

**Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
600 Washington Street, 6th Floor
Boston, Massachusetts 02111**

Linda S. Spears, Commissioner

**Voice: (617) 748-2000
Fax: (617) 261-7428**

IN THE MATTER OF: MS

Fair Hearing # 2017-1202

FAIR HEARING DECISION

Appellant, MS, appeals the decision of the Department of Children and Families, pursuant to M. G.L. c.119, §51B, to support allegations of physical abuse on behalf of A.

Procedural History

On August 5, 2017, the Department of Children and Families (“the Department”) received a report, pursuant to M.G.L. c. 119, §51A, alleging physical abuse of A by her mother, MS (“Appellant”). On August 25, 2017, the Department decided to support, pursuant to M.G.L. c. 119, §51B, the allegations of physical abuse of A by Appellant. The Department notified Appellant of its decision and of her right to appeal. Appellant made a timely request for a Fair Hearing pursuant to 110 C.M.R. §10.06.

The Fair Hearing was held on February 21, 2018 at the Department’s Area Office in Hyde Park, Massachusetts. In addition to the Hearing officer, the following persons appeared at the Fair Hearing:

MS	Appellant/Mother
LF	Department Response Worker
SF	Department Supervisor
RS	Witness/Father
MP	Witness/In-home Therapist
JB	Witness/Department Ongoing Social Worker
JG	Attorney for Appellant
CH	Intern for Attorney JG

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 digitally recorded. All witnesses were sworn in to testify

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

For the Department:

- Exhibit A Intake Report -- 51A Report
- Exhibit B Child Abuse/Neglect Non-Emergency Response

For Appellant:

- Exhibit 1 Fair Hearing request/Department support letter

The record closed upon the conclusion of the oral evidence.

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 C.M.R. § 10.21

Statement of the Issues

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) 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

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

1. Appellant is the adoptive mother and RS is the adoptive father of A, age fifteen. Appellant and RS adopted A from [REDACTED] when A was eight months old. [Exhibits A and B; Testimony of Appellant]
2. As the mother of A, Appellant is deemed a caregiver pursuant to the Department's Protective Intake Policy. See below. [Exhibit B; Testimony of Appellant]

3. A has been diagnosed with a major depressive disorder with psychotic features, anxiety, and PTSD. In 2016-2017, she was psychiatrically hospitalized multiple times due to depression and suicidal ideation. A was severely restricting her caloric intake and cutting herself. [Exhibit B, p.1; Testimony of Appellant]
4. In April through June 2017,¹ A began receiving services from a new team of service providers to support her in staying home and out of the hospital/residential programs:
 - an outpatient therapist whom A saw on a weekly basis; A's therapeutic goals were mental health symptom management (decreasing suicidality, depression, and psychosis); A had never voiced concerns of abuse (by her parents) to her outpatient therapist; [Exhibit B, p.5]
 - a therapeutic mentor who met with A up to twice a week; the mentor worked with A to address peer dynamics and coping skills within the community; the mentor did not have any concerns of abuse or neglect of A; [Exhibit B, p.5]
 - an in-home family therapist once weekly; the family therapist checked in with the family two to six times a week; the in-home therapy focused on risk management and safety planning; the family therapist found that A could be confused about what was "real" if she were under high stress or under the influence and that Appellant and RS responded appropriately to A's issues; and [Exhibit B, p.1; Exhibit A; Testimony of MP]
 - a psychiatrist whom A saw once monthly for check-ins, medication evaluations, and prescription refills; A had reported receiving physical discipline by both parents to her psychiatrist; there is no evidence as to the nature of this physical discipline or as to when and/or how often it reportedly had occurred. [Testimony of Appellant; Exhibit B, p.4]
5. A was medically up to date with well visits and immunizations. The pediatrician noted no concerns of abuse or neglect. There were concerns of borderline anorexia. A consistently attended monthly weight checks. [Exhibit B, p.5]
6. During summer 2017, A's parents paid for a tutor to help A catch up on missed school work. [Testimony of Appellant]
7. A was being very defiant at home. A was not following house rules, was staying out past curfew, was swearing, was hanging out with a crowd of which Appellant did not approve, and was smoking marijuana. [Testimony of Appellant]
8. A's psychiatrist was concerned about A's use of marijuana as the medications prescribed to A would not be as effective due to A's smoking marijuana heavily. [Exhibit B, p.4; Testimony of Appellant]
9. On Tuesday, August 1, 2017, during a meeting with the in-home therapist, A's parents reviewed house rules with A. The rules included: being home by curfew; not smoking marijuana; and not drinking. Appellant expressed that the house rules were intended to keep A safe. A stated that she understood. [Testimony of Appellant]

¹ This was after A's fifth hospitalization.

10. On Friday, August 4, 2017, A came home past her established curfew. A and Appellant engaged in a verbal argument. Appellant noted that A came in with a backpack and questioned why. Appellant searched the backpack and found marijuana and a lighter. Appellant took the backpack and went into her bedroom. A followed Appellant, attempted to grab the backpack, and asked for the lighter back (as it belonged to a friend). Appellant instructed A to go back to her bedroom. A did not comply. Appellant placed her hands on A's shoulders (face to face) and pushed A out of her bedroom and into A's room. A called and texted the in-home family therapist. The next morning Appellant and A apologized to each other. [Testimony of Appellant; Exhibit B, pp.3,4; Testimony of MP]
11. A did not report sustaining any marks or bruises to Appellant or to her in-home therapist as a result of having been pushed into the wall by Appellant. [Exhibit B, p.3; Testimony of MP; Exhibit A]
12. RS was not home during the above referenced incident. [Exhibit B, p.3]
13. Appellant expressed remorse about her actions of August 4, 2017. [Exhibit B, p.5]
14. On August 5, 2017, the Department received a report, pursuant to M.G.L., c.119, §51A, alleging physical abuse of A by Appellant. [Exhibit A]
15. On August 14, 2017, A informed the Department's response worker that she had obtained a bump and a very small cut behind her left ear due to Appellant's having pushed her against the wall. The response worker observed a small circular scab on A's lower left scalp next to the left ear which A identified as being a result of having been pushed into the wall. The response worker did not feel any bump on A's head. The response worker did observe multiple thin linear healed scars on A's forearms. A identified these scars as self-inflicted. [Exhibit B, pp.3,5]
16. A denied to the response worker that either parent had ever hit or physically abused her prior to the August 4, 2017 incident. [Exhibit B, p.3]
17. A continued to disregard her established curfew after the events of August 4, 2017. [Exhibit B, p.3; Testimony of Appellant]
18. On August 25, 2017, the Department, pursuant to M.G.L. c. 119, §51B, supported the allegations of physical abuse of A by Appellant. The Department opened a case with the family for further intervention/assessment to ensure that A's parents did not use physical discipline with A moving forward. [Exhibit B, p.6]
19. Taking all the evidence into consideration, the Department did not have reasonable cause to support the allegations of physical abuse of A by Appellant. [Fair Hearing record]

Applicable Standards and Analysis

Protective Intake Policy #86-015, 6/15/1986, as revised 2/28/2016

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 other person entrusted with responsibility for a child's health or welfare, whether in the child's home, a 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. The "caregiver" definition should be construed broadly and inclusively to encompass any person who at the time in question is entrusted with a degree of responsibility for the child. This specifically includes a caregiver who is a child such as a babysitter under age 18.

Abuse

The non-accidental commission of any act *by a caregiver* which causes or creates a substantial risk of physical or emotional injury or sexual abuse to a child; or
The victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver.
This definition is *not* dependent upon location. Abuse can occur while the child is in an out-of-home or in-home setting.

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.

A "Support" finding means:

Allegation(s)

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 or human trafficking.

Reasonable Cause to Believe

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 the credibility of persons providing relevant information, would lead a reasonable person to conclude that a child has been abused or neglected.

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 C.M.R. §10.05.

To prevail, the aggrieved party must show by a preponderance of the evidence that (1) the Department's or provider's decision was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the aggrieved party.... 110 C.M.R. §10.23.

Analysis

To "support" a report of physical abuse, the Department must have reasonable cause to believe that Appellant's non-accidental actions caused or created a substantial risk of physical or emotional injury to A. 110 C.M.R. §§2.00, 4.32(2). The Department's regulations define "physical injury" 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." 110 C.M.R. §2.00


Appellant may have acted inappropriately in pushing A out of one room and into another. She expressed regret for her actions. Nevertheless, there was insufficient evidence to conclude that the actions of Appellant rose to the level of physical abuse. There was insufficient evidence to conclude that Appellant acted aggressively or was physically inappropriate with A at other times. There was no evidence as to how much force was used in pushing A or as to how exactly A sustained the small cut to her scalp. The Department's response worker observed no evidence of a bump. A made no statements regarding having sustained a cut or a bump until ten days after the event in question. She needed no medical treatment. The evidence is insufficient to conclude that any action of Appellant caused A to sustain a physical injury as defined by Department regulations. A did attribute a small cut and a bump on her scalp to her being pushed by Appellant. However, the evidence is insufficient to conclude the cut or reported bump were caused by Appellant or rose to level of physical injury as defined by Departmental regulations. The evidence also is insufficient to make a finding that any action of Appellant created a substantial risk of harm to A. *See Cobble v. Commissioner of the Department of Social Services*, 430 Mass. 385, 392-393,395 (1999).

The burden is on Appellant to show, by a preponderance of the evidence, that the Department's physical abuse support decision was not in conformity with Department regulations and/or policy. Appellant has presented persuasive evidence in this matter to allow for a reversal of the Department's support decision against her. The evidence is insufficient to support a determination that Appellant physically abused A.

Conclusion and Order

The Department's decision to support the allegations of physical abuse of A by Appellant MS was not made in conformity with Department regulations or with a reasonable basis. Therefore, the Department's decision is **REVERSED**.

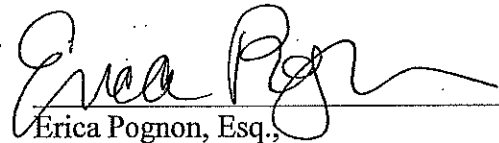
This is the final administrative decision of the Department. If Appellant wishes to appeal this decision, she may do so by filing a complaint in the Superior Court for the county of Suffolk or for the county in which Appellant lives within thirty (30) days of the receipt of this decision. (See, M.G.L. c.30A, §14). In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.



Antonia Chronis, Esq.,
Administrative Hearing Officer

7/13/18

Date



Erica Pognon, Esq.,
Supervisor

Date

Linda S. Spears,
Commissioner