

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)
(EKB & TB)
()
(FH # 2017-0211)
()

HEARING DECISION

Procedural History

The Appellants in this Fair Hearing are TB and EKB (hereinafter "TB," "EKB," or the "Appellants"). The Appellants appeal the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support an allegation of physical abuse pursuant to M.G.L. c. 119, §§51A and B.

On February 1, 2017, the Department received a 51A report from a mandated reporter alleging physical abuse and neglect of A (hereinafter "A" or the "Child") by an unknown perpetrator. The Department unsupported the allegation of neglect. However, the Department supported the allegation of physical abuse by an unknown perpetrator. The Department informed the Appellants of its decision and their right to appeal the Department's determination. The Appellants made a timely request for a Fair Hearing under 110 C.M.R. 10.06

The Fair Hearing was held on May 9, 2017 at the DCF Lowell Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

DH	Administrative Hearing Officer
MD	Attorney for Parents
EKB	Mother
TB	Father
PB	DCF Response worker
BW	DCF Area Program Manager
JG	Witness

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

The Fair Hearing was recorded on a digital voice recorder, pursuant to 110 CMR 10.26.

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

For the Department:

Exhibit A: 51A Report
Exhibit B: 51B Investigation

For the Appellant:

Exhibit 1: Letter from Dr. G
Exhibit 2: Letter from AT
Exhibit 3: Letter from JB
Exhibit 4: Letter from JaB
Exhibit 5: Letter from DB

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)

Statement of the Issue

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 subject child in this hearing is A, age 23 days old at the time of the 51A report. A lives with the Appellants along with two sisters, An, two (2) years old and K, four (4) years old. (Exhibit A, pp. 1, 3)
2. The Appellants are the parents to A. EKB is the mother of A, An, and K and TB is the father of A, An, and K. They were caregivers pursuant to Department regulation 110 CMR; DCF Intake Policy # 86-015, rev. 2/28/16.
3. On February 1, 2017 the Department received a 51A report alleging physical abuse and neglect of A by unknown perpetrator. The Department conducted an emergency response and supported the allegation for physical abuse by an unknown perpetrator and unsupported the allegation for neglect. (Exhibit A, pp 5- 6; Exhibit B, pp 8-9)

4. On January 31, 2017, the mother noticed that A was not using her arm appropriately and brought A to see her pediatrician. X rays were done and A was diagnosed with a small spiral fracture on her upper right arm and designated as a "new" break. A was sent to Children's Hospital and admitted. A had a full skeletal exam which found no other fractures. The Appellants had no explanation on how the injury happened. They both reported that they are the only caregivers to A and did not have an explanation as to what caused the injury. (Exhibit A, p. 3; Exhibit B, p. 7)
5. There were no documented issues in the birth chart of A of any trauma. (Exhibit B, p. 3)
6. The Appellants were interviewed separately by the Response Social Worker (RSW) as to how A may have received the injury:
 - a. EKB reported that earlier in the day of January 31, 2017, she left the living room briefly and left A laying on the couch with K in the room. When she returned, K was holding the baby. EKB denied that A had any falls. EKB stated no one else besides herself and her husband watch the children since A has been born. (Exhibit B, p. 5)
 - b. TB reported he had no idea. He was only made aware of the injury from his wife and was made aware of K holding A through his wife. (Exhibit B, p. 5)
7. Resident Physician at [REDACTED] hospital, JP, stated that A's spiral fracture could "not generally something the force of a 4 year old could inflict, however, not impossible." Child Protection Physician at [REDACTED] AV, agreed with JP's opinion. The break was a type of twisting and a force of motion and it was not something that would have occurred with normal baby care. There was no history of any known injury and the Appellants were unable to figure out how or when it could have happened. This type of fracture is not uncommon and there are times that the cause is never known. DCF Nurse CG also corroborated the opinions of JP and AV. (Exhibit B, pp. 3, 6, 7)
8. At the conclusion of the emergency response the Department supported the allegation of physical abuse of A by unknown perpetrator. It was unsupported for neglect of A by unknown perpetrator. (Exhibit B, pp.7-8)
 - a. 28 day old A had a spiral fracture to her right arm.
 - b. The Appellants were not able to provide any explanation for the injury. The Appellants denied knowing how this fracture occurred.
 - c. The Appellants reported they were the only caregivers to A since the day she was born.
9. At the hearing, the Appellants testified they had no idea how this fracture happened to their A's arm. The Appellants alluded to the possibly of A's sister K accidentally causing injury to A's arm when K moved A on the couch. However, I find the Appellants not persuasive because a physical injury occurred to A and they admitted they were the only caregivers to their daughter since the day she was born. (Testimony of the Appellants)

10. The Department's decision to support the allegation of physical abuse was made in conformity with its regulations, policies and with reasonable basis. 110 CMR 2.00, 432 DCF Protective Intake Policy 86-016, rev 2/28/16

11. I find, in light of the aforementioned, the evidence is sufficient to support the allegation of physical abuse by an unknown perpetrator. A had a spiral fracture on her right arm at 3 weeks old with no explanation by the Appellants. Medical opinion was that her injury was "non-accidental." For the arm to sustain this type fracture some type of twisting force had to be applied to the arm. DCF Protective Intake Policy 86-016, rev 2/28/16

Applicable Standards

"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

"[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

"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)

"Abuse" is defined as (1) The non-accidental commission of any act by a caregiver which causes or creates a substantial risk of physical or emotional injury or sexual abuse to a child; or (2) The victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver. This definition is not dependent upon location. Abuse can occur while the child is in an out-of-home or in-home setting. 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. DCF Protective Intake Policy #86-015, rev. 2/28/16

“Substantial Risk of Injury” is defined 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

“Neglect” is the failure by a caregiver, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; malnutrition; or failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. DCF Protective Intake Policy #86-015, rev. 2/28/16

A finding of support requires that there be: reasonable cause to believe that a 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; 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

“Danger” is defined as 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. DCF Protective Intake Policy #86-015, rev. 2/28/16

“Risk” is defined as the potential for future harm to a child. DCF Protective Intake Policy, (rev. 2/28/2016)

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 and the actions or inactions by the parent(s)/caregiver(s) placed the child(ren) in danger or posed substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

Analysis

It is undisputed that the Appellants are the caregivers for A, 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellants disputed the Department's decision to support the allegation of physical abuse of A by an unknown perpetrator. Despite the Appellant's argument that A was not physically abused, I find the evidence in its totality was sufficient to support the Department's determination of physical abuse of A. Medical opinion was that the break was a type of twisting and a force of motion and it was not something that would have occurred with normal baby care.

The Appellants did not show evidence that their daughter A was not physically abused. According to [REDACTED] and the DCF Nurse, they both felt that this injury was inflicted with a twisting force motion to A's arm causing it to fracture. The Department was unable to find out who inflicted this injury which is the reason for the support by an unknown perpetrator.

The evidence in its totality was sufficient to support the Department's determination of physical abuse as delineated in its regulations and policy. The Appellants did not present persuasive evidence in this matter for a reversal of the Departments decision for physical abuse.

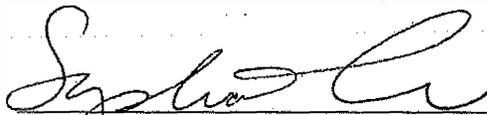
Conclusion and Order

The decision to support the 51A for physical abuse of A by unknown perpetrator 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.


David Halloran
Administrative Hearing Officer

2/15/2018
Date


Sophia Cho, LICSW
Fair Hearing Supervisor