

**EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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IN THE MATTER OF

K. C.

HEARING DECISION

FH # 2018-1352

Procedural Information

The Appellant in this Fair Hearing is K. C. (hereinafter "the Appellant" or "Mr. K"). The Appellant appealed the Department of Children and Families' ("the Department" or "DCF") decision to support allegations of physical abuse and neglect of B, Bil and Ka made pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On August 6, 2018, the Department received a 51A report filed by a mandated reporter alleging physical abuse of "B", (hereinafter "B" or "the child(ren)") by the Appellant. On August 13, 2018 51A reports were filed by a mandated reporter alleging physical abuse "B" and "Bil" (hereinafter "Bil" or "the children") by the Appellant. On August 14, 2018, a 51a was filed by a mandated reporter alleging physical abuse and neglect of Ka (hereinafter "Ka" or "the children") by the Appellant. The allegations of physical abuse of B, Bil, and Ka were supported. The allegation of neglect of Ka was supported and allegations of neglect of B and Bil were added and supported. The Department informed the Appellant of its decision and of his right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06.

The Fair Hearing was held on February 15, 2019, at the Department of Children and Families' Central Office. All witnesses were sworn in to testify under oath, and the record closed at the end of the hearing.

The following persons appeared at the Fair Hearing:

Carmen Colon	Administrative Hearing Officer
KC	Appellant
JL	Appellant's Attorney
CR	Appellant's Attorney
HG	Appellant Witness, daycare teacher
MD	Attorney for Daycare and HG
DMc	DCF Response Social Worker

MD

ADA¹

In accordance with 110 CMR 10.03, the Administrative Hearing Officer attests to impartiality in this case, having had 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:	51A Intake Report1 dated 08/06/18
Exhibit B and B-2:	51A Intake Reports2& 3 dated 08/13/18
Exhibit C:	51A Intake Report4 dated 08/14/18
Exhibit D:	51B Non-Emergency Response
Exhibit E:	DCF Notice of Outcome
Exhibit F:	Class Attendance Roster
Exhibit G:	Enrollment Agreement
Exhibit H:	Child Supervision Record
Exhibit I:	Daily Schedule for 08/06/18
Exhibit J:	Parent Contact Numbers
Exhibit K:	SAIN team member list

For the Appellant:

Exhibit 1	SAIN forensic interview of B Audio and video- 2 discs
Exhibit 2:	Appellant brief
Exhibit 3:	Affidavit of teacher RO
Exhibit 4:	Affidavit of teacher HG
Exhibit 5:	Affidavit of teacher JS
Exhibit 6:	Affidavit of teacher JMc
Exhibit 7:	Affidavit of teacher CM
Exhibit 8:	Affidavit of teacher MW
Exhibit 9:	Affidavit of teacher NI
Exhibit 10:	Affidavit of teacher NK
Exhibit 11:	Affidavit of daycare director MB
Exhibit 12:	Appellant education and certifications
Exhibit 13:	Appellant observation, training, policy and other daycare program specific documents
Exhibit 14:	Appellant medical
Exhibit 15:	DEEC 2016 notice on an unsupport

¹ MD appeared in response to a subpoena to the District Attorney for a copy of the forensic interview. MD agreed to the release of a copy of the recording of forensic interview to the Fair Hearing record and only for purposes of the Fair Hearing.

Exhibit 16:	B's mother: social media posts
Exhibit 17:	MA trial court and out-of-state Trail court documents re B's mother
Exhibit 18:	Temporary order on custody DCF/ B's mother
Exhibit 19:	Probate and Family Court documents Relating to B
Exhibit 20:	injury report from for B 07/30/18
Exhibit 21	Personal ref re Appellant

Pursuant to 110 CMR 10.21, 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.

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) 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

1. B, a four-year old boy, lived with his mother, her partner, and his eighteen-month-old half-sister. Both children attend the K daycare program (hereinafter after "daycare").
2. B's family had a history with DCF and were open with DCF at the time of the response. At one time B was removed from his mother's custody by DCF and lived with the man believed to be his father until paternity testing proved otherwise. B's childhood history of abuse, neglect and exposure to domestic violence resulted in B's experiencing complex trauma which impacts a child developmentally, emotionally, and psychologically. (Exhibit A, Exhibit B, Exhibit D, Exhibit 18 & 19; Testimony of RW)
3. At the daycare B was in a pre-kindergarten group of ten children all of whom were four to five years old. B spent the day with these children. His teacher was CK (hereinafter "CK" or "Miss C"). (Exhibit D, p.5 ; Exhibit F)

4. At the daycare lunch breaks for teachers were covered by other teachers referred to as floaters. Lunch breaks might occur during the rest period, called nap time by some teachers. In CK's class rest period was between the hours of 12:00PM to -2:00PM (Exhibit D, p.5)
5. MW had been a floater for three years. She did not like covering the Pre-k class : "to be honest with you, I don't like going in that room either, nap time is torture." Most of the children do not nap and it could be difficult for the children to settle down to rest. (Exhibit D, p. 6)
6. The Appellant (hereinafter "Appellant" or "Mr. K") was the floater covering CK's class from 1:15 to 2:00 PM on August 6, 2018. (Exhibit D) The Appellant is a caregiver pursuant to 110 CMR 2.0.
7. Appellant had DCF history: an unsupported allegation of sexual abuse. The daycare child who made the allegation said she lied about the allegation during a SAIN interview. (Exhibit A, Exhibit 15)
8. The Appellant had worked at the daycare for three- and one-half years. No colleague or parent had expressed any concern regarding the Appellant's care of children. (Exhibit D, p 23; RW testimony; Appellant testimony; Exhibits 3, 4, 5, 6, 7,8 ,9, 10)
9. Nine children were attending Miss C's class that day. Miss C's lunch coincided with rest period for the children. During rest period the children remained on cots sitting, resting, quieting their bodies but did not need to sleep. They could have a soft toy with them. During the last half of rest period the children could get a book or toy and return to their cot. Children could not walk around the class or engage in talking to other children. If a child was off his/ her cot the teacher would ask child to return to cot, or if necessary physically lead a child or lift up the child by holding the body and carry and place the child on the cot. B did not like to nap. He was one of six children in the class known to cry. (Exhibit F; Exhibit D, p.6; Exhibits 4, 5, 6, 7, 8, 10)
10. Teacher RO's class was adjacent to CK's class. RO heard a child crying, not an unusual circumstance, and walked over and asked Mr. K who was crying. Mr. K responded that he had made B go on his cot and that he was rubbing B's back as B was crying. (Exhibit D, p.5)
11. Lifting and placing a child on their cot when a child was off his/ her cot during rest time and, rubbing children's back or temple area as a method of soothing a crying child were approved practices of the daycare. (Exhibits 4, 5, 6, 7, 8, 10, Exhibit D, p.24; Appellant testimony)

