THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
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IN THE MATTER OF

MB & BB #2017 1383

FAIR HEARING DECISION

Appellants, MB ("MB") and BB ("BB"; collectively "Appellants"), appeal the Department of Children and Families (hereinafter "DCF" or "the Department") decision to support allegations of neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On September 29, 2017, the Department received a report which alleged neglect and physical abuse of J and A by MB, their mother. The basis of the reporter's concern was J's disclosure that MB choked him when he was bad and the reporter's concern that J recently exhibited sexualized behaviors, which he had done in the past, and the reporter felt was a reemerging issue. The reporter expressed concern that A exhibited sexualized behaviors, which led to concern for their supervision at home. The Department screened-in the report and conducted a response. On October 23, 2017, the Department made the decision to support allegations of neglect of J and A by the Appellants. The Department provided the Appellants with written notification of the decision and their right to appeal.

Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. A hearing was held at DCF Greenfield Area Office on February 6, 2018. In attendance were Maura Bradford, Administrative Hearing Officer; KA, DCF Supervisor; SW, DCF Response Worker; MB, Appellant; BB, Appellant.

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 digitally recorded and transferred to one (1) Compact Disc. The witnesses were sworn in to testify under oath.

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

The following evidence was entered into the record:

For the Department:

Exhibit A: 51A Report of September 29, 2017
Exhibit B: 51B Report completed on October 23, 2017 by SW

For the Appellant(s):

No Documentary Exhibits were submitted by Appellant

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

Findings of Fact

1. The Appellants are the parents of J and A. At the time of the report in question, the children were six (6) years old and four (4) years old, respectively. (Exhibit B, p. 1)

2. The Appellants were J and A's caregivers under Department policy and regulations. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00)

3. The Appellants were involved with the Department between November 3, 2015 and December 16, 2015, after the Department received a report which alleged sexual abuse of J by an unknown perpetrator. J completed a "SAIN"[1] interview

[1] SAIN: Sexual Abuse Investigation Network; a forensic exam conducted by a single specially trained interviewer from the District Attorney's Office, which is viewed by the Department, Assistant District

and did not disclose sexual abuse. The Department unsupported the allegations and the case closed following the Department's response. (Exhibit A, p. 6; Testimony of Appellants and SW)

4. At the time of the report in question, the cause of J's sexualized behavior was not known. J's sexualized behavior occurred intermittently. The Appellants and the school had different opinions regarding J's behavior, including whether it was normal exploratory behavior and how J's behavior overall should be treated. The Appellants spoke with J about his behavior. (Exhibit A; Exhibit B, p. 5; Testimony of SW and Appellants)

5. The behaviors referred to in the instant report as "sexualized" included: showing bellies and asking children to rub them together; pulling down pants and asking other children to pull down pants; showing his penis and asking children to show their penises and vaginas. (Exhibit B, p. 5)

6. During the response, the Department contacted the children's pediatrician. The Department did not receive a return call prior to the completion of the response.[2] I inferred from the pediatrician's lack of response and lack of prior reports regarding medical care that there were no concerns for the children's medical care. (Exhibit B, p. 9)

7. J and A were visible in the community and attended school. MB actively communicated with the school. Prior to the report in question, both J and A were evaluated to determine a need for academic support services. At the time of the report in question, J had an Individualized Education Plan (IEP).[3] J received one on one (1:1) support at school and met with the school psychologist as part of his IEP. There was daily documentation and communication regarding J's school day and his behavior. A also had an IEP. (Exhibit B, p. 6; Testimony of Appellants)

8. Prior to the report in question, the school advised the Appellants to seek therapy for J. MB completed an intake with J; however, decided not to utilize services after the clinician was quick to diagnose J with Attention Deficit Hyperactivity Disorder (ADHD) and recommended prescription medication. (Exhibit B, p. 6; Testimony of MB)

9. The Appellants generally utilized a homeopathic/holistic approach to care and were resistant to prescription medication for ADHD. The Appellants utilized a homeopathic doctor to identify and treat the "root cause" of J's behavior(s). MB reviewed literature regarding Attention Deficit Hyperactivity Disorder (ADHD) and ways to address and manage J's behavior. The Appellants had life

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Attorney, Victim Witness Advocate, and police from the jurisdiction where the alleged incident occurred. The interview is intended to limit the number of times a child is interviewed.

[2] A call was made to the pediatrician on the same day the Department concluded the response.

[3] J's IEP addressed academics, J's distraction, being behind in reading and writing and his distracting behavior in the classroom.

experiences which affected their perspective on therapy[4] and choice not to seek additional therapeutic services for J. (Exhibit B, pp. 5, 6; Testimony of Appellants)

10. On September 15, 2017, A drew a picture of a person with a penis, which was a new behavior for her. When asked about the picture, A stated "it was her dad's". On five (5) occasions between September 18, 2017 and September 29, 2017, J pulled down his pants and asked other children to do the same, which the school considered a reemergence of "sexualized behaviors" by J. The school discussed the behaviors with the Appellants during a meeting called by the school. During the meeting, MB reported J had taken a naked picture of A. The school inferred the children were not supervised when J took the picture of A. (Exhibit A, p. 3; Testimony of Appellants)

11. On September 29, 2017, the Department received a report which alleged neglect and physical abuse of J and A by the Appellant after J reported MB choked him when he was bad; due to concern for reemergence of J's sexualized behavior, the Appellants' failure to follow suggestions to obtain help, and after A drew a picture of person with a penis that she said was her father. The Department screened-in the report and conducted a response. (Exhibit A; Exhibit B; Testimony of SW)

12. During the response, the Department learned J was spanked with a wooden spoon. BB corroborated that J was disciplined twice using a wooden spoon, including after he was caught taking a picture of A and his tablet was taken away for punishment. The Appellants were not proponents of physical discipline but believed calculated discipline (e.g. three hits on the butt) was an appropriate punishment for what J had done. J was not injured when he was spanked with the spoon. J admitted that he made up the story about his mother choking him. (Exhibit B. pp. 5-7; Testimony of BB and SW)

13. During the response, BB was not interviewed. At the Hearing, BB did not discount J's behavior. BB agreed the [sexualized] behavior needed to be corrected and that he and MB addressed the behavior when it occurred and tried to prevent the behavior from happening. J's statements during the response corroborated the Appellants', where J volunteered that he knew his body parts were supposed to be covered and he should not show [his body parts] to people; and, when he "looked down and in a quiet voice" during his response to questions about whether anyone had asked to see his penis or had taken naked pictures of him and admitted only he had done those things.[5] (Exhibit B, p. 7; Testimony of BB)

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[4] BB testified that J's behavior was [already being] addressed by the school psychologist and he was concerned that "rehashing" the behavior would induce rather than reduce the behavior. MB concurred with BB that "perseverating" on the behavior would make it worse, where "He seems to do it and gets big rise and reaction, then does it more and more". Both testified that J's did not exhibit sexualized behavior following the report in question.

[5] Considering J's response, the Department concluded J "appears to be ashamed of his behaviors". (Exhibit B, p. 10)

14. During the response the Department contacted the local police department and learned that in January 2017, there was a call to the Appellants' home after passersby called about children "playing in the road".[6] No report pursuant to M.G.L. c. 119 §51A was filed in conjunction with the police response. The Department took the police response into consideration in reaching the conclusion that the Appellants failed to provide minimally adequate supervision for the children. (Exhibit B, pp. 4, 10; Testimony of BB)

15. On October 23, 2017, the Department supported allegations of neglect of J and A by the Appellants. The Department determined the Appellants failed to provide the children with minimally adequate supervision, emotional stability and growth. The basis for the Department's decision was J's continued sexualized behavior, opportunity for J to take a naked picture of A and use of inappropriate discipline. The Department determined that the Appellants' failure to address J's sexualized behaviors and hitting J with a wooden spoon created an environment that was not conducive to his emotional stability and growth and created a risk of harm or injury. (Exhibit B, pp. 9, 10; Testimony of SW and KA; 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

16. While the Department determined that using a wooden spoon for discipline did not constitute physical abuse it was considered "inappropriate discipline" and contributed to the Department's finding of neglect. "Inappropriate discipline" is not part of the definition of neglect and cannot be credited as a viable argument. (Exhibit B, p. 10, 11; 110 CMR 2.00)

17. In reaching the decision that the Appellants neglected the children, the Department considered that when a child has "sexual issues" that are not addressed, it "creates risk of consequences for the child when the child moves through life, including incarceration". The Department concluded that the Appellants had not addressed the behaviors other than speaking with J and spanking him with a spoon and had not followed through with services recommended by the school, including not allowing A and J to be alone together. (Exhibit A, p. 3; Exhibit B, p. 6; Testimony of SW)

18. After a review of all the evidence and for the following reasons, I find the Department did not have reasonable cause to support an allegation of neglect of J and A by the Appellants (also see Analysis):

    a) There were no concerns for the Appellants' ability to provide minimally adequate food, clothing, shelter, medical care and other essential care for J and A (110 CMR 2.00 and 4.32; Testimony of SW);
    b) The children were visible in the community, received supportive services at school and the Appellants were involved with the school where those services were concerned, and;

[6] BB's response to that incident is reflected in the record.

c) Relative to the reported concerns, the Department did not have evidence that the Appellants failed to provide minimally adequate care for J and A, including minimally adequate supervision, emotional stability and growth; (110 CMR 2.00 and 4.32; Exhibit B, p. 10, 11), and;
d) The Department did not demonstrate that the Appellant's actions, including the decision not to obtain therapeutic care and medication for J, placed J and/or A in danger or posed a substantial risk of harm to the children's safety or well-being. (DCF Protective Intake Policy #86-015, rev. 2/28/16)

19. In reaching the instant decision, the Hearing Officer gave due weight to the clinical decision made by the Department. 110 CMR 4.32; 110 CMR 10.29(2)

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 caregiver 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. 110 CMR 2.00 and 4.32; 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 caregiver; 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

"Neglect means 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition"; 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

Danger is "A condition in which a caregiver's actions or behaviors resulted in harm to a child or may result in harm to a child in the immediate future." DCF Protective Intake Policy #86-015, rev. 2/28/16

Risk is "The potential for future harm to a child." 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) 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 were caregivers for J and A under Department regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Department determined the Appellants neglected J and A. The Department determined the Appellants failed to provide the children with minimally adequate supervision, emotional stability and growth. The basis for the Department's decision was J's continued sexualized behavior, opportunity for J to take a naked picture of A and the Appellants' use of inappropriate discipline. The Department determined that the Appellants' failure to address J's sexualized behaviors and hitting J with a wooden spoon created an environment that was not conducive to his emotional stability and growth and created a risk of harm or injury. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellants asserted that they addressed J's sexualized behaviors as they emerged, chose alternative methods including homeopathic intervention to address J's other behavioral issues and provided a structured home environment for the children and for these reasons, that they did not neglect J and A.

The Department determined that the Appellants' responses were inadequate where they disregarded the school's recommendations that J get therapy, that the Appellants actions were potentially injurious where they utilized inappropriate discipline; and, that the Appellants' failure to properly address J's behavior jeopardized J and A's safety and well-being, where J's behavior seemed to be increasing to involve A and other children at school. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellants did not dispute that J exhibited inappropriate behavior. The evidence suggests the Appellants did what they felt was best; they constructively attempted to

correct J's behavior by talking with him about it. When J's behavior expanded to include taking a picture of his sister, the Appellants administered physical discipline, which they considered reasonable and appropriate under the circumstances (i.e., "the punishment fit the crime"). Although the Department disagreed with the Appellants' use of physical discipline and considered such discipline "inappropriate", there was no indication that the discipline was abusive or resulted in a demonstrable impact upon J's emotional stability and growth. The evidence suggests the Appellants provided minimally adequate care, including minimally adequate supervision and emotional stability for the children. 110 CMR 2.00

For these reasons and those enumerated in the above Findings of Fact, this Hearing Officer has determined the Department's decision was not based on reasonable cause or supported by substantial evidence. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); also see Wilson v. Department of Social Services, 65 Mass. App.Ct. 739, 843 N.E.2d 691. Additionally, there was no evidence that the Appellant's actions or inactions placed J and A in danger or posed a substantial risk to J and A's safety or well-being, as required to support an allegation of neglect. DCF Protective Intake Policy #86-015, rev. 2/28/16

Conclusion and Order

Appellants have shown by a preponderance of the evidence that the Department's decision to support allegations of neglect on behalf of J and A was not made with a reasonable basis; therefore, the Department's decision is REVERSED.

Maura E. Bradford
Administrative Hearing Officer

May 30, 2018
Date

Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner