

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN & FAMILIES
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)
)
)

N. M.)
)
)

FH # 2017 1353)
)
)

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Ms. NM ("the Appellant"). The Appellant appeals the Department of Children and Families' ("the Department" or "DCF") decision to support a report of physical abuse pursuant to Mass. Gen. L., c. 119, sec. 51A. Notice of the Department's decision was sent to the Appellant on October 20, 2017, and the Appellant filed a timely appeal with the Fair Hearing Office on November 1, 2017.

The Fair Hearing was held on December 12, 2017, at the DCF Robert VanWart Area Office. The hearing record remained open until December 29, 2017, in order for the Department and the Appellant to submit additional evidence. The following persons appeared at the Fair Hearing:

Linda A. Horvath, Esquire
NM
KL
CR
FM

Administrative Hearing Officer
Appellant
Advocate for Child/Appellant
DCF Response Worker
DCF Supervisor

In accordance with 110 CMR 10.03, the Administrative Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement or bias in this case.

The Fair Hearing was recorded pursuant to DCF regulation. 110 CMR 10.26.

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

For the Department:

Exhibit 1: 10/12/17 51A Report
Exhibit 2: 10/19/17 51B Report
Exhibit 3: 10/17/17 Report of Dr. SB
Exhibit 4a—4c: Photographs (copies)¹

For the Appellant:

Exhibit A: 6/1/17—5/31/18 IEP
Exhibit B: 10/27/17 Email, MK
Exhibit C: 12/8/17 MR
Exhibit D: 12/8/17 LC
Exhibit E: Behavior Support Plan, DM
Exhibit F: 4/24/17—11/22/17 School Daily Log

Statement of the Issue

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 investigation, 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) 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 of human trafficking." Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 10.05.

Findings of Fact

1. The subject child of this Fair Hearing is the male child "J" ("the child"), who was nine (9) years old at the time of the 51A filing referenced below. (Exhibit 1, p.1.)
2. The Appellant is the child's mother. She is raising the child as a single parent and has full custody of him². (Exhibit 1, pp.1 and 2.) She is currently employed as a

¹ Photographs were taken by school staff. (Testimony of CR.)

² The child's father is Mr. TM; he is not involved in the child's life. (Exhibit 1, p.1; Exhibit 2, p.4)

~~REDACTED~~. The Appellant has a Bachelor's Degree in ~~REDACTED~~ and is working toward her Master's Degree. (Testimony of KL.)

3. On October 12, 2017, the Department received a report pursuant to M.G.L. c. 119, s. 51A, alleging physical abuse of the child by the Appellant. A day earlier, school staff noticed marks on the front of his thighs that were "3—4 inches long and a quarter inch wide...three on his right thigh and one on his left near his knee." Two of the marks on his right thigh formed a V-shape that was "bruised." The child allegedly informed the reporter he was hit with a "switch" by his mom because he was a "bad boy." (Exhibit 1, p.3.)
4. The school took pictures of the marks and contacted the Appellant. The child is very physically active at home. The Appellant informed the school that the child must have gotten the marks when he jumped off his bed and hit his miniature keyboard.³ The child also informed school staff that he was running and "hit piano." (Exhibit 1, p.3; Exhibit 2, p.2; See, Exhibits 4a—4c; Testimony of Appellant.)
5. The Department screened-in the 51A report as an emergency response. (Exhibit 1, p.6.)
6. The child has cerebral palsy, a neurological disorder, communication disorder and a seizure disorder; he is taking an array of medications. He has an IEP at school. School staff noticed the bruises when they were changing him; they change him a couple times each day. The child is prone to tantrums at school. "He is a sweet child with a lot of energy. He has decreased muscle tone and he walks with braces on both legs." The child likes to play with electronics and watch TV. (Exhibit 1, pp.3 and 5; Exhibit 2, pp.2 and 4; See, also, Exhibits A and E.)
7. Although the child allegedly informed the reporter he was hit with a "switch" by his mom because he was a "bad boy." (Exhibit 1, p.3), there is evidence the child does not have the capability to express himself in this way:
 - a) The child was inconsistent during his interview with the DCF Response Worker ("RW"); his teacher was also present. During the interview, the child gave simple, one-word answers to introductory questions, and could not answer many other standard protective questions. Overall, the DCF RW opined the child's speech was "not clear." (Exhibit 2, p.2; Testimony of CR.)
 - b) When asked what happens when he gets in trouble, the child "mumbled something." At that point, the teacher interpreted him as saying "switch", however the DCF RW did *not* interpret it as the word "switch."⁴ The RW asked the same question again but could not understand the child. The *teacher* then asked the child the *leading* question "does mommy hit with the switch" and the child nodded his head up and down as "yes." Then, the RW asked the child if anyone hits him and the child did not reply. The *teacher* then asked the child if he