12. CK returned to the class and Mr. K left. No children appeared frightened, but B was crying and CK asked him why. B told her that Mr. K grabbed him and put him on his cot and his body hurt. B's arms appeared slightly red but CK also noted that B was demonstrating folding his arms on each other and clutching his forearms. (Exhibit D, p.6)
13. Student Ka, age 5, was also crying. CK spoke to Ka directly and by name asking Ka why he was crying. Ka responded, "I don't know." (Exhibit D, p.6)
14. CK consulted with RO in the adjacent class and then notified the program director, MB (hereinafter "MB" or "program director"). MB gathered information from CK about what B said occurred. When Mr. K returned to the daycare MB informed him that B said Mr. K hurt him. MB described Mr. K as shocked upon hearing this. He explained that he placed B on his cot and rubbed B's back. Mr. K was sent home on administrative leave. MB informed Ben's mother, DEEC² and filed a 51A report with DCF. (Exhibit D, p. 2)
15. On August 6, 2018, a 51A report alleging physical abuse of B by Mr. K was filed with DCF. Four-year old B was enrolled in a daycare program. B said "(Mr. K) grabbed my arm, put me in bed and now my body hurts." The report was screened-in and assigned to a Response Worker (hereinafter "RW") for a non-emergency response. (Exhibit A)
16. Program Director and CK examined B's back and arms and saw no marks, or injuries beyond an old mark presumed caused by a playground incident the previous week. (Exhibit 11, Exhibit D, p.6)
17. In the response and in her testimony, the RW asserted that RO could hear but not see B when RO approached the classroom in response to a child's crying. In her affidavit RO states that she saw Mr. K sitting on the floor beside B's cot. (Exhibit D, p.5; Exhibit 3)
18. MB informed B's mother of the incident before the end of the day. The following day B's mother went to the police, hired an attorney, and was believed to have been the person responsible for notifying the media about the allegation. The media descended upon the daycare. (Testimony of RW)
19. In the weeks before the alleged incident B had described to daycare staff incidents at home of his mother's partner hurting her and pushing her down stairs. As mandated reporters the program filed a report of suspected abuse or neglect. B's mother angrily confronted the program director about filing. In the days before the first 51a report the program had informed B's mother that if to unpaid childcare fees were not paid her children could no longer attend the program. In the days after the filing of the 51a B's mother informed daycare director MB that the daycare had offered her \$250,000- a falsehood and that B's ribs were broken in the incident. B's mom was told to provide

² DEEC is the acronym for Department of Early Education and Childcare. It is the licensing agency for daycare programs.

documentation and a doctor's note regarding restrictions, and none was ever provided. (Exhibit 11)

20. B was examined by a pediatrician who note no injury consistent with physical abuse. (Exhibit D, p)
21. On August 13, 2018 based upon information provided by B's mother two 51a alleging physical abuse were filed by a mandated reporter. In one report B's mother said B told her that Mr. K grabbed him and slammed him on his cot, on his back and he sat on his stomach. In the second 51a B's mom told the reporter B said that Mr. K sat on B's friend Bil and Bil kicked Mr. K. The reports were screened in and consolidated with the pending response. (Exhibits B and C)
22. On August 10, 2018 B's mother approached the foster parent of Ka, a student in the same Pre-K class as B. The foster parent did not know B's mom. B's mom said, "I'm not sure if you heard, (Mr. K) was aggressive with my son." Ka, age 5, was in DCF custody and placed with the foster parent. Ka had episodes of increasing misbehaviors in the foster home. A therapist came to daycare to work with him. Foster parent observed instances of disorganization at the daycare citing a time when Ka got off the school bus and was released to a relative who was taking him for a visit without program checking the identity of the relative. (Exhibit D, pp. 12-13)
23. On Saturday, August 12, 2018³ Foster parent asks Ka if he likes Mr. K. Ka answers that Mr K pushed (or threw -foster parent unsure of which word was used) him and then sat on him. Foster parent sought no more information, but Ka said the principal (as program director MB is referred to by children) came and talked to my friends. He also said another teacher from another room was there but did she did not see. The foster mother communicated her concern that Ka was abused at daycare to his adoption worker. The adoption worker contacted the RW. After speaking to the foster mother, the RW agreed the RW would file a 51a as the foster mother was too distraught over the allegations and other difficult situations in her life to file the 51a herself. (Exhibit D, p.12)
24. On August 14, 2018, a 51a was filed by a mandated reporter alleging physical abuse and neglect of Ka by Mr. K. The report was reflective of the foster parent's conversation with Ka on August 12, 2018. The report was screened in and consolidated with the pending response. (Exhibit C)
25. Teachers described B as outgoing, a constant talker, a child who made up stories, attention-seeking, a child who made himself known, able to make friends, having some behavioral concerns, and an exaggerator. B was a leader and bossed other children.

