EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN & FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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COMMISSIONER

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IN THE MATTER OF

C. C.

FH #2017 0617

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Ms. CC (or "the Appellant"). The Appellant appeals the Department of Children and Families' ("the Department" or "DCF") decision to support a report of neglect pursuant to Mass. Gen. L., c. 119, sec. 51A. Notice of the Department's decision was sent to the Appellant and she filed a timely appeal with the Fair Hearing Office on May 12, 2017.

The Fair Hearing was held on July 6, 2017, at the Robert VanWart Area Office. The following persons appeared at the Fair Hearing:

Linda A. Horvath, Esquire	Administrative Hearing Officer
CC	Appellant
AR	DCF Response Worker

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 regulation. 110 CMR 10.26.

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

For the Department:

Exhibit 1: 4/6/17 51A Report

Exhibit 2: 4/27/17 51A Report
Exhibit 3: 4/28/17 51B Report

For the Appellant:

Exhibit A: 5/3/17 Ms. DS, Principal
Exhibit B: 6/1/17—6/21/17 Student Safety Plan
Exhibit C: 4/3/17 Ms. JS
Exhibit D: 2016—2017 Incident Reports (Child A)
Exhibit E: 2016—2017 Incident Reports (Child J)
Exhibit F: 2016—2017 Nurse's Notes (Child J)
Exhibit G: 2016—2017 Attendance Record (Child N)
Exhibit H: Requests for School Reassignment

Statement of the Issue

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 investigation, 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) 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 of human trafficking." Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 10.05.

Findings of Fact

1. The subjects of this hearing are the female child, "N" (13 years old), and the male child, "A" (6 years old), at the time of the 51A filing referenced below.

2. The Appellant is the biological mother of the children. (Exhibit 1, pp.1, 2 and 3.)

3. On April 6, 2017, the Department received a 51A report pursuant to M.G.L. c. 119, s. 51A, from a mandated reporter alleging the neglect and physical abuse of A after the child reported on the previous day (April 5th) that his mother was the cause of marks the Reporter saw on his upper and lower left arm. A first stated that his mother was

angry at him and his "younger" brother for fighting, and swung a belt at his brother and hit him by mistake. (Exhibit 1, p.3.) The child contradicted himself when on April 6th he informed the Reporter that during the fight with his brother, his mother swung the belt to hit *him* and not his brother. A was not afraid to go home. (Id. at p.3.)

4. The Department screened-in the 51A report as a non-emergency response. (Exhibit 1, p.11.)

5. A has the diagnosis of ADHD and is prescribed Adderall, Ritalin, Clonidine and Melatonin. (Exhibit 3, p.8.) The Reporter opined that A "can be a story teller."[1] (Exhibit 1, p.3.) When exploring the allegations with A, the child had told school staff "3 different stories" in total. (Exhibit 3, p.5.)

6. It is uncontested that A has had behavioral issues in school.[2] (Exhibit 1, p.3; Exhibit 3, p.6.) The child has an IEP. A was disrespectful to school staff and had attempted to choke another student. He also had fits and lied "a lot." One day in class, A called 911 and thought it was funny.[3] (Exhibit 3, p.6.)

7. The Reporter spoke to the Appellant via telephone. She was not aware of an injury to A and did not mention anything about using a belt for punishment. (Exhibit 1, p.3; Exhibit D, Note of 4/5/17.)

8. The Reporter's purpose in wanting to report A's allegations was "just to ensure things were ok." (Exhibit 3, p.5.)

9. The Reporter did not have any issues with the Appellant, opining she was attentive and had good communication with the school regarding her children. (Exhibit 3, p.5.) The school principal also was supportive and complementary of the Appellant with respect to her attention to her children's needs. (Exhibit A.)

10. The school counselor also agreed that the Appellant was in regular communication with her regarding her children, including a conversation during which the Appellant told the counselor she "[cannot] control the boys at times and it frustrates her that

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[1] For example, the fight occurred with an *older* brother, J (8 years old), not a "younger" brother; A is the youngest child in the family. (Id. at p.1.)

[2] The Appellant had two other children at the same elementary school—8-year-old son, J, and 10-year-old daughter, B. (Exhibit 3, pp.1 and 6.) J also takes Ritalin for ADHD (Id. at p.8), however neither J nor B had behavioral issues at school. (Id. at p.6.)

[3] Despite the school's claims to the contrary (Exhibit 3, p.6), there is evidence that A was getting bullied at school, and the Appellant has had to take issue with the school regarding this, as she believed many of A's behaviors were made in defense of the bullying. (Exhibit 3, pp. 6—7; Testimony of Appellant; See, Exhibit D, Notes of 11/17/16, 11/29/16, 12/19/16, 2/6/17, 4/24/17, 4/25/17.) In June, 2017, the school agreed to a Student Safety Plan for A in order to keep him separated from those children bullying him. (Exhibit B; Testimony of Appellant.) The Appellant was contemplating having her children (A, J and B) change schools for the following school year. (Exhibit H.)

they don't listen." (Id. at p.6.) The counselor opined to DCF that the Appellant was "overwhelmed." (Id.)

11. The DCF Response worker interviewed A at his elementary school on April 11, 2017, separate and apart from his siblings: His mother disciplines him by sending him to his room. He denied being scared of anyone. There was an incident two months earlier when he and his brother were wrestling/ fighting. His mother got upset with J and was threatening him by swinging a brown belt, when she accidentally hit A on the arm and the leg. His arm and leg were "red." A insisted the incident with the belt was an accident. It had never happened before and he denied being scared of the Appellant. A also denied that his mother had ever physically disciplined any of his siblings. (Exhibit 3, pp.3—4.)

12. The DCF Response worker interviewed J at the elementary school, separate and apart from his siblings: The Appellant disciplines J by sending him to his room or yelling at him. J acknowledged that he and his brother "get yelled at a lot." When asked if he or his siblings have ever been hit before, J responded, "[A] lies. He tells stories." He was aware that A said his mother had a belt and hit him. J acknowledged that he and A were yelled at but they were not hit. (Exhibit 3, p.5.)

13. The DCF Response worker interviewed the Appellant's daughter, B, at the elementary school, separate and apart from her siblings: B gets disciplined by being sent to the corner or to her room. She denied ever being hit or ever seeing any of her siblings get hit. Her mother will yell at her brothers when they get loud. B denied being scared of anyone. (Exhibit 3, p.5.)

14. The DCF Response worker interviewed N at her school ([redacted]) on April 11, 2017. (Exhibit 3, p.2.) N does not have any mental health or other diagnoses. (Exhibit 3, p.8.) N rarely gets in trouble, but for discipline the Appellant takes her phone away. Her siblings get sent to their rooms or the Appellant yells at them. N denied that any of them have ever been hit by the Appellant with an object or with her hand. (Exhibit 3, pp.2—3.) With respect to seeing any marks on her brother, A, N stated, "My brothers are always playing and hitting each other. They get crazy. They were play fighting. I heard the school called and they think it was my mother but she didn't do anything." (Id. at p.3.)

15. During the course of the subject DCF response, N's school noted a concern that she had been absent 17 times from school during the 2016—2017 school year. (Id. at p.3.) As a result, on April 27, 2017, the Department received a 51A report pursuant to M.G.L. c. 119, s. 51A, from a mandated reporter alleging the neglect of N due to the 17 absences from school. (Exhibit 2, p.2.) This allegation was incorporated into the DCF response. (Id. at p.7; Testimony of AR.)

16. The DCF Response worker did not ask the school to see N's attendance record. The worker was not aware of the specifics as to how many excused or unexcused absences N had throughout the school year. (Testimony of AR.)

17. The Appellant submitted into evidence N's attendance record. As of the week ending May 12, 2017, N had only two unexcused absences from school when N had stayed home from school to help the Appellant after the Appellant was in a car accident. (Exhibit G; Testimony of Appellant.) N had eight excused absences (doctor's visits, dentist visits, etc....), and eight "approved absences."[4] The child also had 4 suspension days.[5] (Id.)

18. The Appellant has a DCF history dating to 2005. She has a history of victimization due to domestic violence, other trauma and mental health instability, which had affected her ability to care for her children on a daily basis back in 2013. Her last DCF case closed in 2016, after the Appellant cooperated with the agency and completed all tasks asked of her including counseling and domestic violence services. There is no history of the Appellant inappropriately physically disciplining her children with an implement or otherwise. (Exhibit 1, p.9; Exhibit 2, p.6; Exhibit 3, p.7.)

19. At the time of the subject 51A filing, the Appellant was "doing well" and was not on medication for her mental health diagnoses. (Exhibit 3, p.7.) Her four children were up-to-date medically and their pediatrician did not have any concerns. (Id. at p.8.)

20. The Appellant works as a [redacted], and is highly regarded by the families she serves. (Testimony of Appellant; Exhibit C.)

21. This Hearing Officer found the Appellant's testimony at the Fair Hearing to be sincere and forthright. Considering her demeanor and content of her testimony given under oath, along with evidence cited herein and the corroborative statements given by her children to DCF during the investigative response, this Hearing Officer finds the Appellant to be credible with respect to the issues in this case. (Exhibit 3; Testimony of Appellant.)

22. At the time of the DCF Response and at the hearing, the Appellant denied using physical discipline with a belt or otherwise with her children.[6] (Exhibit 3, p.6; Testimony of Appellant.) She acknowledged that that the boys fight, but at no time has she threatened them with a belt or hit them with it. She acknowledged she does yell at her children. (Exhibit 3, pp.6 and 7.) She recalled a particular morning about a week before the 51A filing when A and J were hitting each other with objects. The Appellant was getting dressed and had her belt in her hand and yelled at them, "Stop yelling, stop jumping around!" but she did not waive the belt at the boys. (Testimony

[4] Approved absences are those due to the child having issues from her menstrual cycle, for example. (Testimony of Appellant.)

[5] N had a few significant, negative experiences during the 2016—2017 school year. In January, 2017, there was an incident involving an alleged sexual encounter between N and two boys at school for which the boys were removed from the school, and N was suspended. (Exhibit 3, p.10.) In addition, just prior to the subject 51A filing, N was walking home and a car hit her causing an injury to her knee. (Id. at p.7.)

[6] The Appellant acknowledged she spanked her children years earlier when they were toddlers. (Exhibit 3, p.6.)

of Appellant.) The Appellant acknowledged she is overwhelmed like any parent of four children would be, but she is doing "fine." (Exhibit 3, p.6; Testimony of Appellant.)

23. On April 27, 2017, the Department unsupported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for physical abuse of A by the Appellant. Although DCF believed A's version of events, that the Appellant swung a belt and accidentally hit A's arm and leg causing marks to his body, the Department opined it was the first time this had occurred, and the Appellant's actions were accidental in nature. (Exhibit 3, p.11; Testimony of AR.)

24. On April 27, 2017, the Department supported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for neglect on behalf of A by the Appellant due to the Appellant and the school reporting that the Appellant is "overwhelmed and frustrated with [A's] and [J's] behavior…[A] is a challenge at school. They are concerned that he has exhibited aggressive behaviors…and is disruptive to his teacher." (Exhibit 3, pp.10 and 11.) "The family would benefit from a family assessment." The Department did not explain how the alleged action by the Appellant correlated to "neglect" as that term is defined. (Id. at p.12; See, Analysis below.)

25. The Department opined that due to the Appellant's use of a belt as a threat, the agency had to support something more than a "substantiated concern." (Testimony of AR; See, Analysis.)

26. On April 27, 2017, the Department supported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for neglect on behalf of N by the Appellant as "[N] has been out of school 17 times." The Department did not explain how 17 absences from school correlated to "neglect" as that term is defined. (Exhibit 3, pp.10 and 11, Disposition Comment; See, Analysis below.)

27. The Department opened the family for services following its support decision. (Exhibit 3, p.11.)

28. I find the Department did not have reasonable cause to believe that the Appellant failed to provide minimally adequate care to A or N, and I further find that there was no evidence that the Appellant's actions placed the children in danger or posed a substantial risk to their safety or well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16. (See, Analysis.)

Applicable Standards

A "Support" finding means: "There is reasonable cause to believe that a 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; or the person was responsible for the child(ren) being a victim of sexual exploitation of human trafficking." 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, s. 51B.

"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. Protective Intake Policy #86-015, rev. 2/28/16.

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. 110 CMR 10.23.

Analysis

As the children's mother, the Appellant is deemed a "caregiver" pursuant to Protective Intake Policy #86-015.

Considering the entirety of the evidence in this matter, the Department did not have reasonable cause to believe that the Appellant failed to provide A with minimally adequate care as is contained within the "neglect" definition above. Though the Department believed the child A, that the Appellant swung a belt in his direction while yelling at him and accidentally hit him causing marks to his arm, the evidence does not support DCF's contention. A's credibility is questionable based upon the opinion of school staff that he is a story-teller, that he gave three different version of the incident in question, and based upon the independent statements of A's three siblings who each corroborated the Appellant's argument that she does not physically discipline her children and that the two boys, A and J, fight/wrestle frequently. Any action on the part of the Appellant in yelling at A and J on the morning in question while they were fighting, while holding her belt and getting dressed, did not rise to the level of neglect and did not place A in danger or pose a substantial risk to the child's safety or well-being.

Considering the entirety of the evidence in this matter, the Department did not have reasonable cause to believe that the Appellant failed to provide N with minimally adequate care as is contained within the "neglect" definition above. Though the Department was not specific with respect to what portion of that definition the Appellant did not comply, excessive absences from school (educational neglect) falls under the phrase of "other essential care." (See, definition above.) N's school attendance record, submitted into evidence by the Appellant at the hearing, showed that in fact N only had two unexcused absences for the 2016—2017 school year as of May 12, 2017. The DCF Response worker did not view the child's attendance record or review that information in more detail with the school, which would have made educational neglect a non-issue for this case. In addition, had there been reasonable cause to believe that educational neglect was present in this matter such a conclusion does not fall under the auspices of a support for neglect.[7]

Conclusion

The Department's decision to support the 51A report of April 6, 2017, for neglect by the Appellant on behalf of the child "A" is **REVERSED.**

[7] A "substantiated concern" also requires that the child was neglected, but that there is a lower level of risk to the child, i.e. the actions or inactions by the Appellant create the potential for abuse or neglect, but there is no immediate danger to the child's safety or well-being, including educational neglect or excessive or inappropriate discipline of a child that did not result in an injury, for examples. (See, DCF Protective Intake Policy #86-015, Rev. 2/28/16, p. 28, 29.)

The Department's decision to support the 51A report of April 27, 2017, for neglect by the Appellant on behalf of the child "N" is **REVERSED.**

Linda A. Horvath, Esquire
Administrative Hearing Officer

Date: 10-4-17

Nancy S. Brody, Esq.
Fair Hearing Supervisor

Date: _____

Linda S. Spears,
Commissioner