

**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)
)
 LM) **FAIR HEARING DECISION**
)
 FH # 20170188)
)

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

Procedural History

On January 6, 2017, the Department of Children and Families received a 51A report alleging the physical abuse of A by her mother, LM. A non-emergency response was conducted and on January 30, 2017, the Department made the decision to support the allegation of physical abuse of A by her mother, LM. The Department notified LM (LM or "Appellant") of its decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR §10.06. The hearing was scheduled on April 27, 2017 at the DCF South Central Area Office. Pursuant to 110 CMR §10.17, the Appellant, through counsel, requested on April 26, 2017 that the Department continue the hearing date, citing the need to inquire the possibility by the DCF Area Director to reverse the original decision in the non-emergency response and to subpoena an additional witness. The Appellant's request for continuance was denied by the DCF Office of the General Counsel (Fair Hearing Unit) as it was determined that the Appellant did not have a "good cause" and pursuant to 110 CMR §10.13(2)(b), any request that the Hearing Officer issue a subpoena must be made at least fifteen (15) calendar days prior to the scheduled hearing. Subsequently, the hearing was maintained and held on April 17, 2017, at the DCF South Central Office Area Office in Whittinsville, MA. All parties were sworn in to testify under oath. The record closed at the conclusion of the hearing.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira Fair Hearing Officer

KW	Appellant's Legal Counsel
LM	Appellant
TM	Appellant's Spouse
EK	DCF Supervisor
AS	DCF Response Worker

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 01/06/17
- Exhibit B Child Abuse/Neglect Non-Emergency Response completed 01/30/17

For the Appellant:

None

The Appellant, through counsel, submitted a Memorandum which was reviewed by this Hearing Officer and taken into consideration, along with all the evidence, in rendering this decision. 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. 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 issues are whether there was reasonable cause to believe that a child had been abused or neglected; and, whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being, or the person was responsible for the child being a victim of sexual exploitation or human trafficking. DCF Protective Intake Policy #86-015, Rev. 2/28/16; 110 CMR 10.05

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 report, A was four years old. She resided with her parents, LM and TM, along with her nine-year-old brother, Ai. The family resided in [REDACTED] MA (Exhibit A; Exhibit B)

2. The Appellant was the mother of the subject child; therefore she is deemed a "caregiver" pursuant to Departmental regulation and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, Rev. 2/28/16

3. The family did not have a previous history with the Department. (Exhibit A, p. 4; Exhibit B, p. 1)

4. On January 6, 2017, the Department of Children and Families received a 51A report, pursuant to M.G.L. c. 119, § 51a, filed by a mandated reporter, alleging the physical abuse of A by her mother, LM. According to the reporter, the subject child was in a group setting and talking about feelings. A shared with the group that she gets scared when her mother hits her. The subject child further disclosed that her mother, the Appellant, hits her with a belt on her bottom when she does not listen. The subject child was unable to tell when she was last hit with a belt. (Exhibit A, p. 3)

5. The report was screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, § 51B. The allegation of physical abuse of A by the Appellant was supported by the Department at the conclusion of the response. The allegation was supported because the Appellant acknowledged that she used physical discipline and that she had used a cloth belt when physically disciplining the child. Ai also disclosed having been spanked and physically disciplined with a belt several months ago. The Department determined that by utilizing the belt as form of punishment that it fit the Department's definition of physical abuse. (Exhibit B, p. 8)

6. When interviewed, the Appellant acknowledged utilizing a belt on one occasion with A in September or October 2016. She disclosed that A had acted inappropriately and pulled her pants down in front of her brother. The Appellant added that after she spoke to her about the inappropriate behavior and what discipline she would use. The Appellant confirmed that she spanked her twice with a cloth belt over her clothes. (Exhibit B, p. 3; Testimony of the Appellant)

7. The children are often sent to their room or have privileges taken away from them as a form of discipline. However, because of the severity of their behavior, they have utilized physical discipline at times, including on Ai, who picked up his sister and threw her on the floor or stole from a peer on another occasion. (Exhibit B, pp.2-3)

8. Ai disclosed that he has been spanked in the past with a belt and reported that the last time was more than five months ago. He reported that the belt was smaller than a "wand." He also disclosed that A does not get spanked even though A did acknowledge having been threatened with a spank or having been spanked. Both A and Ai reported feeling safe at home with their parents. (Exhibit B, p. 4)

9. The DCF Response Worker did not observe any marks or bruises on the subject child and her older brother. (Testimony of the DCF Response Worker)

10. The DCF Response Worker spoke with the subject child's physician and school principal. Neither expressed any protective concerns or having observed marks or bruises on the subject child. (Exhibit B, pp. 4-5)

11. The subject child was observed to be very comfortable and affectionate with her parents during the interview. (Exhibit B, p. 5; Testimony of the DCF Response Worker)

12. The utilization of the belt was only used when absolutely necessary and never when the Appellant was angry at the children's behavior, specifically with A in this instant matter. (Testimony of the Appellant)

13. The Appellant and the children's father are both very engaged with the children's school and the children are function well for their age. (Exhibit B, p. 5)

14. 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.*

15. After review of all the evidence presented, I find that the Department did not have reasonable cause to support the allegations of physical abuse of A by the Appellant and the decision was not reasonable; it caused substantial prejudice to the Appellant. There was no corroborating evidence to support a finding that the Appellant's actions created a "substantial risk of physical injury" or "danger" of future harm. 110 CMR §§2.00, 4.32; *DCF Protective Intake Policy #86-015, rev. 2/28/16* (See analysis)

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 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 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 Substantiated Concern means:

- There is reasonable cause to believe that the child was neglected; and
- The actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the children(ren)'s safety or well-being. (*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 Appellant was a caregiver, pursuant to Departmental regulation and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant, through counsel, contested the Department's decision to support an allegation that she physically abused her daughter, A. She argued that she did use physical discipline on A by spanking her with a cloth belt. She did so in order to teach her daughter that her behavior had been inappropriate and needed to be addressed. The Appellant argued that she uses physical discipline as a last resort, often using non-physical forms of discipline. However, in this instant matter she acknowledged spanking A with a cloth belt in a deliberate and calm method over the child's clothing. (Fair Hearing Record) The act did not cause or create a substantial risk or impact her emotional growth and well-being. The Appellant also cited that there had been no prior concerns by doctors, no prior concerns by the school, no bruising or having spanked her out of anger. Finally, the Appellant argues that the Department's finding has resulted in substantial prejudice and could impact on her immigration status and ability to participate in school events with her children. I find that the Appellant's argument to be persuasive.

In determining whether the Department had reasonable cause to support a finding of abuse and neglect by Appellant, 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 Appellant at the Fair Hearing, I find that the Department's decision to support the physical abuse allegation was not made with a reasonable basis.

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; the act was a deliberate and calm method of physical discipline. Next, the non-accidental act must "cause, or create a substantial risk of physical or emotional injury..." I do not find that any of the Appellants actions created a substantial risk of injury to the subject child, A. There were no observable marks or injuries by the Department or concerns of such by collaterals that were interviewed. While the mandated reporter alleged that A had disclosed she was afraid after being disciplined, this does not constitute an emotional injury or impact on growth and well-being. Rather, she was observed by the DCF Response Worker as being very affectionate with her parent. (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).

Based on a review of the evidence presented at the Fair Hearing, including testimony from all parties and documents submitted by the Department, I find that the Appellant has met her burden; she has 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 Appellant.

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 **physically abused** A and therefore, the Department's decision to support the allegations of physical abuse is **REVERSED**.

Date: 12/16/17


Jorge F. Ferreira
Administrative Hearing Officer


Erica Pognon
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spears
Commissioner