

**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

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IN THE MATTER OF)
)
 JD)
)
 FH # 20170612)
)

FAIR HEARING DECISION

The Appellant in this Fair Hearing was JD (hereinafter “JD” or “Appellant”). The Appellant appealed the Department of Children and Families’ (hereinafter “DCF” or “the Department”) decision to support an allegation of physical abuse pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On April 11, 2017, the Department of Children and Families received a 51A report filed by a mandated reporter, alleging the physical abuse of M by the Appellant. A response was initiated. During the response, on April 24, 2017, a second 51A report was received by the Department, also filed by a mandated reporter, also alleging the physical abuse of M by the Appellant. The Department conducted a response. On May 3, 2017, the Department made the decision to support the allegation of physical abuse of M by JD. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was held on July 18, 2017, at the DCF Plymouth Area Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the hearing for one (1) month to allow the Department to submit the Appellant’s family resource records and ongoing case information as evidence on their behalf. On August 10, 2017, the Fair Hearing Unit received the evidence from the Department. On August 18, 2017, the record on this matter was closed.

The following persons appeared at the Fair Hearing:

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|--------------|-----------------------------------|
| Lauren Decas | Fair Hearing Officer |
| JD | Appellant |
| CD | Support |
| RC | Department Response Social Worker |
| DM | Department 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 recorded on one compact disk, pursuant to Department regulations 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 4/11/17
- Exhibit B: 51A Report, dated 4/24/17
- Exhibit C: 51B Report, completed 5/3/17

Appellant

- Exhibit 1: Family Resource Initial Eligibility Screening
- Exhibit 2: Family Resource License Study, dated 4/24/13
- Exhibit 3: Family Resource Annual Reassessment, dated 6/17/14
- Exhibit 4: Family Resource License Renewal, dated 6/24/15
- Exhibit 5: Family Resource Annual Reassessment, dated 12/2/16
- Exhibit 6: Family Resource Dictation
- Exhibit 7: DCF Family Assessment, dated 8/4/17
- Exhibit 8: DCF Family Action Plan

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 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 51A report, M was six (6) years old. He resided in

MA with his legal Guardians/maternal grandparents, CD and JD, as well as B, their fourteen (14) year old son. (Fair Hearing Record)

2. The Appellant is the step grandfather/legal Guardian of the subject child; therefore he was deemed a caregiver pursuant to Departmental regulation and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16
3. At the age of two (2), M was removed from his biological parents due to neglect via a Care and Protection Petition filed in court on his behalf by the Department. M was placed in the kinship placement of his maternal grandparents. In August, 2016 Guardianship was established as the permanent plan for M. (Exhibits 1-6)
4. M was diagnosed with Attention Deficit Hyper Activity Disorder (ADHD) and a Mood Disorder. He exhibited assaultive and aggressive behaviors at daycare and at home. M had difficulty sleeping and woke up approximately, three (3) to twelve (12) times per night. At one time M was prescribed Risperidone; however due to a Roger's Petition needing to be filed he was not given that medication. M was described as very active. (Exhibit 6, Testimony of JD)
5. The Appellant had no history of involvement with DCF due to protective concerns; however he and his wife had been approved kinship foster parents through the Department for A from 2013-2016. Prior to approving the Appellant's license to provide kinship foster care, letters of recommendation were received attesting to the positive attributes of the Appellant. (Fair Hearing Record)
6. On April 11, 2017, the Department of Children and Families received a report pursuant to M.G.L. c. 119, §51A, filed by a mandated reporter, alleging the physical abuse of M by the Appellant. According to the reporter, M was a complex child who had an Individual Education Plan (hereinafter "IEP") and was on medication. M's school was in constant contact with his guardians. On the day of the report, M was moved by the shoulders by a paraprofessional and said, "Aww, that's where my dad punched me". It was noted M referred to JD as dad. M was sent to the nurse and a large bruise was observed on M's left arm. M reported he was outside playing with B, was not listening; M came inside and threw a fit. M was throwing things and went to his bedroom where the Appellant punched him. M said this usually did not happen. This report was screened in for an investigative response. (Exhibit A)
7. When interviewed by the Department, M was asked about the healing circular bruise on his upper arm/shoulder area. M responded, "Grandpa punched me". (Exhibit C, pp. 2, 3)
8. On April 24, 2017, the Department of Children and Families received a second 51A report filed by a mandated reporter, alleging the physical abuse of M by the Appellant. According to the reporter, M was running in the cafeteria in his after school program and was told to stop running. M began to cry and said he "couldn't get into trouble". A bruise was observed on his right arm and M said, "grampy punched me". M said this happened when he was pushed into his room and punched by the Appellant. M reported

his grandfather, the Appellant, hit him a lot, and spanked him so hard he cried, pushed him to the ground and swore at him. (Exhibit B)

9. As to the frequency of being hit by the Appellant, M provided contradictory statements about. On April 11, 2017, M reported he was not usually hit by the Appellant and on April 24, 2017, M said he was hit a lot by the Appellant. (Fair Hearing Record)
10. The record lacked evidence as to whether or not M was a reliable reporter. The Department did not document whether M was able to differentiate between the truth and a lie when they interviewed him. The Department did not inquire with anyone if M was known to make up stories, lies, or if he had a reason to be angry with the Appellant. (Fair Hearing Record)
11. M was interviewed regarding the second 51A report, he said, "Things have been good. There has been no hitting for two (2) weeks". The reported mark was not observed on M. (Exhibit C, p.4)
12. The record did not reflect if the Department reviewed the allegations with the Appellant. One phone conversation to the Appellant was attempted and was noted to be "brief". (Exhibit C, p.5)
13. M was up-to-date with his immunizations and medically. M's pediatrician did not note any concerns. (Exhibit C, p. 4)
14. On May 3, 2017, the Department supported the allegations of the physical abuse of M by the Appellant. The Department supported the allegations because M reported the Appellant punched him; a 2x2 circular bruise was found on M's upper arm/left shoulder area which was in the later stages of healing; M reported he only felt safe at home with his grandmother; and the Appellant refused to cooperate during the investigation. (Exhibit C, p. 6)
15. On August 4, 2017, a Family Assessment was completed and it was recommended the case close upon conclusion of the assessment and that the Appellant's case be administratively reviewed. (Exhibits 7 & 8)
16. The Department relied solely on M's statements and supported the allegations. (Exhibit C)
17. At hearing on July 18, 2017, the Appellant adamantly denied punching M. He described M as a difficult to parent child, who does have to be physically moved into time out. The Appellant testified M was known to seek any attention, good or bad, and felt M received a tremendous amount of attention after his disclosure of being punched. (Testimony of JD)
18. M was known to make up stories and recant later. (Testimony of JD)

19. I find M was not a reliable reporter:

- a. On June 28, 2017, M told the social worker visiting him that he told stories all the time and did not mean to, and did not know why he told so many stories. M denied anyone hit him or was touching him, and reported he loved his grandparents and felt safe at home.
- b. On July 27, 2017, M told his social worker he did not live in the home, rather when he was there he stayed in the basement. M then quickly recanted this statement and stated he was only kidding and offered to show the social worker his room. M stated he said things sometimes because he liked the attention and did not think before he said things.

(Exhibit 7; Exhibit 8)

20. After review and consideration of all of the evidence, including new evidence offered by the Appellant at hearing, I find that the Department did not have reasonable cause to support the allegation of physical abuse of M by the Appellant or that the Appellant's actions placed M in danger or posed substantial risk to his safety or well-being.

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 caretaker 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. 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

"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; DCF Protective Intake Policy #86-015, rev. 2/28/16

"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; DCF Protective Intake Policy #86-015, rev. 2/28/16

"Caregiver"

- (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

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. 2/28/16

Analysis

It is uncontested that the Appellant was a caregiver pursuant to Department regulations and policies. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.


The Appellant disputed the Department's decision to support allegations that he physically abused M. He argued he had no history of being violent, no criminal record, and did not punch or hit either of his children. The Appellant maintained M was known to tell stories, and was happy to receive any kind of attention; good or bad. Further, although the Investigator noted no family history with the Department, the Appellant argued M had a substantial amount of history of neglect, and as kinship foster parents, his acting out behaviors were known to the Department.

As allowed by the Department's regulations, the Appellant presented additional documentation at the Fair Hearing; information that was not available at the time of the investigative response, that raised questions about M's credibility and motivation. I find the presented credible evidence supportive of the Appellant's position; evidence that was not considered by the Department. M's statements alone were not reliable; there was no independent evidence presented that corroborated the allegations against the Appellant other than M's statements. (See, Edward E. v. Dep't of Soc. Servs., 42 Mass. Appt. Ct. 478 (1997) "Statements [made by a child] supported with little, if any, indicia of reliability do not attain trustworthiness through a process of repetition." (Id.)


This Hearing Officer was duty bound to consider the totality of evidence, and whether there was enough evidence to permit a reasonable mind to accept the Department's decision to support the allegation of physical abuse of M by JD. In reaching the instant decision, this Hearing Officer gave substantial weight to the new evidence presented at hearing regarding M's reliability. The Appellant submitted new evidence at the hearing which tended to strongly disprove the allegations of physical abuse. (See, Findings of Fact, above) Based upon the totality of the evidence and for reasons noted in the above Findings of Fact, this Hearing Officer finds the Department's decision to support the allegation of physical abuse was not reasonable or supported by substantial evidence. 110 CMR 2.00 and 10.21(6)

Conclusion

The Department's decision to support the allegations of **physical abuse** by the Appellant was not made with a reasonable basis and therefore, is **REVERSED**.


Laureen Decas
Administrative Hearing Officer

Date: 3/6/18


Darlene M. Tonucci, Esq.
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spears
Commissioner