

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 )  
( EW )  
( )  
( FH # 2017-0235 )  
( )

**HEARING DECISION**

**Procedural History**

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

On January 23, 2017, the Department received a 51A report from a mandated reporter alleging physical abuse of C (hereinafter "C" or "the child") by EW; the allegation was subsequently supported. The Department informed the Appellant of its decision and of her right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06

The Fair Hearing was held on April 26, 2017, at the Department of Children and Families' Dimock Street Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
PH	Intake Supervisor
RB	Response Worker
MR	Response Worker
JW	Father
EW	Mother/Appellant

In accordance with 110 CMR 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 Response

For the Appellant:

None

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) 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. 110 CMR 10.05; DCF Protective Intake Policy #86-015, rev. 2/28/16

**Findings of Fact**

1. EW and JW are the parents of C and J. At the time of the 51A report, C was eight (8) years old and J was three (3) years old. There were no reported allegations in regards to J. In accordance with the regulations and policies that govern these proceedings, I find that EW was a caregiver of C. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16; Exhibit A pp.1-2; Exhibit B p.1; Testimony of RB; Testimony of Appellant)
2. On January 23, 2017, the Department received a report from a mandated reporter alleging physical abuse of C by the Appellant pursuant to M.G.L. c. 119, §51A. According to the mandated reporter, C reported that the Appellant hits him with a belt. C reported he was last hit on January 18, 2017. C did not have any visible marks or bruises. C did not report how often he was hit. C was not afraid to go home or to be with the Appellant. C had made similar statements in the past that were

subsequently responded to by the Department. (Exhibit A pp.3-8; Testimony of RB; Testimony of PH)

3. Since 2013, the family had been involved with the Department. Allegations in the past concerned physical abuse and neglect in regard to the Appellant's care of C. (Exhibit A pp. 5-8)
4. The 51A report was screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, §51B. The Department supported the allegations of physical abuse of C by the Appellant. The Department supported because of past history of allegations of physical abuse and neglect by the Appellant; the Appellant was ambiguous when answering the Department's questions and refused to answer questions directly; that it was unclear if the Appellant knew how to help the child safely regulate and express his emotions; and when interviewed, the child appeared "visibly afraid, shaking, rocking back and forth, ringing his hands, and said 'I lied, I don't want to hurt my family.'" (Exhibit B pp. 7-8; Testimony of RB)
5. When interviewed by the Department, the Appellant acknowledged she spanked C; however would not state whether or not she used a belt during these spankings. (Exhibit B p.5; Testimony of RB)
6. At the Fair Hearing, the Appellant testified she used an open hand to spank C and "always with his clothes on." The Appellant denied C suffered any injuries or had bruising as a result of spanking. (Testimony of Appellant)
7. C met with the Department, he stated, "I lied. I don't want to hurt my family." The Response Workers documented that during this interview, both of his parents, JW and EW, were present; also C appeared visibly afraid, was shaking and rocking back and forth. (Exhibit B p.5; Testimony of RB)
8. During the course of the Department's response, there was no evidence collected of any injuries or marks to C. (Exhibit B; Testimony of RB)
9. C had a nanny, BB, who took care of C. The Department did not meet with BB. (Exhibit B p. 6)
10. C and J were both medically up-to-date and with no concerns. (Exhibit B p. 4)
11. In light of the totality of the evidence in this case, I find that the Department did not have reasonable cause to support an allegation of physical abuse of C by the Appellant 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 was undisputed that the Appellant spanked C.

- c. There was no evidence regarding the use of a belt or severity of any physical discipline the Appellant might have used on C.
- d. There was no evidence that the Appellant's utilization of any physical discipline inflicted any injury or created a substantial risk of injury to C.
- e. The totality of the evidence did not support a finding of physical abuse as defined by Department policies and/or regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

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

### Applicable Standards

A "support" finding of abuse or neglect means that there is reasonable cause to believe that a child(ren) was abused and/or neglected; and the actions or inactions by the parent(s)/caregiver(s) placed 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

"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)

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §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 §51B. Id. at 64; M.G.L. c. 119, §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

A "caregiver" means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child's health or welfare; and (e) 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Abuse” means (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. 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 nontrivial injury; or soft tissue swelling or skin bruising depending on such factors as the child’s age, circumstances under which the injury occurred, and the number and location of bruises. 110 CMR 2.00; 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, or (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, or (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 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 contested the Department’s decision to support allegations of physical abuse of her son, C. While the Appellant acknowledged “spanking” C, there was no evidence of the manner or severity of this physical discipline; other than with an open hand over the child’s clothing. There was no evidence of bruising or injuries to C. As the court held in Cobble v. Comm’r of the Dep’t of Soc. Servs., 430 Mass. 385, 392-393 (1999), mere physical discipline does not necessarily constitute physical abuse. In order for supposed physical discipline to be characterized as physical abuse, various factors are to be reviewed including the child’s age, the severity of the physical discipline, the

frequency of the physical discipline, usage of an implement and resulting injury or substantial risk of injury. The record was absent as to many of the factors listed. Here, the Department relied on statements C made to the mandated reporter and subsequently submitted in the 51A report in order to support the allegation. Notwithstanding, the Department did not provide sufficient evidence that the Appellant's action of "spanking" moved beyond mere physical discipline and can be considered physical abuse. Therefore, the Department decision to support the physical abuse allegation was not made with a reasonable basis and was not in conformity with the Department's policies and/or regulations.

**Conclusion and Order**

The Department's decision to support the allegation of physical abuse of C by the Appellant is hereby **REVERSED**.

Nicholas Holahan (LH)  
Nicholas Holahan  
Administrative Hearing Officer

5/4/18  
Date

Darlene M. Tonucci  
Darlene M. Tonucci, Esq.  
Supervisor, Fair Hearing Unit

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Date

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Linda S. Spears  
Commissioner