THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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Commissioner

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IN THE MATTER OF	)	
	)	
KM	)	**FAIR HEARING DECISION**
	)	
FH # 2017-0412	)	
	)	

The Appellant in this Fair Hearing was KM (hereinafter "KM" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support allegations of sexual abuse (sexually exploited child) pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On March 1, 2017, the Department of Children and Families received a 51A report from a mandated reporter alleging the sexual exploitation of O (hereinafter "O" or "the child") by a substitute teacher, KM. A non-emergency response was conducted and on March 21, 2017, the Department made the decision to support the allegation of sexual abuse of O by the Appellant, KM. The Appellant's name was placed on the Department's Central Registry of Alleged Perpetrators ("Central Registry") and pursuant to M.G.L. c. 119, s. 51B (4) the allegations were referred to the District Attorney. The Department notified the Appellant of its decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was initially held on May 18, 2017, at the DCF Fall River Area Office, in Fall River, Massachusetts. All parties were sworn in to testify under oath. The record remained open until June 9, 2017, to allow for additional documentary evidence to be submitted by the Appellant.[1] On June 9, 2017, the record closed.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira — Fair Hearing Officer

[1] On June 8, 2017, the Fair Hearing Officer received additional documentation from the Appellant, her own statement and character references.

KM	Appellant
SO	DCF Supervisor
JG	DCF Response 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 Department regulations. 110 CMR 10.26

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

For the Department:
Exhibit A: 51A Report, dated 03/01/2017
Exhibit B: 51B Report, completed 03/21/2017

For the Appellant:
Exhibit 1: Appellant's Written Testimony
Exhibit 2: Character References

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

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

1. At the time of the filing of the subject 51A report, O was fifteen (15) years old. He resided with his parents in [redacted], MA. He attended [redacted] High School in [redacted], MA where he met the Appellant in the capacity of a student/teacher relationship. (Exhibit A; Exhibit B)

2. The Appellant was a substitute teacher at [redacted] High School where O was a student; therefore she was a "caregiver" pursuant to Departmental regulations and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

3. The Appellant did not have a previous history with the Department. (Exhibit A, p. 4; Exhibit B, p. 1)

4. On March 1, 2017, the Department received a report from a mandated reporter alleging sexual abuse (sexual exploitation) of O by the Appellant, pursuant to M.G.L. c.119, §51A. According to the mandated reporter, the Appellant expressed her concern to the school Principal that O had obtained photos from her cell phone and was threatening to release them if she did not have sex with him. The child disclosed that the Appellant gave him access to sexually explicit photos contained in her cell phone, allowing him to send the photos to his own cell phone. Reportedly, the Appellant placed her phone on her desk so he was able to access it, using her passcode and gain entry. The reporter alleged the Appellant and O also had an inappropriate relationship, as O was not a student in her class but they had lunch together in her classroom and communicated via Snap Chat. Subsequently, the Appellant was relieved from her duty at the high school and was no longer substituting as a teacher. (Exhibit A, pp. 2 & 5)

5. The report was screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, §51B. The allegation of sexual abuse (sexual exploitation) of the child by the Appellant was supported by the Department at the conclusion of the response. The allegation was supported because the Appellant was a teacher at O's school and allowed him to skip class and lunch with her in her class room. The Appellant made her phone available to the subject child and allowed him to download sexually explicit photos of her. The Appellant made no attempt to inform the school administrators until she was threatened by O that he was going to release the photos on Facebook. The child disclosed during a forensic interview, (hereinafter SAIN[2]) interview the Appellant told him to crop her face out of the photos when he refused to delete them. The Department had reasonable cause to believe that the Appellant offered to engage in sexual conduct with the child while in a role of a caregiver. Subsequently, the Department determined the Appellant sexually exploited the child while in a superior role as a teacher. (Exhibit B, p. 8)

6. On March 7, 2017, the child underwent a SAIN interview at the [redacted] Child Advocacy Center (hereinafter "CAC"). (Exhibit B, p. 2)

7. During the SAIN interview, the child acknowledged he obtained pictures of the Appellant, who was a substitute teacher at his high school, that were inappropriate. He disclosed he told the Appellant he was going to send the pictures to his friends if she did not have sex with him and she replied by saying they needed to wait until he was sixteen (16) years of age until they could engage in sex. The child disclosed they met outside at

[2] "SAIN" is an acronym for Sexual Abuse Intervention Network. Through a joint effort by the Department of Children and Families and the District Attorney's office, the interview of the alleged victim is conducted with members of a team to eliminate the need for several interviews.

the school when he was playing basketball and the Appellant began a conversation with him. Their conversation continued and O "went with it". The Appellant "was getting way too comfortable." The Appellant spoke about other "guys" that she had slept with in the past. O also skipped lunch and the last period class to go to the Appellant's classroom to be with her; she allowed this to occur. (Exhibit B, p.3)

8. During the SAIN interview, the child admitted he took the Appellant's phone and told her he was going through her pictures and she responded "ok." The child disclosed he showed the Appellant the inappropriate pictures of herself and her face got red, but she never took her cell phone from him. He sent the pictures to his phone and showed the Appellant what he did. Two (2) weeks later the Appellant asked him to crop her head from the pictures. The child asked the Appellant when they could have sex and she told him he needed to wait until he was sixteen (16) and sent him a copy of a "law" regarding sexual relations with minors under the age of a sixteen. (Exhibit B, p. 3; Testimony of JG)

9. During the SAIN interview, the child described the pictures of the Appellant; one with her fully naked and one with her in her underwear. The Appellant and child often spoke after school on Snap Chat and had hugged each other in her classroom when no one was looking. The child acknowledged there was sexual talk and the promise of having sex in a few months when he turned sixteen (16) years old; and that this type of talk continued, they communicated on Snap Chat outside of school, until the Appellant complained to the school administration and the police intervened. (Exhibit B, p. 3; Testimony of JG)

10. Following the SAIN interview, NH, the child's mother's boyfriend, disclosed he had caught O masturbating to his phone before this all came about. (Exhibit B, p. 3)

11. Following the SAIN interview, it was determined there was insufficient evidence to criminally charge the Appellant. (Exhibit B, p. 3)

12. When interviewed, the Appellant acknowledged that she did not tell anyone that she was allowing O to skip the last two (2) periods of the day at school. She also acknowledged she allowed O to play with her IPhone and found a picture of her on Snap Chat, in which she was naked wearing only pink tube socks, with her legs spread. The Appellant acknowledged that O had another picture of her wearing only a bra and underwear. (Exhibit B, p. 4) The Appellant asked O to delete the photos but he refused. She acknowledged she told him to at least crop the picture so that her face did not show in the photo. The Appellant was aware that O sent the pictures to himself and showed it to her in his own phone's memory. (Exhibit B, p. 4; Exhibit 1; Testimony of the Appellant)

13. The Appellant maintained she did not give O permission to handle her cell phone, she asked him to give it back and he said no initially but then gave it back at the end of the class. O and other students often ate lunch in her classroom. (Exhibit B, p. 4; Exhibit 1; Testimony of the Appellant)

14. The Appellant admitted to not informing the school administration because she was

trying to handle the situation herself. The Appellant was anxious and overwhelmed with the situation because the child insisted on wanting to have sex with her, which was why she sent him an article regarding having sex with a minor under the age of sixteen (16). The Appellant maintained it was never intended to follow through when she told O that it would happen as soon he was over sixteen (16). (Exhibit B, p. 4; Testimony of the Appellant)

15. The Appellant acknowledged she came forward to the school administration only when O threatened to send her pictures to his friends if she did not have sex with him. However, she denied having any sexually inappropriate conversations or encounters with the subject child. (Exhibit B, p. 4; Testimony of the Appellant)

16. On March 1, 2017, the Appellant had an internal investigation/interview with the school principal and other administrators. The Appellant acknowledged during the interview she allowed O to skip class and lunch with her in the classroom. She also allowed O access to her cellphone, which contained sexual explicit photos of herself. The Appellant confirmed she sought administrative intervention when she was threatened by O that he would send the photos to his friend if they did not sex. Following the internal investigation, the Appellant was released from her teaching duties. (Exhibit B, pp. 6-7)

17. The Appellant was described as a person devoted to the teaching profession, especially to children with special education needs and delays. (Exhibit 2) She was also described as a person who was the victim in this instant matter and taken advantage by the child, and that she was substantially prejudiced by both the internal school investigation and the Department's response. (Exhibit 1; Exhibit 2)

18. Based upon the Appellant's reporting and testimony, I find that the Appellant was not a credible reporter of facts.

19. The Department testified the Appellant used poor judgment and made poor decisions with respect to her inappropriate relationship with O, which led to a situation she desperately tried to get out of. The child had some limitations and the actions of the Appellant subsequently exploited the child. (Testimony of the DCF Supervisor)

20. In light of the totality of the evidence of this case, I find that the Department had reasonable cause to believe the allegation of sexual abuse of O by the Appellant was supported by sufficient evidence and made in compliance with its regulations and policies. (110 CMR 4.32, 4.37; DCF Protective Intake Policy #86-015 Rev. 2/28/16; *See* Analysis)

Applicable Standards

"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)

"[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

A "caregiver" means a child's (a) parent,(b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child's health or welfare; and (e) 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; DCF Protective Intake Policy #86-015, rev. 2/28/16

"Sexual abuse" is any non-accidental commission of any act by a caregiver upon a child that constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caregiver and a child for whom the caregiver is responsible. DCF Protective Intake Policy #86-015, rev. 2/28/16

"Sexually Exploited Child" (as defined in M.G.L.c. 119, §21) is any person under the age of 18 who has been subject to sexual exploitation because such person:

(1) is the victim of the crime of sexual servitude pursuant to section 50 of chapter 265 or is the victim of sex trafficking as defined in 22 United States Code 7105;
(2) engages, agrees to engage or offers to engage in sexual in sexual conduct with another person in exchange for a fee, in violation of subsection (a) of section 53A of chapter 272, or in exchange for food, shelter, clothing, education or care;
(3) is victim of a crime of inducing a minor into prostitution under section 4A of chapter 272; or
(4) engages in common night walking or common streetwalking under section 53 of chapter 272.

