

**THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
DEPARTMENT OF CHILDREN AND FAMILIES  
CENTRAL ADMINISTRATIVE OFFICE  
600 WASHINGTON STREET  
BOSTON, MASSACHUSETTS 02111**

Linda Spears  
Commissioner

Voice: (617) 748-2000  
FAX: (617) 261-7428

IN THE MATTER OF )

IG )

FH #2017-0377 )

)  
)  
) **FAIR HEARING DECISION**  
)  
)  
)  
)

The Appellant in this Fair Hearing is IG (hereinafter "IG" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegation of physical abuse pursuant to M.G.L. c. 119, §§51A and B.

**Procedural History**

On February 10, 2017, the Department received a 51A report alleging physical abuse of (hereinafter "J" or "the child") by the Appellant. The Department conducted a response and, on March 3, 2017, the Department made the decision to support the allegation of physical abuse by the Appellant. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on June 6, 2017 at the DCF New Bedford Area Office. All witnesses were sworn in to testify under oath. The record closed at the conclusion of the Hearing

The following persons appeared at the Fair Hearing:

Carmen Temme  
IG  
JM

Fair Hearing Officer  
Appellant  
Department Response Social Worker

In accordance with 110 CMR 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 recorded pursuant to DCF regulations. 110 CMR 10.26

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

For the Department:

Exhibit A DCF Intake Report/51A Report, dated 2/10/2017  
Exhibit B DCF Child Abuse/Neglect Non-Emergency Response, completed 3/3/2017  
Exhibit C CD/video recording of reported bus incident, 2/8/2017  
Exhibit D Photo of child, taken by child's mother on 2/8/2017  
Exhibit E Photo of child, taken by child's mother on 2/8/2017

For the Appellant:

None

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

**Issue to be Decided**

The issue presented in this 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, the issue is 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, the issue is 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. 2/28/16

**Findings of Fact**

1. The subject child of this Fair Hearing is J; at the time of the subject 51A response J was

fourteen (14) years old. (Exhibit 1, p.1; Exhibit B, p.1)

2. At the time of the reported incident, the Appellant was J's paraprofessional, in charge of him on the bus ride home from school; (Fair Hearing Record) therefore, he is deemed a caregiver pursuant to Departmental regulation 110 CMR 2.00.

3. The Appellant started his employment as a paraprofessional with the [REDACTED] School Department in September 2016; this was his first job working with children. (Testimony Appellant) According to the Appellant, while he was hired as a paraprofessional the school utilized him as a "behaviorist." (Testimony Appellant; Exhibit B, p.3) According to the Appellant, a paraprofessional assisted the classroom teachers, a behaviorist restrained the children. (Testimony Appellant) According to the Appellant, he was trained in restraints, having completed an eight (8) hour class in "CPI" training. (Exhibit B, p.4) At the time of the subject 51A report, the Appellant had just received his "blue card to go hands on." (Testimony Appellant)

4. At the time of the subject 51A response, J was in the 8<sup>th</sup> grade at the [REDACTED] School. J received special education services; J was in a behavioral classroom. J was diagnosed with ADHD. At the time of the reported incident, he had not taken medication for over one (1) year; according to his parents, his behavior was good. (Exhibit A, p.2; Exhibit B, p.3)

5. On February 10, 2017, the Department received a report from a mandated reporter pursuant to M.G.L. c. 119, §51A, alleging physical abuse of J by the Appellant; the reported incident took place on February 8, 2017. Video/audio footage taken on the school bus depicted the Appellant punching J in the face, slapping him on the arm, putting him in a headlock, grabbing and pulling J's arm towards him. The Appellant was reportedly heard "threatening to slit the child's throat." The child is heard screaming "Just let go of me...this is my stop." According to the mandated reporter, it was clear that the Appellant was attempting to "incite" J during these interactions. The Appellant followed the child off at his bus stop asking, "Do you want to go outside? Just hit me." At no point was the child seen putting his hands on the Appellant. Also present were the bus driver and a bus monitor. (Exhibit A, p.2; Testimony JM)

6. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to JM (hereinafter "JM") Social Worker from the DCF New Bedford Area Office. (Testimony JM; Exhibit B)

7. At the end of its response, the Department supported the aforementioned report for physical abuse of J by the Appellant. The Department based this determination on the following:

- The video showed the Appellant throwing J on the floor, pushing child's head towards the window, hitting him in the face as well as swearing and threatening the child.
- J's account of the reported incident was consistent with that of the mandated reporter and what was seen on the school bus video.
- J sustained abrasions to his neck and redness on his face from the incident.
- The [REDACTED] Public Schools immediately terminated the Appellant's employ.<sup>1</sup>

<sup>1</sup> The Appellant maintained that his union representative never spoke with him prior to the meeting with the school superintendent and asked him to say otherwise during the meeting. The Appellant was "shocked" at how the school meeting

The Department concluded this constituted physical abuse as defined by its regulations and policies. (Exhibit B, p.5; Testimony JM)

8. The Appellant denied that he hit, punched, slapped, or put the child in a "choke hold." (Exhibit B, p.4; Testimony Appellant) According to the Appellant, the child's abrasions were the result of J's failure to "comply" with the Appellant's attempts to calm him after the child reportedly made derogatory statements about a female.<sup>2</sup> The Appellant acknowledged that he swore (Testimony Appellant) and perhaps "lost his cool" on several occasions when verbally responding to J's threats to kill his family. (Exhibit B, p.4)

9. The video/audio recording clearly depicts the Appellant getting out of his seat after telling J to stop. The Appellant sits down next to J; the Appellant pushes his body against the child's and puts his arms around the child's neck. The Appellant pushes the child back into his seat where he resumes pushing his body sideways into the child. The Appellant and the child push back and forth. J can be heard cursing at the Appellant. The Appellant pushes the child backwards, down onto the floor of the aisle and appears to be holding the child down by his neck. The Appellant lets the child up and they both return to the seat where they continue to struggle with the child's head by the window. The Appellant is heard saying "Stop" while the child continues to curse and tell the Appellant to get off him. The Appellant then pushes the child down onto the seat; the child cannot be seen as the Appellant holds him down. The Hearing Officer notes that while J struggled with the Appellant, he was not striking out at the Appellant. The Appellant is heard cursing and yelling at the child. (Exhibit C, starting @ 3 minutes 50 seconds)

10. When J sits up, he throws markers towards the front of the bus. The Appellant pushes J down on the seat with his head facing into the aisle. When J sits back up, the Appellant is heard telling J that he "stinks" and then he laughs. The Appellant moves his bag from the seat in front of J to the seat behind J while standing in the aisle next to J's seat. The Appellant briefly sits down. There is a verbal exchange and the Appellant gets up, slaps/grabs J's face and places his body over the child's body; the Appellant's hands are not visible. When J sits up, he is seen holding his left eye, appearing in pain. At this point, J stands up and yells that he wants to get off the bus. (Exhibit C, starting at 5 minutes 51 seconds)

11. The Appellant and the child continue to push back and forth; J repeatedly stands up yelling at the Appellant, "Don't fuckin touch me, I want to get off the fucking bus." The Appellant and J continue to exchange words. The Appellant is heard responding to J that he would "break his neck and that his kids would "slap the shit out of you." J continues to yell that he wants to get off the bus. The Appellant then asks J if he wants to "take it outside and whether J "wants to take a "swing" at him. As the bus comes to a stop at J's house, the Appellant pushes back on J as he attempts to leave his seat. J exits the bus with the Appellant following. The Appellant is out of the bus for at six (6) seconds. (Exhibit C, starting at 6 minutes 57 seconds)

12. According to J's stepfather, he went outside and the bus driver stated that J had been "disrespectful" and drove away. (Exhibit B, p.2) This statement contradicts the Appellant's

---

occurred, likening the meeting to a "lynching mob." The Appellant maintained that the superintendent omitted certain facts and "wrote her own narrative."

<sup>2</sup> These reported statements could not be heard on the video recording. (Testimony JM; Exhibit C)

version of events. According to the Appellant, he followed the child off the bus to ensure that he "did not do anything crazy;" the Appellant reportedly explained what had occurred to the stepfather. During this reported conversation, the stepfather allegedly acknowledged J's difficult behaviors and stated that at times he too needed to "smack" J. The Appellant stated that he "would expect him {stepfather} to change his story." I do not credit the Appellant's version of events. The video depicts the Appellant walking off the bus continuing to instigate the child. The video recording shows that the Appellant returned to the bus within six (6) seconds of exiting the bus. (Exhibit C) I find it improbable that the Appellant had the aforementioned conversation with the child's stepfather in that duration of time.

