

**Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
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Boston, Massachusetts 02111**

**Linda S. Spears
Commissioner**

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IN THE MATTER OF)
)
 GN) **FAIR HEARING DECISION**
)
 FH # 2017-0520)
)

The Appellant in this Fair Hearing was GN. The Appellant GN appealed the decision of the Department of Children and Families (hereinafter "DCF" or "the Department"), to support allegations of physical abuse pursuant to MGL c.119, §§51A and B.

Procedural History

On April 5, 2017, the Department of Children and Families ("Department") received a report, pursuant to MGL c. 119, §51A, alleging the physical abuse of A by her father, GN (GN or "Appellant"). On or about April 12, 2017, the Department decided to support the allegations of physical abuse of A by the Appellant pursuant to MGL c. 119, §51B. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing pursuant to 110 CMR §10.06. The hearing was held on June 14, 2017 at the Department's [REDACTED] Area Office in Taunton, Massachusetts. All parties were sworn in to testify under oath. The record was closed at the conclusion of the hearing.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira	Fair Hearing Officer
ER	Appellant's Attorney
KR	DCF Supervisor
RM	DCF Response Worker
JA	DCF Social Worker (Observing)

In accordance with 110 C.M.R. §10.03, the Hearing Officer attests to impartiality in this matter, having no direct or indirect interest, personal involvement, or bias in this case.

The Fair Hearing was recorded pursuant to Department regulations 110 CMR §10.26.

The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

Exhibit A Child Abuse/Neglect Report dated 04/05/2017
Exhibit B Child Abuse/Neglect Emergency Investigation completed 04/12/2017
Exhibit C Photos of the Subject Child; A

For the Appellant:

None

The Hearing Officer need not strictly follow the rules of evidence....only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 CMR §10.21

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. 110 CMR §10.05

For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issues are whether there was reasonable cause to believe that a child had been abused or neglected; and, whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being, or the person was responsible for the child being a victim of sexual exploitation or human trafficking. *DCF Protective Intake Policy #86-015, Rev. 2/28/16*; 110 CMR 10.05

Findings of Fact

On the basis of the evidence, I make the following factual findings:

1. At the time of the filing of the subject 51A, A was eleven years old. She resided with siblings N, age twelve and L, age one. Residing in the home were the Appellant and the child's stepmother, HP. The family resided in [REDACTED], MA. (Exhibit A; Exhibit B)

2. The Appellant is the father of the subject child, therefore deemed a “caregiver” pursuant to Departmental regulation and policy. 110 CMR §2.00; *DCF Protective Intake Policy #86-015, rev. 2/28/16*
3. The family has been known to the Department since August 2010 stemming from concerns of neglect of A by the Appellant and biological mother, H. On October 16, 2015 a report was supported for the physical abuse of A by the Appellant. The Appellant acknowledged hitting A in the thigh, leaving hand prints and a black and blue mark, including a scattered purple petechial mark around the bruise. Another report was filed for the physical abuse and neglect of A in September 2016 by the Appellant and stepmother. The report was screened out. The family had an open case with the Department stemming from the supported report of October 2015 when the most recent 51A was filed and is now being appealed. (Exhibit A, pp. 6-7)
4. On April 5, 2017, the Department of Children and Families received a 51A report pursuant to MGL c. 119, § 51a, filed by a mandated reporter, alleging the physical abuse of A by the Appellant. According to the mandated reporter, the subject child arrived at school complaining of an ear ache. The nurse observed redness outside ear by the lobe area. The child was hesitant disclosing what happened, citing that her father would be mad. However, A did disclose that her father, the Appellant, had hit her the night before. Allegedly, the Appellant grabbed her by the shirt, put her on her knees and dragged her forward. She fell backwards during the incident and hit her head. The subject child has a history of “story telling” and attention seeking behaviors but there was no indication that it was the case in this disclosure. (Exhibit A, p. 3)
5. The report was screened in and assigned for investigation, pursuant to MGL c. 119, § 51B. The allegation of physical abuse of A by the Appellant was supported. The aforementioned allegation was supported because the Department had reasonable cause to believe the subject child was disciplined by the Appellant as initially disclosed to the mandated reporter by the child. The subject child was consistent with her disclosure to three separate individuals, including the DCF Response Worker and a physician who believed that the injury to the ear lobe was inflicted and specifically inflicted by the Appellant. (Exhibit B, p. 5)
6. The family’s DCF Social Worker went to the subject child’s school and took photos of the child’s injury (red mark/bruised inside left ear). (Exhibit B, p. 2; Exhibit C; Testimony of the DCF Response Worker)
7. The DCF Investigator met with the Appellant and the stepmother on April 6, 2017. When interviewed, the stepmother related that the Appellant had picked up the subject child that week and had to sign a discipline slip. Reportedly, A had admitted to bending another child’s finger and has struggled telling the truth about the incident. Both H and GN related that A had struggled telling the truth when she does something wrong. (Exhibit B, p. 2)

