

**THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
DEPARTMENT OF CHILDREN AND FAMILIES  
CENTRAL ADMINISTRATIVE OFFICE  
600 WASHINGTON STREET  
BOSTON, MASSACHUSETTS 02111**

Linda S. Spears  
Commissioner

Voice: (617) 748-2000  
FAX: (617) 261-7428

IN THE MATTER OF )  
 )  
ND ) **FAIR HEARING DECISION**  
 )  
FH #2017-0730 )  
 )

The Appellant in this Fair Hearing is ND (hereinafter "ND" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegation of neglect pursuant to M.G.L. c. 119, §§51A and B.

**Procedural History**

On April 25, 2017, the Department received a 51A report alleging neglect of A (hereinafter "A" or "the children") and J (hereinafter "J" or the children") by the Appellant. The Department conducted a response and, on May 17, 2017, the Department made the decision to support the allegation of neglect by the Appellant. The Department notified the Appellant of its decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on August 29, 2017 at the DCF New Bedford Area Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the Hearing to afford the Appellant to submit additional documentation, which was received, reviewed and entered into evidence. The record closed on September 15, 2017.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
ND	Appellant
JB	Witness/Children's father
JH	Department Response Social Worker
KT	Department Supervisor

In accordance with 110 CMR 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 recorded pursuant to DCF regulations. 110 CMR 10.26

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

For the Department:

Exhibit A DCF Intake Report/51A Report, dated 4/25/2017

Exhibit B DCF Child Abuse/Neglect Non-Emergency Response, completed 5/16/2017

For the Appellant:

Exhibit 1 Appellants request for Fair Hearing, dated 6/8/2017

Exhibit 2 Correspondence from ██████████ Health, dated 9/6/2017

The Hearing Officer need not strictly follow the rules of evidence....Only evidence which is relevant and material may be admitted and form the basis of the decision. 110 CMR 10.21

**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) 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

**Findings of Fact**

1. The subject children of this Fair Hearing are A and J; at the time of the subject 51A report, A was two (2) days old and J was five (5) years old. (Exhibit A, p.1; Exhibit B, p.1)
2. JB is the father of the children. The Appellant is the children's mother; therefore, she was a caregiver pursuant to Departmental regulation and policy 110 CMR 2.00 and DCF Protective Intake Policy #86-015, rev. 2/28/16. (Fair Hearing Record)

3. Between 1997 and 2007, the Appellant was a child consumer with the Department. The Appellant had no adult involvement with the Department as it pertained to J. (Exhibit A, pp. 4-5; Exhibit B, p.1)

4. On April 25, 2017, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging neglect of the children by the Appellant. The Appellant tested positive for marijuana on 10/13/16, 11/10/16, 2/8/17, 3/3/17 and upon A's delivery on [REDACTED]. The Appellant maintained that she stopped smoking marijuana when she learned that she was pregnant with A in September 2016. The Appellant's OB-GYN physician reportedly told her that marijuana could stay in her system for up to six months. The Appellant reported that she smoked marijuana to assist with sleep. A was born full term; she weighed 5lbs 2oz, with APGAR scores of eight (8) and nine (9). The child's urine was positive for marijuana; the meconium was pending. There are no concerns with A. A was in the room with the Appellant who was appropriate and bonding with the child. (Exhibit A, p.3; Testimony JH)

5. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to JH (hereinafter "JH") Social Worker from the DCF New Bedford Area Office. (Exhibit B, Testimony JH)

6. At the end of its response, the Department supported the aforementioned report for neglect of the children by the Appellant. The Department based this determination on the following information:

- A's prenatal exposure to marijuana. (Exhibit B, pp.5-6; Testimony JH)
- While the child's meconium testing was negative, the Appellant tested positive for marijuana during prenatal visits on on 10/13/16, 11/10/16, 2/8/17, and 3/3/17. (Exhibit A, p.3; Exhibit B, pp.5-6; Testimony JH)
- The Appellant and A testing positive for marijuana upon A's delivery on [REDACTED]. (Exhibit A, p.3; Exhibit B, pp.5-6; Testimony JH)
- The Appellant's admission that she smoked multiple "blunts" over the course of the day on the weekends. The Appellant maintained that her OB-GYN physician told her that the frequency of her use could be detected up to six (6) months after she discontinued her marijuana use. The Department determined that this was not possible (Exhibit A, p.3; Exhibit B, pp.2 & 5; Testimony JH)
- The Appellant "likely" being "under the influence of marijuana" while being a sole caretaker for J while JB worked in light of her "admittedly frequent marijuana use." (Exhibit B, pp.5-6; Testimony JH)

7. A positive urine screen for marijuana was indicative of recent use. (Testimony KT; Testimony JH; Exhibit B, pp. 3 & 6)

8. A meconium test reflects the unborn child's exposure to substances while in utero, capturing the months preceding delivery. (Testimony KT; Testimony JH) A's meconium test result was negative. (Testimony JH; Exhibit B, p.6)

9. While JH confirmed the positive lab results with [REDACTED] Hospital, (Exhibit B, pp. 2 & 6) no contact was made with the Appellant's OB-GYN regarding the positive screens for marijuana;

the OB-GYN was reportedly aware of the positive test results. The DCF Regional Nurse was not contacted during the course of the 51A response to speak to the aforementioned nor to the issue regarding A's meconium test result. (Testimony JH)

10. Throughout the 51A response and Fair Hearing, the Appellant maintained that she had not used marijuana since September 2016. (Testimony Appellant; Exhibit 1; Exhibit B, p.4) JB had no concerns that the Appellant used marijuana while in a caregiving role of J. JB spoke of his and the Appellant's devotion and commitment to their children. (Testimony JB)

11. JH's interview with J yielded no concerns for the Appellant's marijuana use or for her care and well-being. (Exhibit B, p.3) The record was absent any information from J's school or pediatrician. (Exhibit B, pp. 4&7) Additionally, the paternal grandmother who would care-take J on some weekends was not contacted. (Testimony JH)

12. There were no concerns for A's well-being following her birth. (Exhibit A, p.3) A's pediatrician saw A on April 28, 2017 for her newborn visit. The pediatrician was aware of J's exposure to marijuana while in utero. At A's May 8, 2017 appointment, A was gaining weight and feeding well. Her next appointment was scheduled for June 1, 2017. (Exhibit B, p.7; Testimony JH)

13. The record was absent evidence to reflect a demonstrable impact of the Appellant's use of marijuana on either child. (Exhibit A; Exhibit B; Testimony JH) While acknowledging the Department's concerns regarding supervision, safe sleep, and parenting ability, (Testimony JH; Testimony KT) these concerns are speculative. The Department's assertion that the Appellant's use of marijuana placed the children "at risk of neglect" (Testimony JH) was inconsistent with Departmental regulations. In order to "support" a 51A report for neglect, the Department must have reasonable cause to believe that an incident of neglect occurred. (110 CMR 2.00, 4.32)

14. In light of the totality of evidence in this case, I find that there was insufficient evidence to support the allegation of A and J as there was no reasonable cause to believe that neglect occurred and there was no evidence that the actions or inactions by the Appellant A and J in danger or posed substantial risk to their safety or well-being. (110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16) (Fair Hearing Record)

### Applicable Standards

"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 any 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 age 18. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016

“[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §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 §51B. Id. at 64; M.G.L. c. 119, §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

“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)

“Neglect” is the 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016

#### Substance Exposed Newborn (SEN)

A newborn who was exposed to alcohol or other drugs in utero ingested by the mother, whether or not this exposure is detected at birth through a drug screen or withdrawal symptoms. A SEN may also be experiencing Neonatal Abstinence Syndrome (NAS), which are symptoms and signs exhibited by a newborn due to drug withdrawal. NAS is a subset of SEN. Fetal Alcohol Syndrome (FAS) as diagnosed by a qualified licensed medical professional is also a subset of SEN. DCF Protective Intake Policy #86-015, rev. 2/28/2016

A finding of “support” requires that there be: 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. 2/28/2016

“Danger” is defined as a condition in which a caregiver’s actions or behaviors have 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 defined as the potential for future harm to a child. DCF Protective Intake Police, rev. 2/28/2016

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. 2/28/2016

### Analysis

It is undisputed that the Appellant was a caregiver for the children. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016

The Appellant contested the Department's decision to support the allegation of neglect on behalf of the children. The Appellant maintained that she ceased marijuana use after she learned that she was pregnant with A in September of 2016. Prior to this, the Appellant admittedly used marijuana on the weekends; however, she maintained not using while in a caregiving role of J. J had no knowledge of the Appellant's marijuana use nor did she observe any behavioral changes with the Appellant. Absent the 51A report filed following A's positive screen for marijuana at birth, there were no reported concerns for A, who was visible within the community. There was insufficient evidence to suggest that the Appellant failed to ensure either A's or J's safety and well-being. 110 CMR 2.00

At birth, A was a substance-exposed newborn, detected through a drug screen. It was reasonable for the Department to screen in and respond to the 51A report to ensure the children's safety and well-being. DCF Protective Intake Policy, rev. 2/28/2016 "The purpose of the mandatory reporting regime under G.L.c. 119, § 51A is to provide the DCF with information necessary to protect a child's health, safety, and development before actual harm is done." B.K. v. Department of Children & Families, 79 Mass. App. Ct. 777, 782 (2011) In this case, A was born full term and did not experience any withdrawal symptoms. Subsequent visits to the pediatrician revealed good weight gain and no concerns for the child. A home visit conducted by the Department revealed no concerns.

When making a decision to support a report of abuse or neglect, the Department must consider the entire record, including whatever in the record fairly detracts from the weight of the evidence supporting its conclusion. Arnone v. Commissioner of the Department of Social Services, 43 Mass. App. Ct. 33, 34 (1997); the record does not reflect that the Department did so in this case. The Department did not provide sufficient evidence that the Appellant's use of marijuana while A was in utero impacted the child or that it had placed the child in medical danger or risk of injury. While, the infant did test positive for marijuana in her urine, this in itself was not neglect.

Moreover, the Department did not provide sufficient evidence that the Appellant's use of marijuana impacted J or that it had placed the child in danger or risk of injury.


For the Hearing Officer to uphold the Department's decision to support an allegation there must be substantial evidence supporting the Hearing Officer's conclusion that the Department had reasonable cause to believe the Appellant neglected the child. Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006). The Appellant demonstrated through a preponderance of evidence that she was able to meet the children's needs. The Department's concern for the Appellant's *possible* (emphasis added) future actions or inactions, thereby placing the children "at risk for neglect," does not meet the Department's definition of neglect. 110 CMR 2.00

"... When reviewing a support decision or an Alleged Perpetrator listing, the hearing officer may consider information available during the investigation and new information subsequently discovered or provided that would either support or detract from the Departments decision." 110 CMR 10.21 (6)

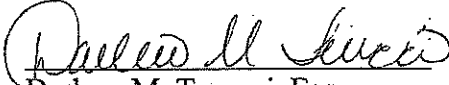
The evidence was insufficient to determine that the Appellant failed to provide less than "...minimally adequate...care" of the children. 110 CMR 2.00 Additionally, there was no information that the actions or inactions by the Appellant placed the children in danger or posed substantial risk to their safety or well-being. Without such information, the Department lacked the evidence necessary to support findings of abuse or neglect per its regulations and policies. 110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/2016

**Conclusion and Order**

The Department's decision to support the 51A report of neglect on behalf of A and J by the Appellant is **REVERSED**.

  
Carmen Temme  
Administrative Hearing Officer

1/23/18  
Date

  
Darlene M. Tonucci, Esq.  
Supervisor, Fair Hearing Unit

\_\_\_\_\_  
Date

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Linda S. Spears  
Commissioner