

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

Linda S. Spears
Commissioner

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IN THE MATTER OF)

KB/EO)

FH # 2017-0018)

FAIR HEARING DECISION

The Appellants in this Fair Hearing were KB and EO (hereinafter "KB" or "EO" or "Appellants"). The Appellants appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support allegations of neglect and physical abuse pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On July 25, 2016, the Department of Children and Families received a 51A report from a mandated reporter alleging the neglect of M (hereinafter "M" or "the child") by his mother, KB, and the physical abuse of M by mothers live in partner, EO. A response was conducted and on August 15, 2016, the Department made the decision to support the allegations of the neglect of M by KB and physical abuse of M by EO. The Department notified the Appellants of its decision and their right to appeal.

Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was held on May 30, 2017, at the DCF Plymouth Area Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the hearing for two (2) weeks to allow the Appellants the opportunity to submit additional evidence. On June 14, 2017, the record on this matter was closed.

The following persons appeared at the Fair Hearing:

Lauren Decas	Fair Hearing Officer
KB	Appellant
EO	Appellant
CH	Department Response Social Worker
DM	Department Supervisor

In accordance with 110 CMR 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 and transferred to one (1) compact disk in accordance with 110 CMR 10.26.

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

For the Department:

Exhibit A: 51A Report, dated 7/25/16

Exhibit B: 51B Response, completed 8/15/16

Appellant

Exhibit 1: Letter from [REDACTED] regarding KB, dated 5/30/17

Exhibit 2: Letter from [REDACTED] regarding EO, dated 5/30/17

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 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. For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issue is whether there was reasonable cause to believe that a child had been abused or neglected; and whether 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. At the time of the filing of the 51A report, M was four (4) years old. He resided in the permanent Guardianship of his maternal grandmother, BG (hereinafter "BG"), in [REDACTED] MA. (Exhibit A)
2. The Appellant is the mother of the child and EO, her live in partner; therefore they are caregivers pursuant to Departmental regulations and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.
3. On July 25, 2016, the Department of Children and Families received a report pursuant to

M.G.L. c. 119, § 51A from a mandated reporter alleging the neglect of M by his mother, KB, and the physical abuse of M by mothers live-in partner, EO. According to the reporter, M was brought to the police station by his grandmother, BG, as he presented with a large significant bruise around his left eye/cheekbone area. The physical incident took place on July 23, 2016; during visitation between KB and M. M reported that EO caused the bruise by hitting him in the face with his hand. (Exhibit A)

4. M consistently disclosed to the mandated reporter, "EO slap me", "EO fault", "EO crazy, EO yell." Det. S of the [REDACTED] Police Department reported he viewed M on July 25, 2016, and observed his left facial area, which had pronounced redness and bruising consistent with being slapped in the face and with a hand print. (Exhibit B, p. 3)
5. On July 25, 2016, M was seen by his pediatrician, Dr. B (hereinafter "Dr. B") due to a facial injury. He presented with bruising on his left lateral scalp, lateral cheek, and above the ear area. Dr. B reported he casually stated to M, "what happened buddy", and M responded "EO did it". Dr. B reported that the injuries were consistent with an open hand slap. (Exhibit B, p. 2)
6. The Department response social worker, CH (hereinafter "CH"), met with M and asked what happened. M responded, "EO slapped me in the face". M stated, "EO did it, he slapped me, he made me sad" and pointed to his face at his left cheek area. CH observed bruising in the shape of a palm and three (3) fingers; the marks were very pronounced and bruised. (Testimony CH) M stated, "EO is mean, he is crazy". M stated, "It hurt, I was sad, that is not good to do". (Exhibit B, p.6; Testimony CH)
7. M denied anyone saw EO hit him. He reported EO hit him in the face in the living room while KB was outside. BG provided CH with photographs of the injuries. (Exhibit B, p.6)
8. EO was arrested and charged with assault and battery and child endangerment. (Exhibit B)
9. KB and EO denied being physical towards M, or having knowledge of the one another ever striking M. KB opined the mark on M's face was from the position of his face against his car seat as he fell asleep during the transport back to maternal grandmother, BG. (Exhibit B; Fair Hearing Record)
10. On August 15, 2016, pursuant to M.G.L. c. 119, §51B, the Department supported the allegation that EO physically abused M and that KB neglected M. The Department supported because based on the evidence gathered during their investigation, from M, collaterals, and police; the Department found reasonable cause to believe that EO physical abused M and KB neglected M. The actions of the Appellants placed M in danger or posed substantial risk to his safety and well-being. (Exhibit B, p. 10; Testimony CH)
11. At the time of the 51A reports, both KB and EO reported they were in recovery from opiate addictions. EO was involved in treatment and KB was not. (Exhibit B)
12. The Appellants provided documentation from the [REDACTED] that they have both been

residing there and in treatment since October 3, 2016, for substance abuse recovery and parenting. (Exhibit 1; Exhibit 2)

