

**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  
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<b>IN THE MATTER OF SA 2017-0311</b>
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**FAIR HEARING DECISION**

**Procedural History**

The Appellant in this Fair Hearing is SA. The Appellant appeals the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support allegations of physical abuse and neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On February 4, 2017, the Department received a 51A report from a mandated reporter alleging physical abuse and neglect of N (or "Child") by their father, SA; the allegations were subsequently supported on February 28, 2017 a non-emergency response. The Department informed the Appellant of its decision and of his right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 C.M.R. 10.06

The Fair Hearing was held on April 5, 2017 at the Department of Children and Families' Area Office located in Salem, MA. All witnesses were sworn in to testify under oath. The Hearing officially closed on this date.

The following persons appeared at the Fair Hearing:

Carmen Colón  
MD  
SA  
RH  
MK

Fair Hearing Officer  
Appellant Attorney  
Appellant  
DCF Response Supervisor  
DCF Response Social Worker

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 of 2/4/2017  
Exhibit B: 51B Non-Emergency Response of 2/28/2017

For the Appellant:

Exhibit 1: [REDACTED] Police Report of February 4, 2017  
Exhibit 2: Police Report Narrative & Suicide Evaluation of February 4, 2017  
Exhibit 3: Criminal Complaint of February 6, 2017  
Exhibit 4: SA Affidavit  
Exhibit 5: AH Text Messages  
Exhibit 6: Counterclaim for Modification and Contempt # [REDACTED]  
Exhibit 7: Separation Agreement of June 6, 2014  
Exhibit 8: Reference Letter of RC

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 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 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 parents(s)/ caregiver(s) placed the child (ren) in danger or pose substantial risk to 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. SA is the father of N who was 9 years old at the time of the reported event. SA is deemed their caretaker pursuant to Departmental Regulation CMR 110 2.00, DCF Protective Intake Policy #86-015, rev. 2/28/16 (Exhibit A, B, p.1).
2. The reported child, N, resides with his mother, AH, and visits with Appellant. N was scheduled to visit his father six out of fourteen nights along with every other weekend. (Exhibit 6, p. 3, DCF testimony, Exhibit B, p. 3)
3. The Appellant and AH were married for a period of five years. The couples' divorce was finalized in 2014. Within the years that the family resided together Appellant's behavior toward AH or N was not a concern. The family had no history of domestic violence or neglect (Appellant testimony, Exhibit B, p.8 Exhibit 6, p. 6).

4. On February 4, 2017, a 51A report was filed alleging that N was physically abused and neglected. Reportedly, N was pushed and pinned down to the bed by his father. N felt like he could not breathe. N then "screamed he could not breath" and was let go. N got up and once he and Appellant left the apartment, N ran to his maternal grandmother's home who lived within walking distance (Exhibit A, DCF testimony).

5. Soon after arriving to his grandmother's home, the police were called and responded. There were no marks or bruises observed on N by responding officer; however, per the statements made by N and his presentation upon arrival to his maternal grandmother's home, the Appellant was arrested and charged with assault and battery of a minor child (DCF testimony, Exhibit 2).

6. On February 22, 2017, DCF Response Worker (DCF RSW) conducted in person interview with N. During this interview the following information was obtained:

- a. N was with father for his extended weekend visit. N was asked to get "dressed" several times. N did not want to get dressed as "he wanted to relax because it was Saturday"
- b. Father called N names and pushed him with one hand on the back
- c. N and his father began to argue and father "came over N " while using "both hands to grasp N' wrists and squeezes...and compresses his arms onto N's chest"
- d. N reported that although father was allegedly pressing on his chest this "did not hurt" and that it "felt" as though he could not breath but in fact he could.
- e. Eventually, N complied with father's request and the two left the home. While walking towards their destination, father pushed N again on the back telling him to "get on the sidewalk". The pushing by father, prompted N to run off to his maternal grandmother's house where he arrived upset.
- f. Father followed N to the MGM home and stopped at the bottom of the front steps , yet N was still upset and picked up a rock to throw at father should he come closer:

(Exhibit B, p. 6)

7. The DCF RSW interview N separate from his mother, AH, on this date. N was detailed in his account of the events and at no point in time during his conversation with RSW did N mention being pushed on to the bed by his father. N instead was clear on stating that he was lying face up on the bed. This is opposite of what N reported to his MGM and the responding police office on February 2, 2017 ( Exhibit B, p. 6, Exhibit 3 ).

8. DCF Response Social Worker also interviewed AH on February 22, 2017. During this interview, AH was not able to corroborate N's statements to his MGM of being "hurt again" by Father. AH stated that Appellant does have a history of using profanity when speaking to N, per N's reports to her. AH denied N ever reporting incidents of physical abuse to her during visits with Appellant. AH remained firm in denying any history of violence on behalf of Appellant and clarified MGM statements made citing they were only related to Appellant's "temper" not his behavior towards N or herself (Exhibit B, p. 7-8).

9. Due to the criminal charges Appellant faces, DCF RSW was not able to gather much information regarding the actual event; however, Appellant did confirm to using "an appropriate amount of physical discipline" and denied any accounts of physical abuse or neglect (Exhibit B, p. 4).

10. On February 28, 2017, the Department completed their response period and supported the

allegations of physical abuse and neglect of N by Appellant (Exhibit B, p.1, p. 14-15).

11. On April 5, 2017 the Appellant was represented by counsel at the Fair Hearing and was able to provide his account of the reported event. Per Appellant's statements, in the morning of February 2, 2017, he asked N to get ready several times and N refused. As a consequence he took N's iPad away while N was lying on Appellant's bed. Then while waiting for N to get ready, the two began to "play wrestle" that is when N stated he could not breathe. N became upset and began to throw "things" at Appellant. Appellant responded by spanking child with an open hand. N then yelled at father "I'll get rid of you forever". A few moments later, the two left Appellant's apartment to pick up his wife's vehicle parked a few streets down, that is when N ran to his mom's home and police were called (Appellant testimony).

12. Although I find that it was reasonable for the Department to rely on N's statements, I further find that the information gathered was insufficient to support a finding of physical abuse. Notwithstanding N's claim that the Appellant used physical discipline, there was insufficient evidence gathered by the Department as there was no documented injury on child caused by the Appellant's reported actions. As such, there was no evidence that N was at of "substantial physical injury." Additionally, there was evidence that N's account of the event were inconsistent (Exhibit B, p. 4, 6, Exhibit 2). I do not find that there was reasonable cause to support the allegation of physical abuse. (110 CMR 2.00; Cobble v. Commissioner of the Department of Social Services, 719 N.E.2d 500, 430 Mass.385 (1999)) The Department's decision to support the allegation of abuse was not made in compliance with its regulations. 110 CMR 2.00 (See analysis)

13. There was insufficient evidence that the Appellant failed to provide minimally adequate care for N. The Appellant's use of physical discipline alone was insufficient to support such a finding. There was no evidence that the Appellant was not providing for N's needs. In fact, the Department was unable to state with clear details its reasoning for the support decision (Exhibit B, p. 14-15).

### Applicable Standards and Analysis

In order for the Department to "Support" an allegation of neglect, the Department must find that there is reasonable cause to believe that the child(ren) was abused and/or neglected ; and that 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 Police #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 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, 63-64 (1990) Id. at 63. 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

"Neglect" is defined as 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. Protective Intake Policy #86-015 Rev. 2/28/16.

"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. The definition is not dependent upon location. Abuse can occur while the child is in an out-of-home or in-home setting.

Substantial Risk of Injury

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.

Physical Injury

Death; or fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such factors as the child's age, the circumstances under which the injury occurred, and the number and location of bruises.

Emotional Injury

An impairment to or disorder of the intellectual or psychological capacity of a child as evidenced by an observable and substantial reduction in the child's ability to function within normal range of performance and behavior.

DCF Protective Intake Policy #86-015 Rev. 2/28/16

"Caregiver" means a child's: (1) a child's parent, stepparent, guardian or any household member entrusted with the responsibility for a child's health or welfare; or, (2) any other person entrusted with the responsibility for a child's health or welfare whether in the child's home, a relative's home, a school setting, a day care setting (including babysitting), a foster home, a group care facility, or any other comparable setting. As such "caretaker" includes (but is not limited to) school teachers, babysitters, school bus drivers, camp counselors, etc. The "caretaker" definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is him/herself a child (i.e. a babysitter under age 18). 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

In determining whether the Department had reasonable cause to support a finding of physical abuse by Appellant, the Hearing Officer must apply the facts, as they occurred, to the definition of abuse, as defined by Departmental regulation. 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; Next, the non-accidental act must "cause, or create a substantial risk of physical or emotional injury..." Given the limited evidence of any "injuries," the Hearing Officer will consider whether the Department had reasonable cause to believe that Appellants' actions "created a substantial risk of injury." (Cobble v. Commissioner of the Department of Social Services, 719 N.E.2d 500, 430 Mass. 385 (1999)). Although statements collected during the response period and testimony from the Department presented as concerns of inappropriate use of force by Appellant, the evidence presented by the Department was insufficient as there was no injury to child documented by anyone who was with child on the date of the event, including the responding police office at the time of the report.

Details of the child's story changed over interviews: to police, his hands were held by father over his (child's) head (Exhibit A and Exhibit 2); to ERW, his wrists were squeezed and Appellant's arms on child's chest. Child had no injuries to his wrists, arms or chest. There was no indication that despite "feeling" like he could not breathe, that he actually could not breathe. Presumably if an adult pressed hard enough on the chest of a child dressed in pajamas a mark or bruise would be left. It should be noted that although the DCF investigator did obtain disclosure from the child of what appeared to be physical abuse, no questioning re child's narrative was done in regard to the details that could corroborate the allegation of abuse or neglect.

The Appellant in this case, contested the Department's decision to support the allegation of physical abuse and neglect of N. Appellant did confirm the use of physical discipline in the past and on the date of the reported event as he spanked the child with an open hand causing N to become upset with Appellant; however, this admission does not rise to the level of physical abuse or inappropriate use of physical discipline.

In conclusion, the facts gathered were insufficient to support an allegation of abuse and/or neglect. Therefore, the Appellant has shown by a preponderance of the evidence that the Department's decision to support the allegations of physical abuse and neglect was not in conformity with the Department's policies and / or regulations and resulted in substantial prejudice to the Appellant.

#### **Conclusion and Order**

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

The Department's decision to support the allegation of neglect of N by Appellant is **REVERSED**.

BC

Date \_\_\_\_\_

Linda S. Spears  
Commissioner