

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

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| C.M.J., | : | Docket No. DPPC-23-0143 |
| <i>Appellant</i> | : | |
| | : | August 2, 2024 |
| v. | : | |
| | : | |
| DISABLED PERSONS | : | |
| PROTECTION COMMISSION, | : | |
| <i>Respondent</i> | : | |

Appearances:

For Appellant: Anthony Rozzi, *Esq.*
For Respondent: Kristyn Kelly, *Esq.*

Administrative Magistrate:

Eric Tennen

SUMMARY OF DECISION

The Appellant was a care provider in a residential home for persons with developmental disabilities. Because of the inequality of position and power between staff and residents, any sexual activity was strictly prohibited. Any such sexual activity is considered abuse *per se* under DPPC’s regulations. Here, a resident accused the care provider of sexually assaulting her. While the care provider did not engage in nonconsensual acts with the resident, he did engage in consensual sexual acts with her. Thus, the care provider committed abuse *per se*. These acts, in turn, require him to be placed on the Department’s abuse registry.

INTRODUCTION

The Appellant, C.M.J., timely appealed the Disabled Persons Protection Commission’s (“DPPC”) decision that he committed registrable abuse. G.L. c. 19C, § 15; 118 Code of Mass. Regs., § 2.02. DPPC alleges that C.M.J. committed “abuse *per se*” when he engaged in inappropriate and prohibited sexual activity with T.G., a resident in the home where he worked. I held an in-person hearing over two days: April 1, 2024 and May 10, 2024. DPPC presented two witnesses, a Norwood police detective and an investigator from the Department of

Developmental Services (“DDS”). The Appellant testified on his own behalf. I admitted Exhibits A-U into evidence. The parties submitted closing briefs on July 19, 2024 at which point I closed the administrative record.

FINDINGS OF FACT

General Background

1. C.M.J. was employed at a residential program operated by Community Resources for Justice. He was a residential direct care staff member from January 2021 until May 2021. (Stipulations of fact.)
2. Community Resources for Justice is an “employer” within the meaning of 118 Code of Mass. Regs. § 2.02. (Stipulations of fact.)
3. C.M.J. was a “care provider” within the meaning of 118 Code of Mass. Regs. § 2.02. (Stipulations of fact.)
4. The complainant in this case, T.G., lived in this residential program. She is a DDS client and meets the definition of a person with an intellectual and developmental disability pursuant to 118 Code of Mass. Regs. § 2.02. (Stipulations of fact.)
5. Care providers are prohibited from having any sexual relationships with individuals in their care due to the inherent power imbalance between a caregiver and a person with a disability. (Investigator testimony.)

T.G.’s background

6. At the time of this incident, T.G. was 29 years old. Her diagnoses include intellectual disability, anxiety disorder, post-traumatic stress disorder, attention deficit hyperactivity disorder, reactive attachment disorder, and bipolar disorder. (Stipulations of fact.)
7. Unfortunately, throughout her life, she has been the victim of physical, emotional, and

- sexual abuse as well as neglect. That, in conjunction with her diagnoses and other experiences, has led to behavioral issues. She has a “history of verbal aggression, taking other’s belongings, making false accusations [including false sexual accusations], elopements, and unsafe behavior while in the community.” (Ex. D.)
8. She has an Individual Support Plan and Behavioral Support Plan. (Stipulations of fact.)
 9. An Individual Support Plan is common for DDS clients and provides details of the client’s disabilities, needs, and community support. Residential care staff is presumed to be familiar with a client’s Individual Support Plan. (Investigator testimony.)
 10. A Behavioral Support Plan is common too, though not every client who has an Individual Support Plan has one. A Behavioral Support Plan is written when someone has behavioral issues that impact their ability to function safely. Like an Individual Support Plan, staff are presumed to be familiar with a client’s Behavioral Support Plan. (Investigator testimony.)
 11. While a staff member may not be familiar with all the terminology in a client’s Individual Support Plan or Behavioral Support Plan, such as their diagnoses, they do not need to understand that to comply with the Behavioral Support Plan’s directives. (Investigator testimony.)
 12. T.G. had a Behavioral Support Plan that requires several safeguards. Chief among them is that, because “she has a history of making false sexual allegations about other males...she should not be left alone with a male (including staff).” (Investigator testimony; Ex. D.)
 13. For example, at age 14, she wrote a note to a family friend stating “do those things you to do me. Stick your finger in my pussy.” The friend said T.G. made him “do things” but

T.G. said he had touched her first. (Ex. D.)

14. As an adult, there are two incidents of false allegations of sexual assault in the record. One involved a false allegation against a staff member following T.G.'s break-up with a peer in 2020. (Ex. D.) A different incident with a different person involved a false allegation of nonconsensual acts by a staff member with whom she did have a consensual sexual encounter. (Detective Testimony.)
15. There are other incidents where T.G. attempted to have sexual contact with peers, sometimes initiating it by passing a note to them. (Ex. D.)
16. C.M.J. was familiar with T.G.'s history, her Individual Support Plan and her Behavioral Support Plan. He was aware she could not be left alone with male staff. (C.M.J. testimony.)

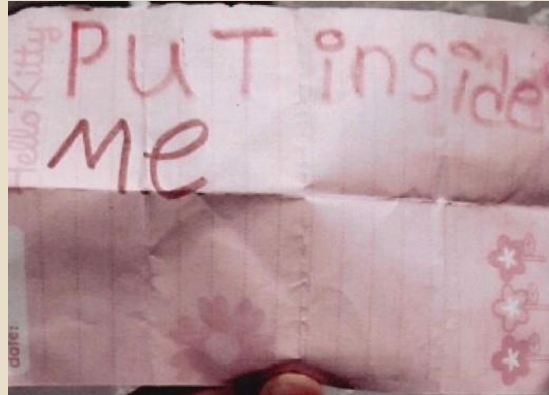
The Home

17. There were four residents living at the home where C.M.J. worked. They required 24-hour care and services. (Investigator testimony.)
18. Because of the residents' needs, the house needed a minimum of three staff members a day and two at night. (Investigator testimony.)
19. C.M.J. was the only male staff member at the house. Other employees working at this home included the house manager, E.S., and staff members J.V., L.M., S.M., and V.D. (Ex. B; Investigator testimony.)
20. The house itself has three floors. The basement was not described but is apparently where the residents receive their medications. On the first floor, when you walk in, there is a little hallway. To the left is the "big" living room; the right is a smaller living room; straight ahead is the kitchen. The residents' rooms are located on the second floor.

(Investigator and C.M.J. testimony.)

The incident

21. C.M.J. and T.G. each describe a very different situation, essentially each accusing the other of assaulting them. I detail their different statements, and my credibility assessments below. Here, I recount general facts about the incident that are not in dispute.
22. C.M.J. was scheduled to work May 15, 2021. He did not feel well and had been trying to call out. But when he was unable to, he went to work anyway. He arrived around 5:00 p.m. (C.M.J. testimony.)
23. L.M. and J.V. were also working that night. (C.M.J. testimony; Ex. E.)
24. When C.M.J. arrived, J.V. was out with another resident. (C.M.J. testimony; Ex. E.)
25. T.G. asked C.M.J. if they could go out for a walk. (C.M.J. testimony; Exs. G, N.)
26. C.M.J. agreed, but said they could not be alone. Therefore, another resident came along. (C.M.J. testimony.)
27. They returned a little before 8:00 p.m., at which point the residents received their medications and went to their rooms. (Ex. E.)
28. After she received her medication, T.G. came back down. C.M.J. was in the big living room. (C.M.J. testimony; Exs. G, N.)
29. T.G. asked L.M. for a “PRN” Medicine, which is an as-needed medication (such as Tylenol for a headache). (Investigator testimony.)
30. She then made her way to the big living room, where C.M.J. was sitting.
31. T.G. later wrote a note to C.M.J. There is some dispute about when she wrote it. There is no dispute about what it said: “Put inside me.”



(Ex. T.)

32. While T.G. and C.M.J. were alone in the big living room, T.G. alleges C.M.J. sexually assaulted her. I unpack this allegation below that they had a sexual encounter. (C.M.J. testimony; Exs. G, N.)

33. Neither of the two other staff members on duty that night saw anything unusual and at least one could not understand how something could have happened without her noticing. (Ex. E.).¹

34. On the day after the incident, E.S. confronted C.M.J. about T.G.’s allegations. At that point, he resigned. (Investigator testimony; Ex. E.)

35. It was only then that C.M.J. told E.S. about T.G.’s note to him (“put inside me”). (Investigator testimony; Ex. E.)

The investigation

36. As soon as the staff made DPPC aware of the allegations, the agency opened an

¹ At least one staff member reported to the investigator that she believed T.G. was making this up. The investigator conveyed this to the detective but did not put that in her report. (Investigator testimony.) I might normally find this omission suspicious but, given the fact that no staff noticed anything even though something did happen—even by C.M.J.’s own admission—it might explain the investigator’s omission. She, like me, may have found the statements that the staff did not believe anything happened to be inaccurate.

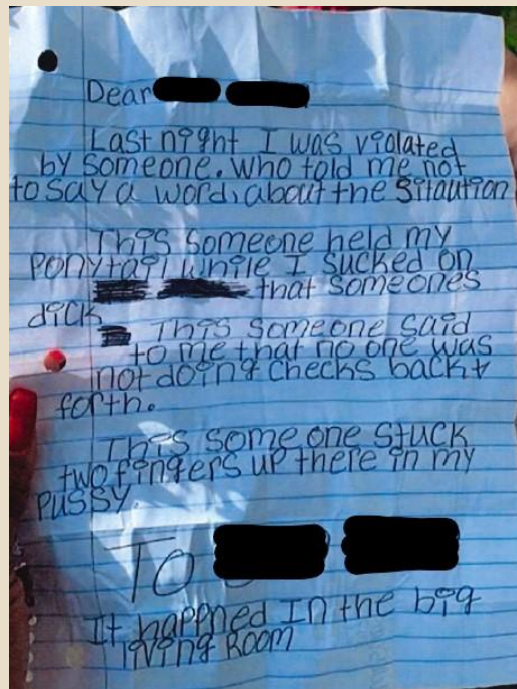
investigation. Because the matter involved someone in DDS services, the investigation was led by a DDS investigator. The investigator, in turn, notified the Norwood police department who assigned a detective to the case. The investigations overlapped. (Exs. E & K.)

37. Between the two of them, the DDS investigator and Norwood detective spoke to most people with information about the allegations. They each wrote reports summarizing their findings and, when appropriate, conclusions. (Exs. E & K.)

A. T.G.'s statements

38. T.G. first told V.D. about the incident the very next day. She explained what happened and handed her a note addressed to S.M. which read:

Dear [S.M.] Last night I was violated by someone. who told me not to say a word about the situation This someone held my ponytail while I sucked on that someones dick This someone said to me that no one was not doing checks back & forth. This someone stuck two fingers up there in my pussy. To [S.M.] It happened in the big living room



(Exs. M & S.)

39. After she showed V.D. the note, T.G. showed it to S.M. and spoke to her about it. T.G. then showed E.S. the note and also spoke to her about it. (Exs. E & P.)
40. T.G.'s statements to the three staff members were consistent. T.G. said that the night before she had been in the large living room with C.M.J. who pushed her up against the television and forced her to perform oral sex on him. She said he touched her breasts, digitally penetrated her, and licked her neck. T.G. also claimed her dress had C.M.J.'s semen on it. (Exs. E & P.)
41. T.G. then went to the hospital. There she gave a statement to the detective. A few months later she gave another statement to the investigator. She told them both essentially the same thing: C.M.J. was alone with her in the big living room. He came over to her, lifted her dress, and put his mouth on her breasts. He then inserted his fingers in her vagina. He forced his penis in her mouth and ejaculated into her mouth; some of his ejaculation also got on her dress. She told him "no" and "stop it" multiple times. He told her not to say anything. (Investigator and Detective testimony; Exs. E & K.)
42. In one of the interviews, T.G. admitted that she did give C.M.J. the note that said "put inside me." (Ex. E.)

B. Staff statements

43. The two staff members who were on shift that night, J.V. and L.M., both explained that C.M.J., T.G., and another resident went for a walk together sometime before 8:00 p.m. L.M. then passed out medications around 8:00 p.m. (Investigator and Detective testimony; Exs. E & K.)
44. After that, J.V. said that she was in the kitchen. T.G. came down to get a glass of water and then returned to her room. J.V. knew C.M.J. was in the large living room. Around

9:00 p.m., C.M.J. came and told J.V. “all the girls been hitting on me” (which was probably after the incident occurred). He said he was not feeling well and wanted to leave. J.V. also said she checked on the residents every two hours and was unaware of how the incident could have happened without someone noticing something.

(Investigator testimony; Exs. E & K.)

45. L.M. remained in the basement after passing out medications. Shortly after 8:00 p.m., T.G. called down and asked her for a PRN medication. When L.M. later came upstairs, T.G. was alone in the big living room with C.M.J. Nevertheless, she did not see anything inappropriate. (Investigator testimony; Ex. E.)

46. S.M. came to work the next day at 8:00 am. T.G. gave her the note. S.M. then spoke to T.G. and another resident. The other resident said she saw T.G. and C.M.J. alone in the same room the night before. The other resident and T.G. both told S.M. that C.M.J. suggested they all take a shower together; this made them feel uncomfortable.

(Investigator testimony; Ex. P.)

C. C.M.J.’s statements

47. During the investigation, C.M.J. made several statements both in writing and orally. He spoke to E.S. the day after the incident, he spoke to the detective at the police station, he made a statement which is undated and whose origin is ambiguous,² and he wrote a

² C.M.J. sent a series of voice texts to E.S. the day after the incident. (C.M.J. testimony.) One of the statements purportedly written by C.M.J. in evidence says it was sent from an iPhone, but C.M.J. said he never owned an iPhone. (Ex. N.) What likely happened is that E.S. received a series of dictated texts from C.M.J., put them together, and printed them out as one long statement. That statement was then provided to someone, maybe the Investigator, and eventually made its way into the file. However, no one could definitively explain the origin of that document; C.M.J. testified that he never wrote it out but, rather, he dictated it. That said, C.M.J. did not deny making the statement, only that he did not write it out. I thus find that C.M.J. made this statement in some form shortly after the incident.

- statement to DPPC in November 2022. (Detective testimony; Exs. E, G & N.)
48. Chronologically, the first thing he disclosed was to E.S. the day after the incident. After E.S. told C.M.J. about the allegations, he told her about T.G.'s note ("put inside me"). (Investigator testimony; Exs. E & T.)
49. Then he provided E.S. with a longer statement through a series of voice texts. At this point he was generally aware of the allegations—that T.G. claimed he sexually assaulted her. But in that statement, he did not disclose any physical contact with T.G. He described some benign interactions with her. He did not deny that he and her had been alone in the big living room, e.g. he said dozed off and woke up with her across from him with the tv on. He explained that he only saw her note to him when she threw it in his lap just before he left. (C.M.J. testimony; Exs. N.)
50. A few days later, he spoke with the detective in person at the police station. He began by reading a prepared statement from his phone and then responded to some of the Detective's questions.³
51. Although the interview with the detective was supposedly video and audio recorded, no copy or transcript of the interview was available at the hearing (nor referenced in DPPC's report). (Detective testimony.)
52. C.M.J. told the detective that prior to coming to work, he had sex with his girlfriend. He did not have time to clean up so when he came to work, he went to the bathroom to clean up there and made a mess with his "man stuff." He then left the bathroom to look for

³ C.M.J. did not give a copy of what he read to the detective. Whatever he wrote does not seem to be in evidence. The statement he submitted to DPPC is substantively different than what he told the detective and not likely what he read from his phone. For example, he denied any physical contact with T.G. to the detective but admitted it in his letter to DPPC.

something to clean up the “mess” he made but T.G. went into the bathroom before he could warn her. She soon exited with a smile on her face. (Ex. K; C.M.J. testimony). It is not clear whether C.M.J. made this statement unsolicited or in response to a specific question by the detective.

D. DNA Evidence

53. The detective secured an order to collect a DNA sample from C.M.J. Through a saliva sample, testing ultimately confirmed that C.M.J.’s DNA was found on T.G.’s breasts.⁴ (Ex. Q.)
54. The dress which T.G. claims contained C.M.J.’s DNA was never recovered and thus never tested. (Detective testimony.)
55. The DNA report indicates that there was also sperm fraction in the same sample.⁵ (Ex. Q.) However, no DNA profile was obtained from the sperm fraction and thus no additional comparison could be made from that specific sample.

C.M.J.’s additional statements

56. After the DDS investigator issued her final report, C.M.J. submitted a written statement in November 2022 to DPPC. (Ex. G.)

⁴ The detective and investigator both testified that C.M.J.’s DNA was found on T.G.’s breasts *and* ear. The parties do not dispute these conclusions. However, the DNA report indicates the swab from T.G. came from her breasts, but says nothing about her ear. Although it does not change the outcome of this decision, I find the facts support only the conclusion that C.M.J.’s DNA was found on T.G.’s breasts. I do not find it was found on her ear.

⁵ DNA analysis sometimes requires a “‘differential extraction’ which separates any sperm cells (sperm fraction) from epithelial cells (nonsperm fraction).” *Commonwealth v. DiCicco*, 470 Mass. 720, 724 (2015). No witness made mention of this sperm fragment and all agree there was no evidence that C.M.J.’s sperm was found in the investigation—presumably because no DNA profile was obtained from this sample. Absent some testimony to explain this evidence, I place no weight on it. I do not rely on it in my ultimate conclusions about the extent of the sexual contact in this case.

57. In that statement, C.M.J. alleged, for the first time, that T.G. attacked him. He found himself alone in the living room with T.G. The lights were off.

The client then started coming close to me, her shirt was lifted exposing her body to me. Before I could speak her hands were on me holding me down, I was so sunken in the chair I was in, I was also feeling dizzy and shocked all at the same time. I was struggling to get her up and away from me, especially when she is half-naked. She immediately tries to get me to up to [sic] go out to have sex with her in the garage. She whispers if I don't go along with it she will get me fired, and it is her word against mine. To be honest I felt very panicked. This has never been said or done to me ever before in my life. She kept trying to reach in to kiss me, and I just kept moving left to right trying to dodge any type of lip contact. She then whispered in my ear and again and pressed her ear against my mouth. She also was straddling me, shoving her breasts in my face. She basically was all over me like a crazed animal. I said enough is enough build up the strenght [sic] I needed, rap [sic] my right arm around her back barely lifting her up off me and away from me is when a piece of paper fell out my lap onto the floor. I picked up the piece of paper and it read "put inside me." After reading it she began spreading her legs pointing downward agreeing to what the letter said.

(Ex. G.)

58. C.M.J. also testified at the hearing. His testimony was a little scattered and indirect; it was also hard to follow. I summarize his somewhat confusing testimony here for completeness even though I do not credit it all. I explain what I do and do not credit in my analysis below.
59. C.M.J. said that after the medications were distributed, he went into the big living room and fell asleep on the couch. At some point he woke up, noticed the light was out, and got up to turn it back on. (C.M.J. testimony.)
60. He then fell back asleep. When he woke up, he saw T.G. leaving the room. He then closed his eyes and relaxed again. (C.M.J. testimony.)
61. Later, while he was sleeping/resting in the chair, he opened his eyes and T.G. was close to him. The lights were off again, but the tv was on. T.G. was trying to get his attention.

- C.M.J. tried to turn a light on and T.G. got into his space. (C.M.J. testimony.)
62. While he was still in the seat, T.G. told him something. She pulled her shirt up and exposed her flesh. He tried to call out to staff but his mouth was dry. He told her to get off him, but she did not move, so he grabbed her and took her off him. (C.M.J. testimony.)
63. With respect to the note, C.M.J. says T.G. put it on him without him noticing. When he took her off him, it fell on the ground. He picked it up and read it. He looked up and T.G. was sitting with her legs open pointing at her crotch. (C.M.J. testimony.)
64. C.M.J. went to try and tell someone but no one was around. He eventually found J.V. and asked her if she knew where T.G. was. J.V. called her name out and T.G. came over. (C.M.J. testimony.)
65. C.M.J. then left because he did not feel well. This all felt “odd” and “inappropriate.” He wanted to tell someone but did not. He waited to report the incident until his next shift because he did not have his co-worker’s phone numbers or names saved on his phone, but did have a list at home. (C.M.J. testimony.)
66. When confronted by E.S. the next day, he gave her a statement via voice texts. He did not finish saying everything he wanted to say. (C.M.J. testimony.)
67. His first statement to the detective was all about “time” so he was letting him know when things happened. He felt uncomfortable because the detective was not writing things down that C.M.J. felt were important. Later when the detective made contact about the DNA swab, he felt the detective was being aggressive and unfair. (C.M.J. testimony.)
68. He told the detective about being with his girlfriend and having to clean up his “man stuff” because the detective wanted a timeline of the day. He admitted the detective

- mentioned something about potential semen on the scene, but that was after he told him about his “man stuff” and he said it “wasn’t his.” (C.M.J. testimony.)
69. He never told the detective about the physical contact with T.G. because he never got around to it. He did not think the detective was listening and the interview was not going the way he wanted it to. (C.M.J. testimony.)
70. His written statement to DPPC was to “add on” to what he had already told the detective. He had already written it, but it had not been provided to anyone until then. (C.M.J. testimony.)
71. He felt attacked. He felt the staff were not around. He felt the detective was not on his side. He felt he was being set up. That is why he did not immediately disclose the note or tell anyone that T.G. attacked him. (C.M.J. testimony.)
72. On direct examination, when asked to explain things in his own words, he failed to mention anything about T.G. being on top of him, trying to kiss him, or rubbing her bare breasts in his face. (C.M.J. testimony.)
73. He denied telling J.V. “all the girls are hitting on me.” (C.M.J. testimony.)
- There was no coercion
74. T.G. has the capacity to consent to sexual activity. For example, DPPC previously disciplined a staff member for having sexual contact with T.G. It found she falsely claimed she was raped, but that there was a consensual sexual encounter with that staff member. (Detective Testimony.)
75. The detective also testified that no criminal charges were brought in this case. One reason involved the understanding that T.G. was capable of consenting to sexual contact. (Detective testimony.)

76. Here, T.G. alleges she was raped. Thus, while T.G. has the capacity to consent, she said she did not consent to this encounter. Given her developmental disabilities, history of false allegations of assault, the inconsistencies among her statements, and the fact that she did not testify, I do not credit her allegations of coercion, i.e. that she did not consent here.
77. For example, T.G. is an unreliable reporter of time. She told the detective that she had known C.M.J. for 18 months but he had only worked there for four months. (Stipulations of fact; Detective testimony). She said the incident occurred at 7:30pm and then corrected that to 4:30pm (Ex. E.); but by all accounts, the incident could only have happened sometime between 8:00pm and 9:45pm.
78. T.G. also has a history of alleging she was sexually assaulted following a consensual encounter which she initiates. That is what likely happened here. This began with her writing a note to C.M.J. asking him to “put inside me”, which was consistent with her prior pattern of behavior.
79. I therefore do not credit her allegations that C.M.J. forced himself on her. Also, I do not credit many of the acts she alleges C.M.J. performed (e.g. that he forced her to perform oral sex on him or that he masturbated in front of her). And I do not credit that she said “no” to him during the encounter.
80. What I do credit are allegations for which there is corroboration: for example, that the two of them were alone (even though that’s forbidden) and that C.M.J. put his mouth on T.G.’s breasts (because there is DNA evidence and C.M.J. admits as much). I credit that T.G. wanted to have some sort of sexual contact with C.M.J., which she communicated through the note.

81. In finding T.G. pursued a consensual encounter with C.M.J., as I explain in more detail below, I do not credit C.M.J.'s statement that he was an unwilling participant in this incident. I thus find that they both engaged in a consensual sexual encounter.
82. I also find that because C.M.J. was T.G.'s care provider, and T.G. has a developmental disability, there was an inequality of position and power between the two.

CONCLUSIONS OF LAW

A care provider is “a caretaker⁶ who is employed by the Department or an Employer to provide services or supports to a Person with an Intellectual [or Developmental] Disability.” 118 Code of Mass. Regs., § 2.02. Care providers may not abuse a person with a disability. There are two types of abuse: abuse and abuse *per se*. *Id.* As relevant to this case, abuse *per se* occurs when a caretaker commits “sexual abuse,” regardless of whether they inflict a serious physical or emotional injury. *Id.*

[Sexual abuse] occurs when a Caretaker forces, tricks, threatens, coerces, exploits or otherwise engages a Person with a Disability . . . in nonconsensual sexual activity. Sexual activities may include, but are not limited to, unwanted or inappropriate touching, kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes or genitalia . . . Sexual Abuse also includes, but is not limited to, instances in which:

- (a) the Person with a Disability lacks the capacity to consent to the sexual activity with the Caretaker or other person, even if the Person with a Disability has purportedly consented; or
- (b) due to the nature of his or her disability, fear of retribution or hardship, or the inequality of position and power, the Person with a Disability was inappropriately engaged in the sexual activity with the Caretaker or other person.

Id.

⁶ A Caretaker is “any individual responsible for the health and welfare of a Person with a Disability by providing for or directly providing assistance in meeting a Daily Living Need, which cannot otherwise be performed by the Person with a Disability without assistance, regardless of the location at which such assistance occurs.” 118 Code of Mass. Regs., § 2.02.

An act of abuse *per se* is considered “registrable abuse,” which presumptively requires the perpetrator to be placed on an abuser registry. G.L. c. 19C, § 15(a).

[However,] “registrable abuse” shall not include instances in which the commission, upon weighing the conduct of the care provider and its outcome, determines that the incident was isolated and unlikely to reoccur and that the care provider is fit to provide services or supports to persons with intellectual or developmental disabilities.

G.L. c. 19C, § 15(a); 118 Code of Mass. Regs., § 2.02.

DPPC bears the burden of proof by a preponderance of the evidence that C.M.J. committed registrable abuse. *J.L. c. DPPC*, DPPC-22-0415, 2023 WL 7402532 (DALA Nov. 1, 2023); *S.S. v. DPPC*, DPPC-22-0537, 2023 WL 7213154 (DALA Oct. 26, 2023).

1. C.M.J. and T.G. had a consensual sexual encounter.

As noted above, I do not credit T.G.’s allegations that C.M.J. committed a nonconsensual, sexual assault. I do, however, credit her statement that there was at least some sexual contact and that C.M.J. was a willing participant. Despite C.M.J.’s denial, I ultimately conclude he did more than he admits.

I acknowledge that much of the evidence can cut both ways—for and against each version. For example, C.M.J. did not share the note he got from T.G. (“put inside me”) until the next day and only after his supervisor called to ask what happened. C.M.J. did not allege that T.G. had forced herself on him until after he was aware of the DNA results and the DDS investigative report. He first explained this in his November 2022 statement and repeated it in his testimony before me. He had multiple chances to share all this information promptly. Right after it happened, there were two staff members at the house; he spoke with his supervisor the day after and told her about T.G.’s note but said nothing about her actions; he spoke to the detective and again said nothing. He was aware there was an active investigation, including having his

DNA tested, and did not come forward with this information then either.

On the one hand, I could understand why someone who did nothing wrong would not want to divulge these facts—because he might not be believed and if he is not, it is highly inculpatory, especially given that there was an open criminal investigation. And C.M.J. said he did not trust the detective. *Cf. Commonwealth v. Correia*, 492 Mass. 220, 234-35 (2023), *citing Commonwealth v. Gardner*, 479 Mass. 764, 769 (2018) (“As we have observed on more than one occasion, ‘there may be many reasons why a defendant does not wish to come forward and speak to the police that have no bearing on his [or her] guilt or innocence.’”). C.M.J. also testified that he felt attacked and cornered; he was thrown off by T.G.’s aggression and simply wanted to get out of there as soon as possible. This account is certainly consistent with other accounts of victims of sexual assault; we now know that victims do not always immediately report assaults for a variety of reasons. *See Commonwealth v. King*, 445 Mass. 217, 237-38 (2005) (“research suggests that, in part because the harm suffered by sexual assault victims often consists of the psychological harm caused by the defendants’ violation of a victim’s body, such victims respond in a variety of ways to the trauma of the crime, and often do not promptly report or disclose the crime for a range of reasons, including shame, fear, or concern they will not be believed.”). If C.M.J. is telling the truth, his delay in reporting the note and the assault is consistent with many victims’ reactions.

On the other hand, someone who did something wrong would have a strong incentive to keep this narrative to themselves, especially if they hope an investigation will not uncover certain facts. It is not uncommon for the guilty to stay silent and then deny wrongdoing upon confrontation.

Then there is T.G.’s history of false allegations of sexual assault. On the one hand, that

would support C.M.J.'s argument that this is another false allegation. On the other hand, C.M.J. could have taken advantage of this history by engaging in sexual contact with T.G. and then claiming she was lying about it.

The DNA evidence is clear evidence of some physical contact. But again, this evidence supports either version: either C.M.J. willingly had some sort of sexual encounter with T.G. or T.G. threw herself at C.M.J. and rubbed her breasts on his face. Either version would have resulted in the same DNA results.

Some facts are inconsequential. At first blush, it is somewhat surprising that no one in the house heard or saw anything. And some staff members expressed doubt anything occurred. Yet, we know something happened because even C.M.J. admits that. The encounter was likely brief and happened in a room isolated from the rest of the house. The other residents were upstairs sleeping, one staff member was in the basement, and one was in the kitchen. The incident was quiet. Thus, the fact that no staff saw or heard anything, and doubt it happened, is meaningless.

However, there are several things that raise doubts about C.M.J.'s version of events. Take C.M.J.'s statement about his "man stuff." If unsolicited, it appears to have been an explanation in anticipation that the authorities might find his DNA, specifically semen. If in response to a specific question by the detective—such as, "are we going to find your DNA on the scene?"—it is a bizarre and unlikely explanation. Indeed, knowing now that C.M.J. admits there was physical contact with T.G., this statement does appear to be a way to explain what he thought might be an inevitable discovery. This is what DPPC suggests. I agree that, either way, this statement is not helpful to C.M.J.

C.M.J. also knew he should not be alone with T.G. He claims that is why he said they could not go on a walk alone. Knowing that, why would he not immediately extricate himself

from any situation in which he was alone with her—especially in the dark living room on a day he claimed “all the girls been hitting on me”? And another resident corroborated T.G.’s statement that C.M.J. asked them if they wanted to take a shower. It is likely that C.M.J. and the residents were all awkwardly flirting and C.M.J. knew T.G. was interested in sexual contact. It is inconceivable that if C.M.J. was not receptive to this, when he found himself alone with T.G., he did not walk away, get another staff member, or tell her to leave. Instead, he stayed in the room where she was hovering. He twice woke up to her alone in the room with him and did nothing. Then, when the sexual contact began, the fact that no one else heard or noticed anything belies his claim that there was any sort of struggle. The house was small enough, and at that time quiet enough, that I believe someone would have heard something if there was a struggle in the way C.M.J. describes. That no one did leads me to believe C.M.J. was trying to hide the encounter.

T.G.’s prior false allegations have been with respect to being assaulted, but she does have a history of initiating and engaging in consensual sexual contact with other males, including male staff. She also has a history of first passing notes seeking sex. Thus, even if this is another false allegation of sexual assault, there is still strong evidence that this was a consensual encounter.

Finally, C.M.J. revealed only certain pieces of evidence over time and in response to being confronted with more damning accusations. Although I noted this evidence *could* cut both ways, I find that it implicates C.M.J. here. He was equivocal about when he saw the note and where he found it. I do not believe that. He said he did not tell anyone right away because he felt he was being set up. But by whom? T.G.? If so, that is exactly why he would tell the staff right away and not let the story evolve. He said he waited to report the incident because he did not have his co-worker’s numbers or names saved on his phone. But they were at the house when

this happened. He did not have to call them; he could have just told them. He did not mention anything about any physical contact until after the DNA evidence came back and the report implicated him. Given his position and the stakes, his conduct is more consciousness of guilt than someone unsure of how to deal with this situation.

While I do not believe C.M.J. coerced T.G., DPPC has convinced me that there was some willing sexual contact. T.G. initiated the encounter, but C.M.J. could have stopped it. It may be that he regretted his decision and even sought to stop the encounter soon after it began. But that does not change the fact that I believe he went along with it to some extent for some time. It is impossible to determine the full extent of the encounter. No such specific finding is necessary to determine that C.M.J. had a brief, consensual sexual encounter with T.G. And while T.G. is capable of consent and initiated the encounter here, she is clearly vulnerable and does not always exercise the best judgment. C.M.J. should have, and could have, avoided sexual contact easily. That he did not is proof to me that he acquiesced to the encounter.

DPPC bears the burden of proof by a preponderance of the evidence. While it would not have met a higher standard—such as proof beyond a reasonable doubt—it has met this lower threshold. Although I have some doubt, this is what I find probably happened—it is more probable than not—and that is enough at this level to affirm DPPC’s allegations. *A.C. v. DPPC*, DPPC-22-0154 (DALA Dec. 15, 2022), citing *Continental Assurance Co. v. Diorio-Volungis*, 51 Mass. App. Ct. 403, 409 n.9 (2001).

2. The sexual encounter amounts to abuse *per se*

Having determined there was a sexual encounter between C.M.J. and T.G., the next question is whether that constitutes abuse *per se* as defined by the regulations.

At the hearing, I had understood DPPC to be arguing that the encounter, while

consensual, was nevertheless abuse *per se*. In its closing brief, DPPC makes the case that the encounter was coerced, but also argues that it does not matter since “[i]n essence, a determination of whether TG consented to any sexual activity with the Appellant is unnecessary simply because the sexual activity occurred between TG, the resident, and the Appellant, staff/her caretaker.” Having found T.G. was not coerced, I agree with DPPC’s secondary position.

Sexual interaction between a staff member and a client is problematic for many reasons including the nature of the disability and inequality of position and power. In this case, that is undoubtedly true. Given T.G.’s complicated history of false allegations but consensual encounters with male staff, any sexual contact with her, even if consensual, would be “inappropriate” as that term is used in the regulations. It is of no moment that this encounter may have been less involved than T.G. claims. Even the most minimal encounter would be inappropriate with T.G.

There is also nothing unusual about DPPC creating a presumption of non-consent even if the parties have the capacity to consent. *C.f. Commonwealth v. Dineen*, 70 Mass. App. Ct. 1, 6, n.5. (“That the intercourse was not by force, and that the victim consented to the advance by the defendant, is not, however, a defense to statutory rape of a child under G.L. c. 265, § 23), *citing Commonwealth v. Dunne*, 394 Mass. 10, 19 n. 17, (1985) (“The law conclusively presumes that those under sixteen years of age are not sufficiently mature to understand fully the physical, mental, and emotional consequences of sexual intercourse, and are therefore incapable of making a rational decision about whether to consent to such conduct”). The regulatory prohibition is clear. This incident violated that prohibition and squarely falls under the definition of abuse *per se*.

3. C.M.J. engaged in “registrable abuse.”

The final question is whether C.M.J.’s conduct rises to the level of “registrable abuse.” *S.S. v. DPPC, supra*; G.L. c. 19C, § 15(c). Acts of “abuse per se” are by default acts requiring registration, with one exception:

“registrable abuse” shall not include instances in which the commission, upon weighing the conduct of the care provider and its outcome, determines that the incident was isolated and unlikely to reoccur and that the care provider is fit to provide services or supports to persons with intellectual or developmental disabilities.

G.L. c. 19C, § 15(a). DPPC’s initial determination that C.M.J. did not meet this exception appears based on its assessment that the encounter was nonconsensual. As noted, I find that while the encounter constitutes abuse *per se*, it was consensual. Nevertheless, I affirm DPPC’s finding that C.M.J. should be placed on the abuse registry.

The incident reflects C.M.J.’s poor judgment and decision making. Although aware of T.G.’s history and limitations—including the rule that she not be alone with male staff—he failed to recognize the inappropriateness of this unfolding situation and extricate himself from it. Instead, he let the situation evolve to the point that he had some sexual contact with T.G. The rule that T.G. should not be alone with male staff requires rigid enforcement because of exactly what happened here. C.M.J. did not enforce this rule and instead found himself in the middle of a sexual encounter with a vulnerable person.

A Behavioral Support Plan does not suggest rules to be followed sometimes; it creates rules that must always be followed, rules which protect both the patient and others. Failure to follow a very simple rule here led to an inappropriate sexual encounter. C.M.J. has not demonstrated that he would be capable of following all rules moving forward, which could result in similar or more harmful results.

Moreover, C.M.J. did not come forth with all the information about the incident and still denies he did anything wrong. Incidents like these need to be reported and dealt with immediately. But C.M.J.'s silence prolonged and complicated the investigation. A caretaker must take responsibility for their actions, especially given this patient population. C.M.J. has not demonstrated that he would do so if he finds himself in a similar situation again.

Finally, placing C.M.J. on the abuse registry is consistent with how DPPC has dealt with similar incidents.⁷

CONCLUSION

DPPC has proved by a preponderance of the evidence that C.M.J. committed abuse *per se*. Because no exception applies, he shall be placed on the abuse registry.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate

⁷ DPPC submitted several decision letters reflecting its consistent policy of placing staff who had consensual or nonconsensual sexual contact with residents on the abuse registry. *See* DPPC Decision No. I-13995 (April 25, 2022); DPPC Decision No. I-18602 (October 13, 2021); DPPC Decision No. I-3248 (March 17, 2021).