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

The Department regulations require that "[f]or any investigation and supported report of abuse, the Department *shall* record the identity of the alleged perpetrator when the report of abuse is referred to the District Attorney and there is substantial evidence indicating that the alleged perpetrator was responsible for the abuse." (emphasis added) 110 CMR 4.33; 4.37

"Substantial evidence" is defined as such evidence as a reasonable mind might accept as adequate to support a conclusion. M.G.L. c. 30A §1(6); DCF Protective Intake Policy No. 86-015, rev. 02/28/2016

A "support" finding of abuse or neglect means that 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) placed 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. 2/28/16

"Danger" is 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

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 CMR 10.05

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, or (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, or (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 the Appellant was a "caregiver" pursuant to Departmental regulation. 110 CMR 2.00; DCF Protective Intake Policy No. 86-015, rev. 02/28/2016

The Appellant contested the Department's decision to support sexual abuse allegations of a student, O while in the capacity of her role as a substitute teacher. The Appellant argued it was never her intent to allow the child to have access to sexually explicit photographs on her cell phone. While she acknowledged that she allowed O to have lunch with her, this was not the exception, and other students at the high school also had lunch in her classroom. The Appellant also argued that her superiors were aware the child came to the classroom during lunch and at the end of the day. The Appellant further argued it was never her intent to lead O to think she

wanted to have sex with him as she was trying to resolve the issue herself. She argued she was being blackmailed by the child due to the pictures in his possession, and she felt anxious and overwhelmed with the situation so she said things to convince him to stop from releasing the photos to his friends; by promising to have sex with him when he turned sixteen (16) years old. The Appellant admitted she did a foolish thing in this situation. Finally, the Appellant argued she was committed to education and the teaching profession since she was young and would never do anything to jeopardize her career. I find the Appellant's argument to be unpersuasive.

The child underwent an independent forensic interview, a SAIN, where he was consistent with his disclosures he made to the mandated reporter. The Appellant was a substitute teacher in the school and allowed the child to skip class and lunch to spend time with her. She made her cell phone available to him, allowing to access to download sexually explicit photographs of her, which she was aware he did. The Appellant made no attempt to inform school administrators of the aforementioned concerns regarding the child taking her phone and emailing the photo's to his cell phone or what transpired after she approached the child and asked him to delete the photos. To the contrary, the Appellant asked the child to crop her face out of the photographs when he refused to delete them and told him to wait until he was sixteen (16) years old and she would have sexual intercourse with him. The Appellant engaged in inappropriate interactions with O and offered to engage in sexual conduct with O while in a role of a caregiver/school teacher. The Department did have substantial evidence to support the allegation of sexual abuse in this matter pursuant to MGL c. 30A, 14 (7) (e), the standard that governs the Department's decision to "support" an allegation of abuse or neglect. An investigator's initial decision to "support" an allegation requires only that there be "reasonable cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker did occur." Hearsay alone may constitute substantial evidence if that hearsay has the indicia of reliability. Covell v. Dep't of Soc. Servs., 439 Mass. 766, 786 (2003)

The Department argued the Appellant "sexually exploited" the child. While the salient facts are undeniable that the Appellant was having an inappropriate relationship due to her poor decisions and judgement, there was no evidence of sexual exploitation pursuant to MGL c.119, §21. Nonetheless, the Appellant did sexually abuse the subject child due to the poor and unprofessional boundaries she maintained with the minor child and her promises of a sexual relationship once he turned sixteen (16) years of age. No matter what her intent was or was not to follow through on her claim of sex with O, the conversations the Appellant had with the child constituted contact and rose to the level of sexual abuse. John D v. Dep't of Soc. Servs., 51 Mass.App.Ct. 125, 129 (2001). As the Court has ruled, when defining sexual abuse "...contact is not limited to physical touching but may include sexual communications not necessarily to provide information and direction for the child's education and physical and emotion well-being." Id.

In making a determination on the matter under appeal, the Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker, if there is a reasonable basis for the decision (110 CMR 10.05). After review of the testimonial and documentary evidence presented, I find that the Appellant has not demonstrated any failure by the Department to follow its regulations, policies, or procedures with respect to the decision to support the report of sexual abuse. 110 CMR 10.06(8)

As provided for in the regulations quoted above, the Investigator relied on available documentation, observable behavioral indicators and her clinical knowledge to support the decision made. Based on the totality of the circumstances, and the evidence gathered, I find that the Department's determination that the Appellant sexually abused the subject child was based on "reasonable cause" and was made in conformity with Departmental regulations.

Conclusion and Order

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

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

Jorge F. Ferreira
Administrative Hearing Officer

Date: 2/23/18

Darlene M. Tonucci, Esq.
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