THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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Linda S. Spears
Commissioner

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IN THE MATTER OF	)	
	)	
MD & CJ	)	**FAIR HEARING DECISION**
	)	
FH # 2017-0327	)	
	)	

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

Procedural History

On February 3, 2017, the Department of Children and Families received a 51A report by a mandated reporter alleging the physical abuse of B (hereinafter "B" or "the children") by his parents, the Appellants. A second 51A report was filed on February 28, 2017, by a mandated reporter to include allegations of physical abuse of a Ma (hereinafter "Ma" or "the children") also by the Appellants. A non-emergency response was conducted and on February 28, 2017, the Department made the decision to support the allegation of physical abuse of the children by their parents, 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. The Fair Hearing was held on May 10, 2017, at the DCF Taunton/Attleboro Area Office in Taunton, MA. All parties were sworn in to testify under oath. The record remained open until May 26, 2017 to allow the Appellant additional time to submit documentary evidence.

The following persons appeared at the Fair Hearing:

Jorge Ferreira	Fair Hearing Officer
PG	Appellants' Attorney
CJ	Appellant
MD	Appellant
KW	DCF Response Worker
SC	DCF Supervisor

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 digitally recorded 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 dated 02/03/17
Exhibit B:	51B Response completed 02/28/17
Exhibit C:	51A Report dated 02/27/17[1]
Exhibit D:	51B Response completed 02/28/17

For the Appellants:

Exhibit 1:	Psycho/Social Evaluation of the Appellants by a Licensed Clinician
Exhibit 2:	Copy of the Published SJC Ruling in the Matter of the Commonwealth vs. Dorvil
Exhibit 3:	Parenting Class Certificate
Exhibit 4:	"Self-Made Man" Certificate
Exhibit 5:	Character Reference
Exhibit 6:	Character Reference
Exhibit 7:	Clinician's Credentials and Resume
Exhibit 8:	Published Decision Gregory v. DCF
Exhibit 9:	Article-Formation of False Memories
Exhibit 10:	Abstract – Changing Beliefs…
Exhibit 11:	Abstract – False Memories…
Exhibit 12:	Wikipedia Article- Memory Implantation

The Appellants, through counsel, submitted a Memorandum which was reviewed by this Hearing Officer and taken into consideration, along with all the evidence, in rendering this decision. 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

[1] The second 51A report added Ma to the Department's Investigatory Response as the Department had concerns that he had also been physically abused, which was not initially alleged in the 1st 51A report of 02/03/17. Subsequently, this resulted in an additional decision (51B) having details pertaining to the child Ma and the same supported decision. (Exhibit D)

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 whether 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. At the time of the filing of the subject 51A reports, B was eight (8) years old and Ma was ten (10) years old. They resided with the Appellants and the infant (age 1), a non-reported child, in [redacted] (Exhibit A; Exhibit B, Exhibit C; Exhibit D)

2. The Appellants were the mother and stepfather/father of the subject children; therefore they are deemed "caregivers" pursuant to Departmental regulation. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

3. The family did not have a previous history with the Department. (Exhibit A, p. 5)

4. On February 3, 2017, the Department of Children and Families received a 51A report, pursuant to M.G.L. c. 119, § 51A, alleging the physical abuse of B by his mother, MD and stepfather, CJ. According to the mandated reporter, B was had behavioral difficulties at school. B disclosed he did not want them to tell CJ of the problems he was having because CJ and MD would hit him with a belt and make him kneel in the corner for an extended time. B added that this occurred when he did something wrong and has been hit over twenty (20) times with a belt in one instance. The reporter did not observe any visible marks or bruises and was unaware when it was the last time that B had been hit with a belt. An additional allegation of physical abuse of Ma was made on February 28, 2017, due to similar concerns. (Exhibit A, p. 3; Exhibit B, p. 2)

5. The reports were screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, § 51B. The allegation of physical abuse of the children by the Appellants was supported by the Department at the conclusion of the response. The allegations were supported because the children disclosed to two (2) police officers and the DCF Response Worker of incidents where they were hit with a belt by the Appellants. Reportedly, there was an incident that occurred 2-3 years ago where B was made to strip naked and was hit repeatedly with a belt. The Appellants acknowledged that the incident was devastating and it precipitated changes in their response to

unwanted behaviors. However, they continued to utilize physical discipline until approximately October 2015. (Exhibit C, p. 8; Exhibit D, p. 9)

6. B's school informed the Department that B was concerned that the Appellants would find out what he had disclosed. The school further reported B disclosed that while he felt safe being at home, he sometimes gets afraid. (Exhibit C. p. 1)

7. The school further alleged that B disclosed that CJ broke a leather belt in the past while hitting his older brother, Ma, reporting that the worst "beatings" happened a while ago. However, B seemed to be worried about when beating will happen next. (Exhibit C, pp. 1-2)

8. The school requested that the DCF Response Worker not go to the home and inform the Appellants about the allegations and get permission to interview the children. They were concerned that further harm would befall B. (Exhibit C, p. 2; Testimony of the DCF Response Worker)

9. The school called the police who picked up the children and transported them to the police station. The school alleged that B was afraid to go home and the police wanted to interview the Appellants at the police station. (Exhibit C, p. 2)

10. The police interviewed B and reported he was scared to go home. The police did not observe any visible signs of injuries on B. (Exhibit C, p. 2)

11. MD was confused at the allegation and as to why the children made the disclosures as nothing had happened in the home. She was also concerned as to why the school did not call her first as they call her for "every little thing" that B does. (Exhibit C, p. 2)

12. When interviewed, B denied that he felt unsafe but was at that moment scared to go home. He disclosed that he was stressed about being punished as he told his teacher about the punishments from the Appellants. (Exhibit C, p. 3)

13. B disclosed to the DCF Response Worker that when he was punished by the Appellants, he was hit with a belt, often with his own belt and was instructed to get the belt himself. B added this did not happen often and he could not remember when this last occurred. B reported the punishment was often having privileges restricted, such as TV and his tablet taken away. (Exhibit C, p. 3)

14. B recalled a time when the family lived in [redacted] where he had to stand outside the home as a form of punishment. He added that CJ also made him undress and he was spanked on his "bum" with a belt. He reported he was punished because he had put his "bum" in Ma's face. During this disclosure, B was teary eyed and reluctant to speak. He was afraid that he would be removed from the Appellant's home. (Exhibit C, p. 3; Testimony of the DCF Response Worker)

15. Ma disclosed that he doesn't like getting hurt when he does something wrong but reported the Appellants whip him with a belt when they are really angry. He added that there have been times he was afraid to go home and MD told him never to tell others about this. (Exhibit C, p. 4)

16. Ma further disclosed that he has also been made to kneel on the floor for 15-20 minutes and that when he was hit with a belt, it ranged between 5 to 20 times. He reported he would get hit on hit foot and back and believed there had been some bruising as he could feel the pain after the beating was done, adding that he once got a black eye because he tried to hide when he was being hit as well as his arm being sore. Ma reported this occurred when they resided in Connecticut (Exhibit C, p. 4)

17. When interviewed, Ma also disclosed he has witnessed B being punished, alluding to B's previous disclosure of a significant punishment when they lived [redacted] Ma reported that CJ still threaten B when he was angry and hit a table with a belt as a warning. He also reported CJ hits "worse" than MD and made them count when CJ was hitting them, the children. (Exhibit C, p. 4)

18. The children were observed to not have any visible injuries. (Exhibit C, p. 5; Testimony of the DCF Response Worker)

19. The Appellants had not used physical discipline since 2015. They received support since the incident in [redacted] and tried different techniques of discipline, such as restriction of privileges. They learned from the experience. (Exhibit C, p. 5; Exhibit 1; Testimony of the Appellant)

20. The Appellants grew up with corporal punishment and the techniques they used on the children were culturally based (Haiti). However, since 2015, they made a conscious decision to stop using corporal punishment and engaged in treatment to address issues related to children and their families. (Exhibit 1; Exhibit 7; Testimony of the Appellants)

21. The incident in [redacted] was regrettable but the Appellants had since grown from that incident and made efforts in becoming better parents utilizing supports and psychoeducational services, specifically emotional support for Appellant CJ. (Exhibit 3; Exhibit 4)

22. The Appellants were described as caring parents who loved their children. They were also described as people committed to new approaches in child rearing and spending quality time with the children. They had always been open to seeking help and receiving it. They have been active members of their community along with their children. (Exhibit 4; Exhibit 5)

23. The children were healthy and up to date with their medical care. No protective concerns were noted by the pediatrician's office. (Exhibit C, p. 7)

24. After review of all the evidence presented, I find that the Department did not have reasonable cause to support the allegations of physical abuse of the children by the Appellants and the decision was not reasonable; it caused substantial prejudice to the Appellants. There was no corroborating evidence to support a finding that the Appellant's actions created a "substantial risk of physical injury." 110 CMR 2.00; 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

"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. 2/28/2016

A Fair Hearing shall address (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;. . . In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 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, 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 the Appellant was a caretaker, pursuant to Departmental regulation. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016

The Appellants, through counsel, contested the Department's decision to support allegations of physical abuse of the children, B and Ma. The Appellants argued that they had no history with the Department prior to this allegation. They also argued that both the police and the Department did not observe any injuries on the children, which was later confirmed by their pediatrician. In their decision to substantiate, the Department relied on the children's disclosure of being physically disciplined, primarily due to an incident that occurred two (2) years ago. It was made clear and agreed that the Appellants stopped using corporal punishment after October 2015, due to the effect it had on the family in general. In fact, the Appellants had signed a document at the police station that they would not use physical discipline. In making such a statement, the Department should have understood that the issue was corporal punishment, not abuse. The Appellants further argued that the Department's decision to support the allegation did not rely on fact or reason; rather it relied on the exaggerated statements of the children. The children had been prematurely taken into police custody due to concerns of the school that deemed this an emergency, not the Department. They were repeatedly questioned by school personnel over a period of months, which according to research can cause false memories to be implanted. (Exhibit 9; Exhibit 10; Exhibit 11; Exhibit 11) The Appellants acknowledged that they both grew

up being physically disciplined as part of their Haitian culture and initially disciplined their children in a similar manner, relating that the [redacted] was a state where corporal punishment was allowed, citing Gregory T. Magazu & another v. Department of Children and Families, 473 Mass. 430, September 10, 2015 (Exhibit 8), which provides that parents have a religious protection for exercising corporal punishment on their children. Further, the Appellants also cited precedence in a decision by the court; Commonwealth v. Jean G. Dorvil, SJC-11738, June 25, 2015 (Exhibit2) which allowed the use of corporal punishment. Finally, the Appellants argued that in this instant matter the Department's decision was not so much the Department's concern for child safety, but rather a disagreement with the Appellant's beliefs in the upbringing of their children. Subsequently, the Appellants maintained that the Department's decision was substantially prejudicial. I find the Appellants' argument to be persuasive.

In determining whether the Department had reasonable cause to support a finding of abuse and neglect by Appellant, the Hearing Officer must apply the facts, as they occurred, to the definition of physical abuse and neglect as defined by Departmental regulation; new information presented at the Hearing, if not available during the investigation, can be considered as well. 110 CMR §§2.00 and 10.06 After review of all the evidence, including verbal testimony offered by the Appellant at the Fair Hearing, I find that the Department's decision to support the physical abuse allegation was not made with a reasonable basis.

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; it was. The Appellants acknowledged having used a belt prior to October 2015, as form of corporal punishment, which was confirmed by the subject children. Next, the non-accidental act must "cause, or create a substantial risk of physical or emotional injury..." I do not find that any of the Appellant's actions created a substantial risk of injury to the subject children. The use of a belt alone did not constitute risk, especially when there was no evidence of injury or that the parents wanted to injure their children through their actions. The credible evidence here did not amount to a "collection of facts, knowledge, or observations which tend to support or are consistent with the allegations that a substantial risk of injury is present," Cobble v. Department of Social Services, 430 Mass. 385, 394 (1999). In the comparable case, Cobble v. Commissioner of Department of Social Services, a father had spanked his son with a belt for discipline, but left no injury; the court considered all of the circumstances and determined that there was no reasonable cause to believe that a father's actions created a substantial risk of physical injury to his son. In this instant matter, Commonwealth v. Dorvil, Mass. SJC-11738 (2015) was neither applicable nor relevant because the court recognized the parental privilege defense in a criminal case to use reasonable force in disciplining a child, not in an administrative civil hearing.

Based on a review of the evidence presented at the Fair Hearing, including testimony from all witnesses and documents submitted by the Department, I find that the Appellants have met their burden; they have shown, by a preponderance of the evidence, that the Department's decision or procedural action was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the Appellants.

Conclusion and Order

The Department's decision to support the allegation of **physical abuse** of B and Ma by the Appellants was not made in conformity with Department regulations and policy and is therefore, **REVERSED**.

Jorge F. Ferreira

Jorge F. Ferreira
Administrative Hearing Officer

Date: 5/24/18

Susan Diamantopoulos

Susan Diamantopoulos
Fair Hearing Supervisor

Date: _____

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Linda S. Spears
Commissioner