

**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

Voice: (617) 748-2000  
FAX: (617) 261-7428

IN THE MATTER OF            )  
                                      )  
                  DS & BS            )       **FAIR HEARING DECISION**  
                                      )  
                  FH # 20170078    )  
                                      )

The Appellants in this Fair Hearing were DS and BS. 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, s.51A and B.

**Procedural History**

On December 31, 2016, the Department of Children and Families received two 51A reports alleging the physical abuse and neglect of A by DS, his father. An emergency response was conducted and on January 4, 2017, the Department made the decision to support the allegations of physical abuse and neglect of A by the Appellant, DS and added and supported an allegation of neglect of A by BS, his stepmother. The Department notified BS and DS (BS and DS or "Appellants") of its decision and their right to appeal.

The Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was conducted on April 25, 2017 and September 12, 2017 at the DCF Area Office in New Bedford, MA. All witnesses were sworn in to testify under oath. The record remained open until May 16, 2017 to allow the submission of additional documentary evidence by the Appellants.

The following persons appeared at the Fair Hearing on April 25, 2017:

Jorge F. Ferreira	Fair Hearing Officer
KM	Appellants Attorney
M	A's Brother/Witness

DS	Appellant
BS	Appellant
JM	Police Officer/Witness
AM	DCF Response Worker
EG	DCF Supervisor

The following persons appeared at the Fair Hearing on September 12, 2017:

Jorge F. Ferreira	Fair Hearing Officer
KM	Appellants' Attorney
DS	Appellant
EG	DCF 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 recorded pursuant to 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 Intake Report dated 12/31/16 @ 12:54pm
Exhibit B	Child Abuse/Neglect Intake Report dated 12/31/16 @ 01:39pm
Exhibit C	Child Abuse/Neglect Emergency Response completed on 01/04/2017

For the Appellants<sup>1</sup>:

Exhibit 1	Copy Appeal Letter and Allegations
Exhibit 2	Copy of Hearing Notice/Rescheduling Ongoing Hearing
Exhibit 3	Copy of Hearing Notice/Original Hearing Date
Exhibit 4	Copy of Allegations/Notice
Exhibit 5	Copy of Unsupported Allegations Notification
Exhibit 6	Copy of 51A Report and 51B Investigation of June 2016
Exhibit 7	Letter Subpoenaing Police Officer JM
Exhibit 8	Letter Subpoenaing Keeper of Records [REDACTED] High School
Exhibit 9	Police Records Regarding Appellants and Subject Child [REDACTED] Police Department
Exhibit 10	Copy of 110 CMR 2.00, et al (Glossary)
Exhibit 11	Copy of 110 CMR 4.00, et al (Intake)
Exhibit 12	Copy of 110 CMR 10.00, et al (Fair Hearing and Grievances)
Exhibit 13	Copy of 110 CMR 10.30, et al (Decision)
Exhibit 14	Copy of ALM G.L. ch.30A, s. 1
Exhibit 15	Copy of ALM G.L. ch.119, s.51a
Exhibit 16	Copy of ALM G. L. ch.119, s.51b

<sup>1</sup> The Appellants' counsel submitted a voluminous amount of exhibits to be considered, which all were reviewed by this Administrative Hearing Officer. However, not all exhibits were found to be relevant or found as a basis to form the decision in this instant matter.

- Exhibit 17 Copy of ALM G. L. ch.18B, s.3
- Exhibit 18 Copy of ALM G. L. ch.233, s.23f
- Exhibit 19 Commonwealth v. Dorvi, 472 Mass. 1
- Exhibit 20 Cobble v. Comm'n of Dep't of Social Services, 430 Mass. 385
- Exhibit 21 Kildonsk v. Dep't of Soc. Servs., 2001 Mass. Super. Lexis 322
- Exhibit 22 Ibanez v. Fair Hearing Office, 2012 Mass. Super. Lexis 164
- Exhibit 23 Hoberg v. Dep't of Soc. Servs., 2006 Mass. Super. Lexis 223
- Exhibit 24 Sheehan v. Dep't of Soc. Servs., 2005 Mass. Super. Lexis 289
- Exhibit 25 Minnehan v. Dep't of Soc. Servs., 1999 Mass. Super. Lexis 325
- Exhibit 26 Commonwealth v. Packer, 88 Mass. App. Ct. 585
- Exhibit 27 Doe v. Dep't of Children & Families, 2014 Mass. Super. Lexis 216
- Exhibit 28 CR Model Jur Instructions for use in the Dis Cts – Mass Instruction 9.260
- Exhibit 29 CR Model Jur Instructions for use in the Dis Cts – Mass Instruction 9.250
- Exhibit 30 Affidavit of BF
- Exhibit 31 Affidavit of PL
- Exhibit 32 Affidavit of JW
- Exhibit 33 Subject Child's School Records

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 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. At the time of the filing of the subject 51A reports, A ( "teen" or "child") was seventeen years old. He resided with his parents and siblings, M who was fourteen years old and Ma who was sixteen years old. The family resided in [REDACTED], MA (Exhibit A, p. 1; Exhibit B, p. 1; Exhibit C, p. 1)

2. The Appellants are the parents of the subject child; therefore they were deemed “caregivers” pursuant to Departmental regulation and policy. 110 CMR 2.00; *DCF Protective Intake Policy #86-015, rev. 2/28/16*

3. The family had a previous involvement with the Department in June 2016 due to allegations of physical abuse of A by his father, DS and stepmother, BS. Allegations of neglect of A by his parents were also made. The allegations were not supported by the Department at the conclusion of the investigation/response. (Exhibit C, p. 1; Exhibit 5; Exhibit 6)

4. On December 31, 2016, the Department of Children and Families received two 51A reports, pursuant to M.G.L. c. 119, s.51A, filed by separate mandated reporters, alleging the physical abuse of the subject child by the Appellant, DS. According to the reports, the police were called due to a “domestic situation” between father and child. DS believed that A was under the influence of marijuana and that A “got into the father’s face” on three different times and A was aggressive. DS slapped the child in the face with an open hand on the third occasion. Reportedly, the teen had jumped out the window and was later found by police and a bruise was on his right eye. The teen, A, disclosed that he was struck with a fist by his father and reported that it was initially a verbal argument and was confronted as to why he was outside in the morning as well as his marijuana use. A disclosed that he was pushed and hit his head on the wall in his bedroom where the physical altercation eventually took place. The Appellants wanted the child to be admitted into a substance abuse treatment facility but A refused to voluntarily go as he disclosed that he only used marijuana for recreational purposes. Reportedly, Appellant DS did not want child to return home and was not willing to safety plan with A, who wanted to stay with his grandparents for the weekend. Appellant DS reported he was going to go to court as A was not safe to go home and did not want him to go to his grandparent’s home. Appellant DS was observed to be irate and proceeded to leave the teen at the crisis center where he had been brought to by the police. (Exhibit A, p. 2; Exhibit B, pp. 2-3)

5. The report was screened in and assigned for an emergency response, pursuant to M.G.L. c. 119, s.51B. The allegation of neglect of A by the Appellants was supported by the Department at the conclusion of the response. The allegation of physical abuse of A by Appellant DS was also supported at the conclusion of the emergency response. The allegations were supported because during the response A was noted to have a small mark on his face, caused by his father. It was also discovered that he had sustained a black eye and marks to his neck also caused by his father, DS. The subject child and his father had engaged in an argument, which escalated and became physical. The Department expressed concern that DS felt justified in his actions because A initiated the altercation. Parents also refused to safety plan when A was brought to the crisis center and parents would not cooperate in finding an alternative placement for a short-term period for the family to “cool off” as they wanted A to have consequences for his actions. Subsequently, an emergency removal was made on behalf of A and he was placed in a short-term adolescent shelter as A would not go home and the parents would not take him home and rejected any identified family settings. (Exhibit C, p. 10; Exhibit 4)

6. When interviewed, the subject child disclosed that Appellant DS not only hit him but also grabbed him by the neck, which caused him to have difficulty breathing. He was observed to have marks, including a black eye and scratches on the right side of his neck. (Exhibit C, p. 2)

7. The crisis center clinician, B, described the child as a "good kid and very intelligent." They described him as more reasonable and that he acted more appropriately than Appellant DS who presented very irritated with the entire situation. They added that the stepmother had been at the crisis center initially but left because she did not have legal custody of the child and could not make decisions for him. A did not meet hospital level of care. (Exhibit C, p. 2)

8. The clinician, B alleged that the Appellant DS admitted to hitting A and that there was a disagreement as to where he was in the morning of the incident. She added that DS was concerned that A was being sneaky and had asked him for his cell phone, which he gave but for which A would not give his password. The clinician, B also reported that DS wanted A to have consequences and was asking for substance abuse treatment for his son. (Exhibit C, p. 2)

9. According to clinician B and clinician R, the subject child had come to the crisis center for similar situations in June 2016, where the Appellant had "assaulted" him and the Department got involved. Clinician R also confirmed that A had visible marks on his face and neck this in regards to this incident and acknowledged that he smokes marijuana. It was also the clinicians' impression that the subject child is product of an affair and that A is aware of this and has impacted him. Reportedly, A suffered neglect and trauma at the hands of his biological mother and went to reside with his father and step mother, the Appellants, when he was four years old. (Exhibit C, p. 2; Exhibit 6)

10. When interviewed, the subject child disclosed that the altercation occurred because his father, DS had inquired why he had been outside in the morning and why he was "sneaky." The A explained that he had let the dog out in the morning and then let him back in into the house. A further explained the Appellants did not believe him and his stepmother asked for his cell phone. However, he would not give her the password. They then followed him to his room where DS pushed him down onto his bed. This occurred a few more times because he kept standing up. A disclosed that his father hit him with a closed fist and more than once causing him to fall on the bed and hitting his head on the wall. (Exhibit C, pp. 2-3)

11. During DCF interview with the subject child, he also disclosed that he was concerned that BS was often intoxicated and would yell at him and his siblings often. Subsequently, he would not have friends over often and felt that he was isolated as his parents did not seem to care about him, they just wanted to control him. (Exhibit C, p. 3)

12. The Appellants acknowledged that they felt A was being sneaky in the morning of the incident and was unaccounted for a short period of time. Reportedly, BS tried calling his cell phone but he would not answer. When stepmother asked for his phone he gave it but without the password. According to BS, A reported that it was her "fucking phone" now and BS would have to figure it out. (Exhibit C, p. 3; Testimony of Appellant BS)

13. Appellant DS reported that they (the Appellants) did follow A to the room and told him that his behavior was not acceptable and that was when A shoved him, DS. Reportedly, DS smacked A with his left hand at this point in order to protect himself. (Exhibit C, pp. 3-4; Testimony of Appellant DS)

14. Following the altercation, the Appellants called the police and that is when A jumped out the window and took off. The police later found him down the street. (Exhibit C, p. 4; Testimony of Witness JM; Exhibit 9)

15. Appellant BS indicated that “things had been building” with A and that she could occasionally smell marijuana on him. Following the incident she went to his car and found paraphernalia. Appellant BS also reported that she would often be afraid of A when DS was working out of town because he became more aggressive as he got older, especially when reprimanded. (Exhibit C, p. 4; Testimony of Appellant BS)

16. The Appellants reported that the subject child has history of aggressive behavior and running from home. He has been assaultive towards teachers and peers in school, which resulted in him being suspended at times. They described him as being socially awkward and having few friends because his peers were afraid of him. They also described him as having difficulties with limits and when being denied things; i.e. accepting “no” as an answer. These behaviors started in middle school. (Exhibit C, p. 4; Exhibit 33; Testimony of the Appellants)

17. The Appellants were not able to identify a short-term substitute placement for A during the response as the Department was trying to avoid filing a Care and Protection petition and placing the subject child in foster care. However, Appellant DS wanted to teach A a lesson. (Exhibit C, pp. 4-5; Testimony of the DCF Response Worker)

18. Appellant DS denied just getting up and leaving the subject child at the crisis center. He reported that he was told he could leave by the clinicians at the crisis center. (Exhibit C, p. 5; Testimony of the Appellant)

19. The subject child disclosed that his parents were not able to identify an informal alternative placement for him because they don't know his friends and were minimally involved in his life. He expressed frustration about the Appellants because he believed that they knew that his friend's family cared about him and would have allowed him to be placed, which is why they did not allow it. (Exhibit C, p. 5)

20. The subject child was placed in an adolescent shelter temporarily on December 31, 2016. The child was removed from parental care and custody pursuant M.G.L. c. 119, s.51B (3) as parents were unable to identify an alternative family setting and the child was not allowed back home. Albeit the child was also reporting that he did not feel safe going back home. The Appellants were informed of the decision and arrangements were made to pick up clothing with police assistance as Appellants appeared irate and upset. (Exhibit C, p. 6; Testimony of the DCF Response Worker)

21. A Child-Specific placement was identified for the subject child. The provider disclosed to the DCF Response Worker that over the years that she had known the family she had “witnessed emotional maltreatment of A by his parents.” She added that several family friends witnessed A being “mistreated” as he was the one that had to do everything; i.e. groceries, etc. compared to his siblings. (Exhibit C, pp. 7-8)

22. The Department filed for a Care and Protection petition on behalf of the subject child, A and was awarded temporary care and custody of the subject child on January 3, 2017. (Exhibit C, p. 8)

23. The responding police officer testified that A was found about a half a mile down the road from his house after they were called to the scene/home. He interviewed the Appellants who told him that A becomes a different person when he smokes marijuana and that is the reason that they were looking for him in the morning. He saw no choking or marks on A's neck but rather a small bruise on his right eye that could have been self-inflicted. Appellant DS was not charged as A was seen as the aggressor by the police and DS' actions were considered a case of self-defense. An odor of marijuana was detected on A when he arrived. (Exhibit 9; Testimony of Witness JM)

24. During the hearing, M testified that he shared a room with A and that M had difficulties with A because of A's anger. M emphasized that if A was asked for his cell phone he would "go crazy." He added that he has witnessed A being aggressive towards BS when his father, DS, is traveling for work and that A has runaway. M reported that A was also struggling with having recently broken up with his girlfriend during the time of the incident. M confirmed that he witnessed the incident and that the argument started outside the bedroom when A was asked for the cell phone by BS and A would not give the password. He added that the incident started in the kitchen and he heard it from his and A's bedroom. A did eventually go into the bedroom and was followed by his parents. M witnessed A "get into DS' face" several times and DS would push him away until he finally slapped him. M did not see any choking or punching by DS. M was aware that A did punch another child in school and was expelled. M was never interviewed by the Department. (Exhibit 33; Testimony of M)

25. BS testified that she had tried to help the subject child since he was a toddler and was with his biological mother. She acknowledged that only she became aware of A when the biological mother could no longer care for him. As A got older she became more afraid of him and that he started to use alcohol and marijuana. She acknowledged that she would randomly checking A's phone was the rule of the house. BS was concerned that A had a history of being inappropriate with the phone they were concerned. (Testimony of Appellant BS)

26. DS testified that there were challenges with A since he was a toddler. These challenges have occurred at daycare and camp when he was younger. He related A had been removed from these settings due to his behavior. DS expressed concern regarding A's drug use and alcohol use and believed it was a factor in the reported incident. DS denied punching him but acknowledged slapping him with an open left hand after being pushed twice as he was trying to protect himself. DS reported that he was trying to calm A down and left after he pushed him into the bed. M was in the room and alerted him when A jumped from the window (a 5'-6' drop) and DS proceeded to call the police. He also confirmed that he found drug paraphernalia in A's car. (Testimony of Appellant DS)

27. DS denied placing his hands around A's neck and that stated that A is an habitual liar with aggressive behavioral issues, which have resulted in A's being suspended from school in the past. DS reported that at the crisis center he was frustrated with the system from which he was

trying to get help for A due to A's substance abuse issues. DS further believed that since entering DCF A had yet to receive appropriate services and A was now as a young adult. (Testimony of Appellant DS)

28. The Appellants submitted three character references that attested to their nurturance as parents and positive involvement in the community. The references attested to knowing the Appellants between ten to twenty years. They specifically described DS as very involved as a coach and being well respected in the community. (Exhibit 30; Exhibit 31; Exhibit 32)

29. I find the Department conducted the investigation in accordance with Department regulations and applicable statutes. 110 CMR 4.27; M.G.L. c. 119 §51B et seq.

30. In light of the totality of evidence in this case, I find the Department did not have reasonable cause to support an allegation of physical abuse of A by the Appellant DS for the following reasons:

- a) A finding of physical abuse requires that the Department have reasonable cause to believe that a caregiver's actions caused or created a substantial risk of physical or emotional injury (110 CMR 2.00);
- b) It is undisputed that A challenged the Appellant DS with his behavior, which escalated and culminated in the Appellant DS physical redirecting A and defending himself due to A's continued posturing and aggression;
- c) The subject teen had a history of aggression in various setting as well as substance abuse;
- d) The teen did suffer a minor abrasion to the face following the incident. However, the responding police officer did not observe any marks to the neck and noted he was determined to be the aggressor and DS acted in self-defense as well as the reasonable determination that any other injury following the incident was self-inflicted;
- e) The totality of the evidence did not support a finding of abuse as defined by Department policies and/or regulations. 110 CMR 2.00, DCF Protective Intake Policy #86-015, rev. 2/28/16. (Also see Cobble v. Commissioner of DSS, 430 Mass. 385 [1999])

31. The Department did not have sufficient evidence to support a finding that the Appellant DS abused A under Department policies and regulations. (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

32. In light of the totality of evidence in this case, I find the Department did not have reasonable cause to support an allegation of neglect of A by the Appellants for the following reasons:

- a) A finding of neglect requires that the Department have reasonable cause to believe that the caregiver's actions placed A in danger or posed substantial risk to his safety through her actions. DCF Protective Intake Policy #86-015 Rev. 2/28/16;
- b) The Appellants appropriately used formal supports such as the police and the crisis center to help the subject teen;



- c) The subject teen was not abandoned as alluded to by the Department. Parents concluded they could not keep teen safe; parents believed teen needed substance abuse treatment and would not agree to asking relatives or parents of teen's friends who were unknown to them to care for the teen;
- d) Simultaneously, the subject child was refusing to go home and refusing substance abuse treatment.
- e) There was no evidence for the Department to determine that the Appellant's behavior constituted a failure to provide A with minimally adequate emotional stability and growth. 110 CMR 4.32(2); DCF Protective Intake Policy #86-015 Rev. 2/28/16

24. Therefore, the Department's decision to support the allegation of neglect was not made in conformity with its policies and regulations. 110 CMR 2.00; 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*

Neglect is 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 a failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. (*Id.*)

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 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 Appellants were a caregivers, pursuant to Departmental regulation and policy. 110 CMR 2.00; Protective Intake Policy No. 86-015 (rev. 02/28/2016)

The Appellants, through counsel contested the Department's decision to support allegations that they neglected the subject child, A. Additionally, Appellant DS, through counsel, contested that he physically abused A as supported by the Department's decision at the conclusion of their emergency response. They argued that the subject child suffered from mental health issues, which was affecting his behavior and exacerbated by his substance abuse of alcohol and marijuana. The Appellants maintained that A has had challenging behavior since he was integrated into the family when he was four years but had had difficulties adapting to social and academic setting. Reportedly, he was expelled from a daycare and a summer camp and has been suspended from school several times due to assaultive behavior towards peers and staff. (Fair Hearing Record) The Appellants denied abandoning him at the crisis center as their intention was to get him help at an inpatient substance abuse program and avoid an unstructured family setting placement where his needs would not be met and his abuse would continue. Appellant DS acknowledged that he was frustrated and was under the impression that he was allowed to leave after signing the necessary paperwork and his intention was also to request court intervention. The Appellants further argued that Appellant DS did not physically abuse A, rather he defended himself against an irate and aggressive youth who was posturing and not abiding to redirections of his parents. The Appellants cited that the court has recently ruled that parents may use force in a reasonable manner for the purpose of safeguarding a minor child when it does not cause substantial injury. (Exhibit 19) They also argued that subject child's disclosure that he was punched and maltreated was not credible due to past reports not being supported and that it was hearsay (Exhibit 21) since a trained law enforcement professional had determined that A was the aggressor and that DS was acted in self-defense. Finally, the Appellants argued that the Department failed to act with a reasonable basis or in a reasonable manner, which resulted in substantial prejudice to the Appellants.

In determining whether the Department had reasonable cause to support a finding of abuse and neglect by the Appellants, the Hearing Officer must apply the facts, as they occurred, to the definition of physical abuse and neglect as defined by Departmental regulation; new information presented at the Hearing, if not available during the investigation, can be considered as well. (110 CMR 2.00 and 10.06) After review of all the evidence, including verbal testimony offered by the witnesses at the Fair Hearing, the Department's decision to support the physical abuse and neglect allegations were not made with a reasonable basis. The Appellants' argument was persuasive.

It is undisputed A had a small bruise (black in nature) to his right eye. 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; there is no evidence to conclude the injuries to A were purposeful committed by the Appellant. Next, the non-accidental act must "cause, or create a substantial risk of physical or emotional injury..." None of the Appellant's DS actions created a substantial risk of injury to J. The Appellant appropriately defended himself from the aggressive stance of his son, which evidence indicated that the son was under the influence of marijuana. The subject teen repeatedly tried to incite a reaction or aggression from his father, who rather would push him away until father slapped A due to increasing aggression by the subject child. Neither the stepmother, his brother nor the responding police officers saw significant injuries or testified that A was punched. Rather, both Appellants tried to confront A with their concerns regarding A's violation of household rules and substance abuse of alcohol

and marijuana. (Fair Hearing Record) The credible evidence here does not amount to a "collection of facts, knowledge, or observations which tend to support or are consistent with the allegations that a substantial risk of injury is present," Cobble v. Department of Social Services, 430 Mass. 385, 394 (1999); (Exhibit 20). Finally, the Department relied upon statements from collaterals (clinicians and child specific foster parent) that were not present during the initial interaction nor fully witnessed the incident, rather observed things and made summations after the fact. Collaterals who dismissed the parent's concerns that A required treatment and structure that parents could no longer provide; not another informal substitute placement as the child requested. This was seen as maltreatment and lack of cooperation by the Department. Therefore, the Department's decision to support the allegation of neglect of A by the Appellants is not supported by substantial evidence. Subsequently, in this instant matter information was not taken into consideration which could have detracted from their decision to support the allegations; i.e. "...evidence upon which the Department relied was so encumbered by unreliability that it fails to have the character of substantiality which would support the Department's decision..." Edwards vs Department of Social Services, 42 Mass. App. Ct. 478(1997) Subsequently, the Department's decision to support the allegation of neglect was not made with a reasonable basis.

Based on a review of the evidence presented at the Fair Hearing, including testimony from all witnesses and documents submitted by the Department, I find that the Appellants have met their burden; they have shown, by a preponderance of the evidence, that the Department's decision or procedural action was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the Appellants.

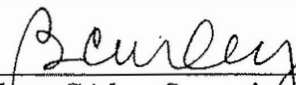
### Conclusion and Order

After review of the evidence, including evidence presented at the hearing, I find that there is not reasonable cause to believe that the Appellant DS **physical abused** A and therefore, the Department's decision to support the allegations of physical abuse is **REVERSED**.

After review of the evidence, including evidence presented at the hearing, I find that there is not reasonable cause to believe that the Appellants **neglected** A and therefore, the Department's decision to support the allegations of neglect is **REVERSED**.

  
\_\_\_\_\_  
Jorge F. Ferreira, Administrative Hearing Officer

May 27, 2018  
Date

  
\_\_\_\_\_  
Barbara Curley, Supervisor  
Fair Hearing Unit

\_\_\_\_\_  
Date

\_\_\_\_\_  
Linda S. Spears  
Commissioner