³ Referred to as a "piano" in the 51B report. (Testimony of FM.)

⁴ Testimony of CR.

- gets hit, and the child replied, "pow pow." The RW asked him who gives him pow pow, and the child answered, "mom." The child could not answer questions regarding where on his body he gets hit. The teacher then asked the child the *leading* question did he get hit on his leg, and he replied, "No." The child did not say anything about being a "bad boy." (Exhibit 2, p.2; Testimony of CR.)
- c) The child's pediatrician, Dr. C, questioned if the child actually spoke the words alleged; as of his last doctor's visit on March 31, 2017, the child was considered to be "non-verbal." (*Id.* at p.6.)
 - d) By the end of October, 2017, the child's speech pathologist, Ms. K, and other staff noticed the child had been showing "reduced speech intelligibility." (Exhibit B.)
8. The child's teacher, Ms. G, had no concerns with the Appellant, and only praise for her as a single parent who is "very active in her son's education." "She is invested in him and loves him a lot" and has regular communication with the school. The Appellant has high expectations for the child and wants school work sent home for him; she rewards the child appropriately using a reward chart. (Exhibit 2, pp.2 and 3.)
 9. The school's licensed clinical social worker, Ms. LC, works with J and is the person who is in constant contact with the Appellant, on an average of 2 to 3 times per day, regarding any issues that arise with the child. Ms. LC had no concerns regarding the Appellant's care of the child. (Exhibit D.)
 10. School personnel and records indicate that on the day of the incident (October 10th), the child had two escorts, both due to his inability to regulate his emotions and behaviors. He pleaded he did not want to go home that day. It is undisputed it is typical for him to not want to go home because he knows his mother will find out about his negative behaviors and will take rewards away from him. (Exhibit 2, pp.4 and 9; See, also, Exhibit F, School Log Entry of 10/10/17.)
 11. The school log does not note anything about marks noted on the child on October 11th or 12th. (Exhibit F, Entries of 10/11/17 and 10/12/17.) The school was working with the child on dissuading his negative behaviors of "pleading as well as invasion of others personal space." (Exhibit A, p.2.) Having tantrum behaviors, including throwing himself on the floor, was a regular and long-standing issue the school was working with the child on. (See, Exhibit F; Testimony of KL.)
 12. The Appellant's testimony at the Fair Hearing was sincere and forthright. Considering the Appellant's demeanor and content of testimony, which was consistent with her explanation of events of the day in question, as she reported to school staff, as reported to the DCF Investigator, as reported to Dr. SB, as reported to the child's in-home therapist (see, findings herein), and as testified to at the hearing, the Appellant is deemed credible.
 13. Per the Appellant's account of events, on the day of the incident (October 10th), the child went upstairs to his room to change his clothes after school while the Appellant

prepped for dinner in the kitchen. She heard a "tumbling" noise and went upstairs to find the child playing "superhero." He had a cape around his neck, a sword in his hand "and all his toys were scattered on the floor along with his keyboard and two baseboard heater covers (metal grates) that he used as a ramp for his hot wheel cars. The Appellant took the cape, sword and covers away. Later, she noticed marks on the child's legs when she gave him a bath, and spoke to him about the marks being consequences of jumping from the bed and being a "bad boy." The next morning she sent him to school and did not think much about it. (Exhibit 2, p.3; Testimony of Appellant.)

