

**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: KT**

**Fair Hearing # 20171191**

**FAIR HEARING DECISION**

Appellant, KT, 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 T.

**Procedural History**

On July 14, 2017, the Department of Children and Families ("Department") received a report, pursuant to M.G.L. c. 119, §51A, alleging physical abuse of T by KT, a JRC residential program staff person. On August 4, 2017, the Department decided to support allegations of physical abuse and neglect on behalf of T, pursuant to M.G.L. c. 119, §51B, by KT ("Appellant").

The Department notified Appellant of its decision and of his 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 December 14, 2017 at the Department's Central Office in Boston, Massachusetts. In addition to the Hearing Officer, the following persons appeared at the Fair Hearing:

RS	Department Supervisor
KT	Appellant

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

For the Department:

- Exhibit A Intake Report – Institutional Abuse
- Exhibit B Child Abuse/Neglect Non-Emergency Response
- Exhibit C Video footage
- Exhibit D Department entry and support letters
- Exhibit E Nursing notes
- Exhibit F Immediate Protections Safety Assessment
- Exhibit G E-mail
- Exhibit H Evaluation - Termination
- Exhibit I Police print out

For Appellant:

- Exhibit 1 Fair Hearing request and Department support letter

The record closed at the conclusion of the oral evidence.

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) 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

**Findings of Fact**

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

1. T was a female resident at the [REDACTED] residential program ([REDACTED]). T had been placed at [REDACTED] in or about October 2016. [Exhibit A; Exhibit B; Testimony of Appellant]

2. In January 2017, the Department unsupported an allegation that a [REDACTED] staff member (not Appellant) had physically abused T. The Department found no corroborating evidence and indications that T was not a reliable reporter. [Exhibit B, pp.1,3]
3. In March 2017, the Department unsupported an allegation that a [REDACTED] staff member (not Appellant) had physically abused T. The Department found no evidence that the staff intended to harm T during a restraint on a van and indications that T was being assaultive. [Exhibit B, pp.1,3]
4. In March 2017, Appellant began working for [REDACTED] as a mental health assistant. Therefore, Appellant is deemed a caregiver pursuant to the Department's Protective Intake Policy. See below. [Testimony of Appellant; Exhibits A and B]
5. In July 2017, T was fifteen years old. [Exhibit A; Exhibit B]
6. On July 14, 2017, [REDACTED] resident C was having behavioral issues on the bus ride from school back to the [REDACTED] residence. T was making fun of Appellant during the bus ride. At approximately 5:59 p.m., after all had arrived back at the residence, people were cooking dinner on the upper level of the residence. C and T were on the lower level and began acting out. T and then C intentionally knocked items off tables. T went up a short flight of stairs to the upper level cooking/dining area and threw chairs and a bin towards Appellant who was on the lower level. At this point, Appellant did not respond aggressively toward T. At about 6:01 p.m., T sat down at the dining table on the upper level after being instructed to do so by another [REDACTED] staff person. Appellant picked up the chairs which had been thrown around/knocked about by T and C and replaced them where they belonged. He then went up and stood at the top of the stairs facing the cooking area. Another staff person was restraining C on the upper level by holding his arms around her (staff's front facing C's back). At approximately 6:05 p.m., T got up from the table and casually approached Appellant, spitting at his face as she got closer. Appellant put out his right arm as if to block T. She continued to approach Appellant aggressively attempting to hit him. Appellant put his right arm around T's neck and his left arm around T's upper back. The two struggled as T struck out at Appellant. Two other [REDACTED] staff approached attempting to intervene. Appellant placed a hand under T's thigh, lifting her leg and backing her against a counter. As the two continued to struggle, Appellant pushed T down onto the counter with his arm/hands. T attempted to punch Appellant and spit at him. T pulled on Appellant's shirt. Appellant repeatedly yelled "are you going to stop now?" at T. At one point, Appellant had his closed fist under T's chin on her neck pushing her down against the counter. Two additional [REDACTED] staff approached to separate Appellant from T. T continued to attempt to go after Appellant once they were separated. T threw items from the kitchen at Appellant. [Exhibit B; Exhibit C; Testimony of Appellant]
7. Staff described the above referenced events as a "mini riot." [Exhibit B, p.3]

8. T was assaultive and belligerent toward Appellant during the incident in question. [Exhibit B; Exhibit C]
9. After T initially spit at Appellant on the upper level of the [REDACTED] residence, Appellant was angry and not acting in a controlled manner toward T. [Exhibit B; Exhibit C]
10. At some point during the incident, [REDACTED] staff called the police. The police responded at approximately 6:21 p.m. At that time, everyone was under control. The police left the scene at approximately 6:24 p.m. [Exhibit I]
11. On July 14, 2017, the Department received a report, pursuant to M.G.L. c. 119, §51A alleging the physical abuse of T by Appellant. The Department initiated a response to look into the allegations. [Exhibit A; Exhibit B]
12. On July 15, 2017, the [REDACTED] staff nurse assessed T. The nurse observed no bruises or scratch marks on T's neck. T reported no discomfort or pain around her neck region. [Exhibit E]
13. On July 19, 2017, [REDACTED] terminated Appellant's employment due to his "utilizing improper Safety Care techniques with a student." [Exhibit H]
14. On August 31, 2017, pursuant to M.G.L. c. 119, §51B, the Department supported allegations of physical abuse and neglect on behalf of T against Appellant. [Exhibit B]
15. Taking into consideration all of the evidence presented, I find that the credible evidence was sufficient to rise to the level of "reasonable cause to believe" that physical abuse of T did occur for the following reasons:
  - a. at the time of the incident, Appellant was yelling at and responding to T in anger and not in any kind of calm and controlled manner;
  - b. Appellant's actions were non-accidental;
  - c. although T sustained no observable injuries during the incident in question, Appellant's responding to T in anger increased the likelihood of his causing harm to her; and
  - d. Appellant's actions put T at substantial risk of serious injury.
16. Taking into consideration all of the evidence presented, I find that the credible evidence was sufficient to rise to the level of "reasonable cause to believe" that neglect of T did occur as Appellant failed to provide T with minimally adequate essential care. The actions of Appellant placed T in danger and posed substantial risk to her safety and well-being. [Fair Hearing Record]

## 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.

### **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" 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. Id.

"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.

### **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 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**

On the basis of the factual findings and standards set forth above and for the reasons set forth below, I uphold the Department’s neglect and physical abuse support decisions.

### **Physical Abuse**

To “support” an allegation of physical abuse in the instant matter, the Department must have reasonable cause to believe that the non-accidental actions of Appellant “caused or created a substantial risk of physical ...injury” to T. 110 CMR §§ 2.00, 4.32(2). There is no evidence that, during the incident in question, Appellant caused T to sustain any physical injury. There is no question that T was behaving in an aggressive and assaultive manner toward Appellant. It is understandable that Appellant would be frustrated and upset with T, especially as she was being assaultive toward and spitting at him. Nevertheless, the evidence indicates that Appellant likewise responded in an angry and aggressive manner toward T. His actions were not of a controlled nature as discussed in Cobble v. Commissioner of the Department of Social Services, 430 Mass. 385,395 (1999). Appellant’s actions in engaging in a forceful struggle with T, pushing her against a kitchen counter, and placing his closed fist under T’ neck while pushing her down

created a substantial risk of physical injury to T and therefore constituted abuse. *See Care and Protection of Robert, supra.*

### Neglect


In order to support a finding of neglect, the Department must determine that there is reasonable cause to believe that Appellant neglected T *and* that Appellant's actions placed T in danger or posed substantial risk to her safety or well-being. In the instant matter, the Department's neglect support decision was made in conformity with its policies and with a reasonable basis. *See* definitions of "reasonable cause" and of "neglect" above. The totality of the evidence was sufficient to rise to the level of "reasonable cause to believe" that neglect did occur as Appellant failed to provide T with minimally adequate essential care, i.e. safety. "Reasonable cause" implies a relatively low standard of proof. *Care and Protection of Robert, supra.* 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 C.M.R. §10.05 A determination of neglect does not require evidence of actual injury. *See Lindsay v. Department of Social Services, 439 Mass. 789 (2003).* Appellant did not present persuasive evidence in this matter to allow for a reversal of the Department's neglect support decision.

### Conclusion and Order

The Department's decision to support the allegations of physical abuse of T by Appellant, KT, 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 neglect of T by Appellant, KT, 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, he 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.

  
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Antonia Chronis, Esq.  
Administrative Hearing Officer

3/12/18  
Date

Erica Pognon  
Erica Pognon, Esq.  
Fair Hearing Supervisor