

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF SOCIAL SERVICES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111**

Linda S. Spears
Commissioner

Voice: (617) 748-2000
FAX: (617) 261-7428

IN THE MATTER OF
KS #2017-0490

FAIR HEARING DECISION

KS appeals the Department of Children Families' (hereinafter "DCF" or "the Department") decision to support allegations of physical abuse pursuant to G.L. c. 119, §§51A and B.

Procedural History

On April 12, 2017, the Department received a 51A report alleging physical abuse of B by his mother, KS. The Department screened-in the report for an emergency response and, on April 13, 2017, the Department made the decision that the allegation of physical abuse of B by KS was supported.

The Department notified KS of its decision and her right to appeal. KS made a timely request for a fair hearing to appeal the Department's decision. A hearing was held on July 25, 2017, in the DCF Cambridge Area Office. KS, the Department response worker and the Department supervisor testified at the hearing.

The Department submitted the 51A and B reports which were entered into evidence at the hearing. (Exhibits A and B).

The hearing record was held open for 30 days to allow KS the opportunity to submit documentary evidence. KS made no submission within that time and the hearing record was closed on August 25, 2017.

The hearing was digitally recorded and transferred to compact disc.

The Hearing Officer attests to having no prior involvement, personal interest or bias in this matter.

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. 110 CMR 10.05

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. KS (hereinafter "mother") is the mother of B (age 11 at the time in question). (Exhibit A, p. 1).
2. Mother and B have no relevant prior history with the Department. There was a prior supported 51A report due to concerns of domestic violence between B's father and his girlfriend. (Exhibit A, p. 4; Exhibit B, p. 1).
3. Mother is employed as a nurse. (Exhibit B, p. 3).
4. B was diagnosed with ADHD when he was in second grade. He has many supports in place. He receives special educational services at school. He is seen by a behavioral specialist and a social worker at school. He sees a therapist outside of school every two weeks. He is prescribed medication. (Exhibit B, p. 2).

5. Sometime in January 2017, B told the school principal that his mother beat him with a chain. The principal contacted mother and told her what B reported. The principal acknowledged that she knew B was lying, but she wanted to make mother aware of it so she could address it with B. (Exhibit B, p. 2; Testimony of mother).
6. On April 11, 2017, B was acting out in class. The teacher brought him out to the hallway and asked him for his mother's phone number. B did not want to be "on punishment" so he refused to give the teacher mother's number and he ran away from the teacher and went to the office to talk to the principal. (Exhibit B, p. 3).
7. The principal called mother and told her about B's behavior in school. When B got home from school, mother asked him what happened. B lied and did not report that he refused to give the teacher her number or that he ran away from the teacher. (Testimony of mother).
8. Mother tried talking to B about his behavior. He did not take it seriously or understand that it could create a safety issue or he could be suspended. (Testimony of mother).
9. Mother slapped the side of B's head and spanked B on the buttocks twice with her hand. When she spanked him, mother's watch broke and the watch scratched B's wrist causing a 5 millimeter mark. (Exhibit A, p. 2; Exhibit B, pp. 2, 3; Testimony of mother).
10. The following day, B told a school staff member that mother slapped the side of his face, threw his duffle bag, hit him on his legs, body and face with his shoes and hit him on his arms and legs with a belt. He said that the mark on his wrist was caused by the belt buckle. The mark was noted to be 5 millimeters. The school nurse checked B for any other marks. She found no other marks on his body. B told the staff that he felt safe going home. (Exhibit A, p. 2).
11. On April 12, 2017, the Department received a 51A report alleging physical abuse of B by mother based upon what B reported to the school staff member. The Department screened-in the report for an emergency response. (Exhibit A).
12. Emergency response workers called mother at 10:30pm that night. They informed mother that they would be at her home to interview her and B in about an hour. (Exhibit B, p. 1-2).
13. Mother was initially resistant to meeting with response workers that night because it was late and B was sleeping at his godmother's home; they were going away the next morning. She ultimately met with the response workers and allowed them to meet with B. Mother drove to the godmother's home and the response workers followed her. Mother woke up B and brought him to speak with response workers. (Exhibit B, pp. 2, 3).
14. Mother provided some background information consistent with the above findings. She acknowledged spanking B on the buttocks twice with her hand. She denied

hitting him with shoes or a belt. She was not aware that B had a mark on his wrist, however, she said he is a very active child who plays sports and he does get marks and scratches from his activities. (Exhibit B, pp. 2-3).

15. B described the incident that occurred at school that led to the principal contacting mother. He reported that he got in trouble for running away from the teacher. He said that mother hit him and he pointed to the side of his head and his back side. He denied that his mother used a belt or any other object. He had a band aid on his wrist and he said that he was scratched when his mother's watch broke. (Exhibit B, p. 3).
16. On April 13, 2017, the Department made the decision that mother physically abused B by slapping the side of his head and spanking his buttocks causing a scratch when her watch broke. (Exhibit B, pp. 4-5).
17. Mother testified at the hearing. Her testimony was consistent with the above findings. She denied hitting B with any object as initially reported by B. She acknowledged spanking him twice on the buttocks. She denied that she spans him often and stated that she has only spanked him a few times in the past. (Testimony of mother). I find mother's testimony credible.

Analysis

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. 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

“[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.

“Abuse” means the non-accidental commission of any act by a caregiver 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 caregiver and a child under the care of that individual, or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 2.00(1), DCF Protective Intake Policy #86-015, rev. 2/28/16

The Department regulations define “physical injury” as follows.

- a) death; or
- b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such non-trivial injury; or
- c) soft tissue swelling or skin bruising depending upon such factors as the child’s age, circumstances under which the injury occurred, and the number and location of bruises; or
- d) addiction to drug at birth;
- e) failure to thrive.

See 110 CMR 2.00(47).

Department Policy defines substantial risk of injury as “[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. DCF Protective Intake Policy #86-015, rev. 2/28/16

As B's parent, mother is his caretaker under Department regulations. 110 CMR 2.00(5).

The Department made the decision that mother physically abused B by slapping his face and spanking his buttocks twice with her hand causing a scratch when her watch broke. The Department determined that mother's non-accidental actions caused and created a substantial risk of physical injury to B.

Mother argues that her non-accidental actions did not cause an injury or create a substantial risk of injury to B. She contends that the minor scratch on B's hand was caused accidentally when her watch broke.

The evidence shows that B has a history of making up or exaggerating stories. He recently reported that mother beat him with a chain which was clearly untrue. In this case, he was in trouble at school. Mother was notified and he lied when she questioned him about what happened. She tried to talk to him about his behavior, but he was not taking it seriously. Mother slapped his face and spanked his buttocks twice with an open hand. Her watch broke in the process and it accidentally scratched his wrist. He had a 5 millimeter mark on his wrist. The school nurse examined him and found no other marks on his body.

The next day, he reported to school staff that mother disciplined him, but he greatly exaggerated. He said she slapped his face, hit his legs, body and face with a shoe and she hit his arms and leg with a belt and that the belt buckle caused the mark on his wrist. When questioned by the response workers, he said mother only slapped his face and spanked his buttocks with her hand. Mother acknowledged spanking his buttocks twice with her hand. They both denied mother hit B with objects.

I disagree with the Department's characterization of the 5 millimeter scratch on B's wrist as a physical injury as defined by the Department regulations. The Department's definition clearly was meant to encompass more significant injuries than a 5 millimeter mark or scratch to the wrist. I also find that the scratch was caused accidentally when her watch broke and not by mother's intentional act of spanking B on the buttocks.

Therefore, the issue is whether mother's actions created a substantial risk of injury to B. I find that they did not.

The question of whether there is sufficient evidence to support a finding that a caregiver's actions create a substantial risk of physical injury is addressed in Cobble v. Commissioner of Department of Social Services, 430 Mass. 385 (1999).

In Cobble, 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 that case, the father had spanked his son with a belt leaving no injury, only temporary redness. The factors considered by the court included the act in question (striking the child's clothed buttocks with a leather belt), the manner in which the spanking was carried out (non-violent, controlled and not in anger), the child's age (9), whether he had ever been injured by such a spanking in the past (no prior injuries), the frequency of this method of discipline (5 or 6 times over 7 months), the child's medical condition (a muscle condition requiring back and leg braces and physical therapy), the level of force used (a "solid smack"), the actual effect of the spankings (temporary red marks that would fade after 10 minutes) and the likelihood that this method of discipline would continue to be used. The court determined that those factors in that particular case, individually and/or collectively, were insufficient to support a finding of physical abuse. Cobble, pp. 388, 391-393.

In this case, I find that the Department's decision is supported by even less than in Cobble. B was 11 years old at the time in question. Mother spanked him with an open hand on his buttocks. The spanking caused no injury as defined by the Department. Although she may have been frustrated with B, there is no evidence to indicate that she was out of control. She rarely uses spanking as a form of discipline. There is no evidence that she has ever caused an injury to B in the past. B has no condition that would make him particularly vulnerable to injury.

Considering all of the credible evidence, I find no reasonable cause to believe that mother physically abused B under Department regulations.

Conclusion and Order

The Department's decision to support allegations of physical abuse of B by mother was made without a reasonable basis and therefore, the Department's decision is REVERSED.

Anne L. Dale Nialetz
Anne L. Dale Nialetz,
Administrative Hearing Officer

Susan Diamantopoulos
Susan Diamantopoulos
Fair Hearing Supervisor

5-17-18
Date

Date

Linda S. Spears
Commissioner