14. At the home visit, the Appellant showed the DCF RW the child's room and all the items described above, including the cape, sword and baseboard heater covers she had put in her bedroom closet away from the child. She also showed the RW the reward charts used for good behavior hanging on the walls in the living room and kitchen. (Exhibit 2, pp.3 and 4.)
15. The Appellant denied that she or her extended family use the word "switch" though he might have heard it from his maternal grandmother or great grandmother via skype when telling him to be a good boy.⁵ The Appellant denied several times using physical punishment with the child and denied the child had ever been hit with a switch, stick or any implement as she was very aware this would not fix or work with his neurological problems. He is rewarded on a reward chart with the use of electronics as his prize. She denied ever using the words "pow pow" and did not know where the child might have heard it; the child has also learned swear words that are not used in the home. The Appellant willingly signed an emergency service plan agreeing that she will not hit her child even though she felt wrongly accused. (Exhibit 2, pp.3 and 5; Testimony of Appellant.)
16. Ms. KL has been the child's special education advocate for four (4) years; she was present at the fair hearing to support the Appellant, and was also present for the Appellant's DCF interview. (Exhibit 2, p.3.) Ms. KL opined the Appellant is very invested in her child's education. She is aware that the child will "come up with stuff when he is in trouble." (Id.)
17. The child's pediatrician, Dr. C, examined him on October 13, 2017, three days after the incident: (See, Exhibit 2, p.6.)
 - a) Dr. C has known the Appellant for ten years and she is an "extremely dedicated, strong advocate for her son." Dr. C opined the child is "hard to understand, not sure how much of what he said has to be open to interpretation. [W]hen he talks they debate what he may be saying." Dr. C was surprised the child would say mom hit me with a switch as "his speech is not that advanced...[his] speech is delayed and non-distinct."

⁵ The Appellant's family is [REDACTED]. They may have used the phrase, "you get a "switch" (stick) if you are not a good boy. (Exhibit 2, p.3.)

- b) When Dr. C asked the child what happened he did not say. The Appellant denied to Dr. C using physical discipline with the child and denied knowing where the child would have gotten the words he is alleged to have used.
 - c) Dr. C's physical examination revealed the following: He had "scratch marks on his hands, bruise on thigh" that was "non-distinct" on this day; "she could see it but had to look at it from an angle. It is hard for her to say what it is."
18. The child was not seen by Dr. SB, child abuse specialist, at the [REDACTED], until October 17, 2017. (Exhibit 3.) The examination with Dr. SB lasted approximately 10 minutes. (Testimony of Appellant.)
- a) On October 13th, *prior to* the examination date, Dr. SB looked at poor resolution photographs of the child's injuries (taken by the school on October 12th) but opined, "There is clear documentation of the railroad track, or tram track appearance⁶ that is highly suggestive of a switch, and thereby very supportive of the child's statement over that of the mother." (Exhibit 2, p.7; See, also, Exhibit 3, p.1.)
 - b) At the examination on October 17th, the child was described as "easy going, happy, very enthusiastic, and prone to over-excitement. He is persistent." (Exhibit 3, p.2.)
 - c) The Appellant was consistent with Dr. SB in her reporting of the events of the day in question, and "strongly" asserted she does not have a switch and would never strike the child given his developmental and neurological condition. The Appellant showed Dr. SB photographs of the objects noted by the Appellant that the child likely fell onto. (*Id.* at pp.1 and 2.)
 - d) Dr. SB opined, "Even without a history, the marks on [J's] thighs would suggest impact by a fast moving elongated object, about ¼ to 3/8th in. or so in diameter. This is consistent with being called a switch, and thus consistent with the reported given history by the child." (*Id.* at p.2.)
 - e) However, Dr. SB also noted, "The setting for and nature of the child's own statements are not available to me, and I did not ask him again, or separate him from his mother." (*Id.*)
 - f) Dr. SB could not discern when the injuries might have occurred. (Exhibit 3; Exhibit 2, p.7.)
19. The child's in-home therapist, Ms. MR, is working with J on "frustration tolerance, problem solving and emotional regulation" through the use of play and art therapy. Neither she nor the child's previous clinician had any issues or concerns regarding the Appellant's care of the child; she was consistent and vested in the child's development through therapy throughout the years the child has been engaged in services. The Appellant had informed her of the allegation of physical abuse, to which Ms. MR opined "she can't see that happening." (Exhibit 2, p.9; Exhibit C.)
20. On October 18, 2017, the Department supported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for physical abuse on behalf of the subject

⁶ DCF interpreted railroad or tram tracks as parallel lines. (Testimony of FM.)

child by the Appellant based upon the school staff's interpretation of the child's disclosure, and Dr. SB's opinion that the child's injuries were caused "by a fast moving object similar to what child reported initially about getting hit with a switch." (Exhibit 2, pp.9 and 10.)

21. The Department opened the family for services following the support decision in order to "assess further." (Exhibit 2, p.10.)
22. Considering the evidence in its entirety, the Department did not have reasonable cause to believe that the Appellant caused or created a substantial risk of physical or emotional injury to the child, and there was no substantial evidence that any action on the part of the Appellant placed the child in danger or posed a substantial risk to his safety or well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16. (See, Analysis.)

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.

A "Support" finding means: "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) 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 of human trafficking." 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).

"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.

"Abuse" means 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.

"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 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 drugs at birth; or (e) failure to thrive. 110 CMR 2.00.

To prevail at a Fair Hearing, an Appellant must show based upon all evidence presented at the hearing, 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/or statutes and/or case law and resulted in substantial prejudice to the Appellant. If there is no applicable policy, regulation or procedure, the Appellant must show by a preponderance of the evidence that the Department acted without a reasonable basis or in an unreasonable manner, which resulted in substantial prejudice to the Appellant. If the challenged decision is a supported report of abuse or neglect, the Appellant must show 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

As the child's mother, the Appellant is deemed a "caregiver" pursuant to Protective Intake Policy #86-015.

The Department's reasoning for the support decision of physical abuse against the Appellant is not supported by substantial evidence and is not reasonable based upon the findings of fact in this matter. The Department's decision was based upon the *reporter's* interpretation of the child speaking the words in some fashion that he was hit with a "switch" by his "mom" because he was a "bad boy", along with Dr. SB's opinion that the parallel lines (train track marks) found on the child's thigh was consistent with having been caused by an implement such as a switch. However, the surety of the child using the word "switch" is in dispute by several individuals including his own pediatrician who is more familiar with the child's history and level of speech than Dr. SB who viewed poor quality photographs, examined the child for ten minutes and did not engage the child in a conversation. Dr. SB commented in his report that "the setting for and nature of the child's own statements are not available to me, and I did not ask him again, or separate him from his mother."

The DCF RW did not understand the child to have said the word "switch" even when the teacher present for the child's DCF interview interpreted it as so. Of note is that the teacher asked the child a few leading questions, one of which led the child to answer "no"

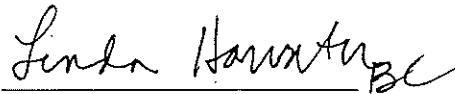
he did not get hit on his leg by his mom. The DCF RW found the child's speech to be very unclear as a whole, which is consistent with the opinion of several professionals involved with the child, including school staff that are in contact with the Appellant several times a day for her interpretation of the child's communication to them.

The undersigned hearing officer found the Appellant's testimony to be credible at the hearing as to how the child sustained marks on his legs. Noteworthy is that the child's own pediatrician also noted marks on the child's hands, which Dr. SB did not comment on, but could be indicative of when the child tried to break his fall onto his toys and other objects on the floor at the time. Most noteworthy, when speaking with school staff, the child corroborated the Appellant's account of events that the child fell and hit his "piano" (keyboard).

The Appellant is clearly taking excellent care of this child as a single parent, which is supported by all the collaterals involved with the family. In light of the totality of evidence in this case, as discussed above and in the detailed Findings of Fact, there is a lack of evidence that the Appellant physically abused J, and there is also a lack of evidence that any action by the Appellant placed the child in danger or posed a substantial risk to his safety or well-being.

Conclusion

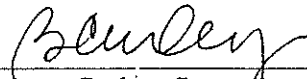
The Department's decision to support the 51A report of October 12, 2017, for physical abuse by the Appellant on behalf of the subject child is **REVERSED**.



Linda A. Horvath, Esquire
Administrative Hearing Officer

June 4, 2018

Date



Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner