

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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(IN THE MATTER OF)
(J.V.)
(FH #2017-0129)
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HEARING DECISION

Procedural History

The Appellant, J.V. appeals the decision of the Department of Children and Families [hereinafter “the Department” or “DCF”], to support for physical abuse and neglect of J. and A., pursuant to M.G.L., c.119, §51A & §51B.

The Department received a 51A Report on December 9, 2016 from a mandated reporter alleging physical abuse and neglect of the aforementioned children by the Appellant, their father. The allegations pertain to injuries received by the children from objects utilized by the Appellant while disciplining them. The allegations were screened in and assigned for a non-emergency 51B response to Response Social Worker, G.J.¹ Following the response, on January 3, 2017, the Department supported for physical abuse of the children by the Appellant due to the non-accidental nature of the injuries received and supported for neglect of the children by the Appellant based on the emotional impact of the Appellant’s discipline on the children, particularly since the children had a history of physical abuse by other relatives. The supported decisions were made and approved on January 3, 2017 and the family’s DCF ongoing case continued. The Department notified the Appellant of the decisions and his appeal rights by letter dated January 4, 2017. The Appellant filed a timely request for Fair Hearing [“Hearing”] on February 1, 2017. [110 CMR 10.06 & 10.08] The Appellant’s request for Hearing was granted and held on March 9, 2017 at the Department’s North Central Area Office in Leominster, MA. Present were the DCF Response Supervisor, S.K.; the DCF Response Social Worker, G.J.; the Appellant; and, the Appellant’s Witness/Wife/Stepmother, L.V. The parties were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a CD. Admitted into evidence for the Department are the DCF 51A Report of December 9, 2016 [Exhibit A] and the corresponding 51B Response Supported on January 3, 2017 [Exhibit B]. The Appellant made no submissions. The Hearing record was closed at adjournment.

¹ The response social worker is bilingual. She spoke with the children in English, with the Appellant in both languages, and with the children’s maternal grandmother in Spanish. [Testimony of Response Social Worker, Exhibit B]

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement, or bias in this case.

Pursuant to 110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney-client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Standard of Review

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

1. The Appellant is the father of three children – eight year-old J.; seven year-old A.; and four year-old half-brother, E. S.V. is the mother of J. and A., and L.V. the Appellant's wife and mother of E. with whom he lives. [Testimony of the Appellant; Testimony of Wife; Exhibit B, pp. 2-5]
2. J. and A. reside with their maternal grandmother, D.A., who is their permanent guardian, and visit the Appellant on weekends. [Testimony the Response Social Worker; Testimony of the Response Supervisor; Exhibit A; Exhibit B, pp.4 & 6]
3. The children have a history of physical abuse by other relatives. [Testimony of the Response Social Worker; Exhibit B, pp.1-2 & 4]
4. The record is replete with evidence of physical discipline of the children by the maternal grandmother, the Appellant, and the Appellant's wife. [Exhibit B]
5. On Sunday night, December 4, 2016, following a weekend visit with the Appellant, maternal grandmother was bathing the children to put them to bed and saw marks on the children. She knew that seven year-old A had a physical the next day [Monday] and brought him there and encouraged the child to tell the doctor. [Exhibit A, p.2; Exhibit B, pp.2 & 5; Testimony of the Response Social Worker]

6. On Monday, December 5, 2016, the pediatrician, Dr. C., saw A for his yearly physical whereupon the child mentioned that he and J had a visit with the Appellant at his house last weekend and the Appellant hit them with a coat hanger on the face, back, and legs, and that J was hit too. [Exhibit A, p.2; Exhibit B, pp.2] According to the maternal grandmother, the doctor asked A about the mark on his face and leg and the child said that the Appellant did it. [Exhibit B, p.5] However, the 51A Report indicates that the doctor did not see any bruising on A during the December 5th physical [Exhibit A, p.2]
7. A collateral contact made by the response social worker, G.J., to the pediatrician's office confirmed that A's most recent physical exam was on December 5, 2016, and at that time, A spoke of being hit in the face with a coat hanger by the Appellant. The collateral contact said that a 51A Report was filed. There is no mention of any injury seen. [Exhibit B, p.7]
8. On December 8, 2016, the mandated reporter of the December 9, 2016 51A Report went to the maternal grandmother's home to speak with the children. Upon arrival, both said, "We know why you are here, the Dr. called you". When the mandated reporter asked them what happened, they said that over the weekend they slept over the Appellant's house. They were playing with Legos and the Appellant told them to put them away. A told the mandated reporter that the Appellant then grabbed a coat hanger and hit him in the face, back, and legs, and he had red marks, though not the bruises that J received. J corroborated A's account, and further told the mandated reporter that he had a bruise on the side of his hip. In the presence of the maternal grandparents, J showed the reporter two small fading bruises on his left thigh. The mandated reporter did not see any marks or bruising on A. [Exhibit B, pp.2 & 5]
9. On December 13, 2016, the response social worker, G.J., who is bilingual, and the family's ongoing social worker, L.M., visited maternal grandmother's home where the maternal grandparents were interviewed and each child individually apart from the maternal grandparents. During the children's interviews, held in English, the children corroborated the allegations as summarized below. [Exhibit B, pp.4-5; Testimony of the Response Social Worker]
 - a) J stated that the Appellant asked him and A to stop playing games and they did not listen. The Appellant hit him with a "gancho" [hanger] and also A with a hanger. J stated that A had a mark on his face and he had two marks on his thigh. The response social worker observed these injuries on J's leg. J reported that the Appellant has hit him with a "correa" [belt], sometimes arms, and now a "gancho" [hanger]. He has never had marks or boo boos before this. He did not feel safe going to the Appellant's home again, because the Appellant hit really hard.
 - b) A stated that he was playing Legos at the Appellant's house and the Appellant told him to stop. The Appellant hit him with a "gancho" [hanger] in the face and the child pointed to his face. He was not hit anywhere else. The response social worker saw no visible marks on the child's face. A stated that he does not feel safe at the Appellant's house because he hits him, and does not want to go there.

10. The children disclosed to three mandated reporters, plus their maternal grandmother.
[Testimony of the Supervisor]
11. The maternal grandmother confronted the Appellant about the marks. According to the maternal grandmother, the Appellant said that the children were lying. According to maternal grandmother, J said that the Appellant told him he lied, but he did not. [Exhibit B, p.5]
12. On December 13, 2016, the response social worker and the ongoing social worker made a visit to the Appellant's home where they separately interviewed the Appellant; the Appellant's wife, L.V., who along with the Appellant testified at the Appellant's Hearing of March 9, 2017; and their four year-old son, E. [Exhibit B, pp.3-4; Testimony of the Response Social Worker; Testimony of the Appellant; Testimony of the Appellant's Wife]
13. The Appellant said that the three children, on that Sunday, were not listening and he "tapped" J. and A. over their clothes with a hanger, which he agreed was a plastic one, but not hard enough to cause injury. He denied hitting A in the face. He acknowledged hitting both children on the leg. He denied ever hitting the children with a belt. No one saw any marks on them. He said the children are always fighting, which may account for the bruise on the face. He reported calling the maternal grandmother in December 2016 about his next weekend visit. At that time, he learned of the allegations, and was told that DCF said he could not take the children for visitations. At this time, the Appellant spoke to the children and, when he asked them, if he hit them, they denied this. The Appellant was adamant that the children "say what the maternal grandmother says to them", meaning that she coached them to lie. The Appellant denied the children were scared to see him. When he spoke to them, they were "crying" because they wanted to visit him. The Appellant was born in [REDACTED] and came to the U.S. the first time in 2006. He conveyed at Hearing that you can't discipline anyone over here, if they don't listen. If children are spanked, they will listen. [Exhibit B, p.3; Testimony of the Appellant]
14. The Appellant's wife reported that the Appellant is a good father and does not abuse his children. She reported that all three children were being bad that Sunday, especially A, who was hyperactive. She reported that the Appellant was cleaning, asked them to stop, and then hit all three children with what he held in his hand, but not that hard. With the Appellant's help, she identified this object as a "gancho" [hanger]. [Testimony of the Appellant's Wife]
15. On December 14, 2016, a DA [District Attorney] referral was initiated, but no prosecution was forthcoming because maternal grandmother did not want to press charges. [Exhibit B, p.6; Testimony of the Response Social Worker]
16. The Department safety planned with the family, when meeting with them on December 13, 2016. The safety plan included a provision that the Appellant and his wife agree not to use physical discipline on the children. [Exhibit B, p.4] The Appellant acknowledged there was a safety plan. [Testimony of the Appellant]
17. Per Department directive, the Appellant's visits with J. and A. were stopped for two months, since December 2016, and all contact with the children supervised. Visits were reinstated one month ago [February 2017]. [Testimony of the Appellant; Exhibit A, p.6; Exhibit B, p.2]

Analysis

A party contesting the Department's decision, to support 51A Report for physical abuse and neglect, may obtain a Hearing to review the decision made by the Area Office. [110 CMR 10.06] The Appellant requested a Hearing, which was granted and held on March 9, 2017.

Regulations and case law applicable to this appeal include, but are not limited to, the following:

After completion of its 51B investigation, the Department shall make a determination as to whether the allegations in the report received are supported or unsupported. To support a report means that the Department has reasonable cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker did occur. To support a report does not mean that the Department has made any findings with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker(s) did inflict abuse or neglect upon the child(ren) in question. Reasonable cause to believe is defined as 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. [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

The Appeals Court, in Edward E. v. Department of Social Services, 42 Mass. Appt. Ct [1997] where the question before the court was not whether the administrative record was based exclusively upon uncorroborated hearsay but whether the hearsay present at the Hearing was reliable.

The Supreme Judicial Court, in Covell v. Department of Social Services, 439 Mass.766 (2003), held that substantial evidence may be based on heresay, if that heresay has "indicia of reliability".

The Court, in Care & Protection of Olga, 7 Mass App. Ct. 821, 825 (2003), held that minor discrepancies are not central to the ultimate conclusion of sexual abuse.

The 51A report under appeal is supported for physical abuse. 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 ... Physical injury means 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, circumstances under which the injury occurred, and the number and location of bruises; or addiction to drugs at birth; or failure to thrive. [110 CMR 2.00]

The Court, in Cobble v. Commissioner of the Department of Social Services, 430 Mass. 385, 719 N.E. 2nd 500 (1999), considered the issue of "substantial risk of injury" and, in that case, determined that there was no reasonable cause to believe that the Appellant's actions created a substantial risk of physical injury to his son. The factors considered in that case included the act in question (disciplining by striking the child's clothed buttocks with a leather belt), the child's age (9), the lack of any prior injury from the same type of discipline, the frequency of this method of discipline (5 or 6 times over 7 months), the child's medical condition (a muscle condition requiring back and leg braces and physical therapy), the level of force used (a "solid smack"), the actual effect of the spankings (temporary red marks) and the likelihood that this method of discipline would continue to be used. The court determined that those factors, individually and/or collectively, were insufficient to support a finding of physical abuse.

In Jean Dorvil v. Commonwealth of Massachusetts, 472 Mass.1 (2015), the Supreme Judicial Court found that a parent or guardian may not be subjected to criminal liability for the use of force in disciplining a minor child under the care and supervision of the parent or guardian, provided that: (1) the force used against the minor child is reasonable; (2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention of punishment of the minor's misconduct; and, (3) the force used neither causes nor creates a substantial risk of causing physical harm (beyond fleeting pain or minor transient marks), gross degradation, or severe mental distress [6-13].

In the conclusion section of the Dorvil opinion, the Court states that the balance established with this parental privilege may not be perfect but "to the extent that it is so, the balance will tip in favor of the protection of children from abuse inflicted in the guise of discipline".

The 51A report under appeal is supported for neglect. Neglect means failure by a caretaker, 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition. This definition is not dependent upon location, i.e., neglect can occur while the child is in out-of-home or in-home setting. [110 CMR 2.00]

The Court has also held that the Department's determination of neglect does not require evidence of actual injury to the child. Lindsay v. Department of Social Services, 439 Mass. 789 (2003).

Caregiver is defined as:

- (1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
- (2) Any other person entrusted with responsibility for a child's health or welfare, whether in the child's home, a relative's home, a school setting, a child care setting (including babysitting), a foster home, a group care facility, or any other comparable setting.

As such, the term "caregiver" includes, but is not limited to school teachers, babysitters, school bus drivers and camp counselors. The "caregiver" definition should be construed broadly and inclusively to encompass any person who at the time in question is entrusted with a degree of responsibility for the child. This specifically includes a caregiver who is a child such as a babysitter under age 18. 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, (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. 110 CMR 10.23.

Upon review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Department in the matter of physical abuse and neglect of the children, J. and A. See Findings #1-#17 and the below discussion.

During visitation, the Appellant is a *caregiver* of eight year-old J. and seven year-old, A., consistent with the definition of this term at 110 CMR 2.00 as cited on page 6.

As to physical abuse, the Hearing Officer finds that the Appellant utilized objects to discipline his children, when they visited him at his home on the weekends. The evidence credibly demonstrates that on Sunday, December 4, 2016, because the children were not listening, the Appellant hit J. with a hanger resulting in two marks on the child's thigh still seen, although faded, on December 13, 2016. In addition, J. reported that the Appellant has hit him with a belt, sometimes on his arms, though no injuries were cited.

The evidence also credibly demonstrated that on that same Sunday, the Appellant hit A with a hanger on his face, leaving a red mark, which was not seen by his pediatrician, when he went to the doctor the next day, on December 5, 2016. Although A told the pediatrician and also the mandated reporter that the Appellant hit him with a coat hanger on his face, arms, and back, this child subsequently told the response social worker that his face was the only place on his body the Appellant hit him. This last account is contradicted by the Appellant, who reported at Hearing that he hit all three children with a hanger over their clothes, and on their legs, that Sunday, for not listening. Although the Appellant denies hitting A in the face with the hanger,

the Hearing Officer is unconvinced because J. and A. each corroborated the other's account of the Appellant's behaviors toward them on Sunday.

The Appellant claimed there were no marks on the children; however, the maternal grandmother saw marks on both children; the ongoing social worker and response social worker saw bruising on J, and A reported that he had red marks.

The Appellant claimed the children have since recanted being hit; however, there is no corroborating evidence to support this as it pertains to J. Although the evidence shows, as discussed previously, that A changed his statement, one can only speculate as to why. The Appellant did confront the children about their statements, and both did not feel safe going to the Appellant's home because of the hitting. On the whole, the children were credible. See Care & Protection of Olga, Edward E. v. Department of Social Services, and Covell v. Department of Social Services.

Based on the record and giving due weight to the Department social workers in this case, the Hearing Officer finds that the Department had reasonable cause to believe that the Appellant committed a non-accidental act on his two children, which caused or created a substantial risk of physical injury. See Care and Protection of Robert. In making this decision, the Hearing Officer considered Cobble v. Commissioner of the Department of Social Services. However, the Hearing Officer concluded that eight year-old J sustained injury from the Appellant disciplining him with a hanger on his thigh, over his clothing, on Sunday, December 4, 2016, which lasted a minimum of nine days. The Appellant had also utilized a belt on this child, sometimes on the arms. In addition, although there were fleeting red marks on A's face, Appellant struck the seven year-old in the face with a hanger, a vulnerable part of the body. In addition, both children did not feel safe returning to the Appellant's home for visitation because the Appellant hits, in the case of J really hard. Both children have been subjected to physical abuse and/or hitting by other members of their family, thus compounding the Appellant's actions. As to Jean Dorvil v. Commonwealth of Massachusetts, this case applies to parental privilege defense in criminal liability cases.

The 51A report under appeal is also supported for neglect. Based on the record, the Hearing Officer finds that the Department had reasonable cause to believe that the Appellant, in striking the children with a hanger on Sunday, December 4, 2016, deliberately failed to provide his young children with emotional stability and growth, and was therefore neglectful. See Care and Protection of Robert. Although the Appellant denies the children were scared, both children told the response social worker they did not feel safe returning to the Appellant's home because he hits. Even so, the Court has held that the Department's determination of neglect does not require evidence of actual injury to the child. See Lindsay v. Department of Social Services.

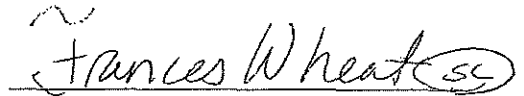
The evidence demonstrated that the Department worked with the Appellant and the Appellant's wife during the 51B response and created a safety plan, which included a requirement that the Appellant and his wife agree not to use physical discipline on the children. Per Department directive, maternal grandmother, who had permanent guardianship of the children, stopped visitation of the children with the Appellant, which remained in place for about two months. In addition to this, the Appellant was also informed in December 2016 that all contact with the children would be supervised.

The Appellant did not meet his burden of proof as it pertains to both matters under review. [110 CMR 10.23] The Hearing Officer finds that the Department, in supporting for physical abuse and neglect, complied with its regulations and policies, and therefore affirms these decisions. This decision in no way negates or minimizes the Appellant's growth over these many years, from a sixteen year-old who became a father for the first time to a twenty five year-old man, who now holds a job, has a home, and shares a young son with his wife.

Orders

1. The Department's decision of January 3, 2017, to support the 51A Report for physical abuse and neglect of J by the Appellant, his father, is AFFIRMED.
2. The Department's decision of January 3, 2017, to support the 51A Report for physical abuse and neglect of J by the Appellant, his father, is AFFIRMED.

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



Frances I. Wheat
Administrative Hearing Officer
Office of the General Counsel

Date: 1/19/2018



Sophia Cho, LICSW
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