

Executive Office of Health and Human Services  
Department of Children and 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: TW

Fair Hearing # 20170200

**FAIR HEARING DECISION**

Appellant, TW, appeals the decision of the Department of Children and Families, pursuant to M. G.L. c.119, §51B, to support allegations of physical abuse and neglect on behalf of I.

**Procedural History**

On December 12, 2016, the Department of Children and Families (“Department”) received a report, pursuant to M.G.L. c. 119, §51A, alleging physical abuse of I by residential program staff, TW (“Appellant”). On January 12, 2017, the Department decided to support allegations of physical abuse and neglect on behalf of I, pursuant to M.G.L. c. 119, §51B, by Appellant.<sup>1</sup>

The Department notified Appellant of its decision and of her right to appeal. Appellant made a timely request for a Fair Hearing pursuant to 110 C.M.R. §10.06. The Fair Hearing was held over the course of two days, June 30, 2017 and August 25, 2017, at the Department’s Central Office in Boston, Massachusetts. In addition to the Hearing Officer, the following persons appeared at the Fair Hearing:

TW	Appellant
DG	Department Investigator
SC	Attorney for Appellant

<sup>1</sup> The Department also supported allegations of physical abuse and neglect against another staff person, JL. Those supported allegations are not the subject of this appeal. Therefore, they will not be addressed in this decision.

In accordance with 110 C.M.R. §10.03, the Hearing Officer attests to impartiality in this matter, having no direct or indirect interest, personal involvement, or bias in this case. The Fair Hearing was digitally recorded. All witnesses were sworn in to testify under oath. The record closed upon the conclusion of the oral evidence. The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit A Entry Letter
- Exhibit B Nursing Notes
- Exhibit C Log Sheets
- Exhibit D Intake Report – Institutional Abuse
- Exhibit E Child Abuse/Neglect Non-Emergency Response
- Exhibit F Video footage

For Appellant:

- Exhibit 1 Fair Hearing request and DCF support letter

The Hearing Officer need not strictly follow the rules of evidence....Only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 C.M.R. § 10.21

**Statement of the Issues**

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 investigation, 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) placed the child(ren) in danger or posed 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. 2/28/2016

## Findings of Fact

On the basis of the evidence, I make the following factual findings:

1. At the time in question, Appellant was a supervisor trained mental health assistant at the [REDACTED] residential program.<sup>2</sup> She had been working there for approximately three and a half years. Her duties included monitoring residents to keep them safe. [Exhibit A; Exhibit B; Testimony of Appellant]
2. Appellant had no background in mental health and received training on the job. Appellant's training included instruction on following the "program" crafted for each resident and instruction on proper restraints of residents. Restraint training was repeated on a yearly basis. [Testimony of Appellant]
3. As a mental health assistant at the [REDACTED] residential program, Appellant is deemed a caregiver pursuant to the Department's Protective Intake Policy. See below. [Testimony of Appellant; Exhibits A and B]
4. At the time in question, I was seventeen years old. She had been a resident at the [REDACTED] program for a little over three months. She was considered a "high crisis" resident as she had a history of running, suicide attempts, self-injurious behavior, and physically destructive behavior. She was on the [REDACTED] program "watch list" and needed to be under constant supervision, i.e. a staff person needed to be within arm's reach of her at all times including while I was sleeping and using the bathroom. [Testimony of Appellant; Exhibit C]
5. On December 12, 2016, I attended school. After classes were over (at approximately 2:30 p.m.), I and another [REDACTED] resident, M, waited in the "transport" room of the school for their transportation back to their program residence. There were two [REDACTED] staff with them, JL and Name Unknown. JL (another female staff person) was assigned to monitor I. At approximately 4:30 p.m., Appellant arrived for her shift and relieved Name Unknown.<sup>3</sup> [Testimony of Appellant]
6. At approximately 5:15 p.m., I became agitated as she felt Appellant and JL were talking about her. I wanted to get some water. Appellant told her that she would get the water for her which she did.<sup>4</sup> I continued to get agitated. JL remained within arm's length of I. Appellant kept her distance. I became further agitated. She went towards a chair and took hold of it as if to throw it. JL intervened and attempted to initiate a restraint of I. At that point, Appellant approached and attempted to assist JL

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<sup>2</sup> As a "supervisor trained" mental health assistant, Appellant could take on the duties of a supervisor when the supervisor was unavailable.