13. EO testified he and BG were not getting along and she had resentment towards him for taking KB out of her house. (Testimony EO)
14. The Department found no indication during its investigation that M had a reason to make up a story about EO; that he was mad at EO; or that any event had occurred which indicated M was not telling the truth. (Testimony of CH)
15. Based upon the totality of the evidence, I find that the Department did not have reasonable cause to support the allegation of neglect of M by KB. There was no evidence that KB knew and/or was present when EO slapped M causing him injury. In addition, KB's actions or inactions did not place M in danger nor posed substantial risk to his safety or well-being. 110 CMR 2.00, 4.32(2); DCF Protective Intake Policy #86-015, rev. 2/28/16
16. Therefore, the Department's decision to support the allegations of neglect of M by KB was not made in compliance with its regulations and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16
17. Based upon the totality of the evidence, I find the Department did have reasonable cause to support an allegation of physical abuse of M by EO. EO's actions posed substantial risk to M's safety. EO's non-accidental act of slapping M on the face created a physical injury. 110 CMR 2.00, 4.32(2); DCF Protective Intake Policy #86-015, rev. 2/28/16
18. Therefore, the Department's decision to support the allegations of physical abuse of M by EO was made in compliance with its regulations and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

Applicable Standards

A "support" finding of abuse or neglect means that 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) placed 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. 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)

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the

requirements of §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 §51B. Id. at 64; M.G.L. c. 119, §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

“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 (1) 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 (2) 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. 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 nontrivial injury; or soft tissue swelling or skin bruising depending on such factors as the child’s age, circumstances under which the injury occurred, and the number and location of bruises. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

A “caregiver” means a child’s (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child’s health or welfare; and (e) 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. 110 CMR 2.00; DCF 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, or (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, or (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

Analysis

It is undisputed that Appellants were caretakers/caregivers pursuant to Departmental regulation and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellants contested the Department's decision to support allegations of neglect and physical abuse of KB's four (4) year old son, M, by them. The Appellants argued a physical altercation did not occur while M was in their care, and surmised the initial red mark observed on M was from falling asleep in his car seat. EO argued KB's mother, and the Guardian to M, did not like him because KB moved out of her home to be with him and that she made him the scapegoat for her household problems. I do not find EO's argument to be persuasive. EO did not present persuasive evidence in this matter to allow for a reversal of the Department's support decision for physical abuse. The undersigned will not pass clinical judgment on the Department's broad discretion as delineated in the regulations.

The Department found that the bruising on the left side of M's face constituted an physical injury as defined by Department regulations. 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. Nothing in the record suggests M was hit in the face by accident; therefore EO's actions were purposeful. Next, the non-accidental act must "cause, or create a substantial risk of physical or emotional injury..." It did so. M had large, significant bruising around his left eye/cheekbone area, left scalp, and above his left ear. M consistently and credibly reported EO hit him on his face; the observed marks, days later, were consistent with a slap mark. Although the incident was isolated according to M, it was significant, and could not be ignored by the Department. M made direct statements to collaterals, using age appropriate language and had no reason to want to harm EO.

The record was absent any indication or evidence that KB provided less than minimally adequate care to M during her visitation. According to M, his mother was not present but was outside the home when EO struck him in the face. The Department did not ask M if he told his mother what occurred, if he was visibly upset when his mother re-entered the home, how long she was outside of the home, nor did they have evidence to suggest KB was aware EO hit M. KB's actions or inactions did not place M in danger nor posed substantial risk to his safety or well-being.

This Hearing Officer was duty bound to consider the totality of evidence, and whether there was enough evidence to permit a reasonable mind to accept the Department's decision that KB neglected M. In order to support a finding of neglect, the Department must demonstrate that neglect *occurred* (emphasis added). The Department's collection of facts, knowledge and observations do not support that KB neglected M in the instant matter. 110 CMR 4.32

Conclusion

The Department's decision to support the allegation of **neglect** by KB was not made with a reasonable basis and therefore, is **REVERSED**.

The Department's decision to support the allegation of **physical abuse** by EO was made with a reasonable basis and therefore, 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 for the county in which she/he lives, or within Suffolk County, 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.



Laureen Decas
Administrative Hearing Officer

Date: 10/21/18



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

Date: _____

Linda S. Spears
Commissioner