

**Executive Office of Health and Human Services  
Department of Children and Families  
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**Linda S. Spears, Commissioner**

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**IN THE MATTER OF:  
D.Z. & S.C.-Z.  
  
Fair Hearing # 2017-1224**

**FAIR HEARING DECISION**

The Appellants, Mr. D.Z. and Mrs. S.C.-Z, (hereinafter referred to as Appellant1 and Appellant2 respectively), appealed the decision of the Department of Children and Families, pursuant to M.G.L. c.119, §51B, to support the allegation of physical abuse and neglect on behalf of J and the neglect on behalf of S by Appellant1.

**Procedural History**

On August 26, 2017, the Department of Children and Families ("Department") received a 51A report, pursuant to M.G.L. c. 119, §51A, which alleged the neglect and physical abuse of MJ and S by DZ ("Appellant1").

The Department notified the Appellants of its decision and of their right to appeal. The Appellants made a timely request for a Fair Hearing pursuant to 110 CMR 10.06. The Fair Hearing was held on December 5, 2017, at the Department's Malden Area Office. The record remained open until December 15, 2017 to allow the Appellants to submit additional evidence.

The following persons appeared at the Fair Hearing:

Ms. Lisa Henshall	Administrative Hearing Officer
Mr. D.Z.	Appellant1/legal guardian
Ms. S.C.-Z.	Appellant2/legal guardian/great Aunt
Ms. C.M.	DCF Response Worker (RW)

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

All witnesses were sworn in to testify under oath. The record closed at the conclusion of the hearing.

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

For the Department:

- Exhibit A Intake Report 51A reported dated 8/26/17
- Exhibit B Child Abuse/Neglect Non-Emergency Response – 51B Report, 8/26/17
- Exhibit C Police Report dated 8/26/17

For Appellant:

- Exhibit 1 Commonwealth v. John G. Dorvil (2015)
- Exhibit 2 Letters from Appellants

The Appellants submitted a written closing argument which was reviewed by the Hearing Officer.

The Hearing Officer need not strictly follow the rules of evidence....only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 CMR 10.21

**Issue to be decided**

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, 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, 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 Appellants were the guardians of the reported children J and S; four (4) and five (5) years old, respectively at the time of the reported incident. (Exhibit A; Exhibit B)

2. As the legal guardians of the children the Appellants are caregivers, pursuant to Department regulation 110 CMR 2.00. Appellant2 is also the maternal great aunt to the children. (Fair Hearing Record)
3. A 51A report was filed on August 26, 2017, pursuant to MGL c. 119, §51A, alleging physical abuse and neglect of J by Appellant1 and neglect of S by Appellant1. According to the report, Appellant1 slapped and spit on J. The reported incident was said to be witnessed and the witness contacted the police. The police responded and Appellant1 was arrested. S was said to be present for the incident. The report was screened in for an emergency response pursuant to MGL c. 119, §51B, and assigned. (Exhibits A & B; Testimony of the RW)
4. The Appellants had no prior history with the Department. The children had history with the Department dating back to their respective births. J was a substance exposed newborn (SEN) and S was born with congenital drug addiction. The children began residing with the Appellants in November of 2015. (Exhibit B, p. 1; Testimony of the Appellants; Exhibit 2)
5. It was undisputed that J is a special needs child. The Appellants were unable to agree on S's needs, Appellant1 described her as having special needs but not being diagnosed with ADHD or Autism. J's special needs were "complex." J experiences tantrums and will head butt, bite, kick and scratch. J was diagnosed with Autism, Attention Deficit Hyperactivity Disorder (ADHD) and was experiencing cognitive delays. The children required round the clock supervision due to their needs. (Testimony of the Appellants; Exhibit 2)
6. At the time of the reported incident, Appellant1 was in the car with the children while Appellant2 was in a store. J was able to get out of car seat and began having a tantrum. Appellant1 got out of the car and went to secure the child in his car seat as he appeared to be choking himself with the seat belt. Appellant1 to avoid getting injured by the child placed his hand on the child's face. (Fair Hearing Record)
7. Appellant2 has sustained various injuries when trying to get J in the car seat and when running after him. (Appellant2; Exhibit 2)
8. The children were "traumatized" by the reported incident as the police responded and Appellant1 was arrested and couldn't come home. Since then when the children hear police sirens, they worry that the police are coming to get them. (Testimony of Appellant2)
9. Appellant1 disputed that he ever struck the child J or ever told anyone that he had. Appellant1 argued that he had placed his hand on the child's face. This contradicted what the police report indicated. (Testimony of Appellant1; Exhibit C)

10. The child S corroborated what was reported. The child saw Appellant1 spit on and "spanked the face" of J. J and Appellant1 were fighting with words and their hands. (Exhibit B, p. 6) The disclosures made by S were detailed and consistent; there was no evidence that the child was motivated to lie. Therefore, I find that S was reliable reporter. Edward E. v. Department of Social Services, 42 Mass. App. Ct. 478, 486 (1997)
11. Appellant1 was arrested and charged with Assault and Battery on a family member. The Department met with Appellant1 but did not interview him about the reported incident as he had been arrested. (Commonwealth v. Howard, 446 Mass. 563 (2006) (Exhibits A, B, & C; Testimony of the RW)
12. The reported child J had no marks or bruises. (Testimony of the RW; Exhibit A; Exhibit B)
13. J spit on the Appellant1 on the day of the reported incident and has a history of spitting. J finds it funny. It had been suggested to Appellant1 by a friend to spit back on J and see what J's reaction would be. On the day of the reported incident, Appellant1 spit "at" J not "on" J arguing that there was no saliva coming out. (Testimony of Appellant1; Exhibit A)
14. Appellant1 was angry and frustrated at the time of the reported incident. Appellant1 told J, "if you spit on me I would spit back at you." Appellant1 demonstrated by sticking his tongue out of his mouth and making a noise. (Fair Hearing Record)
15. Appellant1 was loud and swearing that J at the time of the reported incident. (Testimony of the Appellants)
16. The criminal case related to this incident was still pending at the time of the hearing. (Testimony of Appellant1)
17. At the end of its investigation, the Department supported the aforementioned report for physical abuse of the reported child J and neglect of J and S by Appellant1. The Department based this decision on the Appellant1's actions at the time of the reported incident. (Testimony of the RW; Exhibit B, pgs. 7-8) The Department concluded that Appellant1's actions constituted physical abuse and neglect, as defined by its policies and regulations. DCF Protective Intake Policy #86-015, Revised 2/28/16; 110 CMR 2.00
18. After considering all the evidence, I find that the Department did have reasonable cause to support the allegation of physical abuse of J by Appellant1 for the following reasons:

- While the child J did not sustain any injury there was sufficient evidence to find reasonable cause to believe that Appellant1 smacked the child (age 4) in the face while angry, spitting and swearing at him, which placed the child, who was having a tantrum, at significant risk of serious injury;
- S witnessed Appellant1 spit on J and "spank his face";
- A witness observed Appellant1 strike the child and contacted the police;
- Appellant1 was arrested after he "confessed to slapping J with an open hand slap...and spitting on J";
- The Department did have sufficient evidence to support a finding that the Appellant abused J under Department policies and regulations. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16 (See Findings; Fair Hearing Record)

19. After considering all the evidence, I find that the Department did have reasonable cause to support the allegation of neglect of J (age 4) and S (age 5) by Appellant1 for the following reasons:

- Appellant1 was angry, loud and swearing when he tried to get J secured in his car seat at the time of the reported incident;
- J was having a tantrum and Appellant1 was frustrated;
- J spit at Appellant1 who spit back at him to see what his reaction would be;
- S was in the car next to J while all of this was going on;
- This incident was witnessed by a man who contacted, and was interviewed, by the police;
- The police responded and Appellant1 admitted he smacked and spit on the child and he was arrested;
- Appellant1's actions, at the time of the reported incident, posed a substantial risk to the children's safety and well-being. (Exhibit B, Testimony of the RW; Testimony of the Appellant; Exhibit C) DCF Protective Intake Policy #86-015, Revised 2/28/16; 110 CMR 2.00

#### Applicable Standards and 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 caretaker occurred.

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)

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. *Care and Protection of Robert*, 408 Mass. 52, 63-64 (1990). “[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A. *Id.* at 63. 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.

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 person entrusted with responsibility for a child’s health or welfare, whether in the child’s home, 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. *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

Neglect is failure by a caregiver, 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; malnutrition; or a failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. (*Id.*)

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. (*Id.*)

Physical Injury: Death; or fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such non-trivial injury; or soft tissue swelling or skin bruising depending upon such factors as the child's age, the circumstances under which the injury occurred, and the number and location of bruises. (*Id.*)

To Support a finding means:

- There is reasonable cause to believe that 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 . . . (*Id.*)

Danger is 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. (*Id.*)

Risk is defined as the potential for future harm to a child. (*Id.*)

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.

The Department may consider and rely on hearsay provided the hearsay has sufficient "indicia of reliability." *Covell v. Department of Social Services.*, 439 Mass. 766, 786 (2003), quoting from *Embers of Salisbury, Inc. v. Alcoholic Bevs. Control Commonwealth* 401 Mass. 526, 530 (1988). While the § 51A and § 51B reports from the department contain, in part, hearsay, that hearsay nonetheless bears such indicia, specifically the detailed, exhaustive reports provided by professional, specially-trained persons. The reports detail both the authors' direct observations and the content of their communications with 3 identified persons. "[R]easonable persons are accustomed to rely "on such materials "in the conduct of serious affairs," G. L. c. 30A, § 11(2), inserted by St. 1954, c. 681, § 1, and the department properly could rely on these reports. Compare *Brantley v. Hampden Div. of the Probate & Family Ct. Dept.*, 457 Mass. 172, 185 (2010) ("admissibility of case work documents and court investigator reports prepared by department staff in the course of their work is no longer seriously in question" [quotation omitted]).

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 by a preponderance of all of the evidence presented at the hearing, 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

The Appellants disputed the allegation of physical abuse and neglect that was supported on behalf of the children. The Appellant1 argued that eye witness testimony is often unreliable, "the worst in the world." On the day of the reported incident the children were in the back seat of his vehicle which had "highly tinted" windows and would make it difficult for anyone to see what was transpiring. In addition, Appellant1 disputed that he ever admitted to the police that he spanked J who, he argued, had no marks or bruises. Appellant1 argued that the police arrested him to protect themselves. Appellant1 argued that it was absolutely untrue and he never hit the child and would not have hit him, largely, because he is a special needs child. The Appellants argued that the Department's decision was based largely on hearsay. The Appellants argument was not persuasive;

The Department made the decision to support the allegation of physical abuse and neglect based on the evidence they received during their response. The Department's decision to support the allegation of physical abuse was reasonable based on the S's disclosure to the Department that Appellant1 "spanked" J's face. In addition, the statement from a witness, as well the police report, indicated that Appellant1 had admitted to slapping the child in the face and spitting at him. The child (age 4), who was diagnosed with Autism and ADHD, did not sustain an injury as a result of being slapped in the face. Appellant1 was angry, frustrated and swearing at the child and his action, of slapping the child in the face while that angry and frustrated created a substantial risk of serious injury to the child. All of this transpired while the child was having a tantrum in the back seat of the car. 110 CMR 2.00; 110 CMR 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

With respect to the neglect of the children by Appellant1 there was evidence that Appellant1 failed to meet their minimally adequate needs and that his actions posed a risk to their safety and well-being. Appellant1 was angry and frustrated at the time of the reported incident. Appellant1 was swearing at J as he attempted to restrain him in the car seat. The incident was loud and was witnessed by a man in the parking lot who contacted the police. They responded and subsequently arrested Appellant1 who reported that he had hit the child and spit at him. S was in the car, next to J, while this occurred. Appellant2 testified that the incident was traumatizing to the children, specifically the police response and Appellant1 not being able to come home. Appellant1's actions that day resulted in the police response.

Although there was no evidence that the children were harmed by Appellant1's actions, the Department need not wait for an actual injury to occur to intervene. The Department's decision was made in conformity with its policies and with a reasonable basis. See definitions of "reasonable cause" "caregiver" and of "neglect" above. A determination of neglect does not require evidence of actual injury. Lindsay v. Department of Social Services, 439 Mass. 789 (2003) The Department does not need to wait for a disastrous outcome in order to support an allegation of neglect.

Factors the Department should consider when assessing reasonable cause are "direct disclosure by the children or caretaker; physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals (e.g., professionals, credible family members); and the social worker and supervisor's clinical base of knowledge." Covell v.




Dep't of Soc. Servs., 439 Mass. 766, 775 (2003), citing 110 Code Mass. Regs. § 4.32(2) (2000).

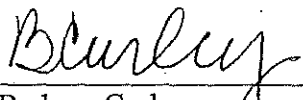
Based on the evidence presented, I find that the Department's decision to support the allegations of physical abuse and neglect was made in conformity with its policies and not with a reasonable basis. 110 CMR 2.00, 4.32

**Conclusion**

The Department's decision to support the allegations of physical abuse of J and neglect of J and S by Appellant1 was made in conformity with Department regulations and was reasonable. Therefore, the Department's decision is **AFFIRMED**.

This is the final administrative decision of the Department. If the Appellants wish to appeal this decision, they may do so by filing a complaint in the Superior Court for the county in which they live within thirty (30) days of the receipt of the decision. (See, G.L., c. 30A, §14.)

  
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Lisa Henshall *BC*  
Administrative Hearing Officer

  
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Barbara Curley  
Fair Hearing Supervisor

April 16, 2018  
Date