8. When interviewed, the Appellant reported that he was very upset with A and was "so mad" he could not deal with it; i.e. the incident involving A. He reported that he normally sits down with A and talks to her but he only made her stay in her room. (Id.)
9. When interviewed, H disclosed that she was in the kitchen preparing dinner and confirmed that she never saw GN enter A's room, relating that she ate dinner with the family and later took a shower. (Id.)
10. The Appellant and H maintained that they did not notice the red mark on the night the incident allegedly occurred. The Appellant related that he never entered the child's room and he was angry at the child and never said goodnight. (Id.)
11. During the DCF interview, the Appellant felt that A's behavior is instigated by her biological mother, whom she visits regularly. It was possible that A got the red mark/bruise at her mother's home over the weekend, relating that A likes to play "gymnastics", which she is not allowed to do in his home. If she hurt herself, he understood why she wouldn't tell him or Heather. (Exhibit B, p. 3)
12. The DCF Response Worker observed one small red-brown bruise on the inside left ear opening. The subject child disclosed that when she got home with her father on the day of the incident, her father was angry and made her kneel in front of him when he talked to her. She further disclosed that her father grabbed the top of her shirt, which made her fall forward and hit her head, relating that she hit her head on the molding at the bottom of a wall in her bedroom. (Id.)
13. When interviewing the subject child, the subject child was inconsistent with her initial disclosure in the school and would contradict herself as to where her father was positioned in the room and whether she fell backwards or forwards. (Exhibit B, p. 3; Fair Hearing Record)
14. The subject child denied fearing anyone in the home and also denied being touched inappropriately. (Exhibit B, p. 3)
15. When interviewed, N denied having witnessed the incident as he was in his room. However, he did hear A crying in her room but did not know why. (Id.)
16. Following an area clinical review and consult with the Department's legal division, all three children were removed from the Appellant's home pursuant to MGL c. 119, § 51b (3) and placed in substitute care on April 6, 2017. (Exhibit B, p. 4)
17. The children were brought to the hospital for a physical examination. There were no concerning marks or bruises on L and N. However, the attending physician related that A's injury was inflicted and believed that father, the Appellant hit her. (Id.)

18. The decision to remove the children via an emergency Care and Protection, §51b (3), was because the Appellant was unable to reasonably explain how the injury occurred and/or admit that he inflicted the injury. Had he done so, the Department would have come up with a safety plan in order to keep the children home. (Testimony of the Response Worker)
19. A factor in the Department's decision to support the allegation of physical abuse of A by the Appellant was due to a prior supported allegation that he physically abused the subject child in a similar situation. (*Id.*)
20. The subject child disclosed to the attending physician while being examined that the Appellant "hit her on her bum and face." As related, the attending physician and the Department's regional nurse concurred that it was inflicted and that the father was the perpetrator based on the child's disclosure. (Testimony of the DCF Supervisor)
21. The Appellant was not present for the Fair Hearing, being represented by his legal counsel. Subsequently, he did not testify nor offer any written testimony through counsel. As such, I find that a negative inference can be drawn. Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976) (*See Analysis*).
22. Based on the evidence, I find that A was physically injured and therefore abused by the Appellant as corroborated by three mandated reporters and the DCF Investigator's interview and observation. 110 CMR §2.00; *DCF Protective Intake Policy #86-015, rev. 2/28/16*
23. I find the Department conducted the investigation in accordance with Department regulations and applicable statutes. 110 CMR §4.27; *DCF Protective Intake Policy #86-015, rev. 2/28/16*
24. After considering all the evidence, I find that the Department had reasonable cause to support the allegations of physical abuse by the Appellant. 110 CMR §4.32; *DCF Protective Intake Policy #86-015, rev. 2/28/16*

Applicable Standards

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, s. 51B.

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. *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

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 is defined as 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. (*Id.*)

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 . . . (*Id.*)

Danger is a condition in which a caregiver’s actions or behaviors have resulted in harm to a child or may result in harm to a child in the immediate future. (*Id.*)

A Substantiated Concern means:

- There is reasonable cause to believe that the child was neglected; and

- The actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the children(ren)'s safety or well-being. (Id.)

A Fair Hearing shall address (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;. . . In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 CMR §10.05

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; or (e) if the challenged decision is a listing on the alleged perpetrators list, that there is not substantial evidence indicating the person is responsible for the abuse or neglect of a child. 110 CMR §10.23

Analysis

It is undisputed that the Appellant was a caregiver, pursuant to Departmental regulation and policy. 110 CMR 2.00; *DCF Protective Intake Policy #86-015, rev. 2/28/16*

The Appellant, through counsel, contested the Department's decision to support allegations that he physically abused his daughter, A. He argued that A has a history of attention seeking behavior and has been known to lie, relating that she was known to "tell stories." (Fair Hearing record) The Appellant also related that the Department's investigation did not corroborate whether or not that the Appellant was angry at the child because she bent another child's finger and that the subject child's disclosures were inconsistent and contradictory. Additionally, there was an inconsistent description of the room where the incident occurred and where she may have hit her head. The Department also failed to consider other plausible reasons why she was injured and where she was injured, relating that the Appellant stated A had spent the weekend prior to the weekday incident with her mother who allowed her to "play gymnastics", which was against the Appellant's household rules. The subject child was afraid that she was going to get into trouble by her custodial parent as she has difficulty accepting responsibility when she does something wrong; relating that she probably hurt herself while with her mother. Finally, the Department failed to obtain any medical records to corroborate that this was a

new inflicted injury. In failing to consider the aforementioned as plausible explanations, the Department did not follow up with information that could have detracted from their conclusion and decision, thus substantially prejudicing the Appellant. I find the Appellant's argument to be unpersuasive.

To meet the Department's definition of physical abuse, several factors must be present. (See above definitions of "abuse" and "physical injury") First, the act(s) must be non-accidental; it was. Appellant's actions were purposeful although the injuries were not. Next, the non-accidental act must "cause, or create a substantial risk of physical or emotional injury..." It did so. The subject child, A, was injured; she had red and brown bruising on her inner ear lobe above the ear canal, which was described as inflicted by a physician and a DCF Regional Nurse (Fair Hearing Record) Subsequently, the Department's decision was not just based on the consistent disclosure of the subject child, which the Appellant disputes her credibility. The Department gave due weight to the initial observing mandated reporter, the DCF Response Worker, the attending physician, the nurse and the Appellant's history of physical abuse and was able to consider the entire record. Arnone v. Dep't of Soc. Servs., 43 Mass, App. Ct. 33, 34 (1999) Additionally, A was consistent in her account regarding the bruising that she sustained and corroborated by a physician, whom she disclosed to that she had been hit by her father not just in the face but also on the "bum." Therefore in this instant matter A and her siblings were in a situation where substantial risk of further injury was possible had the Department not removed them from the Appellant's care as he was unable to give a plausible explanation nor admit that he caused the injury. The Department could not ignore such and their decision was reasonable in light of such injury to the subject child. Finally, I find that the child's statements were reliable and given proper weight by the Department in its decision to support the allegation of abuse of A by the Appellant. Edward E. v. Department of Social Services, 42 Mass. App. Ct. 478, 484 (1997) As provided for in the regulations quoted above, the DCF Response Worker relied on professional opinions and recommendations, available documentation, observable behavioral indicators and his clinical knowledge to support the decision made.

As stated in Finding #21, the Appellant did not testify at his Fair Hearing. Administrative fact finders are generally permitted to draw adverse inferences from a defendant's failure to testify in civil actions. Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976). Further, in cases where the burden of proof was higher than that required in the instant matter, the Court has determined that a negative inference can be drawn from a party's failure to testify if "...a case adverse to the interests of the party affected is presented so that failure of a party to testify would be a fair subject of comment..." Adoption of Nadia, 42 Mass.App.Ct. 304 (1997), Custody of Two Minors, 396 Mass. 610, 616, 487 N.E.2d 1358 (1986), quoting Mitchell v. Silverstein, 323 Mass. 239, 240, 81 N.E.2d 364 (1948).

In making a determination on the matter under appeal, the Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker, if there is a reasonable basis for the decision (110 CMR §10.05). The Appellant has not presented persuasive evidence in this matter to allow for a reversal of the Department's decision to

support the allegation of physical abuse. Based on a review of the evidence presented, in its totality, this Hearing Officer finds that there was reasonable cause to believe that the Appellant's actions caused injuries to A, and therefore, he did physically abuse her under the Departmental policies and regulations. The Department's decisions were made in conformity with Department regulations and with a reasonable basis. 110 CMR §10.06(8); *DCF Protective Intake Policy #86-015, rev. 2/28/16*

Conclusion and Order

The Department's decision to support the allegations of **physical abuse** and of "A" by Appellant was made in conformity with Department regulations and with a reasonable basis. Therefore, the Department's decision is **AFFIRMED**.

This is the final administrative decision of the Department. If the Appellants wish to appeal this decision, they may do so by filing a complaint in the Superior Court for the county of Suffolk or for the county in which the Appellants reside within thirty (30) days of the receipt of this decision. (*See MGL c.30A, §14*). In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.



Jorge F. Ferreira
Administrative Hearing Officer

1/21/18
Date



Susan Diamantopoulos
Fair Hearing Supervisor