³ Exhibit D , p.12, third entry, first sentence misidentifies the child about whom the RW and Foster parent are talking. It also misidentifies the date of the foster parent's conversation with Ka as 8/11/18 instead of the correct date 8/12/18. These errors are inconsequential.

Although CK thought B was truthful, teacher HG who often covered the class at the end of the day thought B often made up stories, took toys from other children and denied it, hid daycare toys in his pockets and claimed they were from home and often hit or kicked other children but would say he had not when the behavior was addressed with him. (Exhibit D, pp. 6-7; Exhibits 4, 5, 6, 7, 8, 9, 10, 11; Testimony of HG)

26. On August 15, 2018, a SAIN regarding B's allegation was convened at the District Attorney's office. Forensic Interviewer FC (hereinafter "the interviewer") interviewed B about the allegation. The interview lasted about twenty-four minutes. B was physically active throughout the interview. He ran into a wall, he ran around the room, falling once and hurting his knee. He knocked over a chair. He balanced rocking back and forth on the front legs of a chair. He pretended he was a robot, made monster noises and gestures and sat drawing. The interview was marked by three breaks which appeared caused by B's reluctance to answer the interviewer's questions. During one break B brought a drawing to his mother. One break lasted over six minutes. After about twelve minutes of trying to engage B in talking about general topics like with whom he lived, what he did for fun, and explaining that her role was to understand if kids are safe, the interviewer tells B that "this is a talking room and it is important to talk about things that are true and really happened." B responds that his mother told him to talk about Mr. K. The interviewer responds that B should tell her about Mr. K. B responds "Mr. K grabbed me by my forearm, and he slammed me on my cot. He sat on my friend Bil." The interviewer asks where B was when Mr. K slammed him on the cot. B's answer is "I said na, na, na, na, na and he slammed me on my cot." He tells the interviewer that she does not think that is true. When she tries to clarify how he knows she thinks that is not true he says, "because my brain." The interviewer asks if that is something that is true and happened, B says "yes." The interviewer asks about B's forearms. B says they hurt when Mr. K grabbed them. B identifies his forearms. The interviewer asks how Mr. K picked up B and B says with his hands. The interviewer asks where on B's body did Mr. K pick-up B. B does not answer. The interviewer asks again "how did Mr. K pick up your body?" B does not answer. The interviewer next asks "When Mr. K picked you up and slammed you, how did you land on the cot?" B does not answer but encircles his right hand over his left forearm and pulls his forearm down. The interviewer asks, "What part of your body got slammed on the cot?" B does not answer. B tells the interviewer he told his mama and his mama can tell her. The interviewer responds, "But I want you to tell me." B responds "I don't remember. I lost my memory." The interviewer next says "You told me Mr. K slammed your body on the cot and it hurt. Where on your body did it hurt?" B does not answer but says "Let's go see my mom." He takes a drawing with him. On returning the interviewer asks B what happened after Mr. K slammed your body on the cot. B responds, "He did not say he was sorry." B opens the door and walks from the room. After a six-minute break B and the interviewer re-enter the room. The interviewer tells B they are almost finished and asks B what was happening before Mr. K slammed your

body on the cot? B does not answer. He shrugs his shoulders. B stands, says he wants water and heads to the door. The interviewer tells him they are done talking. (Exhibit 1)

27. The allegation that Mr. K sat on B as alleged in the second 51A was not addressed with B by the forensic interviewer or the RW. The allegation that Mr K sat on B's friend Bil which B raised in the SAIN was not addressed by the forensic interviewer. (Fair Hearing Record)
28. I find the statements of B lack indicia of reliability based upon B's responses and behaviors during the SAIN:
 - By the time of the SAIN B had adopted his mother's language of being slammed onto the cot
 - B could not or would not identify how he was lifted, how he landed on the cot, where on his body was hurt
 - B tells the interviewer he does not remember; he lost his memory and his mama can tell the interviewer
 - B shrugs his shoulders in an I do not know manner
29. The record does not reflect any RW interview of B's mother regarding B or what B told her about the allegations or how B learned Mr. K sat on Bil and Bil kicked Mr. K. (Fair Hearing record)
30. Department policy requires response workers to conduct collateral contacts, as needed, to obtain information specifically related to the allegations. The investigation response was not conducted in accordance with 110 CMR 4:27 or DCF Protective Intake Police #86-015 Rev. 2/28/16. DCF Protective Intake Policy #86-015, rev. 2/28/16
31. Bil, age 5, lived with his mother, father (hereinafter "Bil's mother" or "Bil's father" or collectively "Bil's parents") and four siblings. Three of the children attended the program: an eighteen-month old girl, a four-year old boy and Bil. . After being informed by the program while picking up his children that a 51A was filed regarding Bil, once home Bil's father asked Bil what had happened. Bil responded "Mr. K sat on me, we were playing"; "it happened sometime back" and "Oh, he's (Mr. K) not coming back." Bil's father had not seen any marks on Bil's body and any marks presently on Bil's body were from play. (Exhibit D, p. 15)
32. Bil's father knew Mr. K well. Mr. K had been Bil's teacher the prior year and Mr. K was the only person who could calm down Bil when Bil was upset. Bil talked incessantly about how much he liked Mr. K. On hearing the allegation Bil' mother said, "He loves that teacher!" She was surprised to hear of this incident and questioned if it actually happened because Bil was always very communicative with them about his day,

beginning his review of each day by saying, 'I had a good day' or 'I had a bad day' and neither she nor her husband had ever heard Bil say what was alleged. (Exhibit D, p.15)

33. The RW interviewed Bil at his home. Bil's father and his siblings were home. While Bil's father cooked, the RW interviewed Bil at the dining room table as his four-year old and nine -year old siblings sat with them. Bil and his friends, specifically naming only Ka, had been laughing and fighting at nap time. "Mr. K was sitting on my belly when I wasn't listening." When asked what happened next, Bil replied, "he picked me up and put me on my cot and told me to listen." Bil was coughing and could not breathe for a while but his body did not hurt, and he had no bruises or boo-boo's. (Exhibit D, p. 16)
34. Day of the incident when CK returned to her class from lunch B and another student Ka were crying. CK spoke directly and by name to Ka asking why he was crying. Ka responded, "I don't know." The RW interviewed Ka at daycare. At rest time it was hard for Ka to nap. "... I don't nap, I don't like it." Ka was laughing at his friend Bil and he was not listening. "Mr. K picked me up and put me on my cot and sat on me." Ka indicated Mr. K picked him up under his armpits. Ka told the RW he had no marks, bruises, or boo- boos because of being picked up and put on his cot or sat upon. (Exhibit D, p. 6; p.18)
35. Based upon her interviews with Bil and Ka the RW did not think a forensic interview of B or Ka was necessary because although their disclosures of force were consistent, there had been no marks or bruises upon them, neither had there been expressions of fear disrupting their emotional well-being.. (Exhibit D, p.21)
36. The record does not reflect that the RW interviewed any teacher regarding the allegations made regarding Ka or Bil to gather information to assist in assessing the credibility of Ka and Bil, though she did speak to a summer intern. (Fair Hearing record)
37. Department policy requires response workers to conduct collateral contacts, as needed, to obtain information specifically related to the allegations. The investigation response was not conducted in accordance with 110 CMR 4:27 or DCF Protective Intake Police #86-015 Rev. 2/28/16. DCF Protective Intake Policy #86-015, rev. 2/28/16
38. Bil was described as a parrot who repeated what was said to him. Bil was a friend of B and followed B around. Bil would tantrum during rest and circle time. (Exhibits 4, 5, 6, 7, 8, 9, 10, 11)
39. Ka had a difficult time sharing and could be aggressive. He had a hard time listening and became angry when he did not get his way. (Exhibits 4, 5, 6, 7, 8, 9, 10,)

40. B, Bil and Ka were friends who played together every day at daycare. Their play was rough and like the world wrestling federation. (Testimony of HG)
41. I find the statements on Bil and Ka lacked corroborative detail and were not consistent. Neither child identified when the events occurred, neither child confirmed the details of the other child's statements. Ka did not tell the RW that Mr. K pushed or threw him onto his cot as Ka's Foster mother reported he told her. Neither child recounts what Mr. K said to them, before, during or after the alleged incident or how long or how Mr. K sat on them (straddling them, legs to the side etc.). Neither child made any in the moment statement to their teacher CK upon her return to class, and in Ka's case, if the alleged incident occurred at the same as B's alleged incident, after he was asked directly and specifically why he was crying.
42. The record does not reflect that the RW viewed the classroom, the layout and size of the cots, the distance between cots, height of the cots, the cot assignments, or the distance of assigned cots to each other. (Fair Hearing record)
43. The RW and DEEC investigator divided the class roster and made phone calls to the children's parent(s). The three parents who contacted the RW had no concerns regarding Mr. K. When MS asked his daughter, what had happened in her class and she told her father a child was sad and crying. Another parent, CrK, described Mr. K as very loving and nurturing to CrK's children, an amazing teacher and never aggressive. CrK asked her daughter A if A had ever seen Mr. K hurt any of the children, and if A was ever hurt by Mr. K. A stated she had not and felt safe at the program. LA's son B told his parents when he got bumps or bruises at school and never said anything about someone causing harm to him. LA knew Mr. K for a long time as Mr. K was once his son's class teacher. LA never observed any problem with Mr. K (Exhibit D, p.14, 18, 20)
44. It was not that uncommon for kids to cry, become upset, or rowdy in the classroom during rest time and when that happened that if children got up, Mr. K would lay them back down and rub their backs to help them calm their bodies. If more than one child was unsettled during nap time, Mr. K would go between the unsettled kids and rub their backs to help them to rest and stay on their cot. (Exhibit D, pp. 23-25 ; Appellant testimony)
45. On the day Mr. K covered CK's class Ka was being "loud" and talking in a higher than normal indoor voice while talking to another student. Mr. K asked Ka to lie down and then guided Ka with his hands to his cot and helped Ka to lie down and then Mr. K rubbed Ka's back while Ka rested. (Exhibit D, pp. 23-25; Appellant testimony)
46. Bil was not resting so Bil was verbally instructed by Mr. K to get on his cot prior to being picked up. Mr. K picked him up with his hands by Bil's waist and placed Bil onto his cot

in the lying position. After he placed Bil on his cot Bil remained lying down on the cot. Mr. K rubbed Bilal's back to help him settle. (Exhibit D, pp. 23-25; Appellant testimony)

47. B also got off his cot during rest nap time and Mr. K verbally prompted B to get back onto his cot and B walked back in the direction of his cot, but B did not get on the cot. Mr. K picked up B and put him on the cot then rubbed his back and while Mr. K was rubbing his back B started to cry. B was crying but not complaining of anything. (Exhibit D, pp. 23-25; Appellant testimony)
48. When Mr. K rubbed a child's back he sat on his hip on the edge of the cot. At 5'8" tall Mr. K had to bend over from the knee when placing a child on a cot. The cots were close to the floor with little navigable space for an adult between them. (Exhibit D, pp. 23-25; Appellant testimony)
49. Mr. K denied that he ever sat on Ka or Bil or that Bil was ever coughing or that Bil kicked him. He was not frustrated with any of the children that day. Appellant acknowledged that caring for young children can have frustrating moments and described how he deals with frustration: acknowledge it; step back, ask for assistance. (Exhibit D, pp. 23-25 ; Appellant testimony)
50. Mr. K did not know why B, Bil or Ka would say he hurt them. He thought Ka and Bil may have overheard B say that he was hurt. (Exhibit D, pp. 23-23; Appellant testimony)
51. Contrary to the RW assertion that colleagues described Mr. K's low frustration tolerance and propensity to yell and thereby frighten children, no colleague described Mr. K as such. CK noted that Mr. K could raise his voice when frustrated, and that it was possible that (a raised voice) could frighten the children. CK observed no frightened children and nothing unusual about Mr. K when she returned to the class from lunch. (Exhibit D, p.29; Exhibit D, p. 6)
52. The RW weighed the credibility of the children against Mr. K. She determined that the children were credible based on the consistency of their statements. She found Mr. K not credible because she believed he was "untruthful" when he could not supply the surnames of three colleagues and because he could not provide an alternate explanation for how the children may have misperceived his actions. (Exhibit D, p 29; RW testimony)
53. At the response conclusion the RW supported the allegation of physical abuse of B, Bil, and Ka; supported the allegation of neglect of Ka; and *added* and supported an allegation of neglect of B and Bil. (Exhibit D, p.)

54. The Department did not inform the Appellant of the added allegations relative to him, did not afford him the opportunity as regulations call for to corroborate or disprove the added report (*of neglect*) against him. The investigation response was not conducted in accordance with 110 CMR 4:27 or DCF Protective Intake Policy #86-015 Rev. 2/28/16. (Fair Hearing Record)
55. Mr. K had given his two notice at the daycare as he had accepted a position at another daycare. As a result of the supported allegation the offer was rescinded. (Exhibit D; Appellant testimony)
56. Based on the credible evidence presented at the Fair Hearing I find that the Department did not have reasonable cause to support the allegations of neglect and physical abuse of B, Bil and Ka by the Appellant. DCF Protective Intake Policy #86-015 Rev. 2/28/16)

Applicable Standards

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

Risk is defined as the potential for future harm to a child. DCF Protective Intake Policy #86-015, rev. 2/28/16

Substantial Risk of Injury

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

“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 §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 §51B. Id. at

64; M.G.L. c. 119, §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

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

“Abuse” means (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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Physical injury” is defined as death; or fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or 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; DCF Protective Intake Policy #86-015, rev. 2/28/16

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

Interview Person(s) Alleged Responsible

The Response Worker shall contact any person alleged to be responsible for the incident(s) of abuse or neglect alleged in the report *or discovered during the response*. DCF Protective Intake Policy #86-015, rev. 2/28/16

Collateral Contacts

Contacts made by the Department for the purpose of obtaining, clarifying, or verifying information the Department has gathered or received concerning a particular family or child. A collateral contact can be:

- A professional – such as a therapist, teacher, doctor, or other mandated reporter.

- A non-professional – such as a friend, neighbor, or relative who has been identified as having information about a reported incident of abuse or neglect or about a child(ren), parent/caregiver and/or family who is the subject of a reported incident.
- Kin collateral – an adult who is not the child’s parent and who acts now, or may act in the future, in a caregiving role (may reside in or outside of the home).

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

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

As a daycare provider to the reported children the Appellant was a caregiver pursuant to DCF Protective Intake Policy #86-015, rev. 2/28/16 and 110 CMR 2.0.

The Court has determined that in deciding that a report is supported, the Department must consider the entire record, including whatever in the record fairly detracts from the weight of the evidence supporting its conclusion. Arone v. Comm. of the Dep’t of Soc. Servs., 43 Mass. App. Ct. 33, 34 (1997) Moreover, the Court has determined that issues of credibility and reliability must be carefully considered and the facts and circumstances in such cases must be carefully reviewed. See, Edward E. v. Dep’t of Soc. Servs., 42 Mass.App.Ct. 478 (1997)

The Department made its support decision relying on B’s disclosure to Reporter1, B’s mother’s statements to reporter2, Ka’s statement to his foster mother, B’s statements during a SAIN, Bil’s statement to his father, and Ka’s and Bil’s statements DCF RW.

Regarding B, he initially says the Appellant grabbed his arm, put him on his cot and his body hurt. He had no observable injury which could be attributed to these actions. By the time of the SAIN forensic interview, B had adopted his mother’s language regarding the alleged incident: he was “slammed onto his cot.” B could or would not respond to the interviewer’s questions to elicit corroborative details. He could not answer how he was slammed on the cot but instead demonstrated holding a forearm. He could not answer how he landed on the cot. He could not answer where on his body he was hurt when he was slammed onto the cot. He told the

interviewer that he lost his memory and she should ask his mama. When asked what was happening before he was slammed onto the cot he shrugs his shoulders. Contrary to the RW who found B was consistent in his disclosure, upon viewing the recording of the SAIN it was clear to the Fair Hearing officer that B's SAIN interview lacked indicia of reliability and thus the allegations supported based upon B's statements must be reversed.

The allegations regarding Bil and Ka are made one week after B's allegations and are not based upon spontaneous reports of either child. In Bil's case the source is B via B's mother to a mandated reporter. The response contains no information directly from B about what he saw or was told regarding Bil and the Appellant. Bil's parents only heard that their son was allegedly sat upon by the Appellant when informed that a 51a was filed. Bil's mother was concerned that B was the source of the allegation. Everyday Bil recounted to his mother what was good and what was bad about his day at daycare, yet Bil had never told her the Appellant sat on him. When Bil's father asked Bil what happened Bil responded, "(Mr. K) sat on me, we were playing." Bil told his father it had happened "some time back." Ka made his allegation after being asked by his foster mom if he liked the Appellant. Ka tells her he was pushed/ thrown onto his cot by the Appellant who then sat on him. Bil's and Ka's statements in this regard, including those to the RW, were significantly lacking in detail and there was no evidence that the Department attempted to obtain, or was able to obtain, additional information the children with respect to the timing of, existence, nature, extent of the alleged abuse. The RW did not think a SAIN was necessary for Bil or Ka. There is no corroborative evidence that a physical injury or abuse occurred in this case, as those terms are defined.

While gathering information to assist DEEC in assessing the programmatic concerns regarding the daycare the RW spoke to parents of three other students in the class. All the parents knew the Appellant, and none had concerns regarding him. One of the parents asked his child what happened in class and was told that a child was crying, and the second parent asked her child if she ever saw Mr. K harm a child and was told no. Her daughter felt safe in class. Assuming all the incidents occurred on the same day a reasonable person might wonder how neither of these other children was aware that of the Appellant sitting on two children and slamming another onto a cot during a time -the last half of rest time- when children could sit quietly on their cots, or get a book or toy and return to their cot.

Beyond the lack of indicia of reliability of the children and the lack of corroborative evidence, in order to support a finding of neglect, the Department must determine that there was reasonable cause to believe that the Appellant neglected the child and placed him/ her in danger or posed substantial risk to his/her safety or well-being. Even if Appellant sat on Bil or Ka this would not rise to the level of an abusive or a neglectful act. There were no marks, bruises or soft tissue injury observed or noted. The evidence presented was insufficient to conclude that the Appellant's actions created a risk of a substantial physical injury to the child. (Cobble v. Commissioner of the Department of Social Services, 430 Mass. 385, 392-393,395 (1999)) Therefore, the reported incident did not rise to the level necessary to support the allegations of physical abuse.

Additionally, the record was absent evidence that if it occurred either child was impacted by the alleged actions of the Appellant. Neither child was fearful to return to daycare, neither child's caretakers noted any behavioral or emotional changes in either child, understanding that Ka already exhibited "maladaptive behaviors" in the words of his foster mother. The evidence was insufficient to conclude that even Appellant failed to provide either Bil or Ka with less than minimally adequate "...emotional stability and growth..." (110 CMR 2.00)

Conclusion and Order

The Department's decision to support the allegations of physical abuse and neglect of B, Bil, and Ka by the Appellant is **Reversed**.

Carmen Colon
Carmen Colón
Fair Hearing Officer

June, 14 2020
Date

B. Curley
Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner