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

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(IN THE MATTER OF E.S. FH #2018-0237)

HEARING DECISION

Procedural History

The Appellant, E.S., appealed the decision of the Department of Children and Families [hereinafter "the Department" or "DCF"], to support for physical abuse of N, pursuant to M.G.L., c.119, §§51A & 51B.

On February 1, 2018, the Department received a 51A Report from a reporter alleging physical abuse of N by the Appellant, his father. The allegations were screened in and assigned for a non-emergency 51B response to DCF response social worker, C.L. On February 9, 2018, following the response, the Department supported for physical abuse of N by the Appellant, approved the decision on February 12, 2018, and kept the family's case open, which was pending the completion of an assessment out of the DCF Hyde Park Area Office when the Appellant's Hearing was held.

The Appellant learned of the decision and his appeal rights, and in response filed a request for Fair Hearing ["Hearing"] by letter dated February 21, 2018, pursuant to 110 CMR 10.06. The Appellant's request for Hearing was granted and held on April 4, 2018 at the Department's Park Street Area Office in Dorchester, MA. Present were the DCF Response Supervisor, Y.S., and the Appellant; both of whom were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a compact disk [CD].

Admitted into evidence for the Department was the DCF 51A Report of February 1, 2018 [Exhibit A] and the corresponding 51B Response Supported and Approved on February 9, 2018 and February 12, 2018, respectively [Exhibit B]. Admitted into evidence for the Appellant was his Request for Hearing [Exhibit 1] and Appellant's Statement [Exhibit 2]. The Hearing record was closed on April 4, 2018.

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

Pursuant to110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney-client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Standard of Review

The issue 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 51B 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. [110 CMR 10.05]

For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issues are whether there was reasonable cause to believe that a child had been abused or neglected [110 CMR 10.05] and whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being or the person was responsible for the child being a victim of sexual exploitation or human trafficking. [DCF Protective Intake Policy #86-015 Revised 2/28/16]

Findings of Fact

1. The Appellant and his wife, N.M., are the father and mother, respectively, of two sons – reported child eight year-old N and twelve year-old N. The Appellant also has two other children – a twelve year-old daughter named A, who was going back and forth between the Appellant and her mother's homes, and a twenty two year-old son named E Jr., who is in college. [Exhibit A; Exhibit B, p.1; Testimony of the Appellant; Exhibit 1, p.2; Exhibit 2]

2. The Appellant is a caregiver of his children, consistent with the Department's definition of that term within its Protective Intake Policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015 Revised 2/28/16

3. The Appellant recently resigned from being the Director of a residential program and has started a new career with the commuter rail. [Exhibit B, p.3; Testimony of the Appellant]

4. The Appellant has a history with the Department, which includes a 2007 support for neglect by him of his daughter, A, due to a verbal and physical altercation with the child's mother; an unsupported 51A Report for neglect of a child at a facility where he worked in 2017; and, an unsupport for physical abuse of now twelve year-old N in March 2015. As to the last, N was caught cheating at school at which time the child expressed fear that he would be hit. During the 51B response, N recanted his statement and the Appellant denied hitting his sons with a belt or any object. The Appellant maintained at Hearing that it did not happen. [Exhibit B, pp.1-2 Testimony of the Supervisor; Testimony of the Appellant]

5. All three of the Appellant's minor children have been in the METCO Program in [redacted] since first grade. They are bused outside of their community in Boston to [redacted]s public schools. [Testimony of Supervisor; Testimony of the Appellant; Exhibit B]

6. Eight year-old N and twelve year-old N both have exhibited behavioral issues at school; though the older of the two had grown out of some of these behaviors by the time of the Department's involvement in February 2018. Because eight year-old N exhibited some behavior issues at school, he participated in individual sessions with the METCO social worker, K.D., and the school had developed a behavior plan for him. At the time of the Department's involvement in 2018, eight year-old N's behaviors had escalated and the METCO Director, B.H., who was familiar with the family, reached out to the Appellant to see, if there had been any changes at home, which the Appellant denied. [Exhibit B, pp.2 & 4-5; Testimony of the Appellant; Testimony of the Supervisor]

7. N's METCO social worker, K.D., reported that N is very bright and has a lot of maturity about him, but tends to goof off, not respond to redirection from his teacher, is disruptive in class, and uses inappropriate language. There was an issue recently, when the teacher had to intervene because N and another child looked like they may get into an altercation. The METCO social worker stated that N has a daily report that he brings home and, although he has not reported fear to her of any consequence if it is not good, it is very important to him that he bring home a good report. [Exhibit B, p.5]

8. Other than the usual sibling bickering, the Appellant and his wife do not have issues with eight year-old N at home. [Exhibit B, p.3; Testimony of the Appellant]

9. On [Wednesday], January 31, 2018, eight year-old N was acting in such a way that his teacher had marked something on his behavior chart, resulting in the loss of his free time. This triggered a lot of anger in the child and his behavior escalated into turning over a chair. The school almost did not put him on the bus home, but he did calm down. The school e-mailed the Appellant about the incident. On [Thursday], February 1, 2018, [upon his return to school], N told a school peer that he was whooped eight times, one for each year of his age, which his teacher overheard. N was also heard telling other students that their behavior would result in a whooping. The teacher went to the assistant principal and N was brought to the school social worker, K.V. The child confirmed with this social worker that he was "whooped" with a belt by the Appellant. This information resulted in the filing of the 51A Report of February 1, 2018 with the Department and the resulting 51B response by response social worker, C.L. [Exhibit A; Exhibit B; Testimony of the Supervisor]

10. No marks were visible on the child's arms and N denied having any marks or bruises from being whooped. [Exhibit B, p.2]

11. The response social worker conducted a home visit on February 7, 2017 and interviewed the Appellant, mother, and all three children. The below is a summary of the more relevant responses. [Exhibit B, pp.3-4 & 6-7; Testimony of the Supervisor]

a) Twelve year-old N reported that he heard that the Appellant had hit his [younger] brother, N. He stated that this is not typical, but it has happened. He stated that the Appellant has not been abusive to him or his siblings. He said that, when he was younger, he used to get into a lot of trouble at school so there were a few times when the Appellant had spanked him on his clothed bottom with a belt. He stated that he is older now and it has not happened in a couple of years.

b) Subject child, eight year-old N, reported that he sometimes gets in trouble at school and has a behavior plan. He said he got in trouble at home, because his parents were notified by the school that he had pushed over a chair when he was mad and lost his free time. The Appellant, his father, whooped him, meaning he hit him with a belt on his butt while he was wearing clothes. And took away his electronics. N said that the Appellant did not hurt him; it did not tickle, but he was not hurt. He stated that he did not like to be hit with a belt, though. N reported this had happened before; a long time ago, maybe last school year. The child stated that he was not afraid of his parents. They do not hurt him or abuse him, and he has never sustained any marks from being hit. He said he has never been hit on his bare skin. He reported being happy and safe with his parents.

c) Daughter A said she knows her brothers get into trouble at school sometimes when they act up, but she has not seen them get hit. She stated she does not get hit and feels safe in the home and has never felt scared for her or her brothers' safety.

d) The Appellant reported disciplining eight year-old N with a belt the day of the reported incident. He and mother reported having conversations with N about his behavior and so, when notified by the school that N had shoved or pushed over a chair, the Appellant said he reprimanded N, hit him on his clothed buttocks several times, took away his electronics for two weeks, sent him to bed, and talked with him about it the next day. The Appellant did not believe he hit him eight times. He did not hurt or injure the child. Both the Appellant and mother said that they do not typically use physical discipline; this was done as a last resort, because flipping over the chair in anger would have put other children at risk. The Appellant said using a belt on his son was within his rights to do so. They had also exhausted other methods of discipline. The Appellant and mother said they talk with their children and take away privileges; this is the main form of discipline used with the children. The Appellant said they also use a lot of incentives as a goal to get them to do what they need to do using positive reinforcements. The Appellant stated he has never hurt his son. The Appellant said he felt that [redacted] has a different culture when it comes to the children; N was enabled to get away with things when he was younger, because he was cute, and now that he is getting older, he is not so cute. He gets a lot of attention and so, when he does not get it immediately from his teachers, he gets angry. The Appellant said that his actions toward N that day were an act of discipline used as a last report. He said he has spanked N, but could not recall the last time he did this as it was months ago.

12. The Appellant's testimony at his Hearing of April 4, 2018 was similar to the interview he had with the response social worker at his home. He acknowledged the incident; saying that he hit N four times on his bottom, but they spoke before and after his punishment, and there

were no bruises. N was punished in this way because he almost injured a girl, when he flipped the chair over. The Appellant said that his usual method is to talk things out, remove the electronics. He reported that this is N's first "public" school, which is a different setting for him. The Appellant said it has been explained to him that what was acceptable before is not acceptable in [redacted], inferring that the child has to adjust to a new culture which presents difficulty. The Appellant said there are also race issues, as [redacted] has largely a white population and described N as having a "high yellow complexion". The Appellant reports that N feels he is being targeted. [Testimony of the Appellant]

13. The Appellant reported using reasonable force to discipline N, left no bruising, and the child was not harmed physically or emotionally. The Department's decision, to support for neglect of eight year-old N impacts his community involvement as a volunteer coach and mentor. [Exhibit 2; Exhibit 1, p.2]

14. There is no evidence in record that the Appellant was angry when hitting N with a belt. [Administrative Hearing Record]

15. The Appellant is invested in the care of his children, engages his sons in sporting activities; is committed to the children's educational needs, communicates well with their school, and meets with the school on N's behavior plan; and interacted well with the children, who appeared happy and safe in the home. [Exhibit B; Testimony of the Appellant]

16. On February 9, 2018, following the 51B response, the Department supported for physical abuse of N by the Appellant because there is a pattern of the Appellant using discipline on his two sons, first twelve year-old N and then eight year-old N. Although there was a previous unsupport for physical abuse of now twelve year-old N by the Appellant [Finding #4], this same child reported during the 2018 51B response that the Appellant also used a belt on him. In addition, the Appellant self -reported having knowledge about techniques to utilize with eight year-old N, because he worked in a residential facility; was overwhelmed with the child's behaviors [although the Appellant denied this at Hearing]; and, self-reported using a belt to punish his eight year-old son. The Department acknowledged that the Appellant was well-meaning, but his actions toward eight year-old N created the potential for risk of injury to the child. [Exhibit B; Testimony of the Supervisor]

17. The Hearing Officer finds that the Appellant's actions, in hitting his eight year-old son, N, on his buttocks four times with a belt, over his clothes, did not place the child in danger or pose a substantial risk of physical harm. *See Analysis*.

Analysis

A party contesting the Department's decision, to support 51A Report for physical abuse, may obtain a Hearing to review the decision made by the Area Office. [110 CMR 10.06] The Appellant requested a Hearing, which was granted and held on April 4, 2018.

Policies, regulations, and case law applicable to this appeal include, but are not limited to, the following:

After completion of its 51B investigation, the Department shall make a determination as to whether the allegations in the report received are supported or unsupported. To support a report means that the Department has reasonable cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker did occur. To support a report does not mean that the Department has made any findings with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker(s) did inflict abuse or neglect upon the child(ren) in question. Reasonable cause to believe is defined as 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. [110 CMR 4.32]

"[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

The 51A report under appeal is supported for physical abuse. 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 ... Physical injury means 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, circumstances under which the injury occurred, and the number and location of bruises; or addiction to drugs at birth; or failure to thrive. [110 CMR 2.00]

The Court, in Cobble v. Commissioner of the Department of Social Services, 430 Mass. 385, 719 N.E. 2nd 500 (1999), considered the issue of "substantial risk of injury" and, in that case, determined that there was no reasonable cause to believe that the Appellant's actions created a substantial risk of physical injury to his son. The factors considered in that case included the act in question (disciplining by striking the child's clothed buttocks with a leather belt), the child's age (9), the lack of any prior injury from the same type of discipline, the frequency of this method of discipline (5 or 6 times over 7 months), the child's medical condition (a muscle condition requiring back and leg braces and physical therapy), the level of force used (a "solid smack"), the actual effect of the spankings (temporary red marks) and the likelihood that this method of discipline would continue to be used. The court determined that those factors, individually and/or collectively, were insufficient to support a finding of physical abuse.

The SJC, in Commonwealth v. Jean Dorvil 472 Mass,1 (2015), recognized the parental privilege defense in a criminal case to use reasonable force in disciplining a minor child; that the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor,

including the prevention or punishment of the minor's misconduct; and, the force used neither causes nor creates a substantial risk of causing physical harm [beyond fleeting pain or minor, transient marks], gross degradation or severe mental distress. In the conclusion section of the opinion, the Court stated that the balance established with this parental privilege may not be perfect but "to the extent that is so, the balance will tip in favor of the protection of children from abuse inflicted in the guise of discipline".

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 children 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. One such example is neglect that has led to a serious physical or emotional injury. Protective Intake Policy #86-015 [2/28/16]

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. Protective Intake Policy #86-015 [2/28/16]

Danger: A condition I which a caregiver's actions or behaviors have resulted I harm to a child or may result in harm to a child in the immediate future. Protective Intake Policy #86-015 [2/28/16]

A substantiated concern finding means there was reasonable cause to believe that the child was neglected and the actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being. Examples include neglect that resulted in a minor injury and the circumstances that led to the injury are not likely to recur, but parental capacities need strengthening to avoid future abuse or neglect of the child; neglect that does not pose an imminent danger or risk to the health and safety of a child; and, educational neglect. Protective Intake Policy #86-015 [2/28/16]

An unsupported finding means there is not reasonable cause to believe that a child(ren) was abused and/or neglected, or that the child(ren's) safety or well-being is being compromised; or the person believed to be responsible for the abuse or neglect was not a caregiver, unless the abuse or neglect involves sexual exploitation or human trafficking where the caregiver distinction is not applied. Protective Intake Policy #86-015 [2/28/16]

Caregiver is defined as:
(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 other person entrusted with responsibility for a child's health or welfare, whether in the child's home, a relative's home, a school setting, a child care setting (including babysitting), a foster home, a group care facility, or an other comparable setting.

As such, the term "caregiver" includes, but is not limited to, school teachers, babysitters, school bus drivers, and camp counselors. The "caregiver" definition should be construed broadly and inclusively to encompass any person who, at the time in question, is entrusted with a degree of

responsibility for the child. This specifically includes a caregiver, who is a child such as a babysitter under the age of 18. [Protective Intake Policy, #86-015, Revised 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) 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

After review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Appellant in the matter of physical abuse of his son, eight year-old N. See Findings #1-#17 and the below discussion.

The Hearing Officer reviewed Cobble v. Commissioner of the Department of Social Services, and the criminal case, Commonwealth v. Jean Dorvil , for guidance in making a decision in the instant matter. Although the Appellant's actions in hitting an eight year-old child with a belt lacked good judgment, particularly given his professional experience, and the child did not like it, the Hearing Officer found no evidence of anger nor of injury and such action was preceded and followed by conversation with the child about his behavior.

Further, the Hearing Officer finds the evidence insufficient to meet the Department's policy definition of a support for physical abuse of N. Such evidence, that the child was in danger or the Appellant's actions posed a substantial risk to the child's safety or well-being would be necessary to support the allegations, as opposed to the Department making a finding of concern, which also requires that the children were neglected, but there is no evidence of immediate danger to the child's safety or well-being. [DCF Protective Intake Policy #86-015, Revised 2/28/16] N was clear, when interviewed by the response social worker, that the Appellant did not hurt him; it did not tickle, but he was not hurt; that he was not afraid of his parents; that they do not hurt him or abuse him; and, he reported being happy and safe with his parents.
The burden is on the Appellant to show, by a preponderance of the evidence, that the Department's decision, to support for physical abuse of N by the Appellant, was not in conformity with Department's regulations and policy. [110 CMR 10.23] The Appellant met his burden of proof in this appeal.

Order

1. **The Department's decision of February 9, 2018, to support the 51A Report for physical abuse of eight year-old N by the Appellant, his father, is REVERSED.**

Frances I. Wheat
Administrative Hearing Officer
Office of the General Counsel

Date: 5/8/2018

Sophia Cho, Supervisor
Fair Hearing Unit
Office of the General Counsel

Date: _____

Linda S. Spears, Commissioner