

**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 Spears
Commissioner

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IN THE MATTER OF)
)
) **FAIR HEARING DECISION**
 IT)
 FH #2017-0313)
)

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

Procedural History

On February 8, 2017, the Department received a 51A report alleging physical abuse of D (hereinafter "D" or "the child") by the Appellant. The Department conducted an emergency response, and, on February 15, 2017, the Department made the decision to support the allegation of physical abuse of D by the Appellant. The Department notified the 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 held on May 16, 2017 at the DCF Brockton Area Office. Departmental witnesses were sworn in to testify under oath. The Appellant promised to tell the truth to the best of her ability.¹ The Spanish-speaking interpreter provided for the Appellant promised to interpret to the best of her ability. The record closed at the conclusion of the Hearing.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
IT	Appellant
AM	Spanish Interpreter for Appellant
NE	Department Response Social Worker
IR	Department Supervisor

¹ Due to her religion, the Appellant declined to be sworn in.

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 DCF regulations. 110 CMR 10.26

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

For the Department:

Exhibit A DCF Intake Report/51A Report, dated 2/8/2017

Exhibit B DCF Child Abuse/Neglect Non-Emergency Response, completed 2/15/2017

Exhibit C-F Photos of child's injury, taken by DCF

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

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. 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 of this Fair Hearing is D; at the time of the subject 51A report, D was three (3) years old. (Exhibit A, p.1; Exhibit B, p.1)
2. D resided with his five (5) year old sister B (hereinafter "B") and the Appellant. The Appellant is B and D's mother; therefore, she was a caregiver pursuant to Departmental regulation and policy. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016)
3. At the time of the subject 51A report, the Appellant was twenty-five (25) years old. In 2007, the Appellant came to [REDACTED] from [REDACTED] (Exhibit B, p.5; p.6; Testimony Appellant)

4. D and B have two (2) different fathers. D's father left the Appellant during her pregnancy; B's father did call to check in with the Appellant and B. (Exhibit B, p.2)

5. The Appellant and the children had no previous involvement with the Department. (Exhibit A, p.4; Exhibit B, p.1)

6. At the time of the subject 51A report, the Appellant was an active member of the ██████████ ██████████ the Appellant identified as a Christian. (Exhibit B, p.4, p.6) VC (hereinafter "VC") was the "██████████" of the ██████████ where she also served as "██████████" VC spoke of her experience working with mothers and children. When VC met the Appellant, the Appellant "did not have anyone..." The Appellant resided in a shelter placement hotel; the church advocated for the Appellant to remain in ██████████ so that she could maintain this community connection. (Exhibit B, p.6) The Appellant informed the mandated reporter that she had a "past" prior to finding Christ; this "changed her life." (Exhibit B, p.1)

7. On February 8, 2017, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging physical abuse of D by the Appellant. Following a toileting accident at daycare, the reporter observed bruises on the right side of A's hip and buttocks area. The reporter stated there was a "waffery" pattern of bruising, possibly from a shoe; it appeared that the child was hit "repeatedly." The child is "light skinned" and the bruising was "intense." Additionally, A had marks on his back that looked like old cigarette burns and scratches on his back. The child spoke about a friend when asked what happened. The reporter noted, "Concerns with the "intensity" of discipline with mother ..." and described the Appellant as "intense." (Exhibit A, p.2; Testimony IR)

8. The 51A report was assigned for an emergency response, pursuant to M.G.L. c. 119, § 51A to NE (hereinafter "NE") Response Social Worker from the DCF Brockton Area Office. (Exhibit B; Testimony NE)

9. D reported that he got "pow pow" when he did something wrong at home; D would not demonstrate what "pow pow" was. The ERWs observed marks on his right outer thigh and buttocks area; the mark observed appeared consistent with a shoe print.² (Exhibit B, p.2; Testimony NE) The Department took pictures of the aforementioned marks, which showed the shoe imprint. (Exhibit D)

10. VC informed NE that she would be working with the Appellant regarding appropriate discipline techniques; a book had been provided to the Appellant at the time of the 51A response. VC planned to begin a parenting class for the benefit to the Appellant and other church members. VC reported that the Appellant was a good mother with "great potential" and believed she should "be given another chance." (Exhibit B, pp.6-7)

11. At the end of its response, the Department supported the aforementioned report for physical

² The Department viewed scratches and healed hives or rashes on A's back. These marks did not factor into the Department's decision to support the allegation of physical abuse. (Exhibit B, p.2, p.8) According to the Appellant, A suffered from eczema and had been scratching his back. (Exhibit B, p.4)

abuse of D by the Appellant. The Department based this determination on the following:

- D was injured when the Appellant hit him with a shoe, as punishment.
- Daycare staff's observation of marks on his outer right thigh and buttock area that appeared consistent with a shoe imprint. (Exhibit A, p.2; Exhibit B, pp. 7-8; Testimony NE; Exhibit D)
- The Appellant spanked D when he got into trouble. (Exhibit B, p.3, pp.7-8; Testimony NE)
- The Appellant's admission that on February 7, 2017, she hit D three (3) times with her shoe due to his behaviors at daycare. (Testimony Appellant; Exhibit B, p.4, pp.7-8; Testimony NE)
- The Appellant's belief that she should discipline the children as she wanted them to be good children. (Exhibit B, p.4, p.7, p.8; Testimony NM)

12. The Appellant's use of a shoe to physically discipline D and the resulting bruises were undisputed facts of the instant case. (Exhibit B; Testimony NE; Testimony Appellant, Exhibit D)

13. The Appellant wanted to teach her children to be respectful and to teach them the skills necessary in life. The Appellant had been receiving frequent reports from the daycare that D was being disrespectful; she was also afraid that he would be kicked out of daycare. The Appellant had taken toys away from him; however, his behaviors continued. The Appellant told D that should he continue, he would give him "pow pow" on his buttocks. D repeated his behavior in school by hitting a teacher and a student and then was disrespectful to the Appellant. According to the Appellant, she told him to go to his room as she wanted to calm down and she prepared dinner. After one (1) hour, the Appellant told him what was going to happen and why. After hitting him, the Appellant told him she wanted him to be a good boy and wanted the best for him, that she loved him and then kissed him. (Testimony Appellant)

14. The Appellant initially denied hitting D and causing the marks, but then stated that this was the first time that she had disciplined D with an object; prior to this, she spanked him utilizing her hand. The Appellant agreed that going forward she would no longer utilize physical discipline. (Exhibit B, p.4; Testimony Appellant) In the Appellant's culture, physical discipline was an accepted form of discipline. The Appellant noted that she is a young mother who had a lot to learn, particularly new ways of disciplining the children. In an effort to improve/enhance her parenting skills, the Appellant was educating herself by reading related books and from her relationships/groups within her congregation. The Appellant noted her commitment to utilizing appropriate discipline techniques going forward. (Testimony Appellant)

15. The Appellant was polite, well spoken, and apologetic for her actions. The Appellant spoke of her love for her children and how she "wants to be the mother that {her} children love." The Appellant admittedly made a mistake and hoped that she could be afforded "a second chance." According to the Appellant, "the mother she is today is not the mother she was yesterday." (Testimony Appellant)

16. At the time of the Fair Hearing, the children were doing well; the family was residing in a different shelter where there was a great deal of support and activities; the Appellant was learning a great deal. The Appellant planned to complete her GED so that she could get a good

job and provide for her children. (Testimony Appellant)

17. The Appellant expressed her concern that the Department's decision to support the allegation of physical abuse could result in substantial prejudice as she had goals for herself and may want to work with children or the Department. (Testimony Appellant)

18. Based on the evidence, I find that it was reasonable for the Department to determine that the Appellant's "non-accidental" acts, her use of physical discipline with a shoe on February 7, 2017, caused physical injury to her three (3) year old child and that her actions placed him in danger and posed substantial risk to his well-being, as defined by the Department's policy. DCF Protective Intake Policy #86-015 rev. 2/28/16; 110 CMR 2.00, 4.32(2)

19. In light of the aforementioned, I find that the Department's decision to support the allegation of physical abuse was made in conformity with its policies and regulations. 110 CMR 2.00, 110 CMR 4.32, DCF Protective Intake Policy #86-015 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. 110 CMR 2.00; 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)

"Abuse" means

- (a) "the non-accidental commission of any act by a caretaker 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

caretaker and a child under the care of that individual. 110 CMR 2.00 OR
(b) "The victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver. DCF Protective Intake Policy, (revised 2/28/2016) at p.8

This definition is not dependent upon location. Abuse can occur while the child is in an out home or in home setting. 110 CMR 2.00

"Physical injury" is defined as "(a) death; or (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or (c) 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.

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. 2/28/2016)

"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 Police, (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. 2/28/2016

Analysis

It was undisputed that the Appellant was a caregiver for D.

Also undisputed was the Appellant's action of striking D (3) times with her shoe on his thigh/buttocks area. This non-accidental action resulted in pattern like red marks visible the following day. The Department's definition of "physical injury" includes "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. The child was three (3) years old at the time of the reported incident.

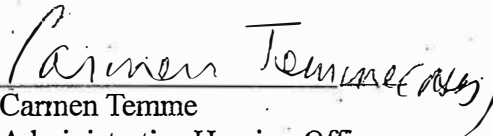
The Hearing Officer considered the Appellant's responses during the Department's initial involvement, her subsequent engagement with services and her presentation at Fair Hearing. The Appellant described calming down before she disciplined D; however, the facts suggested otherwise. The Appellant's use of physical discipline left a shoe imprint that was visible the following day; from that it was reasonable for the Department to determine that the Appellant was angry when she hit D. The Appellant spoke of her remorse for her actions, and immediately agreed to cease using objects for physical discipline. The Appellant looked forward to learning alternative disciplinary techniques and how to improve her parenting skills. The Appellant spoke positively of her newly acquired skills and their effectiveness.

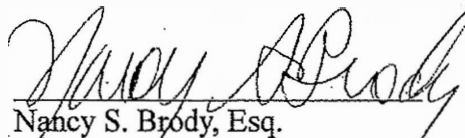
This case was distinguishable from the facts in Cobble v. Commissioner of the Department of Social Services, 719 N.E.2d 500, 430 Mass.385 (1999). Unlike the child in Cobble, D suffered an injury, visible the day after the incident. Although the Appellant described that she explained to the child what was to occur and why, the evidence demonstrated that she hit D hard enough to cause the described injury.

Considering the entirety of the record in this case, there was reasonable cause to believe that D sustained an injury after being struck by the Appellant with her shoe and that her actions constituted abuse, per the Department's policy. The Appellant has not shown by a preponderance of the evidence that the Department failed to comply with its regulations and policy when it made a finding to support the allegation of physical abuse. DCF Protective Intake Policy #86-015, rev. 2/28/2016

Conclusion and Order

The Department's decision to support the 51A report of physical abuse on behalf of D by the Appellant is **AFFIRMED**.


Carmen Temme
Administrative Hearing Officer


Nancy S. Brody, Esq.
Supervisor, Fair Hearing Unit

10-24-17
Date