13. According to the child's parents, when J arrived home from school he was "crying and mad." J informed them that the Appellant had him in a chokehold; J punched him to get him off. According to J, the Appellant choked him; J reported that he punched the Appellant in an effort to defend himself. (Exhibit B, p.2) The video recording did not capture J punching the Appellant. (Exhibit A, p.2; Exhibit C) The Appellant hit J in the eye and held him down between the seats. The Appellant pushed J's face against the window and swore at him. (Exhibit B, p.2; Testimony JM) Prior to the reported incident J, and the Appellant had a good relationship. (Exhibit B, p.2; Testimony Appellant)

14. J's sustained abrasions to his left shoulder and redness to his left cheek because of the Appellant's actions. (Exhibit D; Exhibit E)<sup>3</sup>

15. The Appellant viewed the video recording during his meeting with the school administration and his union representative. According to the Appellant, after viewing the video recording, this Hearing Officer would arrive at the conclusion that he was "just doing his job." According to the Appellant, the situation could not be viewed in a vacuum, and one needed to understand what was going on. According to the Appellant, J was swearing and using vulgar language directed at females. According to the Appellant, he could see that the situation was starting to escalate, he "was just trying to make him comply," and let J know that the Appellant was "in control." On this day, he was the only "behaviorist" assigned to the bus; typically, there are two (2). The other male was a monitor who did not deal with the behavior kids.<sup>4</sup> In hindsight, the Appellant could not think of a different way he could have handled the situation on a moving bus and with no established protocol. (Testimony Appellant)

16. While J was verbally aggressive and utilized inappropriate language, I find that the Appellant repeatedly provoked the child, thereby escalating the situation. I find that the Appellant utilized excessive and inappropriate physical force. The child sustained physical injuries as a result. (Exhibit C; Exhibit D, Exhibit E Testimony JM; Exhibit B, p.2, p.4)

17. The [REDACTED] School Department contacted the [REDACTED] Police who planned to charge the Appellant with Felony Assault and Battery. (Exhibit B, p.2; Testimony JM) According to the Appellant, a July 24, 2017 pre-trial date was scheduled for Abuse on a Minor Child.

<sup>3</sup> The photo documentation was taken by the child's mother on February 8, 2017 and copies provided to the Department. (Testimony JM; Exhibit B, p.3)

<sup>4</sup> The monitor and the bus driver were employed by [REDACTED] Bus; neither the monitor nor the bus driver intervened during the reported incident. They were no longer permitted to work with the [REDACTED] Public School (Exhibit A, p.2, p.3; Exhibit B, p.4; Exhibit C)

(Testimony Appellant)

18. The Appellant noted his concern that the Department's decision would affect his future ability to go on field trips with his daughter and grandchild. (Testimony Appellant)

19. The Department's decision to support the allegation of physical abuse was made in conformity with its regulations, policies and with a reasonable basis. 110 CMR 2.00, 4.32 The Appellant's continued use of excessive and inappropriate physical force while instigating and threatening the J, caused abrasions on J's neck and a red mark on his cheek, placing J at substantial risk of physical injury. 110 CMR 2.00, Cobble v. Commissioner of the Department of Social Services, 719 N.E.2d 500, 430 Mass.385 (1999) The Appellant's repeated actions placed J in danger. DCF Protective Intake Policy # 86-015, rev. 2/28/16) The video footage clearly depicts the reported incident and the Appellant's repeated provocation. (Exhibit C)

### Applicable Standards

Caregiver is defined as:

- (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. 110 CMR 2.00

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A." Care and Protection of Robert, 408 Mass. 52, 63 (1990) 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 "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. Id. at 64

"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)

"Abuse" means

- (a) "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 OR  
(b) "The victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver. DCF Protective Intake Policy, (revised 2/28/2016) at p.8

This definition is not dependent upon location. Abuse can occur while the child is in an out home or in home setting. ~~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 on such factors as the child's age, circumstances under which the injury occurred, and the number and location of bruises..." 110 CMR 2.00.

Substantial Risk of Injury is defined as: "A situation arising either through intentional act or omission which, if left unchanged, might result in physical or emotional injury to a child or which might result in sexual abuse to a child."

A finding of support requires that there be: 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. (DCF Protective Intake Policy #86-015, rev. 2/28/2016)

"Danger" is defined as a condition in which a caregiver's actions or behaviors have resulted in harm to a child or may result in harm to a child in the immediate future. DCF Protective Intake Policy #86-015, rev. 2/28/16

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Police, (rev. 2/28/2016)

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 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 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

---

### Analysis

It is undisputed that at the time of the reported incident, the Appellant was a caregiver for J. 110 CMR 2.00.

The Appellant contested the Department's decision to support the allegation of physical abuse, arguing that the reported incident necessitated the need for the Appellant to exert "control" over the escalating situation on the school bus as J failed to "comply." The Appellant's assertions are troublesome to this Hearing Officer as he showed no remorse or insight except to say that he verbally "lost his cool" with the child, due to the child's behaviors. I did not find the Appellant's testimony regarding his actions or his intent to be credible. Additionally, I do not credit the Appellant's contentions that a lack of established bus protocol for such situations and having only one paraprofessional on the school bus were compelling factors and justification for his actions. The Appellant, despite having viewed the video, did not see, or acknowledge how his actions directly contributed to the child's behavioral responses.

The first three (3) plus minutes of the video show the child and the Appellant talking, laughing and at one point rough housing. While not audible on the video recording, the Appellant maintained that J then made a vulgar comment about a female; this initiated the Appellant's intervention. The verbal exchange quickly escalated into a physical struggle between the Appellant and J. Rather than attempting to calm the situation, the Appellant verbally provoked the child, a deliberate act of goading and adding fuel to the fire. The video shows no efforts to diffuse the situation and culminates in the physical struggle and verbal exchanges between the two.

The Appellant's physical intervention was excessive and caused physical injury to the child. Had the bus not arrived at the child's stop, the situation most likely would have escalated further resulting in additional harm and danger to the child. The Hearing Officer carefully considered the circumstances under which the injuries occurred and finds that the Appellant was either not in control of his actions or grossly misguided in his decision-making. 110 CMR 2.00 The Court addressed the issue of physical discipline/ intervention in Cobble case, where the Court held that the use of physical discipline did not constitute abuse. This case is distinguishable from Cobble as the Appellant was not a parent and Court anticipated and conveyed that "... a method of corporal punishment similar to the plaintiffs' could, in different circumstances, rise to the level of severity that would result in the actual infliction of impermissible injuries or, alternatively, warrant a rational inference that it posed a substantial risk that such injuries would result. Cobble v. Commissioner of the Department of Social Services, 719 N.E.2d 500, 430 Mass.385 (1999) This is such a case.



Unlike the nine (9) year old boy in Cobble, L suffered abrasions on his neck from being grabbed/placed in an arm hold and redness on his face from the Appellant's physical intervention. While J repeatedly cursed at the Appellant, the video recording did not show that he was physically aggressive with the Appellant. The video clearly depicted that the Appellant put his arms and hands around J's neck, repeatedly shoving J into the side of the bus, slapping/grabbing his face and throwing him down on the seat and on the bus floor. Also ~~dissimilar to the parent in Cobble, the Appellant in the instant case was overly reactionary,~~ provoking and was not in control. The altercation culminated with the Appellant threatening to break J's neck and asking J if he wanted to "take a swing" at the Appellant. The evidence, in its totality, was sufficient to support the Department's determination of physical abuse, as delineated in its regulations and policy. 110 CMR 2.004.32(2); DCF Protective intake Policy #86-015, rev. 2/28/16

"Reasonable cause" implies a relatively low standard of proof which, in the context of 51A, "serves a threshold function" in determining whether there is a need for further assessment and/or intervention. "[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of Section 51A." This same reasonable cause standard of proof applies to decisions to support allegations under 51B. Care and Protection of Robert, 408 Mass. 52, 63 (1990). As set forth in the Findings, and above, I find that the evidence presented was sufficient to support the Department's findings.

The Appellant did not present persuasive evidence in this matter to allow for a reversal of the Department's support decision for physical abuse. The undersigned will not pass clinical judgment on the Department's broad discretion as delineated in the regulations.

Conclusion and Order

The Department's decision to support the 51A report for physical abuse of J by the Appellant, 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 in Suffolk County, or in the county in which he resides, 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.



Carmen Temme  
Administrative Hearing Officer

1-19-18

Date



Susan Diamantopoulos  
Fair Hearing Supervisor