

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
BOSTON, MASSACHUSETTS 02111

LINDA S. SPEARS
COMMISSIONER

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IN THE MATTER OF)
)
R. S.)
)
FH # 2017 0125)

HEARING DECISION

Procedural Information

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

On November 28, 2016, the Department received a 51A report filed by a mandated reporter alleging physical abuse of R ("R" or "the child"), by the Appellant; the allegations were subsequently supported.¹ 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 April 11, 2017, at the Department of Children and Families' Greenfield Area Office. All witnesses were sworn in to testify under oath. The record remained open until April 25, 2017 to allow for the submission of additional documents to be entered into the record.²

The following persons appeared at the Fair Hearing:

Anastasia King
Mr. R.S.
Ms. K.A.

Administrative Hearing Officer
Appellant
DCF Supervisor³

¹ Based on information obtained by the Response Worker during the 51B response, allegations of neglect of the child by the Appellant were added and subsequently supported by the Department. (Pursuant to DCF Protective Intake Policy) (Testimony of Supervisor)

² Exhibit "A"

³ DCF Supervisor, Ms. K.A. ("Supervisor") provided testimony on behalf of the Department.

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 1: 51A Report

Exhibit 2: 51B Response

For the Appellant:

Exhibit A: Appellant's Statement

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. The subject child of this Fair Hearing is R ("R" or "the child"); a male child who was nine years old at the time the 51A report was filed. (Exhibit 1, p.1)
2. On November 28, 2016, a 51A report was filed alleging physical abuse of the child by the Appellant. According to the report, the Appellant was called to the child's school due to the anger and rageful behaviors the child was displaying. While waiting for the Appellant to arrive, the child disclosed to the reporter that the Appellant had struck

him, leaving marks on his back. The child reported that the incident occurred approximately one week before and the mother had taken photos of his injury. The Appellant was asked to take the child for a crisis evaluation, which he agreed to do. (Exhibit 1, p.3; Testimony of Supervisor)

3. The 51A report was screened in as an Emergency Response and assigned to DCF Response Worker, Mr. S.H., ("Response Worker" or "RW") (Exhibit 2, p.1)
4. The Appellant and Ms. S.S. ("SS" or "the mother") are a married couple and the child's biological parents. (Testimony of Appellant) The Appellant is a "caregiver" as defined by Departmental policy and regulation. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00
5. The Appellant and the mother are also the biological parents of N ("N" or "the sister"). N is an eight year old female child who also resided in the home. (Testimony of Appellant)
6. The only prior DCF history for this family involved an Initial Assessment that occurred in January, 2015, due to concerns of the Appellant's use of physical discipline in the home. The case was closed after the Department concluded a Substantiated Concern finding in this matter. (Exhibit 2, p.1)
7. The Appellant and the mother, along with the school, had been struggling with the aggressive and disrespectful behaviors the child had been displaying. (Exhibit 2, p.3; Exhibit 2, p.4; Exhibit A)
8. The child was attending therapy, which the Appellant and the mother were actively participating in to address the child's concerning behaviors. (Exhibit 2, p.4; Exhibit A; Testimony of Appellant)
9. Although the Appellant would spank the child, this form of discipline was only utilized by the Appellant as a last resort. The Appellant would spank the child on the buttocks, over the clothes, and with an open hand, which would occur only after other forms of discipline, such as taking the child's Kindle and other privileges away, had been exhausted. (Exhibit 2, p.3; Testimony of Appellant)
10. The last occasion the child had been spanked by the Appellant occurred approximately one and a half years prior to the reported incident. (Exhibit 2, p.2; Testimony of Appellant)
11. On the day of the reported incident, the child's Kindle privileges were taken away by the Appellant for not listening and being disrespectful. When the child's behaviors did not improve, the Appellant instructed the child to go to his room, at which time the child slammed the bedroom door in the Appellant's face and locked the door. (Exhibit 2, p.2; Testimony of Appellant)

12. The child pushed a small dresser in front of his bedroom door after he locked it. The child did this because he knew this would make the Appellant mad, and not because he wanted to protect himself. (Exhibit 2, p.3)
13. The child was warned two or three times by the Appellant to open the door or he would be spanked as a consequence. The child was spanked by the Appellant because the child failed to open the door as instructed. (Exhibit 2, p.2; Testimony of Appellant)
14. Although the Appellant struggled with his decision to spank the child, he felt that he had exhausted other options of discipline and after warning the child several times that he would be spanked, the Appellant felt it necessary to follow through with his statement. (Exhibit 2, p.2; Testimony of Appellant)
15. The Appellant did not dispute that he struck the child on the day of the reported incident. (Exhibit 2, p.2; Exhibit A; Testimony of Appellant)
16. The Appellant was angry with the child when he spanked him on his buttocks. The Appellant's actions left marks, resembling approximately one or two finger prints, on the child's upper buttocks area. (Exhibit 2, p.4; Exhibit A; Testimony of Supervisor)
17. The mother took a photograph of the child's injury when she noticed the marks on the child while he was getting ready for his bath. The photograph was viewed by the RW during the RW's interview with the mother on November 29, 2016. (Exhibit 2, p.3; Exhibit 2, p.4)
18. The child felt safe in the home and did not report to the RW, during the RW's interview with the child on November 28, 2016, that he was afraid of the Appellant. (Exhibit 2, p.3)
19. No evidence was presented to suggest that the child's behavioral issues were a direct result of the Appellant's actions. (Fair Hearing Record)
20. On December 22, 2016, pursuant to MGL c. 119, § 51B, the Department supported allegations of neglect and physical abuse of the child by the Appellant. The Department concluded that the Appellant struck the child during an episode of challenging behavior which resulted in the child sustaining an injury. The Department further concluded that during the reported incident, the Appellant created an environment that was not conducive to the child's emotional stability and growth. (Exhibit 2, p.6; Testimony of Supervisor)
21. Based upon a review of the evidence presented in its entirety, and after consideration of all the facts and circumstances, I find that the physical injuries inflicted on the child by the Appellant occurred as described, and although not seriously injured, the Appellant's actions were intentional, left marks on the child, and created a substantial risk of physical and emotional injury. Cobble v. Commissioner of the Department of Social Services, 719 N.E.2d 500, 430 Mass.385 (1999) Therefore, I find that the Appellant's actions constituted "abuse" as defined by Departmental regulations (110 CMR 2.00). (See, definitions of "neglect" and "abuse" below)

22. I further find that the Department's decision to support the allegations of physical abuse of the child by the Appellant was based on "reasonable cause" and therefore, made in compliance with its policy and regulations. (See, "reasonable cause" and "Analysis" below)
23. However, after consideration of all the evidence provided, I find that the Department did not have reasonable cause to believe that the child's emotional stability and growth had been negatively impacted by the reported incident, and that the Appellant's actions or inactions placed the child in danger or posed substantial risk to his safety or well-being as required by the Department's intake policy when supporting for neglect. (110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16)
24. As a result, I find that the Appellant's actions did not constitute neglect as defined in its regulations, and its decision was not in compliance with its regulations. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00 & 4.32) (See, "Analysis" below)

Analysis

To Support a finding means:

- There is reasonable cause to believe that child(ren) was abused and/or neglected; and

The actions or inactions by the parent(s)/caregiver(s) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being . . . DCF Protective Intake Policy No. 86-015 (rev. 02/28/2016.).⁴

Caregiver

- (1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
- (2) Any person entrusted with responsibility for a child's health or welfare, whether in the child's home, 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. DCF Protective Intake Policy No. 86-015 (rev. 02/28/2016.)

Neglect is 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 a failure to thrive. Neglect cannot result solely from inadequate

³ Courts have established that the Department's determination of abuse or neglect is properly determined based on a "reasonable cause" standard. See, Lindsay v. Department of Social Services, 439 Mass. 789 (2003)

economic resources or be due solely to the existence of a handicapping condition. DCF Protective Intake Policy No. 86-015 (rev. 02/28/2016.)

“Reasonable cause to believe” means a collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected. (110 CMR 4.32(2)) Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caretaker; physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals (e.g. professionals, credible family members); and the social worker’s and supervisor’s clinical base of knowledge. (110 CMR 4.32(2))

“[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A.” Care and Protection of Robert, 408 Mass. 52, 63 (1990) This same reasonable cause standard of proof applies to decisions to support allegations under s. 51B. Id. at 64; M.G.L. c. 119, s. 51B “Reasonable cause” implies a relatively low standard of proof which, in the context of 51B, serves a threshold function in determining whether there is a need for further assessment and/or intervention. Id. at 64

“Abuse” means the non-accidental commission of any act by a caregiver upon a child under age 18, which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the law of the Commonwealth or any sexual contact between a caregiver and a child under the care of that individual, or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 2.00, DCF Protective Intake Policy #86-015, rev. 2/28/16

Physical Injury

Death; or fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such non-trivial injury; or soft tissue swelling or skin bruising depending upon such factors as the child's age, the circumstances under which the injury occurred, and the number and location of bruises. DCF Protective Intake Policy #86-015, rev. 2/28/16

To prevail, an Appellant must show by a preponderance of the evidence that the Department’s decision or procedural action was not in conformity with the Department’s policies and/or regulations and resulted in substantial prejudice to the Appellant. If there is no applicable policy, regulation or procedure, the Appellant must show by a preponderance of the evidence that the Department acted without a reasonable basis or in an unreasonable manner, which resulted in substantial prejudice to the Appellant. (110 CMR 10.23)

When reviewing a support decision, the Hearing Officer may consider information available during the investigation and new information subsequently discovered or provided that would either support or detract from the Department’s decision. (110 CMR 10.21(6))

The Appellant did not dispute that on the day of the reported incident he spanked the child on the buttocks due to the child's defiance and disrespect. The Appellant maintained that based on the circumstances, he felt the use of physical discipline was warranted as he had exhausted all other options to discipline the child. The Appellant further maintained that because he had given the child ample warnings that he would be spanked if did not open his bedroom door, it was necessary for him to then follow through and spank the child when he continued to disobey him. However, the Appellant was angry with the child when he administered the physical discipline and used an excessive level of force which resulted in marks being left on the child's upper buttocks area. The marks remained present when the mother later observed the injury which she then felt compelled to photograph and show the RW.

Although the occasions in which the Appellant feels the use of physical discipline were not frequent, on this occasion its use was excessive and resulted in the child sustaining a physical injury. The Appellant's actions were intentional, left marks on the child, and created a substantial risk of physical and emotional injury. Cobble v. Commissioner of the Department of Social Services, 719 N.E.2d 500, 430 Mass.385 (1999)

After review of all of the evidence provided, including documentary evidence and testimony provided by the Appellant at the Fair Hearing, I found no evidence to detract from the Department's finding in this matter to allow for a reversal of the Department's decision to support allegations of physical abuse of the child by the Appellant. Based on the totality of the evidence, for reasons cited above and in the detailed Findings of Fact, the Department's concerns rose to the level of "reasonable cause to believe" that physical abuse of the child by the Appellant occurred in this case. As stated above, "reasonable cause" implies a relatively low standard of proof which, in the context of the 51B investigation, serves as a threshold function in determining whether there is a need for further assessment and/or intervention. (Care and Protection of Robert, 408 Mass. 52, 63-64 (1990)) As such, there was sufficient evidence to support a finding of physical abuse.

The Appellant also contested the Department's determination that neglect of the child occurred, and that the Appellant's actions on the day of the reported incident failed to provide the child with an environment that was conducive to the child's emotional stability and growth. Despite this conclusion, the Department did not provide evidence to support its determination that the child's emotional stability and growth had been negatively affected by the Appellant's actions. The child felt safe in the home and did not report to the RW that he was fearful of the Appellant. Additionally, no evidence was presented to suggest that the concerning behaviors the child was displaying were a direct result of the Appellant's actions.

As a result, there was insufficient evidence that the child had been negatively impacted as a result of the reported incident, or that the Appellant's actions rose to the level necessary to support allegation of neglect. A Hearing Officer's decision must be supported by substantial evidence; there must be substantial evidence supporting the Hearing Officer's conclusion that the Department had reasonable cause to believe that neglect occurred in this instance. (Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006))

Therefore, based on the evidence provided and in the aforementioned findings, the Department's determination that the Appellant's actions constituted neglect of the child, as defined in its regulations, was not made in conformity with Department policy and regulations.

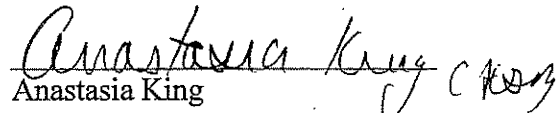
The Appellant has shown by a preponderance of the evidence that the Department acted without reasonable basis or in a reasonable manner, and resulted in substantial prejudice to the Appellant when making its decision to support allegations of neglect of the child by the Appellant.

Conclusion

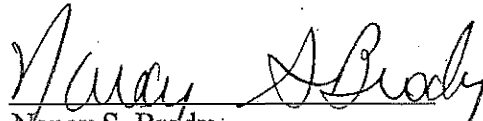
The Department's decision to support the allegation of **physical abuse** of the child by the Appellant is **AFFIRMED**.

The Department's decision to support the allegation of **neglect** of the child by the Appellant is **REVERSED**.

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he may do so by filing a complaint in the Superior Court for the county in which he lives, or within Suffolk County, within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, s. 14.)


Anastasia King
Administrative Hearing Officer

Date: 3-21-18


Nancy S. Brody
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spears,
Commissioner