

**Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
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Linda S. Spears, Commissioner

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IN THE MATTER OF: Mr. D.S.

Fair Hearing # 2017-0001

FAIR HEARING DECISION

The Appellant, Mr. D.S., appealed the decision of the Department of Children and Families, pursuant to M.G.L. c.119, §51B, to support the allegation of physical abuse on behalf of the child, C.

Procedural History

On November 4, 2016, the Department of Children and Families ("Department") received a 51A report, pursuant to M.G.L. c. 119, §51A, which alleged the physical abuse of C by DS ("Appellant").

The Department notified Appellant of its decision and of his right to appeal. The Appellant made a timely request for a Fair Hearing pursuant to 110 CMR 10.06. The Fair Hearing was held on March 1, 2017, at the Department's Lawrence Area Office in Massachusetts.

The following persons appeared at the Fair Hearing:

Ms. Lisa Henshall	Fair Hearing Officer
Mr. D.S.	Appellant
Mr. C.L.	Appellant's Counsel
Mr. J.T.	Witness
Mr. J.St.S.	Response Worker
Ms. K.R.	Supervisor

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 on one (1) compact Disc. All witnesses were sworn in to testify under oath. The record remained open to allow the Appellant time to

submit additional evidence and closed on February 3, 2017. The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

Exhibit A: Intake Report 51A reported dated 11/04/16 10:46am

Exhibit B: Child Abuse/Neglect Non-Emergency Response – 51B Report,
11/30/2016

For Appellant:

Exhibit 1: Clerk Magistrate finding

Exhibit 2 Affidavit from a witness

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

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) 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

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

1. The Appellant, DS, was the substitute teacher at the school for the approximately three years and was an Assistant football coach at the school. On the day in question the Appellant was a substitute teacher in the classroom that the child (C) was in at the time in question. C was seventeen (17) years old at time of the incident. (Testimony of the Appellant; Exhibit A; Exhibit B, p. 3) The Appellant was a caregiver pursuant to Department regulation 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

2. A 51A report was filed on November 4, 2016, pursuant to M.G.L. c. 119, §51A, alleging physical abuse of the child (C) by the Appellant. According to the report, the child disclosed that the Appellant got upset with the child for swearing and “got into his face and struck him.” The child reportedly sustained a “swollen and bloody lip.” (Exhibit C, p.11) The report was screened in for a non-emergency response pursuant to MGL c. 119, §51B, and assigned for a response. (Exhibit A, pgs. 3 & 5; Exhibit B; Testimony of the Response Worker)
3. The Appellant has no history with the Department. The Appellant was not working at the school at the time of the Fair Hearing. (Exhibit B, p. 1; Testimony of the Appellant)
4. On the day in question the child’s phone rang during class and the child answered the phone. The Appellant and the child exchanged words and the Appellant instructed the child to shut his phone off and “go to discipline.” The Appellant slapped the child on the left side of his face, with an open hand, and he sustained an injury to his lip. At some point the child saw the school nurse who gave the child ice for his lip. (Exhibit B, p. 3; Exhibit C; Testimony of the Response Worker)
5. The child was concerned about the implications for the Appellant as “this was his career.” (Exhibit B, p. 3)
6. The Appellant was angry with the child and swore at him when he told him to leave the classroom. (Fair Hearing Record; Exhibit B; Exhibit C)
7. The Appellant did not dispute that he struck the child but that it was accidental and he never intended it to happen. The Appellant lost his balance when the child hit him with his “book bag” when he was getting ready to leave the classroom. The Appellant disputed that the child sustained an injury as a result of this incident. The Appellant’s accounts of the events were consistent with the child with the exception of whether the child was struck intentionally or not. (Exhibit C; Testimony of the Appellant; Exhibit 2; Testimony of the Witness)
8. The Appellant disputed that the child sustained any injury as a result of the incident. (Testimony of the Appellant; Exhibit C, Testimony of the Witness; Exhibit 2)
9. The police took pictures of the child’s “injured lip.” These photographs were not entered into evidence and there was no evidence to describe the injury. There was no evidence that the Department viewed the injury that the child sustained. (Fair Hearing Record; Exhibit C; Testimony of the Supervisor; Testimony of the Witness; Exhibit 2)
10. The Police and School Administration interviewed witnesses who were students in the classroom at the time in question. One of whom confirmed the child’s story and the other indicated he saw the Appellant’s hand come up near the child’s face but did not witness him strike the child. Later the witness who confirmed that the Appellant

struck the child recanted as he felt the Appellant deserved a second chance and had been good to him. (Testimony of the Response Worker; Exhibit C; Exhibit B, pgs. 4 & 7) I find that the initial statements made by the witnesses were credible and should stand. The witness statements changed after rumors arose about the child and his family suing the school because of the alleged incident. (Testimony of Supervisor; Testimony of the Witness; Exhibit 2)

11. The School Principal (██████) believed that the Appellant hit the child based on the information she had gathered and saw the injury the child sustained. (Exhibit C, p. 4; Testimony of the Supervisor)
12. The child was seen at the School Nurse for a cut lip. (Exhibit C, p. 4)
13. The Department, despite attempts to reach the Appellant, was unable to interview him during the response. (Exhibit B, pgs. 6 & 7; Testimony of the Response Worker)
14. A hearing was held December 12, 2016, subsequent to the completion of the response, at Lawrence District Court and it was determined that the touching between the Appellant and the child was "incidental." (Exhibit 1; Testimony of the Appellant)
15. At the end of its investigation, the Department supported the aforementioned report for physical abuse of the child by the Appellant. The child reported that he sustained an injury to his lip when the Appellant hit him in the face with an open hand. (Testimony of the Response Worker; Exhibit B; Exhibit C) The Department concluded that the Appellant was responsible and that his actions constituted physical abuse, as defined by its regulations. 110 CMR 2.00
16. After considering all the evidence, I find that the Department had reasonable cause to support the allegations of physical abuse of C by Appellant and that his actions placed the child in danger:
 - There was reasonable cause to believe that Appellant had abused the child;
 - The child was consistent in his reporting of the events that transpired;
 - The child and other witnesses, were concerned about the implications of this report for the Appellant;
 - The child sustained an injury to his lip when he was hit with an open hand which was documented by the police;
 - The Appellant's story was consistent with the child's but indicated that he hit the child accidentally;
 - The Appellant was angry with the child at the time in question;
 - The child not only sustained an injury to his lip but the Appellant's actions caused a substantial risk of injury to the child;
 - C's statements about being smacked by the Appellant were consistent and the repetition of the statements does equate to reliability and trustworthiness. Edward E. v. Department of Social Services, 42, Mass. App. Ct. 478, 486 (1997). (See Findings) 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 4.32 (2)

Applicable Standards

In order to “support” a report of abuse or neglect, the Department must demonstrate the following:

- 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. 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.

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 and supervisor’s clinical base of knowledge. *Id.*

“[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.

A “caregiver” means a child’s (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with the responsibility for a child’s health or welfare, and (e) any other person entrusted with the responsibility for a child’s health or welfare whether in the child’s home, a relative’s home, a school setting, a day care setting (including baby-sitting), a foster home, a group care facility, or any other comparable setting. As such, “caregiver” includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The “caregiver” definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is himself/herself a child (i.e. baby-sitter). 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 caretaker 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 laws of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. 110 CMR 2.00

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 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 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

Analysis

The Appellant, as argued by Counsel, disputed the allegations of physical abuse contained within the report and argued that not only did the child not have an injury to his face when he left the classroom that these allegations were driven by money and that the family wanted to make money by suing.¹ The Appellant did not dispute that the event took place on the day in question but that he struck the child by accident and apologized to him afterwards. The Appellant implied that the child's injury was self-inflicted after the incident. Counsel argued that there was no "probable" cause to support the allegation citing the court involvement that was unfounded since the response was completed. The Appellant would love to continue coaching children. Witness statements and evidence provided were reviewed and the arguments made were not persuasive.

As set forth in the findings, the child was determined to be credible. The child's statements were consistent and there was no evidence that he was motivated to lie about the Appellant. The child's injury was viewed by police and school staff and while there was no evidence that the child sustained a bloody lip, there was evidence that the child sustained an injury to his lip. The child and other witnesses understood the seriousness of the situation and one of the witnesses even changed his statement as he was concerned for the Appellant. At the hearing the Department introduced that the Principal had

¹ As of the time of the hearing no lawsuits had been filed pertaining to this incident. (Fair Hearing Record)

referred to a prior incident that involved the Appellant that they would not be re-opening. The Department felt that this demonstrated a pattern. I did not find that there was any evidence to support this ascertain and was irrelevant as there was no question that the incident occurred on the day in question. The Appellant had no documented history of abuse or neglect.

The Department supported the allegation of physical abuse based on the child's statement, the police report and witness statements contained in the police report. The child's injury was noted by the police and school administrators but was not documented. The exact nature of the injury to the child's lip remains unclear.

There was reasonable cause to believe that Appellant caused the injury that the child sustained when he smacked him in the face while trying to get him to leave his classroom. In addition, the Appellant's actions placed the child in danger and posed a substantial risk to the child's safety and well-being. The child provided details of the incident, as did other witnesses, as well as the Appellant. The Appellant's argument that this was an accident was not reasonable as he was angry at the time he struck the child in the face and had been asking the child to leave the room and swore at him. The child reported being "a little nervous" as he was unsure what would happen to the Appellant's career.

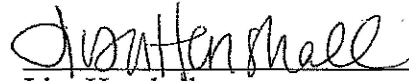
Based on the evidence presented, I find that the Department's decision to support the allegations of physical abuse was made in conformity with its policies and with a reasonable basis. 110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

Factors the Department should consider when assessing reasonable cause are "direct disclosure by the children or caretaker; physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals (e.g., professionals, credible family members); and the social worker and supervisor's clinical base of knowledge." Covell v. Dep't of Soc. Servs., 439 Mass. 766, 775 (2003), citing 110 Code Mass. Regs. § 4.32(2) (2000).

Conclusion

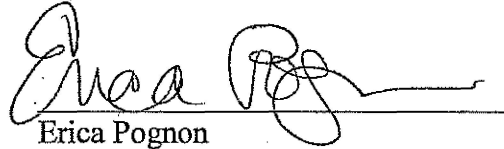
The Department's decision to support the allegations of physical abuse of C by Appellant was made in conformity with Department regulations and with a reasonable basis. Therefore, the Department's decision is **AFFIRMED**

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he/she may do so by filing a complaint in the Superior Court in Suffolk County, or in the county in which he/she resides, 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.



Lisa Henshall
Administrative Hearing Officer

Date: 11/1/17



Erica Pogon
Fair Hearing Supervisor