<sup>3</sup> This Hearing Officer notes that I and M had been waiting for their transport back to their residence for approximately two hours at his time. This was not an unusual occurrence.

<sup>4</sup> The water was located near the door. Staff did not want I to go near the door for fear that she would attempt to run.

with the restraint. I resisted and bent her body over making it difficult to accomplish an appropriate two person standing restraint. At most points during Appellant's contact with I, Appellant had one hand on I's arm. At one point, Appellant had her other hand on I's head. At another point, Appellant swung her other arm twice towards I's back with a closed fist as if punching I on the back.<sup>5</sup> Appellant then placed an open hand on I's back. I said "Ow" when Appellant placed her hand on I's back. Shortly thereafter, Appellant asked M to get help. Additional male staff responded. At this point, JL and Appellant were on either side of I with a hold on her. I was relatively calm until the male staff interacted with her. I spit some blood onto the floor. I became agitated again. The newly arrived staff put I in another restraint on a mat on the floor. I cried, yelled, and complained of arm pain during this restraint. Appellant left the room to get towels during this restraint. [Exhibit F; Testimony of Appellant; Exhibit E]

7. M remained seated across the room during the entire incident (often times laughing) until asked to get help by Appellant. [Exhibit F]
8. At all times during the incident, Appellant remained calm and did not appear angry. She did not verbally engage with I who was swearing at times during their interaction. [Exhibit F]
9. At 5:53 p.m., I was assessed by the nurse. I complained of pain when raising her right arm. I had full range of motion and no swelling or redness noted. [Exhibit B]
10. On December 12, 2016, the Department received a report, pursuant to M.G.L. c. 119, §51A, alleging physical abuse of I by Appellant. The Department initiated a response to look into the allegations. [Exhibit D]
11. I reported being choked, punched, and having her hair pulled during her interaction with Appellant and JL. I was unclear as to which staff had done what during the incident. I also reported being elbowed in the jaw and feeling like her arm was going to break during the subsequent restraint by the male staff. [Exhibit B]
12. On March 13, 2017, pursuant to M.G.L. c. 119, §51B, the Department supported allegations of physical abuse of I against Appellant. [Exhibit B; Exhibit 1]
13. Based upon a review of the documentary evidence and testimony presented, I find that there was insufficient evidence to support a finding of physical abuse of I by Appellant. [Fair Hearing Record] See Analysis
14. Based upon a review of the documentary evidence and testimony presented, I find that there was insufficient evidence to support a finding of neglect of I by Appellant. [Fair Hearing Record] See Analysis

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<sup>5</sup> Appellant asserts that she was trying to hold on to I's sweatshirt in an attempt to get her to stand up straight (so that they could properly restrain her).

## Applicable Standards

Protective Intake Policy #86-015, 6/15/1986, as revised 2/28/2016

### **Caregiver**

- (1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
- (2) Any other person entrusted with responsibility for a child's health or welfare, whether in the child's home, a relative's home, a school setting, a child care setting (including babysitting), a foster home, a group care facility, or any other comparable setting.

As such, the term "caregiver" includes, but is not limited to school teachers, babysitters, school bus drivers and camp counselors. The "caregiver" definition should be construed broadly and inclusively to encompass any person who at the time in question is entrusted with a degree of responsibility for the child. This specifically includes a caregiver who is a child such as a babysitter under age 18.

### **Abuse**

- (1) The non-accidental commission of any act *by a caregiver* which causes or creates a substantial risk of physical or emotional injury or sexual abuse to a child; or
- (2) The victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver.

This definition is *not* dependent upon location. Abuse can occur while the child is in an out-of-home or in-home setting.

### **Physical Injury**

Death; or fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such non-trivial injury; or soft tissue swelling or skin bruising depending upon such factors as the child's age, the circumstances under which the injury occurred, and the number and location of bruises.

"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. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

### **A "Support" finding means:**

#### ***Allegation(s)***

- 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 or human trafficking.

110 C.M.R. §4.32 (2)

“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.

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 and supervisor’s clinical base of knowledge.

A Fair Hearing shall address (1) whether the Department’s or provider’s decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;.... In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 C.M.R. §10.05.

To prevail, the aggrieved party must show by a preponderance of the evidence that (1) the Department’s or provider’s decision was not in conformity with the Department’s policies and/or regulations and resulted in substantial prejudice to the aggrieved party.... 10 C.M.R. §10.23.

**Analysis and Conclusion**

The burden is on Appellant to show, by a preponderance of the evidence, that the Department’s support decisions were not in conformity with Department regulations and/or policy. I find that Appellant has presented persuasive evidence in this matter to allow for a reversal of the Department’s support decisions against her. I find the evidence insufficient to support a determination that Appellant physically abused or neglected I.

Physical Abuse

During the incident on December 12, 2016, there were times at which Appellant appears to have reacted inappropriately. The video footage of the incident indicates that Appellant most likely did punch I on the back during the attempted restraint. However, there is no indication of how much force was used and there were no resulting injuries as a result of the presumed punching. The video footage also indicates a point at which Appellant had her hand on I’s head. It does not indicate that Appellant was grabbing I’s hair. Appellant does not appear angry during her interaction with I. Appellant calmly stood away when I first began to get physically agitated. It was not until I took hold of a chair and JL physically intervened that Appellant approached to assist JL with the restraint of I. Even during the restraint, Appellant does not appear to be provoked by I’s resistance and is able to calmly ask M to get assistance.

There was insufficient evidence to conclude that any intentional action of Appellant caused I to sustain a physical injury. It is unclear from the evidence what caused I to spit out blood. Further, the evidence was insufficient to make a finding that any action(s) of Appellant created a substantial risk of harm to I. Cobble v. Commissioner of the Department of Social Services, 430 Mass. 385, 392-393,395 (1999).

Neglect

In order to support a finding of neglect, the Department must determine that there is reasonable cause to believe that Appellant neglected I and that the actions of Appellant placed I in danger or posed substantial risk to I's safety or well-being. The evidence in this matter is insufficient to conclude that Appellant failed to provide I with minimally adequate essential care. Although it is reasonable to believe that at times Appellant was inappropriate during her interaction with I, this Hearing Officer is not persuaded that Appellant was neglectful. I was a "high crisis" resident who was constantly monitored due to her concerning behaviors. At the time in question, Appellant for the most part was controlled in her actions. As stated above, she stood away from I and JL until I took hold of a chair and JL initiated a restraint. She did not appear to escalate the situation by yelling or responding to I's verbal affronts. There is no reason to believe Appellant was intending to do anything other than trying to perform a proper restraint of I. Furthermore, I find the evidence insufficient to conclude that Appellant's actions placed I in danger or posed a substantial risk to her safety and well-being.

Order

The Department's decision to support allegations of physical abuse on behalf of I by Appellant TW was not made in conformity with Department regulations and policies. Therefore, the Department's decision is **REVERSED**.

The Department's decision to support allegations of neglect on behalf of I by Appellant TW was not made in conformity with Department regulations and policies. Therefore, the Department's decision is **REVERSED**.

4-30-18  
Date

\_\_\_\_\_  
Date

Antonia Chronis  
Antonia Chronis,  
Administrative Hearing Officer

Susan Diamantopoulos  
Susan Diamantopoulos  
Fair Hearing supervisor

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Linda S. Spears  
Commissioner