

**Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
600 Washington Street, 6th Floor
Boston, Massachusetts 02111**

Linda S. Spears, Commissioner

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IN THE MATTER OF: KA

Fair Hearing # 2017-0208

FAIR HEARING DECISION

Appellant, KA, 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 D.

Procedural History

On November 22, 2016, the Department of Children and Families ("the Department") received a report, pursuant to M.G.L. c. 119, §51A, alleging neglect of D by residential program staff member, KA ("Appellant"). On February 2, 2017, the Department decided to support the allegations of physical abuse and neglect, pursuant to M.G.L. c. 119, §51B, on behalf of D by Appellant.

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 on April 6, 2017 at the Department's Central Office in Boston, Massachusetts. In addition to the Hearing officer, the following persons appeared at the Fair Hearing:

KA	Appellant
JN	Department Investigator

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 conclusion of the oral evidence.

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

For the Department:

Exhibit A Intake Report – Institutional Abuse received 11/22/2016
Exhibit B Child Abuse/Neglect Non-Emergency Response completed 2/2/2017
Exhibit C Color photocopy of photograph/D's ear
Exhibit D Entry letter and support letter
Exhibit E Internal Investigation Report Summary
Exhibit F Nurse's Notes
Exhibit G Summary of Interview
Exhibit H 11/21/16 Note of J/L F/R, R.N.
Exhibit I Case review

For Appellant:

Exhibit 1 Fair Hearing request and Department 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. 110 C.M.R. §10.05

Findings of Fact

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

1. On August 25, 2016, Appellant began working at [REDACTED] as a residential counselor. [Exhibit B, p.1; Testimony of Appellant; Exhibit E, p.6]
2. As a residential counselor at [REDACTED], Appellant is deemed a caregiver pursuant to the Department's Protective Intake Policy. See below. [Exhibit B; Exhibit E; Testimony of Appellant]

3. On September 17, 2106, D, age fifteen, became a resident of [REDACTED] D had an extensive trauma history and emotional mental health issues. At intake, the [REDACTED] agreed that as an allowed coping skill D could leave her cottage when necessary to take walk around and "take space." Staff were not to stop D if she tried to leave the cottage. [Testimony of Investigator; Exhibit B, p.3; Exhibit E]
4. On November 20, 2016, Appellant was a residential counselor on duty assigned to work in D's cottage. [Exhibit B; Exhibit E; Testimony of Appellant]
5. On November 20, 2016 at approximately 1 p.m., the [REDACTED] residents were having lunch. Residential Counselor HF and D engaged in a power struggle over what D could have for lunch. A verbal altercation took place. D decided to take some space and went outside to sit on the porch. Residential Counselor KM approached D who was very upset and shaking. KM and D walked around together and processed the situation. D went back into the cottage much calmer. HF instructed D to go to her room. D stated she was not going to her room as she was already calm. Another verbal altercation took place between D and HF. D became frustrated and angry and attempted to leave the cottage to remove herself from the situation. As D was between the door and the screen door with her hand on the screen door handle, Appellant ran down the hallway, pulled D back in by the hair, and shut the door. The door hit D on her ear. D and Appellant began hitting each other. They fought from the door to the time out room where Appellant pushed D up against the wall, causing D's head to smack against the wall. HF approached and tried to grab D. Appellant and HF tried to restrain D. D screamed, tried to hit HF, and grabbed Appellant by the hair. D had a panic attack and felt as if she were blacking out. Another Residential Counselor, AM, approached and instructed the staff to leave D alone. AM was able to get D to calm down. [Exhibit B; Exhibit E]
6. D sustained a cut to the top of her right ear as a result of being struck by the door being closed by Appellant. [Exhibit B; Exhibit E; Exhibit F; Exhibit G; Exhibit H; Exhibit C]
7. D had never been restrained before the incident in question. [Exhibit B]
8. Appellant quit her job on the spot shortly after the incident despite being asked by a Senior Staff Supervisor not to jeopardize the safety of the staff and children in the cottage by leaving the shift short staffed. [Exhibit E]
9. On the morning of November 21, 2016, D was seen by a nurse who checked her arms and neck for any injuries, marks, or bruises. None were noted. The nurse did note dried blood on the top of D's right ear. The nurse cleaned the area, applied Bacitracin, and noted that there was a small area (approximately a ½ centimeter) in which the skin had been scraped off and which was starting to discolor/bruise. The area was sore. [Exhibit G]

10. On November 22, 2016, the Department received a report, pursuant to M.G.L., c.119, §51A, alleging physical abuse and neglect of D by Appellant. The Department initiated an investigation of the subject allegations. [Exhibit A]
11. On February 2, 2017, the Department supported allegations of physical abuse and neglect of D. [Exhibit B; Testimony of Investigator; Exhibit 1]
12. I do not credit Appellant's self-serving denials regarding the incident. Her denials are not corroborated by the statements of [REDACTED] residents and other staff who had no motive to lie. [Exhibit B; Exhibit E]
13. The cut and resulting bruise to D's right ear constitutes a physical injury as defined by Department regulations. 110 C.M.R. §2

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.

Neglect

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. 110 C.M.R. §2

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.... 110 C.M.R. §2

Physical Injury means

- (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 drug at birth; or
- (e) failure to thrive. 110 C.M.R. §2

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.

Reasonable Cause to Believe

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 the credibility of persons providing relevant information, would lead a reasonable person to conclude that a child has been abused or neglected.

"Reasonable cause" implies a relatively low standard of proof which, in the context of the 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 § 51A." Id. At 63. This same reasonable cause standard of proof applies to decisions to support allegations under §51B. Id. At 64; G.L. c.119, s 51B. 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.... 110 C.M.R. §10.23.

Analysis

On the basis of the factual findings and standards set forth above and for the reasons set forth below, I uphold the Department's decisions.

Neglect

The burden is on Appellant to show, by a preponderance of the evidence, that the Department's neglect support decision was not in conformity with Department

regulations and/or policy. On November 20, 2016, instead of trying to diffuse an escalating set of circumstances, Appellant engaged with D in a manner which aggravated the situation. Appellant did not allow D to take her approved method of calming down and instead prevented her from doing so. During Appellant's interactions with D, D was grabbed, hit, pushed against a wall, and caused to sustain a cut to her right ear. Given all the evidence, it is reasonable to believe that Appellant's behavior on the day in question was aggressive and out of proportion to the situation. It is also reasonable to believe that during this event Appellant was not taking D's wellbeing and safety into consideration.

In making a determination on the matter under appeal, the Hearing Officer shall give due weight to the clinical decision made by a trained social worker (110 CMR 10.05). Appellant has not presented persuasive evidence in this matter to allow for a reversal of the Department's neglect support decision. After considering all the evidence, I find that the Department had reasonable cause to support the allegations of neglect of D by Appellant KA. The totality of the evidence indicates that Appellant KA failed to take those actions necessary to provide D with minimally adequate essential care in the form of emotional stability and growth and other essential care, i.e. safety. "Reasonable cause" is a low standard of proof. Taking into consideration all of the evidence presented as well as the clinical expertise of the Department staff, I find that the evidence was sufficient to rise to the level of "reasonable cause to believe" that neglect did occur. See Care and Protection of Robert, *supra*. Furthermore, Appellant's actions posed a substantial risk to D's safety and well-being.

Physical Abuse

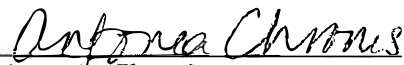
Appellant has not presented persuasive evidence in this matter to allow for a reversal of the Department's physical abuse support decision. The instant situation is dissimilar to that outlined in Cobble v. Commissioner of the Department of Social Services, 430 Mass. 385 (1999) in that Appellant was not acting in a calm, controlled manner in an effort to discipline D. On the afternoon of November 20, 2016, Appellant physically interacted with D in such a manner that D sustained an injury to her right ear. Appellant was acting aggressively and not following D's approved behavior plan. The Department has presented a reasonable basis for its decision and complied with its regulations in finding "reasonable cause to believe" that Appellant KA physically abused D. "Reasonable cause" is a low standard of proof. See Care and Protection of Robert, *supra*. In addition to causing a cut and bruising to D's ear, Appellant's actions posed a substantial risk to D's safety and well-being.

Conclusion and Order


The Department's decision to support the allegations of neglect of **D** by Appellant KA was made in conformity with Department regulations and with a reasonable basis. Therefore, the Department's decision is **AFFIRMED**.

The Department's decision to support the allegations of physical abuse of **D** by Appellant KA was made in conformity with Department regulations and with a reasonable basis. Therefore, the Department's decision is **AFFIRMED**.

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


Antonia Chronis,
Administrative Hearing Officer

11-28-17
Date


Susan Diamantopoulos
Fair Hearing Supervisor