THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
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IN THE MATTER OF

WL & CL #2017 0245

FAIR HEARING DECISION

Appellants, WL and CL (collectively, "Appellants"), appeal the Department of Children and Families (hereinafter "DCF" or "the Department") decision to support allegations of physical abuse and neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On January 11, 2017, the Department received a report which alleged physical abuse and neglect of A by her father, WL, after A arrived at school with a red mark near her eye and disclosed that she and her parents were fighting the previous night and WL hit her with a belt. The reporter asked A additional questions and A disclosed that WL also hit her mother (CL) and often hit A and CL with a belt or rolled-up towel. The Department conducted an emergency response. During the response, the Department added and allegation of neglect of A by CL on the basis that she failed to protect A from harm. On January 19, 2017, the Department made the decision to support the allegations of neglect and physical abuse of A by the Appellants. The Department notified the Appellants of its decision and their right to appeal.

The Appellants made a timely request for a Fair Hearing under 110 CMR 10.06(4)(b). A hearing was scheduled for April 18, 2017. On March 8, 2017, Appellants' Attorney requested a continuance due to a schedule conflict. The request was granted. The hearing was rescheduled and held at the DCF Worcester East Area Office on May 2, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; JJ, DCF Response Worker; WL, Appellant; CL, Appellant; Penelope Kathiwala, Attorney for Appellants.

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 digitally recorded and transferred to one (1) Compact Disc. The witnesses were sworn in to testify under oath.

Prior to the completion of the hearing, the record was left open until May 12, 2017 for additional submissions by the Appellant.

The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply; only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 CMR 10.21

The following evidence was entered into the record:

For the Department:

Exhibit A: 51A Report of January 11, 2017
Exhibit B: 51B Report completed on January 19, 2017 by JJ

For the Appellant(s):

Exhibit 1: Report of [redacted] ([redacted])
Exhibit 2: Photographs of family and child, including DVD and printed photographs
Exhibit 3: Copy of Handwritten DCF Safety Plan
Exhibit 4: DCF Case Closing Letter of May 2, 2017

Issue to be Decided

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record, 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. 110 CMR 10.05

Findings of Fact

1. The Appellants are the parents of A. At the time of the report in question, A was 6 years old. (Exhibit A)

2. As the parents of A, the Appellants are her caregivers under Department regulations. 110 CMR 2.00

3. The Appellants were in a relationship of nine years prior to their marriage in August

2016. (Exhibit B, pp. 4, 5)

4. The Appellants do not have a history of adult involvement with the Department. (Exhibit A, pp. 3, 4)

5. In 2014, CL and WL had a domestic dispute following a 4th of July party. After CL and WL got into the car, they began to argue. WL pushed CL. CL pulled over, got out of the car and continued to yell at WL. A bystander called 911. WL was arrested. CL did not pursue criminal charges against WL and the case was dismissed. There is no other history of domestic disturbances or violence between the Appellants. Based upon this history, the Department determined that there was a history of "domestic violence". (Exhibit B; Testimony of CL and JJ[1])

6. A report pursuant to M.G.L. c. 119 §51A was not filed on A's behalf regarding the July 2014 incident. It is inferred that A was not present at the time. (Exhibit A, p. 4)

7. According to DCF Protective Intake Policy #86-015 (rev. 2/28/16), domestic violence is "A pattern of coercive controls that one partner exercises over another in an intimate relationship. While relationships involving domestic violence may differ in terms of the severity of abuse, control is the primary goal of offenders. Domestic violence is not defined by a single incident of violence or only by violent acts."

8. CL is diagnosed with anxiety and depression. She attended counseling for a year preceding the report in question. CL stopped visits due to lack of insurance coverage and inability to afford out-of-pocket payments. CL does not require medication to treat her condition. (Exhibit B, p. 4; Testimony of CL)

9. Prior to A's eligibility for kindergarten, CL was A's full-time caregiver. At the time of the report in question, CL and WL were each gainfully employed. CL worked two (2) jobs, one of which allowed her to bring A along.[2] WL worked for a company close by the family's apartment house. (Exhibit B, pp. 3, 4; Testimony of CL)

10. At the time of the report in question, A was visible in the community; she attended full-day kindergarten, took karate lessons and played sports. Prior to the report in question there were no concerns for her care. (Exhibit A; Exhibit B, p. 2; Testimony of JJ and Appellants)

11. The Appellants and A often played together. WL play wrestled with A. A described that she and her parents would form teams, which sometimes included A's dog, Kiara. On January 10, 2017, A and her parents were "roughhousing" when WL used a pair of rolled up exercise pants to snap at A. The pant leg/zipper accidentally hit A

[1] JJ testified that due to CL's disclosure about a single past incident and because CL "seemed to be holding back information", that there was a "suspected history" of domestic violence. JJ also testified that WL denied any history of domestic violence, which the Department viewed as a minimization of the 2014 incident.

[2] CL testified that she was a nanny and A could bring A with her.

in the eye and left a visible mark. CL told WL to stop, comforted A and the evening progressed without further issue. (Exhibit B., pp. 3, 4, 6; Exhibits 1 and 2; Testimony of CL and WL)

12. On January 11, 2017, A went to school, where her teacher noticed the mark on her eye and asked A about it. A disclosed that her parents were fighting the previous evening, WL got mad and hit her with a belt. A also disclosed that WL was trying to decide who to hit first, her or her mother (CL); that WL hit CL, they fight "a lot" and he often hit A and CL with a belt or rolled up towel. A's statements precipitated a report to the Department on January 12, 2017. The Department screened-in the report and conducted an emergency response. (Exhibit A; Testimony of JJ)

13. On January 11, 2017, the Department interviewed A at school without the Appellants' knowledge. A had small red mark on her left eyelid and the bridge of her nose. During the interview, A talked about "fighting" in the home, that WL hit her and CL with a rolled-up towel and after they fought, they "made a truce" by shaking hands. Among other statements, A noted that WL asked her who she liked best and when she said "momma" that WL chased her and "tickled her"; and, that CL would take the rolled-up towel from WL and hit him with it. I inferred from A's statements that there was a playful aspect to their "fighting". (Exhibit B, p. 2; Testimony of JJ)

14. The Response Workers did not ask A what WL hit her with the previous evening or explore her statement to the reporter that WL hit her with a belt. (Exhibit B, p. 2; Testimony of JJ)

15. The Response Worker asked A general questions about drinking and drug use by her parents. A told the worker that WL drank "lots of beers" and on New Year's Eve and "puked"; that she did not like when he drank beer. A stated that WL drank "10 beers" every day and that CL did not drink. A denied that she was left alone with WL when he was drinking. (Exhibit B, p. 2; Testimony of JJ)

16. When asked what happened when she got in trouble, A did not disclose any physical discipline. (Exhibit B, p. 2)

17. A stated that WL hurt A's young friend and neighbor. The reporter spoke with D, who did not corroborate A's statement. The Department did not contact D's parents. (Exhibit B, pp. 2, 6; Testimony of JJ, CL and WL)

18. The Department interviewed WL and CL separately. The Appellant's corroborated that there was playful/mock fighting and that A was accidentally injured. During the interview, the Response Worker cautioned WL that play fighting was not appropriate and likely to be misinterpreted by A. The Appellants signed an Emergency Safety Plan, which requested that WL leave the house until the Department completed the response and required CL to take A to the [redacted] for an examination. (Exhibit B, pp. 3-5; Exhibit 3; Testimony of CL, WL and JJ)

19. As part of the Safety Plan, WL was requested to complete a substance abuse evaluation at a community agency. The Appellant completed the evaluation and no substance abuse issue was identified. (Testimony of Appellants and JJ)

20. CL and WL denied that WL abused alcohol. CL and WL corroborated that on New Year's Eve, WL was intoxicated and A was aware he was intoxicated. (Exhibit B, p. 4; Testimony of JJ)

21. On January 11, 2017, A was examined by a [redacted] nurse practitioner. The practitioner noted that the injury to A's eye was "not conclusive" but "concerning for inflicted injury" consistent with A's statements that WL hit her. No other injuries were observed. The [redacted] conclusion informed the Department's decision. (Exhibit 1; Testimony of JJ)

22. During the response, the Department added an allegation of neglect of A by CL, on the basis that CL failed to protect A from harm and due to concern that CL's untreated mental health issues posed a substantial risk of harm to A. (Exhibit B, p. 8; Testimony of JJ)

23. On January 17, 2017, the Department supported allegations of neglect and physical abuse of A by the Appellants. The basis for the Department's decision was A's consistent disclosure that WL hit her with a belt. (Exhibit B, p. 8; Testimony of JJ)

24. In reaching the decision that WL abused A, the Department determined that WL intentionally hit A. (Exhibit B, p. 7; Testimony of JJ)

25. Following the response, the Department conducted an assessment. No protective concerns were found during the Assessment. For these reasons, the Department determined that the Appellants did not require further intervention. (Exhibit 4; Testimony of Appellants and JJ)

26. The Appellants' testimony at the hearing was consistent with their statements to the DCF Investigator. I find the Appellants credible.

27. After a review of all the evidence and for the following reasons, I find the Department did not have reasonable cause to support an allegation of neglect of A by CL:

    a) The Department did not have evidence that CL failed to provide minimally adequate care for A or neglected A under Department regulations. 110 CMR 2.00 and 4.32

28. After a review of all the evidence and for the following reasons, I find the Department did not have reasonable cause to support allegations of neglect and physical abuse of A by WL:

    a) The Department did not have evidence that the Appellant failed to provide

minimally adequate care for A, including minimally adequate supervision, emotional stability and growth or neglected A under Department regulations (110 CMR 2.00 and 4.32); and

b) The Department did not have sufficient evidence to support a finding that WL abused A under Department policies and regulations. (110 CMR 2.00 and 4.32 DCF Protective Intake Policy #86-015, rev. 2/28/16)

Applicable Standards

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. 110 CMR 2.00 and 4.32; 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

"Neglect means 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition." 110 CMR 2.00

The issue presented in this Fair 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 investigation, 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, 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, whether there was reasonable cause to believe that a child had been abused or neglected. 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. 110 CMR 10.23

Analysis

As the parents of WL and CL, the Appellant are her caregivers under Department regulations. 110 CMR 2.00

The Department supported allegations of neglect and physical abuse of A by the Appellants. The basis for the Department's decision was A's consistent disclosure that WL hit her with a belt and concern that CL failed to protect A. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellants, through their Attorney, illustratively argued that the Department's decision was not reasonable or supported by substantial evidence.

The evidence supports that the Appellants routinely engaged in play-fights with A and during a playful skirmish, that WL snapped a pair of exercise pants in A's direction and accidentally struck her eye. Given A's age, the Department's own observation that play-fighting could be misinterpreted, the lack of any previous concern for A, and lack of corroboration regarding her statement that WL harmed a neighbor's child, the Department's reliance on A's statements alone is problematic. The evidence supports that during the response, the Appellants were cooperative and transparent, but the Department did not credit their statements, including denial of domestic violence, and instead relied upon A's "consistent disclosure(s)." Prior to the reported incident there were no concerns for the Appellants' care of A. There is no history of police responses to their apartment residence to support the suggestion of actual daily fighting. In particular, the Department's assertion that CL's "untreated mental health issues" posed a risk to A's safety and well-being was conclusory and without merit. Edward E. v. Department of Social Servs., 42 Mass. App. Ct. 478, 479-480 (1997); also see Covell v. Department of Social Services, 439 Mass. 766, 786 (2003)

The Department understandably grew concerned for WL's use of alcohol given A's statements that he drank "10 beers every day" and WL's admission of occasional misuse; however, A did not spontaneously raise the issue until asked specifically about it by the Response Worker, there was no indication that alcohol use by WL precipitated the reported incident, and WL later completed a substance abuse evaluation that did not identify a substance abuse issue. The Department closed the Appellants' clinical case following a comprehensive assessment because there were not any protective concerns.

This Hearing Officer is obliged to consider the entire administrative record, including evidence that may cut other ways. For these reasons and with respect to the totality of the evidence, including testimony at the Fair Hearing, this Hearing Officer finds the Department's decision was not reasonable or supported by substantial evidence. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); Wilson v. Department of Social Servs., 65 Mass.App.Ct. 739, 744-745 (2006) Additionally, there was no evidence that the Appellants' actions or inactions placed A in danger or posed a substantial risk to A's safety or well-being, as required to support an allegation of neglect. DCF Protective Intake Policy #86-015, rev. 2/28/16

Conclusion and Order

Appellants have shown by a preponderance of the evidence that the Department's decision to support allegations of physical abuse and neglect on behalf of A was not reasonable; therefore, the Department's decision is REVERSED.

Maura E. Bradford
Administrative Hearing Officer

May 1, 2018
Date

Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner