

**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

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(IN THE MATTER OF)
(EO & RO)
()
(FH # 2017-0008)
()

HEARING DECISION

Procedural History

The Appellants in this Fair Hearing are EO and RO. The Appellants appeal the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support an allegation of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On December 5, 2016 the Department received a 51A report from a mandated reporter alleging neglect of G and J ("Children") by EO. During the course of the Department's subsequent response, an allegation of neglect of G by RO was incorporated into the Department's response. The allegations of neglect of G by both EO and RO were supported. The allegation of neglect of JO by EO was not supported. The Department informed the Appellants of its decision and of their right to appeal the Department's determination. The Appellants made a timely request for a Fair Hearing under 110 C.M.R. 10.06

The Fair Hearing was held on April 25, 2017 at the Department of Children and Families' South Central Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
AL	Appellants' Attorney
EO	Appellant
RO	Appellant
KZ	Response Worker
SS	Response Worker
SG	DCF Supervisor

In accordance with 110 C.M.R. 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 on a digital voice recorder, pursuant to 110 CMR 10.26

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

For the Department:

Exhibit A: 51A Report received 12/5/2016

Exhibit B: 51B Response completed 12/22/2016

For the Appellants:

The Appellants did not submit any documentary evidence. They did submit a post-hearing memorandum that was included into the record.

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)

Statement of the Issue

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. DCF Protective Intake Policy #86-015 Rev. 2/28/16

Findings of Fact

1. EO and RO are the parents of G and J. Appellant EO is the children's step-father and Appellant RO is the children's biological mother. At the time of the 51A report, G was fourteen years old and J was eleven years old. In accordance with the regulations

and policies that govern these proceedings, I find that the Appellants are caregivers for G and J. (Exhibit A p.1-3, Exhibit B p.1-2, Testimony of KZ)

2. On 12/5/2016, G's biological father contacted a mandated reporter who has contact with G. The father told this reporter that G had been expressing concerns about EO's interactions with her. The reporter then spoke with G, who said that EO would place his hands on her hips, poke her belly with his finger, stroke her chin and say "Your skin is so soft." She further said that EO has forced G to hug him, and that RO forces her daughter to kiss EO on the cheek. When asked, G stated that she felt like the contact was sexual. G told the reporter that E had not touched her privates. I credit G's statements to the reporter and to the Department's Response Worker. Her statements remained consistent over time and included detailed information of EO's conduct. (Exhibit A p.3, Exhibit B p.2, Testimony of KZ)
3. During the course of the Department's response, G stated that EO's actions had begun to make her feel uncomfortable approximately a year and a half before the 51A filing. G reiterated the details she had provided to the reporter. She further elaborated about an incident during the past Thanksgiving where EO "got drunk" and was touching and grabbing a female cousin, M. Reported child G then stated that M eventually went upstairs with G in order to get away from EO. Neither Appellant RO nor J were present during this incident. (Exhibit B p.4-5, Testimony of KZ)
4. G stated that when she tried to talk with her mother, RO, about her concerns regarding EO, her mother became very angry and told G she was lying. G stated that she had received text messages from her mother, telling her to stop talking about the issue and that if she told anyone, she would regret it. Her mother took away her cell phone as punishment and she had to hide her iPod in order to text her father. Her mother told G that EO was just being affectionate, but G stated that it feels "creepy". The Department's Response Worker observed these text messages. (Exhibit B p.5,12 Testimony of KZ)
5. G also told the Department's Response Worker that EO drinks alcohol and that his behavior changes when he is drunk. G stated that he becomes "touchy feely" or gets "really mad about nothing". (Exhibit B p.5, Testimony of KZ)
6. When interviewed by the Department's Response Worker, RO stated that "G is not usually one to make things up". I find that G does not have history of making false allegations. (Exhibit B p.11, Testimony of KZ)
7. When interviewed by the Department's Response Work, EO denied having any sexual intent with his interactions with G. He also stated that he has a beer at night when he gets home from work, but does not drink to the point of intoxication. (Exhibit B p.12, Testimony of KZ)
8. The Department interviewed G's adult sister, JB. She stated that she had endured similar interactions with EO. She stated, "He does the same stuff to me that he does to

Gianna. He will touch my face and stomach and grab my hips." She further stated, "sometimes it comes across as loving and sometimes a bit too much." JB was also present during the incident on Thanksgiving Day. She stated that EO was "extremely drunk". JB was uncomfortable and chose to leave. She stated "He was all over me." I find that JB's statements corroborate G's account of EO's pattern of behavior, particularly in regards to his conduct during Thanksgiving Day. (Exhibit B p.10, Testimony of KZ)

9. In regards to her mother, JB stated that she is concerned that previously RO was overprotective of her and her siblings. JB further stated that she believes RO is in denial and doesn't want another divorce. JB stated that RO and EO are constantly fighting and JB believes RO does not want the family to get torn apart. (Exhibit B p.10, Testimony of KZ)
10. The Department's Response Worker interviewed PB, G's biological father. PB played audio recordings that G had made of her interactions with her mother, RO. In these recordings, RO tells G to shut her mouth about the allegations. RO tells G that EO is merely being affectionate. RO tells G that EO has done nothing wrong and that G is misunderstanding. RO then threatens to ground G and potentially slap her. I find that RO denied her daughter's account of EO's behavior. I further find that RO threatened G if she persisted. (Exhibit B p.14, Testimony of KZ)
11. The Department's Response Worker spoke with PO, the sister of EO. PO called the Department to refute the allegations of her brother's conduct. Although she could not remember when she last saw the family. (Exhibit B p.15, Testimony of KZ)
12. At the Fair Hearing, the Appellants declined to testify. An adverse inference will be applied to their refusal to testify. (Fair Hearing Recording)
13. I find that there is reasonable cause to believe that EO neglected G for the following reasons:
 - a. For approximately a year and a half, EO has engaged in a pattern of physically intimate behavior that has made G feel uncomfortable.
 - b. During one particular incident on Thanksgiving Day, EO also interacted in this physically intimate manner with G's adult sister, JB and another relative, M.
 - c. G has witnessed EO drinking and has observed personality changes when he drinks.
 - d. G's statements were consistent to both the Reporter and the Response Worker.
 - e. G's statements in regards to the EO's pattern of physically intimate behavior and drinking were corroborated by her adult sister JB.
14. I find that there is reasonable cause to believe that RO neglected G for the following reasons:
 - a. When informed of G's account of EO's behavior, she denied any potential misconduct and threatened G.

15. I find that EO's actions by establishing a pattern of physically intimate behavior towards G posed a substantial risk to her well-being.
16. I find that when RO actions when she denied any misconduct by EO, and threatened G if she persisted in the allegations, posed a substantial risk to G's well-being.

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 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's and supervisor's clinical base of knowledge.

"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." 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

"Caregiver". A caregiver is a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or 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.

"Neglect". Neglect is 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.

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.

Analysis

In this case, there is creditable, corroborated evidence that EO engaged in a pattern of physically intimate behaviors that failed to provide G with minimally adequate emotional stability and growth. These behaviors included placing his hands on her hips, poking her belly with his finger, and stroking her chin and saying "Your skin is so soft." G has also been forced to hug EO and allow him to kiss her on the cheek. Factors the Department should consider when assessing reasonable cause are "direct disclosures by the children 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." Covell v. Dep't of Soc. Servs., 439 Mass. 766, 775 (2003), citing 110 Code Mass. Regs. s4.32(2) (2000). Factors the Department should consider when assessing reasonable cause are "direct disclosures by the children 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." Covell v. Dep't of Soc. Servs., 439 Mass. 766, 775 (2003), citing 110 Code Mass. Regs. s4.32(2) (2000).

In regards to RO, her refusal to acknowledge to her daughter the emotional impact EO's behaviors were having is a failure to provide minimally adequate emotional stability and growth. This failure is compounded by RO's threats to G if she persists in these allegations.

As stated in Finding #12, the Appellants did not testify at their Fair Hearing. Administrative fact finders are generally permitted to draw adverse inferences from a defendant's failure to testify in civil actions. Baxter v. Palmigiano, 425 U.S. 308, 96

S.Ct. 1551 (1976). Further, in cases where the burden of proof was higher than that required in the instant matter, the Court has determined that a negative inference can be drawn from a party's failure to testify if "...a case adverse to the interests of the party affected is presented so that failure of a party to testify would be a fair subject of comment..." Adoption of Nadia, 42 Mass.App.Ct. 304 (1997), Custody of Two Minors, 396 Mass. 610, 616, 487 N.E.2d 1358 (1986), quoting Mitchell v. Silverstein, 323 Mass. 239, 240, 81 N.E.2d 364 (1948). Therefore, since the Appellants did not submit any of their own evidence, they have failed to show by preponderance that the Department did not have reasonable cause to believe that G had been neglected.

In their post-hearing memo, the Appellants attempt to argue that G's statements are not reliable. However, as detailed above, G's statements remained consistent during separate interviews and are corroborated by her older sister, JB. Further, RO herself acknowledged to the Department Response Worker that G is not prone to making things up. Therefore, the G's statements are creditable and reliable and can form a basis for the Department's decision to support the allegations of neglect.

In their post-hearing memo, the Appellants allude to proceedings in the Probate and Family Court that favor their position. However, the Appellants did not submit any actual documentary evidence or testimony in regards to these proceedings, so they are not considered in this Fair Hearing decision.

Therefore, there is sufficient evidence that both Appellants neglected G by failing to provide her with minimally adequate emotional stability and growth.

Conclusion and Order

The Department's decision to support allegations of neglect of G by EO and RO is hereby AFFIRMED.

This is the final administrative decision of the Department. If Appellant wishes to appeal this decision, she may do so by filing a complaint in the Superior Court for the county in which she lives, or in Suffolk County, within thirty (30) days of the receipt of this decision. See, M.G.L. c.30A, §14. In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.

Nicholas Holahan (RSS)
Nicholas Holahan
Administrative Hearing Officer

3-1-18
Date

Susan Diamantopoulos
Susan Diamantopoulos
Fair Hearing Supervisor