

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
DEPARTMENT OF CHILDREN & FAMILIES  
CENTRAL ADMINISTRATIVE OFFICE  
600 WASHINGTON STREET, 6<sup>TH</sup> FLOOR  
BOSTON, MASSACHUSETTS 02111

LINDA S. SPEARS,  
COMMISSIONER

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IN THE MATTER OF )  
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T. M. )  
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FH # 2017 0195 )  
)

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Mr. TM (“the Appellant”). The Appellant appeals the Department of Children and Families’ (“the Department” or “DCF”) decision to support a report of neglect and physical abuse pursuant to Mass. Gen. L., c. 119, sec. 51A. Notice of the Department’s decision was sent to the Appellant on January 13, 2017, and the Appellant filed a timely appeal with the Fair Hearing Office.

The Fair Hearing was held on April 20, 2017, at the DCF Springfield Area Office. The hearing record remained open until May 4, 2017, for receipt of documentation from the Appellant.<sup>1</sup> The following persons appeared at the Fair Hearing:

Linda A. Horvath, Esquire  
TM  
KS

Administrative Hearing Officer  
Appellant  
DCF Special Investigations Supervisor

In accordance with 110 CMR 10.03, the Administrative Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement or bias in this case.

The Fair Hearing was recorded pursuant to DCF regulation. 110 CMR 10.26.

The following evidence was entered into the record for this Fair Hearing:

For the Department:

Exhibit 1: 11/29/16 51A Report

<sup>1</sup> The Appellant did not forward documentary evidence to be entered into evidence.

- Exhibit 2: 12/27/16 51B Report  
Exhibit 3: DVD of Part of Restraint (Left Camera)

The Appellant did not submit documentary evidence into the hearing record.

### Statement of the Issue

The issue presented in this Fair Hearing is whether, based upon the evidence and the hearing record as a whole, and on the information available at the time of and subsequent to the response, the Department's decision or procedural action, in supporting the 51A report violated applicable statutory or regulatory requirements, or the Department's policies or procedures, and resulted in substantial prejudice to the Appellant; if there is no applicable statute, policy, regulation or procedure, whether the Department failed to act with a reasonable basis or in a reasonable manner which resulted in substantial prejudice to the Appellant; for a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, whether there was reasonable cause to believe that a child had been abused or neglected; and the actions or inactions by the parent(s)/caregiver(s) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16

For reasons set forth below, the Department's decision is **AFFIRMED**.

### Findings of Fact

1. The subject child of this Fair Hearing is the male child "B" ("the child"), who was seventeen (17) years old at the time of the 51A filing referenced below. (Exhibit 1, p.1.)
2. In November, 2016, the child was a resident in a [REDACTED] group home in [REDACTED] MA; he also spent time at his family home. (Exhibit 1, p.2; Exhibit 2, pp.1—2.) The child is a "tough child" with "a lot of aggression." (Exhibit 2, p.2.)
3. In November, 2016, the Appellant was employed by [REDACTED] ("the program") (Exhibit 1, p.1) assigned at the child's school as an Institutional Aide; he was originally hired as a Teacher's Aide. (Testimony of Appellant.) He had only been working in that capacity for two months at the time of the 51A filing (Id.), but had been working for the program for five months. (Exhibit 2, p.3.)
4. Prior to the 51A filing, the Appellant had never had a complaint filed against him. (Id. at p.2.)
5. When hired, the Appellant took all necessary trainings required by the program including CPI training (restraint training). (Exhibit 2, p.3; Testimony of Appellant.)

6. On November 29, 2016, the Department received a report pursuant to M.G.L. c. 119, s. 51A, alleging physical abuse of the child by the Appellant during an incident of the previous day, November 28, 2016, when the child punched the Appellant causing the Appellant injury, and the Appellant reacted by putting the child in a headlock. (Exhibit 1, p.2.)
7. The Department screened-in the 51A report as a non-emergency response. (Exhibit 1, p.3.)
8. The child was consistent in his reporting of the incident to the reporter (Exhibit 1, p.2), and to the DCF Special Investigator. (Exhibit 2, pp.1—2.) The child's version of events was also corroborated by staff member, Mr. AW. (Id. at p.2.) As such, the child is deemed credible in this matter.
9. The incident occurred as follows:
  - a) It is uncontested that the child was having a difficult time in class on the morning of November 28, 2016. The child requested to go to the "self-contain room or a room to take space" so he could calm down. (Exhibit 2, p.2.)
  - b) Per the child's IEP, he is allowed to listen to music on his phone when he needs to take space and calm himself, but he is not allowed to play games on his phone. (Id.)
  - c) On his way to take space, the Appellant saw the child on his phone and told him to get off it as he thought the child was playing a game. It is uncontested that the child responded back to the Appellant with an attitude and using curse words. (Exhibit 2, p.2, Statement of Child and Statement of Mr. AW.)
  - d) The Appellant then commented about how "everyone is a tough guy," and the child said, "What...are you going to do about it...you are at work?" (Exhibit 2, pp.2 and 5.) The Appellant then told the child he would meet him somewhere, asked the child for his home address, and slid a pen and paper over to the child on a chair with wheels in order to write down his address. The child perceived this as a viable threat from the Appellant. (Id.)
  - e) Thereafter, the child punched the Appellant "with a closed fist one time in his face" and a struggle began. (Exhibit 2, p.2.)
  - f) Realizing the situation was escalating, staff member Mr. AW began looking for another staff member for assistance. (Id.)
  - g) The Appellant thereafter took the child down to the floor with both hands. (Id.) When the child started to get back up, the Appellant put him in a headlock from behind "with one arm around his neck and the other arm on the side of his face, like a choke hold/wrestling move." (Id.) A "choke hold" was confirmed by Mr. AW. (Id.)
  - h) When he was in the choke hold, the child could not breathe. Mr. AW heard the child "gasping for air" and went over to assist and had to tell the Appellant to let go of the child two times before the two staff then put the child in a proper hold. (Id.) Another staff member, Mr. VC, then relieved the Appellant from the hold. (Testimony of Appellant.) The child thereafter calmed down. (Exhibit 2, p.2.)

- i) The Appellant then left the area but returned to get his backpack and was still in an "escalated" state. The child grabbed the backpack and began stomping on it, and tried to go after the Appellant. Staff then put the child in a second, proper restraint standing up. (Id.)
10. A choke hold is not a proper CPI restraint technique. (Exhibit 2, p.5.)
11. There are inconsistent descriptions of the marks on the child's neck in evidence. On the day of the incident, the reporter saw "redness" and "blotches" on the left side of the child's neck, and he complained that his side hurt. (Exhibit 2, p.4.) On the day of the incident, the child's mother saw "marks/scratches" on the child's neck. There is no time frame in evidence as to how long the marks lasted on the child. During the days after the incident the child complained to his mother that his neck hurt. (Id.)
12. Staff member, Mr. AW, opined that the Appellant "escalated the situation verbally which was his mistake," and that the Appellant attempted to set limits with the child "but he took it too far" when he gave the child the pen and paper. (Exhibit 2, p.2.)
13. It is against program policy to use a hold/restraint on a child simply because the child is yelling or screaming. A restraint is proper when/if a child becomes physical, but must be done properly and with two staff members. (Exhibit 2, p.2; Testimony of KS.)
14. Pursuant to program policy and CPI training, if a staff member gets punched, the staff must move away from the situation when possible. (Exhibit 2, p.3.)
15. The child had been attending the school/program for nine years, and had not been restrained in approximately a year (Exhibit 2, pp.1—2); he had been aggressive two months earlier when he punched a computer screen. (Id. at p.3.) The child did not have a history of hitting an individual prior to this incident, but was known to try to be intimidating toward staff. (Id. at pp.2 and 3.)
16. The Appellant's supervisor/manager, Mr. VC, had informed the Appellant and all his staff about the child's aggressive propensities and advised them not to get into power struggles with the child. (Exhibit 2, pp.2—3.)
17. The Appellant acknowledged he made the statement that "everyone is a tough guy" and that he gave the child a pen and paper to write down his address, but denied he told the child to meet him somewhere in order to fight him. He acknowledged putting the child into a "hold" after the child punched him to defend and protect himself as he could not see out of his left eye, which was swollen. He acknowledged that the child fell down but did not remember having arms around the child's neck at any time. (Exhibit 2, p.3; Testimony of Appellant.)
18. The DCF Response worker viewed the video of a portion of the incident and DCF submitted the video into evidence. (Exhibit 2, p.4; Exhibit 3.) The video shows the

Appellant put a pen and a piece of paper on a chair with wheels and slid it toward the child. The altercation then started and the Appellant's arm went around the child's neck in a "choke hold." (Exhibit 3, Left-Side Video; Exhibit 2, pp.4 and 5.) The amount of time from when the Appellant slid the pen and paper to the Appellant to the restraint of the child was approximately 20—30 seconds. (Testimony of K.S.)

19. On December 21, 2016, the Department supported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for neglect on behalf of the subject child by the Appellant due to escalating the situation verbally with this behaviorally challenged child when he said the child was a "tough guy" and offered a pen and paper to the child threatening to fight with the child outside of the program. (Exhibit 2, pp.5—6.) "This triggered [the child] and escalated him to an unsafe level." (*Id.* at p.6.) As such, the Appellant failed to provide the child with minimally adequate emotional stability and growth. (Testimony of K.S.)
20. On December 21, 2016, the Department supported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for physical abuse on behalf of the subject child by the Appellant due to his use of "excessive physical force" with the child (throwing the child down), and the use of an improper restraint (choke hold) on the child causing "marks/scratches around his neck area." (Exhibit 2, p.5; Testimony of K.S.)
21. The Department closed its case following the support decision as no services were required. (Exhibit 2, p.5.)

#### Applicable Standards

A "Support" finding means: "There is reasonable cause to believe that a child(ren) was abused and/or neglected; and The actions or inactions by the parent(s)/caregiver(s) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation of human trafficking." Protective Intake Policy #86-015, rev. 2/28/16.

"Reasonable cause to believe" means a collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected. 110 CMR 4.32(2). Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caretaker; physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals (e.g. professionals, credible family members); and the social worker's and supervisor's clinical base of knowledge. 110 CMR 4.32(2).

"Reasonable cause" implies a relatively low standard of proof which, in the context of 51B, serves a threshold function in determining whether there is a need for further assessment and/or intervention. Care and Protection of Robert, 408 Mass. 52, 63-64 (1990). "[A] presentation of facts which create a suspicion of child abuse is sufficient to

trigger the requirements of s. 51A. Id. at 63. This same reasonable cause standard of proof applies to decisions to support allegations under s. 51B. Id. at 64; M.G.L. c. 119, s. 51B.

“Neglect” is defined as failure by a caregiver, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; malnutrition; or failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. Protective Intake Policy #86-015, rev. 2/28/16.

“Abuse” means the non-accidental commission of any act by a caretaker upon a child under age 18, which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the law of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. 110 CMR 2.00.

“Physical Injury” is defined as (a) death; or (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or (c) soft tissue swelling or skin bruising depending upon such factors as the child’s age, circumstances under which the injury occurred, and the number and location of bruises; or (d) addiction to drugs at birth; or (e) failure to thrive. 110 CMR 2.00.

To prevail, an Appellant must show based upon all of the evidence presented at the hearing, by a preponderance of the evidence that: (a) the Department’s or Provider’s decision was not in conformity with the Department’s policies and/or regulations and/or statutes and/or case law and resulted in substantial prejudice to the Appellant, (b) the Department’s or Provider’s procedural actions were not in conformity with the Department’s policies and/or regulations, and resulted in substantial prejudice to the aggrieved party, (c) if there is no applicable policy, regulation or procedure, that the Department or Provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party; or (d) if the challenged decision is a supported report of abuse or neglect, that the Department has not demonstrated there is reasonable cause to believe that a child was abused or neglected. 110 CMR 10.23.

### Analysis

The Appellant is deemed a "caregiver" pursuant to Protective Intake Policy #86-015, with respect to the subject child.<sup>2</sup>

The Department's support for neglect of the child was based primarily on the child's statements, those of the witness, Mr. AW, and the video evidence of the relevant portion of the incident. Each of these three sources corroborated the others. The Appellant escalated the situation, with this emotionally and behaviorally challenged child, by making the "tough guy" comment to him, and offering a pen and paper to the child for his

<sup>2</sup> See, also, Departmental regulation 110 CMR 2.00.

address to threaten to fight him outside of the program, which was deemed a viable threat to the child. The child immediately soared into an unsafe emotional level by all accounts and punched the Appellant. By these words and actions of the Appellant, he failed to provide the child with minimally adequate emotional stability and growth, and posed a substantial risk to the child's safety and well-being.

The Appellant argued at the time of the fair hearing that after the child punched him, he went into shock and instantly reacted to defend and protect himself. He also commented that he does not remember holding the child around his neck but that he grabbed the child the "best way I could" as he could not see out of his swollen left eye. The Appellant was new to his employment with these children but was CPI trained in how to de-escalate the situation with the subject child—something he did not do. The Appellant reacted to being punched in the face with the emotionally charged, excessive response of throwing the child to the ground and putting the child in a choke hold. This response by the Appellant, though reactionary and defensive on his part, also showed his failure to provide the child with minimally adequate emotional stability and growth, and posed a substantial risk to the child's safety and well-being, and therefore also contributed to the neglect of the child.

The Department's support for physical abuse of the child was based primarily on excessive use of force, and an improper restraint of the child causing marks on his neck. The marks on the child's neck, without more evidence, do not constitute "abuse" or "physical injury", as those terms are defined. The evidence is inconsistent with respect to the description of the marks on the child's neck and how long they lasted—were they simply redness/blotches that faded after a few hours, or true marks/scratches that remained for some days thereafter. The evidence that the child complained of his side hurting or his neck hurting is also not dispositive of physical injury without more information. However, based on the evidence presented, the Appellant's actions created a substantial risk of injury. When the Appellant placed the child in a headlock/choke hold, the child was unable to breathe. A co-worker heard the child "gasping for air" and had to let the Appellant know twice that he needed to let go and put the child in a proper restraint.

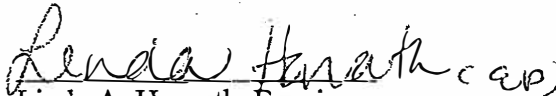
In light of the totality of evidence in this case, as discussed above and in the detailed Findings of Fact, the Department had reasonable cause to believe the child was neglected and physically abused and the Appellant's actions posed a substantial risk to the child's safety and well-being.

### **Conclusion**

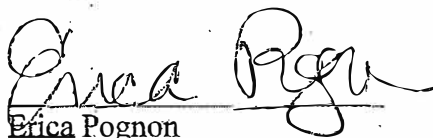
The Department's decision to support the 51A report of November 29, 2016, for neglect by the Appellant on behalf of the subject child is **AFFIRMED**.

The Department's decision to support the 51A report of November 29, 2016, for physical abuse by the Appellant on behalf of the subject child is **AFFIRMED**.

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he may do so by filing a complaint in the Superior Court for the county in which the Appellant lives within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, s. 14.) In the event of an appeal, the Hearing Officer reserves the right to supplement the Findings of Fact.

  
Linda A. Horvath, Esquire  
Administrative Hearing Officer

Date: 10/18/17

  
Erica Pogon  
Fair Hearing Supervisor