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DEPARTMENT OF SOCIAL SERVICES
CENTRAL ADMINISTRATIVE OFFICE
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IN THE MATTER OF

MS

#2017-0127

FAIR HEARING DECISION

MS appeals the Department of Children Families' (hereinafter "DCF" or "the Department") decision to support allegations of physical abuse pursuant to G.L. c. 119, §§51A and B.

Procedural History

On October 5, 2016, the Department received a 51A report alleging physical abuse of D and P by their mother MS. The Department screened-in the report for a non-emergency response and, on October 27, 2016, the Department made the decision that the allegation of physical abuse of D and P by their mother, MS, was supported. The Department also determined that there were "substantiated concerns" that the children's father physically abused them.

The Department notified MS of its decision and her right to appeal. MS made a timely request for a fair hearing to appeal the Department's decision. A hearing was held on July 13, 2017, in the DCF Hyde Park Area Office. MS, MS's Family Partner from [REDACTED] and the Department response worker testified at the hearing.

The Department submitted the following exhibits at the hearing.

Exhibit A: 51A report
Exhibit B: 51B report

MS submitted the following exhibits at the hearing.

Exhibit 1: Letter from D's therapist, dated July 7, 2017.
Exhibit 2: Letter from D's medical provider, dated July 9, 2017.

The hearing was digitally recorded and transferred to compact disc.

The Hearing Officer attests to having no prior involvement, personal interest or bias in this matter.

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. 110 CMR 10.05

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

1. MS (hereinafter "mother") is the mother of D (age 13) and P (age 6). (Exhibit A, p. 1).
2. D and P's father is DS (hereinafter "father"). (Exhibit A, p. 1; Testimony of mother).
3. Mother also has a 19 year old son, J, from a prior relationship. (Exhibit A, p. 1; Testimony of mother).
4. By December 2012, mother and father had separated. Mother had custody of the children and father visited with them every other week. Their divorce was final in 2014. (Exhibit A, pp. 7, 8; Testimony of mother).

5. The parents' separation was difficult for D. Until very recently, the parents did not communicate very well regarding the children. D was known to be manipulative and she would tell mother and father negative things about the other to upset them. This has led to abuse and/or neglect reports being filed with the Department. (Exhibit A, pp. 7-8; Exhibit B, pp. 3, 4, 5; Testimony of mother).
6. The Department has received 4 prior reports regarding the family; however, none of those reports ever resulted in "supported" allegations against either parent. In 2012, a report alleging sexual abuse of D by father because he was bathing her was unsupported. Father believed that mother was responsible for that report and, in April 2013, he filed a report of neglect of P and abuse of D by mother. The Department determined that the report was retaliatory and it was screened-out. In October 2013, a report of physical abuse of D by mother was unsupported because both mother and child reported that mother accidentally scratched D when D was trying to stop mother from looking in her book bag. Neither father nor collaterals expressed any concerns about mother's care of the children during that investigation. In September 2014, a report of physical abuse by paternal grandmother and neglect by father was unsupported. (Exhibit A, pp. 7-8).
7. For the past several years, mother and the children (primarily D) have received medical care and therapeutic services through [REDACTED]. D has engaged in therapy with the same therapist since 2013. Mother is diagnosed with depression, anxiety and PTSD. She is in treatment with a therapist and a psychiatrist who prescribes her medication. The family has also been working with a Family Partner who provides support to mother around parenting issues. The Family Partner has worked with the family for the past 2 years and she knows them well. The children have never reported abuse or neglect by mother to treatment providers and none of the professionals working with the family members have ever had any concern that mother physically abuses or neglects the children. (Exhibit 1; Exhibit 2; Exhibit B, pp. 2-3, 4, 5, 6; Testimony of mother; Testimony of mother's Family Partner).
8. Mother is very involved with the children's education. She communicates with the school on a regular basis and she is very responsive when the school contacts her. (Exhibit A, p. 3; Exhibit B, p. 6).
9. D is a strong student. She earns A's and B's and she attends school every day on time. She is known to seek out attention. She has made vague complaints to the school counselor. She often goes to the school counselor and reports having arguments with mother. On one occasion, she told the counselor that she was nervous to go home because mother was upset with her for staying after school without permission. She did not specifically say why she was nervous. On one occasion, D told her counselor that "years ago" when her doctor asked about how she got a bruise, mother answered for her and when the doctor left the room, mother told D not to tell the doctor the truth. There is no evidence in the hearing record regarding exactly what "the truth" was. (Exhibit B, p. 6).

10. P is a good student. She does well academically. Her attendance is great and she is performing on target for her grade level. She has never disclosed being physically disciplined to anyone at school. (Exhibit B, p. 6).
11. In late 2016, there were conflicts between mother and D. Much of the conflict stemmed from D not wanting to go to visits with father because she feels he favors P and ignores her, but mother makes her go anyway because it is court ordered. (Exhibit B, pp. 2, 4, 7; Testimony of mother).
12. Mother disciplines D by talking to her or taking away her electronics. Mother disciplines P by talking to her and putting her in the corner. She has spanked P on the butt with an open hand to get her attention. (Exhibit B, pp. 2, 6, 7).
13. On October 5, 2016, D told her school counselor that, the day before, she was late getting home from school and her mother got upset and punched her twice in the back of the head with a closed fist. The counselor did not see any marks on the child's head. D also told the counselor that she and mother argued that morning and mother got upset and hit her with a brush on her knee, hand and wrist. D said her adult brother was present. The counselor observed a scrape on D's wrist and a small bruise on her knee and on her hand. D said that mother beats P with a belt and she has also seen her mother use a belt to beat a one year old child she babysits. (Exhibit A, p. 3).
14. On October 5, 2016, the Department received a 51A report alleging physical abuse of D, P and the one year old child mother babysits. The Department screened-in the report for a response. (Exhibit A).
15. The Department response worker spoke with mother. She denied hitting D as alleged. She reported that D may have gotten the bruises from playing lacrosse. (Exhibit B, pp. 2-3).
16. The Department response worker spoke with D's therapist, mother's therapist, the children's pediatrician's office and P's school counselor. None of them reported any concerns about physical discipline or mother's care of the children. (Exhibit B, pp. 4, 5, 6).
17. The Department response worker spoke with mother's adult son, J. He denied that mother uses physical discipline and he denied witnessing an argument between mother and D on the day in question. (Exhibit B, pp. 6-7).
18. The Department response worker spoke with D. She reported that she and mother had an argument on the day in question and mother hit her with an open hand on the arm. She reported that mother disciplines her by taking away her electronics and mother usually just yells at P. When asked how she got the small bruise on her knee and on her hand, she said they could have come from playing sports. (Exhibit B, p. 7).
19. The Department response worker spoke with P. P said that mother and father hit her with a belt and they sometimes spank her with their hands. She reported feeling safe with her parents when she can find a good hiding spot when her parents say they are going to hit her with a belt. She said she does not feel safe when they find

her which they usually do. She said she cries when she gets spanked. She did not report ever having any injuries as a result of being spanked. (Exhibit B, p. 7).

20. On October 27, 2016, the Department made the decision that allegations of physical abuse of D and P by mother were supported and that there were substantiated concerns of physical abuse of D and P by father. The Department determined that the initial allegation made by D to the reporter was credible because D disclosed physical abuse by mother in 2013, and because D gave the same explanation for the bruises as mother which suggests that mother coached her. (Exhibit B, pp. 7-8).
21. Mother testified at the hearing. Her testimony was consistent with the above findings. She denied hitting D or P. She acknowledged having conflicts with D primarily over visits with father because D does not want to go. D had difficulty with her and father's separation and she has always engaged her in services. When the communication between her and father was poor, it was effecting D, however, she and father are communicating better now and things have gotten better. (Testimony of mother).
22. Mother's Parenting Partner testified at the hearing. She confirmed that D has never told her therapist or other providers that mother hits her and none of the family's providers have ever had concerns that mother was hitting the children. (Testimony of mother's Parenting Partner).
23. I find mother's and the Parenting Partner's testimony to be credible.
24. Considering all of the evidence, I find no reasonable cause to believe that mother physically abused D.

Applicable Standards and Analysis

In order to "support" a report of abuse or neglect, the Department must have reasonable cause to believe that an incident of abuse or neglect by a caregiver occurred 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. 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 caregiver; 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

"[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.

"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(1), DCF Protective Intake Policy #86-015, rev. 2/28/16

The Department regulations define "physical injury" as follows.

- a) death; or
- b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such non-trivial injury; or
- c) soft tissue swelling or skin bruising depending upon such factors as the child's age, circumstances under which the injury occurred, and the number and location of bruises; or
- d) addiction to drug at birth;
- e) failure to thrive.

See 110 CMR 2.00(47).

Department Policy defines substantial risk of injury as "[a] situation arising either through intentional act or omission which, if left unchanged, might result in physical or emotional injury to a child or which might result in sexual abuse to a child. DCF Protective Intake Policy #86-015, rev. 2/28/16

As D and P's parent, mother is their caretaker under Department regulations. 110 CMR 2.00(5).

The Department made the decision that mother physically abused D because she told the school counselor that mother punched her in the head and hit her knee, hand and wrist with a brush causing a small bruise on her knee and hand. The Department determined that D's denial that mother caused the bruises during the response was likely coached because D gave the same explanation as mother and the initial allegation she made was likely credible because she made allegations of physical abuse in 2013.

Considering all of the evidence, I find no reasonable cause to believe that mother physically abused D.

D has a history of manipulating her parents and saying things to each of them about the other parent that will upset them and that, in the past, has led to 51A reports. All of the prior reports were either screened-out or unsupported including the 2013 report that mother physically abused D. Mother has engaged the family in multiple services including individual therapy for D. They have had the same providers for years and the children have never complained about physical abuse by mother or father. None of the providers have ever had any concerns about abuse.

The small bruises observed by the reporter on D's knee and hand could easily have been caused by playing sports or by other means not related to abuse. It is not reasonable to conclude that D was coached simply because both mother and D offered sports as an explanation for the bruises. The response worker did not observe the bruises and the reporter did not describe them so there is no evidence that would allow for an assessment of the likely cause. It is also notable that D told the reporter that her adult brother was present when the alleged abuse occurred; however, he denied that there was an argument between mother and D or any abuse.

The Department made the decision that mother physically abused P because P told the response worker that mother and father hit her with a belt, she hides when they are going to hit her and she cries when they do. Given that P claimed that both parents hit her with a belt, it is not clear why the Department made a distinction between mother and father in its conclusion, specifically why the allegation of abuse by mother was "supported" but that there was only a "substantiated concern" of abuse by father.¹

Considering all of the evidence, including mother's credible testimony, I find no reasonable cause to believe that mother physically abused P under Department regulations and policy.

In addition to the reasons stated above regarding D, even if mother had hit P with a belt, there is no evidence that P has ever suffered an injury as a result. Therefore, the issue is whether mother's actions created a substantial risk of injury to P. Cobble v. Commissioner of DSS, 430 Mass. 385 (1999). In Cobble, the court outlined several factors to take into consideration when determining whether a caregiver's actions created a substantial risk of injury. Given the complete lack of any details or circumstances, it is impossible to evaluate the level of risk to P in this case.

Conclusion and Order

¹ Department policy allows a finding of "substantiated concern" in cases where a caregiver's discipline is excessive or inappropriate, but does not result in an injury. A finding of "substantiated concern" indicates a lower level of risk to a child and does not result in the naming of the caregiver to the Department's Central Registry. Protective Intake Policy #86-015, rev. 2/28/16

The Department's decision to support allegations of physical abuse of D and P by mother was made without a reasonable basis and therefore, the Department's decision is REVERSED.

Anne L. Dale Nialetz
Anne L. Dale Nialetz, *BC*
Administrative Hearing Officer

April 17, 2018
Date

Barburley
Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner