COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Docket No: OC-17-151

Department of Early Education and Care,

 Petitioner

 v.

Dori Boodakian,

 Respondent

**Appearance for the Petitioner:**

Denise J. Karlin, Esq.

Assistant General Counsel

Department of Early Education and Care

51 Sleeper Street, 4th Floor

Boston, MA 02210

**Appearance for the Respondent:**

Sharon Woodward

S & D Instructional

528 Merrimac Street

Newburyport, MA 01950

**Administrative Magistrate**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**SUMMARY OF RECOMMENDED DECISION**

The Department of Early Education and Care established, by a preponderance of the evidence, sufficient grounds under 102 C.M.R. § 1.07(4)(a)(1) to revoke the family child care license issued to the Respondent and, therefore, I recommend that the Commissioner affirm the decision to revoke the license.

**RECOMMENDED DECISION**

 On March 9, 2017, the Department of Early Education and Care (“Department”/”EEC”) issued an Order to Protect Children, Notice of Revocation, Notice of Sanctions and Notice of Intent to Fine pertaining to the family child care program licensed and operated by the Respondent, Dori Boodakian. On March 20, 2017, Boodakian filed a timely Notice of Claim concerning the revocation of her license. On March 27, 2017, the Department filed the Notice of Claim with the Division of Administrative Law Appeals (“DALA”). A pre-hearing conference was scheduled for May 8, 2017. Following the pre-hearing conference, I scheduled the evidentiary hearing for July 14, 2017 and it was re-scheduled at my request until August 14, 2017. The Petitioner filed a pre-hearing memorandum which was marked “A” for identification and the Respondent filed her pre-hearing memorandum and I marked it “B” for identification.

 I held the evidentiary hearing on August 14, 2017 at the Offices of DALA, 1 Congress Street, Boston, Massachusetts. The hearing was recorded by digital means.

 The Department called Maristela Tosato, a Family Child Care Licensor, and Maria Martinez, a Family Child Care Supervisor, as witnesses. In addition, the Department called Anne Conners, EEC Associate Commissioner for Field Investigations and Regional Director, to testify. Boodakian testified on her own behalf. Boodakian called Wendy Berkeley as a witness. Berkeley is an educator with 2 children enrolled in Boodakian’s program. Boodakian also called Theresa Ferris, another parent with a child enrolled in her program, as a witness. I admitted 12 exhibits into evidence, nine (9) introduced by the Petitioner (Pet. Exs. 1-9)[[1]](#footnote-1) and three (3) offered by the Respondent (Res. Exs. 1-3).

 Following the presentation of the evidence, the parties’ representatives made oral closing arguments. On August 22, 2017, following the hearing, I closed the administrative record.

**FINDINGS OF FACT**

 Based on the testimony and other evidence in the record, the reasonable inferences from the evidence and my assessment of witness credibility, I make the following findings of fact:

1. The Department issued a Regular License to Provide Family Child Care Services, License Number 9019595, to Boodakian on October 12, 2014. (Pet. Ex. 4)
2. Dori Boodakian was first licensed as a Family Day Care provider in 1998. Prior to that, she served in the Air Force. She gained experience in emergency preparedness while in the Air force. (Boodakian Test.)
3. Maristela Tosato is a Bilingual Family Child Care Licensor employed by the Department. Tosato has worked at the Department for seven (7) years as a Licensor. (Tosato Test.)
4. Tosato’s duties at the Department include: conducting home visits, investigating complaints, and providing training. She has a case load of about 260 providers. Tosato has taken a college course concerning childhood development and training in investigating child abuse and neglect. (Tosato Test.)
5. Tosato first visited Boodakian’s program in 2010 with her former supervisor. Tosato did not observe any violations during that visit. (Tosato Test.)
6. When Tosato started, she had 417 programs and Boodakian’s was one of them. (Tosato Test.)
7. At that time, Boodakian was working with a coach. (Tosato Test.)
8. Boodakian had a history of complaints and non-compliance. (Tosato Test., Pet. Ex. 2)
9. In 2006, it was noted that a wood stove was in use at Boodakian’s facility and there was no barricade so children could enter the room with the stove. (Pet. Ex. 2)
10. In 2007, Boodakian went inside and left children unsupervised outside. Boodakian was told, at that time, to keep children in her supervision at all times. (Tosato Test., Ex. 2)
11. A 2009 complaint, involved a child with a fractured skull and broken ribs. A finding of abuse was made in that case, against an unknown perpetrator, because no perpetrator was identified. (Pet. Ex. 2, Conners Test.)
12. Boodakian was cited for supervision and safe sleep violations. (Boodakian Test.)
13. During that investigation, it was noted that Boodakian was unable to identify marks and bumps on a child, failed to complete injury reports or report that a child was taken to medical treatment. (Pet. Ex. 6, Boodakian Test.)
14. As a result of the investigation of the matters described above, EEC began, but did not complete, the process of revoking Boodakian’s license. Instead EEC and Boodakian entered into an agreement. The agreement placed conditions on Boodakian’s license. (Tosato, Conners, Boodakian Test., Pet. Ex 9)
15. The agreement required Boodakian to take training including courses concerning supervision specific to infants and toddlers. (Boodakian Test., Pet. Ex. 9)
16. Boodakian met the requirements of the agreement and the conditions were lifted. (Conners, Boodakian Test.)
17. Tosato made 7 visits to Boodakian’s program before there were any complaints and during those 7 visits she found only minor non-compliance issues. (Tosato Test.)
18. The frequency of these visits was because Boodakian’s history required that she be monitored more closely. (Tosato Test.)
19. Maria Torrez Martinez is a Family Child care Supervisor. She supervisors 6 licensors including Tosato. Before working at EEC, she worked as Director of Child Care Services at the YMCA. Martinez has a Bachelor of Science degree in Human Services and a Master’s degree in Diversity Training. She has conducted investigations of Family Child Care programs. (Martinez Test.)
20. Anne Conners works for EEC and has for 30 years. Conners has a Bachelor of Science degree in Social Work from Syracuse University. She was a Family Child Care Licensor for about 9 years and an Investigator for 20 years. Conners is currently Regional Director of North East Region and Associate Commissioner for Field Investigations. (Connors Test.)
21. Conners became familiar with Boodakian as an investigator in 2007. (Conners Test.)
22. In 2009, Conners was assigned the case involving the child with the fractured skull and ribs involving Boodakian. The investigation was done in conjunction with DCF. (Conners Test.)
23. On September 14, 2016, Boodakian was caring for 5 children, including an infant. One of the children, a boy (“Child “A”), had recently enrolled in the program. (Tosato Test.)
24. Boodakian had been keeping Child A close because he was new to the program and had tried to leave it on two occasions. On the fourth day, because Child A seemed to be adjusting, Boodakian decided to take the children to the park. (Boodakian Test.)
25. On the way to and from the park, they passed an excavator. Some of the children expressed an interest in the equipment. (Boodakian Test.)
26. When they returned to Boodakian’s facility, the children had a snack and then played in the play area. (Boodakian Test.)
27. Boodakian knew this was Child A’s first experience with day care and was trying to encourage him to be more independent. (Boodakian Test.)
28. She made a point of checking on Child A, who was playing near the playhouses. He seemed to be curious and was moving around. Boodakian turned her back on Child A to give a bottle to a baby and, when she looked back, she did not see Child A. (Boodakian Test.)
29. Boodakian called Child A’s name and started looking for Child A. She immediately called Child A’s mother. (Boodakian Test.)
30. Child A’s mother said she would call police and come right over. (Boodakian Test.)
31. Boodakian called neighbors. (Boodakian Test.)
32. Boodakian did not call police, because Child A’s mother said she would. (Tosato Test.)
33. Boodakian continued to look for Child A. Believing Child A may have gone to look for his mother, she looked in the direction Child’s A’s mother went after dropping him off. (Boodakian Test.)
34. Child A’s father called Boodakian and told her that the police had been called. (Boodakian Test.)
35. Child A’s mother arrived about 12 minutes after Boodakian called her. (Boodakian Test.)
36. The police arrived before Child A’s mother. (Boodakian Test.)
37. Child’s A’s mother found Child A unhurt playing on the excavator about 350 feet from the Boodakian’s facility. (Boodakian Test.)
38. Child A had tried to get away from the facility on two (2) earlier occasions, but Boodakian was able to stop him. (Tosato Test.)
39. It is not unusual that children try to leave when new to a program. (Tosato, Boodakian Test.)
40. All EEC cases involving walkaways are referred to EEC’s Legal Department. (Martinez Test.)
41. The Deputy Commissioner and Department General Counsel determine what legal action is appropriate. (Conners Test.)
42. Citations have been issued to other programs as a result of children walking away from programs. (Tosato Test.)
43. Boodakian’s facility is at the end of a quiet street. At the end of Boodakian’s driveway, are some large rocks. The play area is not completely fenced in. (Tosato Test.)
44. There is no regulation requiring a fence at a facility located on a quiet street. (Tosato, ConnersTest.)
45. EEC requires a written emergency plan to make certain that parents know the plan and EEC has reviewed and approved it. (Conners Test.)
46. Boodakian had two emergency plans. One was the plan approved by EEC. Boodakian’s plan stated that she would call 911 immediately. (Tosato Test., Res. Ex. 1)
47. Boodakian self-reported to the Department that a 23 month-old boy had walked away from the outside play area at her program. (Tosato Test.)
48. Martinez reviewed Boodakian’s file after Boodakian self-reported. She noted Boodakian’s history of non-compliance. (Martinez Test.)
49. Martinez treated Boodakian’s case the same as every other case. (Martinez Test.)
50. The next day Boodakian, Tosato and Martinez had a conference call. During the call, Boodakian agreed to place her license temporarily inactive and stop providing services. (Tosato, Martinez Test.)
51. On September 16, 2016, Boodakian stopped providing care. On September 19, 2016, she surrendered her license and signed an inactive status letter. (Tosato Test.)
52. EEC and Boston Police both filed 51A Reports. A 51A report is drafted to alert the Department of Children and Families (“DCF”) that a child may have been abused or neglected so that DCF may investigate and determine if those reported suspicions are supported and, if so take the necessary steps to protect the child. (Tosato Test.)
53. EEC and DCF conducted a joint investigation. When Conners and Tosato discussed the case with personnel at DCF, they mentioned Boodakian’s history of non-compliance. The DCF Investigator was the DCF Investigator who investigated Boodakian in the 2009 case involving the child with the fractured skull and ribs. (Tosato, Conners Test.)
54. The investigation arising from the incident at issue resulted in a finding of support in a 51B Report. Boodakian appealed for a Fair Hearing.[[2]](#footnote-2) (Tosato Test.)
55. Conners reviewed the report and Boodakian’s entire file. (Conners Test.)
56. Conners met with Boodakian in October 2016 and told Boodakian she intended to recommend legal action. Boodakian agreed to remain inactive because of the DCF finding. (Conners Test.)
57. Conners recommended revocation and made a referral for legal action. (Conners Test.)
58. Conners considered: the needs and history of Child A, a toddler on his 4th day of day care, and also considered his past attempts to leave the program. Conners also considered Boodakian’s non-compliance history and the serious nature of the most recent violations and the supported 51B, which was a disqualifying background. (Conners Test.)
59. The Deputy Commissioner and General Counsel must review recommendations for legal action and decide whether to assign the matter to an attorney. (Conners Test.)
60. In this matter, Conners’s recommendation was approved and the Notice of Revocation issued. (Conners Test.)
61. Legal action is not taken every time a child walks away. The decision is made on a case-by-case basis considering a number of factors, including: the developmental needs of the child, how the child wondered away, and the educator’s history. (Conners Test.)
62. Boodakian believes she did the correct thing remaining calm and not calling the police. She would not do anything differently. (Boodakian Test.)

**DISCUSSION**

The Department has the authority to license Family Child Care facilities. G.L. c. 15D, § 6(a). The Legislature has also given the Department the authority to regulate them, providing:

Subject to the requirements of chapter 30A, **the department may suspend, revoke**, make probationary, refuse to issue or renew the license of any person, assess a civil fine within the limits prescribed by this section, or impose any other sanctions it considers appropriate, in accordance with rules and regulations promulgated by the board. This action may be **taken if the person: fails to comply with applicable rules and regulations,** furnishes or makes any misleading or false statements relative to any submission required under the rules and regulations, refuses to submit any reports or make available any records required by the rules and regulations or refuses to admit representatives of the department at any reasonable time for purposes of investigation or inspection. The department may temporarily suspend a license in an emergency situation without a prior hearing…

G.L. c. 15D, § 10 (emphasis added).

The Department, exercising the authority given it by the Legislature, has adopted regulations setting out the grounds for revoking a license. One section of the regulations provides:

(a) Grounds. The Office may make probationary, suspend, refuse to renew, revoke, or refuse to issue a license or approval if it finds any of the following:

1. the applicant or licensee failed to comply with any applicable regulation, or any deficiency correction order, notice of sanction, suspension, agreement or terms of probation;

…

102 C.M.R. § 1.07(4)(a)(1). Another provision, 606 C.M.R. § 7.10(5), requires that:

Supervision of Children. In addition to interacting with children as required by 606 CMR 7.05, **all licensees and educators must exercise appropriate supervision of the children in their care in order to ensure their health and safety at all times.** Such supervision must include, but not be limited to, indoor and outdoor activities, mealtimes, naptime, transportation, field trips, and transitions between activities.

 …

(b) Licensees and educators must use good judgment at all times and must consider the following factors when determining the appropriate level of supervision:

* + 1. the chronological age and developmental needs of each child;
		2. the behavioral characteristics of each child;
		3. the number of educators supervising each group and their qualifications;
		4. the environment and its impact upon the educator's ability to see and/or hear children; and
		5. the nature of the activity and the materials and equipment used.

(c) Educators must be in sufficient proximity to children at all times in order to be able to intervene quickly when necessary.

(d) Educators must be positioned to maximize their ability to see and/or hear children in their care.

(e) Educators must be aware of children's activities at all times.

(f) Educators must not engage in any other activities or tasks that could unnecessarily divert their attention from supervising the children.

…

(h) No child may be outdoors without appropriate adult supervision as set forth in 606 CMR § 7.10(5)(b).

606 CMR § 7.11(4)(a),(b) and (c) states:

(a) Any form of abuse or neglect of children while in care is strictly prohibited.

(b) The Licensee and all educators must operate the program in ways that protect children from abuse or neglect.

(c) Educators are responsible for abuse and neglect if:

1. the educator admits to causing the abuse or neglect, or

2. the educator is convicted of the abuse or neglect in a criminal proceeding, or

3. the Department of Early Education and Care determines, based upon its own investigation or an investigation conducted by the Department of Children and Families subsequent to a report filed under M.G.L. c. 119, §§ 51A and 51B, that there is reasonable cause to believe that the educator or any other person caused the abuse or neglect while children were in care.

102 CMR § 1.02 defines neglect as “the failure, either deliberately or through negligence or inability, to adequately care for, protect, or supervise children.”

As noted above the Legislature has given EEC authority to revoke a license when the licensee “fails to comply with applicable rules and regulations.” G.L. c. 15D, § 10. The Department has the burden to prove that it had reasonable cause to revoke Boodakian’s license. The Division of Administrative Law Appeals’ role is to evaluate whether or not there was substantial evidence to support EEC’s decision that there was reasonable cause to revoke Boodakian’s license. *Lindsay v. Department of Social Serv*. 439 Mass. 789, 798 (2003). “When the Legislature delegates to an administrative agency a broad grant of authority to implement a program of reform or social welfare, the administrative agency generally has a wide range of discretion in establishing the parameters of its authority pursuant to the enabling legislation.” *Id.* at 797

In this case, the evidence established that Child A, a 23-month-old- boy, wandered away from Boodakian and traveled some 350 feet. It established that he was missing at least 15 minutes and was found playing on a piece of construction equipment. Boodakian knew that children new to a day care are inclined to wander off. In fact, Boodakian knew that Child A had tried to wander off before. Despite all of those factors, Boodakian took her eyes off Child A long enough for him to wander off. I find that this constituted neglect as it was “the failure…through negligence or inability, to adequately care for, protect, or supervise [Child A].” *See* 102 CMR § 1.02 (defining neglect). It was a violation of: 606 C.M.R. § 7.10(5) and 606 CMR § 7.11(4)(a). The lack of a fence all the way around the play area did not violate any policy of EEC. It was, however, a factor Boodakian should have considered when deciding how to supervise Child A. *See* 606 C.M.R. § 7.10(5)(b)(1-5) and (c).

I also find that Boodakian’s failure to call the police violated her emergency plan and showed poor judgment thereby violating 606 CMR § 7.11(7)(f). While Child’s A’s mother did call the police, the police would have arrived even sooner had Boodakian called them. Moreover, the only way Boodakian could be certain that the police were called was to call them herself. Finally presenting an emergency plan to EEC and then not following it, makes it impossible for EEC to fulfill its obligations to ensure that there is an appropriate emergency plan in place.

 Pursuant to its regulations, when considering what sanction to impose, EEC had to consider at least the following factors:

(a) any non-compliance at the facility or program;

(b) the risk the non-compliances present to the health, safety, and welfare of children;

(c) the nature, scope, severity, degree, number, and frequency of the non-compliances;

(d) the licensee's failure to correct the non-compliances;

(e) any previous non-compliances; and

(f) any previous enforcement action(s).

102 C.M.R. § 1.07(2). I find that EEC considered these factors. I have considered them too and I believe that they all weigh in favor of revocation of the license. Boodakian had a history of serious non-compliance including issues around supervision that resulted in EEC and Boodakian entering into an agreement placing conditions on Boodakian’s license. In addition, there was the risk of a catastrophic result present because of the non-compliance in this case: Child A, a 23-month-old, was found playing on construction equipment 350 feet from Boodakian’s facility. Boodakian’s statement at the hearing that she would not do anything differently also weighs in favor of revocation.

 Boodakian presented letters and testimony of parents whose children have had wonderful experiences at Boodakian’s program. I note that EEC did consider that parents of children enrolled in the program had positive things to say about the program. But, while it may be true that Boodakian has provided wonderful experiences to many children, that does not change the facts pertaining to Child A and the incident of September 14, 2016. The fact that Boodakian properly supervised children before is not relevant to what she did as Child A wandered off. *See Palinkas v. Bennett*, 416 Mass. 273, 276 (1993); *see also* Massachusetts Guide to Evidence § 406(b) and note.

 In her argument, Boodakian’s representative stated that there was no evidence that Boodakian was “purposefully neglectful,” but that is not the standard. Neglect is defined by the regulations as: “The failure, **either deliberately or through negligence or inability, to adequately care for, protect, or supervise children”** and the evidence produced by EEC convinced me by a preponderance of the evidence that Boodakian neglected Child A.

 I do not recommend that the Department’s decision to revoke Boodakian’s license because the allegations of neglect were supported in a 51B Report be affirmed. While, pursuant to 102 C.M.R. § 1.07(5)(b), such evidence was prima facie evidence that there was an emergency endangering the life, health or safety of children present in Boodakian’s program, there was not an emergency situation in this matter, because Boodakian voluntarily ceased care. In addition, while the supported 51B Report gives rise to a disqualifying background, pursuant to 102 CMR § 1.05(1)(a)4, there has been no Fair Hearing decision and revoking Boodakian’s license because of the existence of the Supported 51B Report would give rise to constitutional issues. *See Peterson v. DEEC*, 17-2193-D slip op. at 9-11 (Suffolk Sup. Ct. 7/31/2017) *citing* *Lindsay, supra* at 802-803. Once the Fair Hearing decision is issued, then any potential constitutional issues arising from use of the supported 51B Report will have been satisfied. Moreover, as discussed above, the evidence presented at the instant hearing supported EEC’s decision to revoke the license without relying on the Supported 51B Report.

**CONCLUSION**

 By a preponderance of the evidence, the Department has established sufficient grounds, under 102 C.M.R. § 1.07(4)(a)1, to revoke the Regular License to Provide Family Child Care Services issued to the Respondent. I recommend that the decision be **AFFIRMED**.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Edward B. McGrath, Esq.

 Chief Administrative Magistrate

DATED: 12/28/2017

1. I *sua sponte* impounded Pet. Ex. 2 Child Abuse Neglect Non-emergency Response Report as it names Child A. *See* G.L. c. 119, § 51E [↑](#footnote-ref-1)
2. No Fair Hearing decision had been issued as of the date the record in this matter closed. [↑](#footnote-ref-2)