

**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: A.D.

Fair Hearing # 2017-1361

FAIR HEARING DECISION

The Appellant, Ms. A.D., 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 on behalf of her child, C.

Procedural History

On October 8, 2017, the Department of Children and Families ("Department or DCF") received a 51A report, pursuant to M.G.L. c. 119, §51A, which alleged the physical abuse of C by her mother AD ("Appellant"). On October 10, 2017, the Department made the decision to support the allegation of physical abuse.

The Department notified Appellant of its decision and of her right to appeal. The Appellant made a timely request for a Fair Hearing pursuant to 110 CMR 10.06. The Fair Hearing was held on January 11, 2017, at the Department's Haverhill Area Office in Bradford, Massachusetts.

The following persons appeared at the Fair Hearing:

Ms. Lisa Henshall	Fair Hearing Officer
Ms. A.D.	Appellant/mother
Ms. C.P.	DCF Ongoing Social Worker (OGSW)
Ms. J.S.	DCF Emergency Response Worker (ERW JS)
Ms. S.P.	DCF Emergency Response Worker (ERW SP)
Mr. M.W.	DCF Response Supervisor (RS)

In accordance with 110 C.M.R. 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 on one (1) compact Disc. All witnesses were sworn in to testify under oath. The record remained open to allow the Appellant and the Department time to submit additional evidence and closed on January 26, 2018. The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit A: Intake Report 51A reported dated 10/08/17
- Exhibit B: Child Abuse/Neglect Non-Emergency Response – 51B Report, 10/10/2017
- Exhibit C: Photograph of the child's face

For Appellant:

- Exhibit 1: Letter from the child's therapist
- Exhibit 2: DVD from the Appellant¹
- Exhibit 3: Letter from the Appellant with additional evidence attached dated 10/30/17

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

Statement of the Issues

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

¹ This disc was unable to be obtained by the hearing unit. The Appellant was contacted and notified.

Findings of Fact

1. The Appellant, AD, is the mother of the child C. Therefore, the Appellant was a caregiver pursuant to Department regulation 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16
2. C was eleven (11) years old at the time of the reported incident. (Exhibit A & B)
3. A 51A report was filed on October 8, 2017, pursuant to M.G.L. c. 119, §51A, alleging physical abuse of the child (C) by the Appellant. According to the report, the child disclosed that she and the Appellant had gotten into a physical altercation. The child reported that her mother was mad at her behavior and hit her, with an open hand, on the face and on her leg. The child reportedly had bruising to her upper cheek bone. The child's friend, who had been at the home at the time of the altercation, videoed part of the incident, which showed the mother on top of the child but not hitting the child. The mother acknowledged that she and the child were hitting one another. The child hit her and she hit the child back. The child disclosed that her mother hit her last week and locked her in her room on another occasion. The child was described by the father as being difficult to deal with. The Appellant was not arrested. The report was screened in for an emergency response pursuant to MGL c. 119, §51B. (Exhibit A, pgs. 2 & 4; Exhibit B; Testimony of the ERW SP)
4. The family was involved with the Department in 2013 due to concerns of physical abuse and neglect of the child by the Appellant and neglect by her father. At that time, the 51A report was screened in and assigned as an initial assessment. The Department determined that there was no/minimal concern. In April 2016, there was a 51A which was screened out for neglect of the child by the Appellant. At that time, there were concerns about the child's behaviors and she was transported to a hospital for an evaluation. (Exhibit B, pgs. 1 & 2)
5. The Appellant had no criminal history. (Exhibit B, p. 2)
6. It was undisputed that the child had a friend (N) sleepover at the time of the reported incident. (Fair Hearing Record)
7. At the time of the reported incident, the Appellant told the child and her friend she would not be taking them to cheerleading practice. C was upset and began swearing at her mother. (Fair Hearing Record)
8. N videotaped the reported incident which was viewed by the Department and showed the Appellant on top of the child but not hitting the child. The video was of the Appellant "holding the child down and holding her face" while the child yelled for help. (Exhibit B, p. 3)

9. It was undisputed that the child had significant behavioral problems and, at the time of the reported incident, was out-of control and throwing things. The Appellant put the child on the floor as she was not safe and was trying to hit the mother (restrain). The floor in the child's bedroom is carpet. (Exhibit B; Exhibits 1 & 3)²
10. The child attended school based counseling twice a week to address "mood, anger, acting out at home and academic progress." The child had been engaged in counseling since the 5th grade. At the time of the reported incident the child was in the 6th grade. (Exhibits 1 & 3)
11. The police had been to the home on numerous occasions due to the child's behaviors. (Testimony of the Appellant; Exhibit B, pgs. 1 & 3; Exhibit 3)
12. The police responded at the time of the reported incident. The Appellant was not arrested. The police were "more concerned" that the family needed services. (Exhibit B, p. 2)
13. The Department did not interview the child's friend (N) who witnessed the incident or her mother. (Testimony of the ERWs; Exhibit B)
14. The child had a visible red mark on her left cheek bone and near her ear, which the Department concluded was consistent with a rug burn. (Testimony of the ERW SP; Exhibit B, p. 3; Exhibit C)
15. The child had an "injury" to her leg but there was no further evidence about this injury. (Fair Hearing Record)
16. The child stated that the Appellant slapped her on her face thirty (30) times. The Department testified that the child's injuries were not consistent with her report of being slapped thirty times; however, the Department credited her statement because that was what the child said. (Exhibit B, p. 3; Exhibit C; Testimony of ERW SP) Upon review of the evidence, I did not find the child's statement that she was hit in the face 30 times to be believable. There was no evidence to corroborate what the child reported. Edward E. v. Department of Social Services, 42 Mass. App. Ct. 478, 484 (1997)
17. The Appellant disputed that she slapped or hit the child and disputed that she told the police this. (Testimony of the Appellant; Exhibits A & B)
18. It was unclear how the child sustained the injury to her face. (Fair Hearing Record)
19. The father denied that the Appellant disciplines the child physically. (Exhibit B, p. 2)

² The Appellant showed a video of the child's behaviors at the hearing, which she later submitted into evidence. This was Exhibit 2 that was unable to be viewed by the hearing officer.

20. The child does not listen to the Appellant but would listen to her father. (Fair Hearing Record)
21. The Department did not speak to the reporter or review a copy of the police report. (Fair Hearing Record)
22. At the end of its response, the Department supported the aforementioned report for physical abuse of the child by the Appellant. The Department based this determination on the child's report that the mother had hit her and that she sustained an injury to her face and leg. The Appellant disputed that she struck the child. The Department viewed a video that shows the mother on top of the child and the child yelling for help. The child has been exhibiting acting out behaviors in the home and the mother has been having difficulty managing the child's behaviors. (Testimony of the ERW SP; Exhibit B; Exhibit C) The Department concluded that the Appellant was responsible and that her actions constituted physical abuse, as defined by its regulations. A referral was made to the District Attorney. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 4.32 (2)
23. After considering all the evidence, I find that the Department did not have reasonable cause to support the allegations of physical abuse of C by Appellant:
 - It was undisputed that the Appellant and the child got into a verbal argument that became physical;
 - The Department viewed a video of the incident which shows the child yelling for help and the Appellant on top of the child holding her face;
 - There was no evidence to determine that the injury to the child's face was a result of the Appellant hitting the child;
 - C's statements about being smacked by the Appellant thirty times were not consistent or supported by any evidence. Edward E. v. Department of Social Services, 42, Mass. App. Ct. 478, 486 (1997);
 - The police responded to the home, and have in the past due to child's behaviors, and the Appellant was not arrested or charged;
 - The father disputed that the Appellant used physical discipline;
 - The Appellant disputed that she hit the child but restrained her on the floor which was consistent with the Department's determination that the injury to the child's face appeared to be consistent with a rug burn;
 - There was no evidence that the child's injuries were the result of a non-accidental injury. (See Findings) 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 4.32 (2)

Applicable Standards

In order to “support” a report of abuse or neglect, the Department must demonstrate the following:

- 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 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 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. *Id.*

“[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.

A “caregiver” means a child’s (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with the responsibility for a child’s health or welfare, and (e) any other person entrusted with the responsibility for a child’s health or welfare whether in the child’s home, a relative’s home, a school setting, a day care setting (including baby-sitting), a foster home, a group care facility, or any other comparable setting. As such, “caregiver” includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The “caregiver” definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is himself/herself a child (i.e. baby-sitter). 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

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 laws of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. 110 CMR 2.00

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, (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) 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 or human trafficking. 110 CMR 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

Analysis

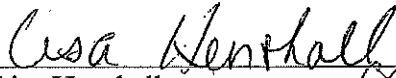
The Appellant disputed the allegation of physical abuse contained within the report. The Appellant argued that the child had significant behavioral problems which were undisputed. At the time of the reported incident, the child was out-of-control and the Appellant restrained her to calm her down but she did not hit her. The Appellant referred to prior police responses to the home and others who have witnessed the child's behaviors. (See Exhibit 3)

The Department supported the allegation of physical abuse based on the child's statement, but testified the child's injuries could be consistent with a rug burn. There was no evidence that these injuries were inflicted by the Appellant. The child's report of being hit in the face thirty times was not believable. The Department viewed the video taken by the child's friend (N) during the incident, which did not show the Appellant hitting the child. The Appellant was not arrested when police responded. Clearly the Appellant and the child engaged in a verbal argument that became physical but there was no evidence that the Appellant physically abused the child causing the injury to her face and leg. It remains unclear how the child sustained these marks.

Based on the evidence presented, I find that the Department's decision to support the allegation of physical abuse was not made in conformity with its policies or with a reasonable basis. 110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

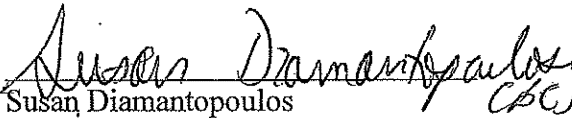
Conclusion

The Department's decision to support the allegations of physical abuse of C by Appellant is reversed.



Lisa Henshall (BC)
Administrative Hearing Officer

Date: 6-11-18



Susan Diamantopoulos (BC)
Fair Hearing Supervisor

Date:

Linda S. Spears
Commissioner