

**EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET 6TH FLOORS
BOSTON, MASSACHUSETTS 02111**

**Linda S. Spears
Commissioner**

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IN THE MATTER OF: JS

Fair Hearing # 2017-0178

FAIR HEARING DECISION

The Appellant in this Fair Hearing is Mr. JS (hereinafter "JS" or "Appellant") The Appellant appeals the Department of Children and Families' (hereinafter "the Department" or "DCF") decision, to support allegations of physical abuse and neglect by the Appellant of the subject child (hereinafter "R"), the report filed and investigated pursuant to M.G.L., c.119, §§ 51A and B.

Procedural Information

On January 4, 2017, the Department received a mandated 51A report alleging the neglect of R by the Appellant. The report was received by the Department's Worcester West Area Office, where it was deemed non-emergent and assigned accordingly. The Department completed its response on January 26, 2017. The allegations of neglect and physical abuse of R by the Appellant were supported. The Appellant was informed of the decision and of his right to appeal the Department's determination. The Appellant filed a timely request for a Fair Hearing under 110 C.M.R. 10.06 (8).

The Fair Hearing convened for two (2) hearing sessions, April 6, 2017 and May 25, 2017, at the Department of Children and Families Worcester West Area Office.

The witnesses were sworn in on both days to testify under oath. The Fair Hearing was digitally recorded and transferred to two (2) compact discs.

Part one of the hearing session was convened on April 6, 2017 at the Worcester West Area Office. The following persons appeared at the Fair Hearing:

Anna L. Joseph
NM
JS
JP

Hearing Officer
Appellant's Counsel
Appellant
Department Response Worker

SC
SM
TL
PS

Department Supervisor
Department Social Worker
Witness
Witness

Part two of the hearing session was convened on May 25, 2017 at the Worcester West Area Office. The following persons appeared at the Fair Hearing:

Anna L. Joseph
JP
JS
NM
SB

Hearing Officer
Department Response Worker
Appellant
Appellant's Counsel
Witness

In accordance with 110 C.M.R. 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 following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit 1: 51A dated January 4, 2017
- Exhibit 2: 51B dated January 26, 2017
- Exhibit 3: List of Chores and Expectations at VV
- Exhibit 4: Screen Shot of Text exchange between R and Appellant

For the Appellant:

- Exhibit A: Memo detailing disciplinary incident at school dated January 9, 2017
- Exhibit B: In school suspension documentation dated January 11, 2017
- Exhibit C: Complaint for Modification [REDACTED] Probate Court dated January 9, 2017
- Exhibit D: Stipulation on Complaint for Contempt dated March 27, 2017
- Exhibit E: R's Behavioral History from Elementary School
- Exhibit F: Letter of Support from SB dated April 2, 2017
- Exhibit G: Letter of Support from NB dated April 3, 2017

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. (110 CMR 10.21)

Issue To Be Decided

The issue presented in this Fair Hearing is whether, based upon the evidence and the hearing record as a whole, and on the information available at the time of and subsequent to the 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, whether the Department failed to act with a reasonable basis or in a reasonable manner which resulted in substantial prejudice to the Appellant; for a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, whether there was reasonable cause to believe that a child had been abused or neglected; and the actions or inactions by the parent(s)/caregiver(s) 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 10.05; DCF Protective Intake Policy #86-015, rev. 2/28/16

Findings of Fact

1. The subject child of the Department's response, R, was age twelve (12) when the reported incident occurred. (Exhibit 1, p.1)
2. R was the child in common between the Appellant and his former spouse (hereinafter "VV"). The Appellant and VV are separated. (Exhibit 2, p.1; Testimony of Appellant)
3. The Appellant and VV had no protective history with the Department. (Exhibit 2, p. 1)
4. R was hospitalized in Spring 2016 for "pseudo seizures" which were diagnosed as possibly psychogenic. R was placed on medication and diagnosed with anxiety. (Exhibit 2, p.3)
5. Prior to these events, R had behavioral issues at school which resulted in disciplinary action by his school. (Exhibit A; Exhibit B; Exhibit E; Testimony of Appellant)
6. The Appellant testified that R is a liar and was coached or coerced into making his disclosures. (Testimony of Appellant)
7. R presented as a bright, polite and articulate boy and was deemed credible by the Department (Testimony of Department Social Worker; Testimony of Department Response Worker)
8. In the course of the Department's response, R disclosed both verbal and physical abuse by the Appellant. R reported the Appellant hits him on the back of the head, his butt and his back. R reported the Appellant screams and shouts at him at sporting events in front of his teammates and friends. R made these statements to the mandated reporter, the Department social worker, the Department's response worker and to his mother, VV.

(Exhibit 2; Testimony of Department Response Worker; Testimony of Department Social Worker) (say more of what R told)

9. The Appellant resided with a domestic partner, and her two (2) sons, both are close in age to R. (Testimony of Appellant; Testimony of Witness)

10. The Appellant characterized his partners' children as "great kids" and described R as a "liar". (Exhibit 2; Testimony of Appellant)

11. On January 10, 2017 the Department Response Worker contacted the Appellant to discuss 51A and to set up a time to meet. The Appellant yelled and swore on the phone and used profanity, calling the report "bullshit". (Exhibit 2, p.4)

12. On January 11, 2017 the Appellant reported that R "owes him an apology" by telling everyone this. This is a "crock of shit" and R is lying and needs to pay consequences and "DSS thing is bullshit." (Exhibit 2, p. 5)

14. The Appellant testified he grabbed R by his sweatshirt to move R to his room. (Testimony of Appellant)

15. Between the reported events and Fair hearing, the Appellant has not had parenting time with R. The Probate Court and the Department attempted to a visitation between R and the Appellant to be facilitated by the Department. This did not occur as R did not want to see the Appellant. (Exhibit D; Testimony of Department Ongoing Worker)

16. R attends individually counselling sessions weekly. R's therapist reported concerns around the Appellant's verbally and physically abusiveness towards R. R appeared to be doing better since he stopped visiting with the Appellant. (Exhibit 2, p. 6; Testimony of Department Response Worker)

17. R reported feeling less anxious at not having to visit the Appellant. (Testimony of Department Social Worker)

18. The Appellant is a long standing youth sports coach with strong ties to the community. (Testimony of Witness; Exhibit F; Exhibit G)

19. The Appellant has been observed treating R with kindness and affection by family and friends. (Testimony of Witness)

20. As of May 25, 2017, the Appellant engaged with the Department's social worker and is trying to commence family therapy. (Testimony of Appellant; Testimony of Department Social Worker)

21. I find the Department conducted the investigation in accordance with Department regulations and applicable statutes. 110 CMR 4.27; M.G.L. c. 119 §51B et seq.

21. In light of the totality of evidence in this case, I find the Department did not have reasonable cause to support the allegation of physical abuse of R by the Appellant. I find the Department did have reasonable cause to support the allegation of neglect.

- a) A finding of physical abuse requires that the Department have reasonable cause to believe that a caregiver's actions caused or created a substantial risk of physical or emotional injury (110 CMR 2.00);
- b) There was no credible evidence that the Appellant's actions caused or created a substantial risk of physical injury to R ;
- c) The totality of the evidence does not support a finding of abuse as defined by Department policies and/or regulations. 110 CMR 2.00, DCF Protective Intake Policy #86-015, rev. 2/28/16. (Also see Cobble v. Commissioner of DSS, 430 Mass. 385 [1999]);
- d) The Department did not have sufficient evidence to support a finding that the Appellant abused E under Department policies and regulations. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16;
- e) The Department had sufficient evidence to support a finding that the Appellant neglected R under Department policies and regulations. R's clinician, mother and R himself articulated a causal relationship between the Appellants actions and R's decline in emotional health. In so doing, the Appellant's actions did create a substantial risk of emotional injury. 110 CMR 2.00 and 4.32 DCF Protective Intake Policy #86-015, rev. 2/28/16

Applicable Standards

"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 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

A support finding of abuse or neglect requires that there be reasonable cause to believe that a child(ren) was abused and/or neglected; and that 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. 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).

“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. Care and Protection of Robert, 408 Mass. 52, 63-64 (1990). “[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A.” Id. at 63. This same reasonable cause standard of proof applies to decisions to support allegations under s. 51B. Id. at 64; M.G.L. c. 119, §. 51B.

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, (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, (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

In making a determination, the Hearing Officer shall give due weight to the clinical decision made by a Department social worker. 110 CMR 10.29(2)

Analysis

The Department supported allegations of physical abuse and neglect of R by his father, the Appellant. The evidence in this case is sufficient to sustain the Department’s finding of neglect, but fails to meet the threshold for physical abuse.

R provided detailed, consistent accounts of being routinely physically disciplined by the Appellant, notably, being hit in the back of the head. R also described an incident where the Appellant left a handprint on his buttocks after being hit by the Appellant. The

Appellant's denial of striking R is not credible; however the disclosures made by R are insufficient to warrant a physical abuse finding. There is no evidence that the Appellant's action of disciplining R in this manner caused a significant risk of injury. However, the manner and pattern of discipline, coupled with the Appellant's lack of regard of R's significant mental health diagnoses had a demonstrably adverse effect on R's overall well-being. R is fearful of the Appellant and has not wanted to be with him. R has been disciplined at school for aggressive behavior and acting out towards others, even threatening others at school. Notwithstanding the physical harm which could possibly occur by administering a slap to a 12 year old; R is a fragile child with a mental health condition serious enough to require hospitalization. This should have merited R more tender care from the Appellant, not less.

In order to credit the Appellant's version of these events, one would have to conclude that R conspired to invent these allegations, and/or was coerced into making these disclosures by the Department's response worker and his mother. No evidence supports these conclusions.

While the Appellant's belligerent, if not outright hostile response to the Department is not proof of anything per se, it does corroborate R's description of the Appellant's temper.

Considering all the evidence, I find the Departments' concerns to be valid and to rise to the level of "reasonable cause to believe" that neglect did occur as the Appellant failed to take actions necessary to provide R with minimally adequate emotional stability and growth, and created a substantial risk to his safety and well-being. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); Wilson v. Department of Social Servs., 65 Mass.App.Ct. 739, 744-745 (2006); Cobble v. Commissioner of DSS, 430 Mass. 385 (1999)

Based upon the evidence presented both at the time of the Department's response and at the Fair Hearing , the decision of the Department to support the allegation of neglect by JS, as defined in its regulations, was reasonable, and made in conformity with Department regulations, policies and procedures. Therefore, the decision of the Department to support the allegation of neglect is **AFFIRMED**.

Based upon the evidence presented both at the time of the Department's response and at the Fair Hearing , the decision of the Department to support the allegation of physical abuse by JS, as defined in its regulations, was not reasonable, nor made in conformity with Department regulations, policies and procedures. Therefore, the decision of the Department to support the allegation of physical abuse is **REVERSED**

Conclusion and Order

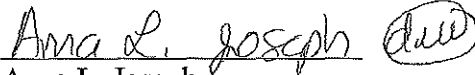
The Appellant has failed to show by a preponderance of the evidence, that the Department's decision to support the allegation of neglect was not in conformity with Department regulations nor that such was done without reasonable basis, and therefore the Department's decision is **AFFIRMED**.

The Appellant has shown by a preponderance of the evidence, that the Department's decision to support the allegation of physical abuse was not in conformity with Department regulations nor that such was done without reasonable basis, and therefore the Department's decision is **REVERSED**.

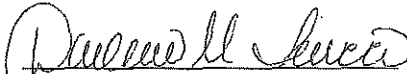
Orders

1. The Department's decision to support the allegation of neglect R of by the Appellant, JS, is AFFIRMED.
2. The Department's decision to support the allegation of physical abuse of R by the Appellant JS 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 within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, s. 14.)


Anna L. Joseph
Administrative Hearing Officer

Date: 11/10/17


Darlene M. Tonucci, Esq.
Supervisor, Fair Hearing Unit

Date:

Linda S Spears
Commissioner