury, the New Horizon staff were aware that J.P., an eight-year-old child, liked to engage in play and was active. The Center Director was not surprised that J.P. would want to kick a soccer ball. She also acknowledged that any child on a playground might want to join in play.

The New Horizon staff failed to provide J.P. with necessary medical, health, or other care when they allowed him to be on the playground without the knee immobilizer. Being an active child, it was reasonably foreseeable that J.P. would engage in play and bend his knee while playing if not wearing the knee immobilizer. As the Center Director recognized, any child on the playground might want to join in play. It was not a rash decision by J.P., but rather, a likely event that New Horizon could have prevented by requiring J.P. to wear the knee immobilizer while on the playground to keep him from bending his knee. By failing to ensure that J.P. was wearing the knee immobilizer while on the playground, New Horizon committed maltreatment by neglect. New Horizon failed to provide the necessary care for J.P. when it was reasonably able to do so.

New Horizon argues that J.P.’s teacher who was on the playground at the time should be held responsible for any finding of neglect, not the facility. Under Minn. Stat. § 626.556, subd. 10e, when maltreatment is determined in an investigation involving a facility, the investigating agency is to determine whether the facility or an individual or both were responsible for the maltreatment. In making that determination, the comparative responsibility between the facility, other caregivers, and requirements placed on an employee are to be analyzed. Here, a preponderance of the evidence shows that the facility as a whole, not just J.P.’s teacher, is responsible for the maltreatment.

J.P. was the first child to attend this New Horizon facility with a knee immobilizer, a medical device. The staff knew he had the immobilizer to help his knee heal and was not supposed to bend his knee. Yet, the record shows that J.P. was on the playground for at least three days without the knee immobilizer, not just on August 4, 2016. His morning teacher, Ms. Neutkens, stated that J.P. was on the playground with her from August 2 to 4, 2016 without the knee immobilizer. Similarly, J.P.’s other teacher, Ms. Ostman stated that he went outside from August 2 to 4, 2016 with her with just the Coban wrap, and did not have the immobilizer on his leg. Also, the Director and Assistant Director were aware that J.P. was not wearing his immobilizer at times, but neither took any steps to make sure J.P. wore the knee immobilizer while on the playground to prevent bending of his knee. Nor did either ask for doctor’s instructions from J.P.’s mother.

Given that J.P. was the first child to attend this New Horizon facility with a knee immobilizer, the Center Director had a duty to ensure that the facility could properly care

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194 Test. of K. Schmitz.
195 Id.
196 Id.
197 Minn. Stat. § 626.556, subd. 10e(d), (i).
198 Ex. 7 at DHS 000118 (B. Virden notes of V. Ostman interview); Ex. 32 (recording of V. Ostman interview).
for J.P. and that he was wearing the knee immobilizer when needed for medical care. The Center Director did not request any written doctor’s instructions from J.P.’s mother, but rather, relied on the mother’s oral instruction to his teacher that he needed to keep his knee straight and could not bend it. To ensure J.P. received the necessary medical care to allow his knee to heal properly, the Center Director should have requested a doctor’s written instructions from J.P.’s mother. But even without written doctor’s instructions, the Director knew J.P.’s mother had instructed that J.P. was not allowed to bend his knee. Given this direction from J.P.’s mother, at a minimum, the Director should have developed a plan with staff to ensure J.P. was wearing the knee immobilizer at times when he was likely to bend his knee, including on the playground. The Director failed to do so.

The Assistant Director also failed to ensure that J.P. was wearing the knee immobilizer when needed to prevent bending of his knee. As part of her duties, the Assistant Director walks around the playground each evening to see how everyone is doing. There is no indication in the record that Ms. Arnett, the Assistant Director, ever directed Ms. Ostman, J.P.’s afternoon teacher, to have J.P. put on the immobilizer while Ms. Arnett did her rounds on the playground from August 2 to 4, 2016.

Although J.P.’s teacher, Ms. Ostman, should have required J.P. to put on the immobilizer on August 4, 2016, before going out on the playground, Ms. Ostman is not the only staff member at New Horizon who engaged in neglect. As discussed above, New Horizon staff at all levels failed to take the necessary steps to care for J.P.

This is not an instance where J.P.’s teacher had received instructions from the Director or Assistant Director and then failed to follow through on those instructions. Rather, this is a case where the facility as a whole failed to ensure that J.P. wore the knee immobilizer when necessary. As a result, J.P. injured the incision area on his knee while playing outside at the facility. J.P.’s knee had not yet fully healed as of the time of the hearing in this matter. For these reasons, the Administrative Law Judge concludes that the Department properly determined that the facility was responsible for the maltreatment by neglect of J.P. under Minn. Stat. § 626.556.

In addition, the Department properly imposed a $1,000 fine based on the maltreatment determination. Pursuant to Minn. Stat. § 245A.07, subd. 3(c)(4), a license holder is required to forfeit $1,000 for each determination of maltreatment.

J. M. C.

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199 During the recorded interview with the Department investigator, J.P.’s mother stated that she gave a note from J.P.’s doctor with instructions to J.P.’s teacher, Ms. Ostman, prior to his injury on August 4, 2016. Ex. 1 at DHS000092 (B. Virden notes); Ex. 32 (recording of T. Hamilton). At the contested case hearing, J.P.’s mother stated that she provided three notes from doctors to New Horizon regarding J.P.’s knee before the August 4, 2016 incident. Test. of T. Hamilton. There is no evidence of such a note or notes in the medical files provided by J.P.’s doctors to the Department or in New Horizon’s files. Therefore, there is not a preponderance of the evidence that one or more such notes exist.

200 Ex. 8 at DHS000121 (B. Virden notes of interview with A. Arnett); Test. of A. Arnett.