EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN & FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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COMMISSIONER

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IN THE MATTER OF

S. T.

FH # 2017 1372

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Mr. ST ("the Appellant"). The Appellant appeals the Department of Children and Families' ("the Department" or "DCF") decision to support a report of neglect and physical abuse pursuant to Mass. Gen. L., c. 119, sec. 51A. Notice of the Department's decision was sent to the Appellant and he filed a timely appeal with the Fair Hearing Office on November 4, 2017.

The Fair Hearing was held on January 9, 2018, at the DCF Robert VanWart Area Office. The following persons appeared at the Fair Hearing:

Linda A. Horvath, Esquire	Administrative Hearing Officer
ST	Appellant
MDP, Esquire	Counsel for Appellant
MS	DCF Response Worker

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: 9/30/17 51A Report
Exhibit 2: 10/6/17 51B Report

The Appellant did not submit documentary evidence into the hearing record.

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 Mother; 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 Mother; 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 "B" ("the child"), who was one (1) month old at the time of the 51A filing referenced below. (Exhibit 1, p.1.)

2. The Appellant is the child's father. (Exhibit 1, pp.1and 3.) He works full-time as a roofer. (Exhibit 2, p.7.)

3. The child's mother is Ms. SB ("the mother"). The Appellant and the mother were together as a couple and living together at the time of the 51A filing. (Exhibit 1, pp.1—3.)

4. On Saturday, September 30, 2017, the Department received a report pursuant to M.G.L. c. 119, s. 51A alleging neglect of the child by the Appellant after the Appellant gave the child a bath in the kitchen sink, put the child on the kitchen counter and the child fell from the counter sustaining injuries. (Exhibit 1, p.3.)

5. The Department screened-in the 51A report as an emergency response. (Exhibit 1, p.5.)

6. The Appellant and the mother have a DCF history unrelated to the issues in this matter. (Exhibit 2, pp.1—2; Testimony of MS.)

7. The Appellant and mother were interviewed separately by the Police/DCF. (Exhibit 2, p.3.) The Appellant also described the incident to the child abuse specialist, Dr. SB, while in the child's hospital room. (Testimony of Appellant.)

8. The Appellant got up at 4:30AM when the child woke up for a feeding.[1] The baby had a dirty diaper, and because the child had been getting such bad diaper rashes, the couple would give the child a quick bath instead of using baby wipes. The Appellant gave the child a quick bath in the kitchen sink. He had forgotten to get a towel from the cabinet below the sink; he usually took one out before the bath. He took the wet child out of the sink and placed him on his back on the counter to the left of the sink. He then knelt down to grab a towel from the cabinet. The child fell from the kitchen counter, hit the open kitchen cabinet, and fell onto the tile floor right next to the Appellant. The Appellant yelled to the mother to come down. (Exhibit 1, p.3; Exhibit 2, p.3, 4 and 5.)

9. It is uncontested that the Mother was sleeping at the time of the incident. The Mother remembered the baby fussing in the early morning hours; he usually got up to eat around 4AM. She heard the Appellant get up for the baby and then she fell back to sleep. The next thing that woke her was the Appellant yelling for her. "The baby was crying. [The Appellant] was distraught and it took him a few moment[s] to verbalize that the baby had fallen." (Exhibit 2, p.4.)

10. The Mother corroborated the Appellant's statements that they give the child a bath or a quick rinse because baby wipes make his diaper rash worse. She also corroborated they keep towels for the child under the sink[2] and usually get a towel out first before they bathe him in order to lay him down on it. They do not use physical punishment. The Mother believed the Appellant's account of events completely as "he is a loving, patient father who would never harm his children."[3] (Exhibit 2, p.4.)

11. The couple observed the child and looked for signs of concussion. They noticed swelling and that one eye was not opening. The Mother telephoned the child's pediatrician's office[4] and they were instructed to bring the child to the emergency room. The Mother brought the child to the hospital at approximately 5AM, while the Appellant found care for their 3-year-old child and met them at the hospital thereafter. The Mother and Appellant were fully cooperative with the Police and the DCF Response Workers ("RW") at the hospital. (Exhibit 1, p.3; Exhibit 2, pp.3 and 4.)

12. As a result of the fall, the child sustained a subarachnoid hematoma, an intraventricular hematoma, and a subdural hematoma. On September 30th, child abuse specialist, Dr. SB, opined "the child has a significant skull fracture that goes from ear to ear, and has 'branching.'" He could not exclude child abuse but also stated that the family's story was possible. (Exhibit 1, p.3; Exhibit 2, pp.2 and 7.)

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[1] The Appellant gets up for feedings on the weekends to let the Mother get more sleep; the Mother gets up for the child during the week. (Exhibit 2, p.3.)
[2] The DCF RW viewed the towel supply in the cabinet under the sink. (Exhibit 2, p.5.)
[3] The couple also has a three-year-old daughter. (Exhibit 1, p.1.)
[4] This was corroborated by the pediatrician's office. (Exhibit 2, p.13.)

13. The hospital social worker met with the Appellant and had "absolutely no concerns." He gave the social worker a consistent account of events as what he told the police and DCF. He was "appropriately very upset with himself." Nursing staff also reported no concerns. (Exhibit 2, p.7.)

14. The child's pediatrician did not have any medical concerns for the child and confirmed the child had diaper rash as described by both parents. (Exhibit 2, p.6.)

15. A skeletal survey was performed on the child. It showed the skull fracture with no evidence of other fractures. (Exhibit 2, p.6.) Dr. SB opined babies do get skull fractures more easily but found the child's fracture to be outside the range of what he typically sees from a fall from counter height. (Id. at p.9.)

16. An ophthalmologist examination was performed on the child. It showed sub-conjunctive hemorrhage of the right eye, which was consistent with the fall and not a child abuse concern. There was no evidence of retinal hemorrhage. (Exhibit 2, p.6.)

17. A subsequent MRI also showed a "white matter shear injury, which is indicative of a severe traumatic event...caused by an abrupt acceleration and deceleration of the brain." (Exhibit 2, p.7.) Dr. SB opined that the subdural bleeds found on the base of the child's brain (separate from the area of the fracture) were unusual. "They are not exclusively due to abusive head trauma, and do have accidental causes as well." (Id. at p.9.)

18. The child remained stable while in the hospital following the incident and was discharged to the paternal grandparents on October 3, 2017. (Exhibit 2, pp.2, 9, 10.)

19. The Department believed there to be discrepancies in the information the parents gave them with respect to how many alcoholic drinks the Appellant had the night before the incident, who fed the child at midnight, and what time the incident occurred:

    a) The Appellant had two Twisted Teas (he calls them "beers") on his ride home from work beginning at 2:30PM (as a passenger in the vehicle coming from [redacted] to MA). He arrived home from work between 5:30 and 6:00PM and had a third Twisted Tea when he was showering. He had a fourth Twisted Tea before he went to bed. He denied he was drunk and denied having an issue with alcohol. He denied a history of drug abuse and is randomly tested for his employment. He was physically disciplined as a child and denied he would do this to his children. (Exhibit 2, pp.3; 7—8.)

    b) The Mother corroborated that the Appellant calls Twisted Teas "beers" and that he usually has one or two after work. On the night of the incident, she did not notice the Appellant drinking, but she also was not looking for that as drinking is

not an issue for him; she denied he is ever drunk while caring for the children.[5] (Exhibit 2, pp.3, 4 and 8.)

c) The Mother and the Appellant each informed DCF that the other parent fed the child at his midnight feeding. (Exhibit 2, p.8.)

d) The Appellant indicated the child woke up "around 4:30AM" for his feeding. (Id. at p.3.) The mother also indicated she heard the child fussing "around 4:00AM" and the time between getting downstairs when called to the time she called the pediatrician was ten minutes. (Id. at p.4.) The pediatrician's records indicate the mother called them at 5:45AM. (Id. at p.13.) The 51A report indicated the mother arrived with the child "5:00AM or 6:00AM." (Exhibit 1, p.3.)

20. Based upon the above perceived inconsistencies, the Department performed an emergency removal of the child (pursuant to M.G.L. c. 119, s.51B(3)) on October 2, 2017. (Exhibit 2, pp.8 and 9.)

21. On October 6, 2017, the Department supported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for neglect and physical abuse on behalf of the subject child by the Appellant[6] based upon the Appellant being the individual who gave the child a bath and did not secure the child when he knelt down to get a towel from the cabinet under the kitchen sink. The Appellant "reported he was halfway asleep and made a mistake of not getting the towel" prior to the bath. The Department was also concerned about discrepancies in the parents' statements regarding who had given the child his midnight feeding, about the amount of alcohol the Appellant drank prior to the incident, and regarding the time period of the incident to the time the child arrived at the hospital. (Exhibit 2, pp.14 and 15.)

22. The Department made the support decisions against the Appellant (and mother) as there was a "small window" of possibility that the child's injuries were due to physical abuse despite all other positive collateral evidence in this matter. (Testimony of MS.)

23. The Department opened the family for services following the support decisions. (Exhibit 2, p.15.)

24. There were no concerns regarding the Appellant's or the mother's care of the child by any collateral or by the DCF response worker. (Testimony of MS.)

25. The specialist, Dr. SB, could not say conclusively during the DCF response that the child was physically abused. (Testimony of MS; See, hearing record.)

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[5] The Mother has a history of substance abuse but had been sober for three years at the time of the incident. (Exhibit 2, pp.3and 4.)

[6] The Department also supported the mother for neglect of the child. (Exhibit 2, pp.14 and 15.) The mother had a separate fair hearing (FH#20171365), which was also conducted by the undersigned hearing officer.

26. Dr. SB and the Appellant were the only two individuals to testify at the 72-hour hearing. At that time, Dr. SB, also testified he could not say conclusively that the child was physically abused. The Juvenile Court returned custody of the child to the parents at the conclusion of that hearing. (Testimony of MS.)

27. The Appellant's testimony at the Fair Hearing was sincere and forthright. Considering his demeanor and content of testimony, which was consistent with his explanation of events of the day in question to DCF, to the Police and to Dr. SB,[7] and as corroborated by the mother, (see, findings herein) the Appellant is deemed credible.

28. 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

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.

[7] The Appellant acknowledged that when he first explained what happened to Dr. SB, he forgot to mention that the child hit the open cabinet door first before he fell onto the floor, however he did report such to the Police (oral and written) and to DCF. (Testimony of Appellant.) This portion of his statement to DCF was confirmed by the DCF response worker. (Testimony of MS.)

"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 defined as 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 failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. 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 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 father, the Appellant is deemed a "caregiver" pursuant to Protective Intake Policy #86-015.

The Department's reasoning for the support decisions of neglect and physical abuse by the Appellant are not supported by substantial evidence and are not reasonable based upon the findings of fact in this matter.

Physical Abuse:

Dr. SB could not say with certainty either during the DCF response or at the time of the 72-hour hearing in Juvenile Court that the child was a victim of physical abuse by the Appellant. In addition, the Appellant testified at the 72-hour hearing and gave the Court the same information he had given to the Police and to DCF. Based upon the testimony of only these two individuals the Court gave custody of the child back to the parents. Of note, the radiologist was not concerned for physical abuse in this matter and all collaterals, as well as the DCF response worker, found the Appellant (and mother) to be cooperative and appropriate.

The facts of the incident, as described by the Appellant's credible statements, taken together with Dr. SB's opinion, indicate this incident was a horrific accident. Therefore, there is no evidence that the Appellant committed a non-accidental act upon the child, which caused him substantial physical injury. Thus, "physical abuse" as that term is defined is not present in this case.

Neglect:

The Department did not state with specificity that portion of the definition of neglect within which this matter fits. Taking this incident to be an accident in its truest sense does not lead to a support finding of neglect in that there is no evidence the Appellant failed, either deliberately or through negligence, to provide the child with minimally adequate care. The Appellant put the wet child down on the kitchen counter and then knelt down to get a towel leaving the child unattended; the child then fell and unfortunately sustained significant injuries. Though this was not good judgment on the part of the Appellant, the incident was truly an unfortunate incident that occurred unexpectedly and unintentionally on the part of the Appellant.

In addition, the Department's perceived inconsistencies of the time frame of the early morning hours of the incident are not indicative of neglect by the Appellant. The father recalled feeding the child at 4:30AM, and the Appellant arrived at the hospital between 5AM and 6AM. It is conceivable that the parents' recollection of time might not have been exactly on target in all respects due to the traumatic event that occurred. In addition, the pediatrician's record is not clear if the mother telephoned them at 5:45AM or if that is when the on-call physician spoke with her. Also, the hospital record is not clear as to when the mother arrived with the child to the emergency room—5AM or 6AM.

The Appellant had no control over the times listed by the pediatrician's office or the hospital. It is plausible that within the 1-1/2 hour time span (4:30AM—6AM), the father fed the child, bathed the child, the fall occurred, the mother assisted with the child, made a phone call to the pediatrician's office, waited for the on-call physician to call back, and then took the child to the emergency room. Finally, the evidence is clear that the Appellant acknowledged having 3 to 4 alcoholic beverages in approximately a 7-1/2 hour time span. However, there is no evidence that the Appellant was intoxicated while caring for the child; this was corroborated by the mother.

Though it is understandable that the Department erred on the side of caution in this matter, in light of the totality of evidence in this case, as discussed above and in the detailed Findings of Fact, there is no reasonable cause to believe that the Appellant neglected or physically abused the child.

Conclusion

The Department's decision to support the 51A report of September 30, 2017, for physical abuse and neglect by the Appellant on behalf of the subject child is **REVERSED.**

Linda A. Horvath
Linda A. Horvath, Esquire
Administrative Hearing Officer

June 5, 2018
Date

Barbara Curley
Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner