TEXAS LAWYER

EXPERT OPINION

# Questionable judgment by child residential treatment center staff can constitute child abuse

**Elisa Reiter and Daniel Pollack | March 17, 2022**

"Good judgment comes from experience; experience comes from bad judgment." This astute observation, attributed to Dr. Kerr L. White, has daily application when supervising children in a residential treatment setting. While we should expect staff to make occasional bad decisions, they can, even though well-intentioned, still be legally defined as "child abuse."

According to the American Academy of Child and Adolescent Psychiatry, "effective residential treatment programs provide:

- "A comprehensive evaluation to assess emotional, behavioral, medical, educational, and social needs, and support these needs safely.
- An Individualized Treatment Plan that puts into place interventions that help the child or adolescent attain these goals.
- Individual and group therapy.
- Psychiatric care coordinated by a child and adolescent psychiatrist or psychiatric prescriber.
- Involvement of the child's family or support system. Model residential programs encourage and provide opportunities for family therapy and contact through on-site visits, home passes, telephone calls and other modes of communication.
- Nonviolent and predictable ways to help youth with emotional and behavioral issues. The use of physical punishment, manipulation or intimidation should not occur in any residential treatment program."

In a recent case, *Texas Health and Human Services Commission v. Davis*, 2022 (Tex. App. LEXIS 1321), the Seventh Court of Appeals (Amarillo), grappled with whether a caseworker's actions in attempting to restrain a 14 year-old constituted abuse. The child was 5'10", weighed 175 pounds, had an IQ of 70 and had a history of engaging in fights with staff and fellow residents.

At the time of the incident underlying the case, Tex.Fam. Code Section 261.401(a)(1) defined "abuse" as:

"An intentional, knowing or reckless act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program that causes or may cause emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy."

*Davis* involved an incident that occurred in June 2017. Three months later, the foregoing definition of abuse was repealed by the Texas legislature, effective Sept. 2, 2017. After that date, Tex.Fam. Code Ann. Section 261.001(1)(A)(B), (C ) defined abuse as including the following acts or omissions by an individual:

- Mental or emotional injury to a child that results in an observable and material impairment to the child's growth, development, or psychological functioning.
- Causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning.
- Physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm.

The Tex. Admin. Code Ann. Section 745.8555(b) provides a definition for what constitutes an intentional, knowing or reckless act as one involving an act or omission where the person accused of such conduct:

- Deliberately causes or might cause physical injury or emotional harm to the child.
- Knows or should know that physical injury or emotional harm to the child is a likely result of the act or omission.
- Consciously disregards an unjustifiable risk of physical injury or emotional harm to the child.

The Texas Health and Human Services Commission (THHSC) is the agency charged with checking the central registry as part of a background check process and for providing a person whose name appears on the registry with a chance for a due process hearing pursuant

to Tex.Fam. Code Ann. Section 261.002(a). If and when a person's name appears on the central registry of those found to have committed abuse, that status may be disclosed to third parties. As an example, status on the central registry may be disclosed to a school or childcare provider should such a provider run a background check when considering making an offer of employment to an individual.

In *Davis*, a 22-year-old caseworker, "E.D." had been employed as a "youth care counselor and caregiver at the Burke Center in Driftwood, Texas for 10 days." The Burke Center offers services to boys between the ages of 11 to 17, who have "mental, emotional and behavioral problems." E.D. was faced with how to handle the 14-year-old child. The child's record reflected that the child had been turned out of several facilities due to fighting both staff and fellow residents, necessitating being restrained on "at least 10 to 20" times that were documented in the child's file. E.D., new to the job, had only been involved in cases that required restraining children much smaller than he. In this instance, E.D. was of a similar stature to the child he sought to restrain. Prior to the incident, E.D. received training in how to deescalate situations that might necessitate emergency intervention, such that restraints were understood to be necessary in situations involving an immediate danger.

In the instant case, one Sunday, the 14-year-old child grew agitated as another child was allowed to use the bathroom in the older children's dormitory. The child went outside; one counselor followed. The child asked the counselor to give him some space, and the counselor complied. The child's plan required him to be supervised at all times in the event he was outside of the building. E.D. went outside, and was joined by another counselor. Several other children were outside, but those other children

were 30 to 40 feet away from the 14-year-old. The 14-year-old refused to respond to the counselors' attempts at redirection and entreaties for the child to go back inside the building. The child was verbally abusive to E.D. and the other counselor, and threw a small stick in E.D.'s direction. The stick flew close to E.D., but did not strike him, though the director of the facility observed that the child "threw a stick at staff and was being aggressive and dangerous." E.D. asked the child if he had just hurled the stick at him. The child responded with profanity. Others testified at the administrative hearing that the child appeared to continue to look down, perhaps for another object to throw. In the summary of service on file for the child, there were many notes indicating that when the child reached such an agitated state, he often "reaches a point where he attempts to physically harm someone." E.D. was described as looking at the 14-year-old, then to where the other children were, and then in the direction of another counselor, nodding and looking back at the child. E.D. then approached the child in an attempt to restrain him, first attempting a "basket hold."

The basket hold has been criticized as follows:

"The basket-hold is the most fatal technique in history since the police choke hold. In or about 1999 the GAO did an investigation on restraint use in 4 states and found that one of the states engaged in a dangerous restraint practice, the basket hold.

The basket hold is also not effective because it has only two weak connection points at the wrists.  Even when done properly it is not a 'passive' hold by strict definition because it applies significant traction

on the child's wrists and, when the elbows disengage, there is traction at elbows and shoulders of the child, as well."

E.D.'s basket-hold on the child was ineffective. E.D. then attempted to hold the child's wrist, with his other hand on the child's shoulder, despite the fact that the child's records included notations that it typically took "two people to restrain this particular child because he was strong." The second counselor joined the attempt to restrain the child. E.D., the other counselor and the child all hit the ground. As the child resisted, the counselor who first followed the child outside joined the fray after E.D. and the second counselor lost control of the child. Ultimately, it took all three counselors to restrain the child. Two of them, including E.D., suffered injuries during the incident.

The incident was investigated by Texas Department of Family and Protective Services (TDFPS). E.D. advised the investigator that "as the new person, he had to show that he was able to handle the children. He could not let the children bully him." E.D. perceived the child's actions as an attempt to test him, and that he needed to assert himself to earn the child's respect, adding that he felt compelled to restrain the child, as he felt threatened by the child. E.D. indicated that by throwing the stick, the child presented a danger to himself and others. TDFPS found that E.D.'s actions constituted "abuse and/or neglect," in that E.D. engaged in a "lengthy, unnecessary, improper, and/or prohibited restraint" of the child. TDFPS also found that E.D. "unequivocally violated applicable minimum standards regarding discipline, punishment, and emergency behavior intervention … that could have easily caused physical injury or death of the child."

E.D. appealed the TDFPS findings, with a trial before an administrative court judge. As the administrative court judge held that THHSC presented sufficient evidence to support TDFPS's findings, the administrative judge found that E.D.'s name should be maintained in the central registry as a person who committed child abuse. E.D. again appealed, seeking to overturn the administrative law judge's rulings. The district court judge reversed the administrative court's decision, netting an appeal by THHCS. The Seventh Court of Appeals, in an opinion by Justice Patrick A. Pirtle, analyzes whether substantial evidence was presented to support the findings of abuse, necessitating two inquiries:

- Whether the agency made findings of underlying facts that logically support the ultimate facts and legal conclusions establishing the legal authority for the agency's decision or action, and, in turn,
- Whether the findings of underlying fact are reasonably supported by the evidence presented.

In *Davis*, decided Feb. 23, 2022, the Seventh Court of Appeals holds that while they are sympathetic to E.D.'s position as to the fleeting definition of abuse in effect when the incident occurred, "given the state of the law applicable at the time, we cannot adopt" E.D.'s contention, adding that the court is "constrained to construe the statute as it existed" when the incident occurred. Rather than using restraint as a last resort during an emergency, the appellate court found that E.D. did not make an attempt to de-escalate the child's agitation before resorting to physically restraining the child. Moreover, an employee of TDFPS testified that "she believed the child could have suffered emotional or physical injuries from the restraint … used." While two workers were injured, and the child suffered no injury, these facts proved irrelevant to the appellate court. The appellate court concluded that simply throwing a stick, potentially seeking other objects to hurl at others, and using profanity to

an authority figure, did not create an emergency, or the need to "prevent imminent physical harm to another because of a child's overt acts, including attempting to harm others." Justice Patrick Pirtle notes: "None of the child's acts constituted aggressive acts to such a degree that immediate intervention was necessary to prevent harm to others and nothing suggests an emergency existed at the time."

The result is that E.D.'s name will remain on the THHSC child abuser list. Might E.D. appeal again? What's the takeaway? Usually, sticks and may break my bones … Perhaps those who work in residential treatment centers—and their attorneys—need to engage in more trauma-informed training.

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