

**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)
)
J. A.)
)
FH # 2017 0014)

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Mr. J.A. (hereinafter "JA" or "the Appellant"). The Appellant appeals the Department of Children and Families' ("the Department") decision to support allegations of sexual abuse pursuant to Mass. Gen. L., c. 119, §§ 51A.

On November 9, 2016, the Department received a 51A report filed by a mandated reporter alleging the sexual abuse of K ("K" or "the child") by the Appellant; the allegations were subsequently supported. The Department informed the Appellant of its decision and of his right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06.

The Fair Hearing was held on September 28, 2017, at the Department of Children and Families' Worcester East Area Office. All witnesses were sworn in to testify under oath. The record closed at the end of the Hearing.

The following persons appeared at the Fair Hearing:

Anastasia King	Administrative Hearing Officer
Mr. J.A.	Appellant
Mr. P.E.	Attorney for the Appellant
Ms. L.N.	DCF Supervisor
Mr. P.B.	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 regulations 110 CMR 10.26.

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

For the Department:

Exhibit 1: 51A Report

Exhibit 5: 51B Response

For the Appellant:

Exhibit A: Copy of Facebook Post

Exhibit B: Appellant's Statement

Exhibit C: Seven Letters of Support

Pursuant to 110 CMR 10.21, 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.

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 subject child of this Fair Hearing is K, ("K" or "the child") a female child who was 11 years old at the time the 51A report was filed. (Exhibit 1, p.1)
2. On November 9, 2016, the Department received a 51A report filed by a mandated reporter alleging sexual abuse of the child by the Appellant. According to the report, the reporter responded to the home on November 9, 2016, after the mother called for assistance. According to the mother, the child disclosed to her that the Appellant had touched her genitals approximately five years prior. The mother reported that the child had been thinking about it often lately and finally told the mother of the abuse. The child did not provide details of how she was touched and she refused to speak to the reporter. It was further reported by the mother that the Appellant was a Level II Sex Offender and had court ordered visitation with the child, and although there was a

scheduled visit sometime the following week, the mother was not going to send the child. (Exhibit 1, p. 2; Testimony of RW)

3. The 51A report was screened in by the Department as a Non-Emergency Response and assigned to DCF Response Worker, Mr. P.B. ("Response Worker" or "RW"), to complete a 51B Response. (Exhibit 2, p.1)
4. The Appellant and Ms. K.A. ("KA" or "the mother") are a divorced couple and the child's biological parents. (Testimony of Appellant) The Appellant was a "caregiver" as defined by Departmental policy and regulation. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00.
5. The Appellant last resided in the mother's home when the child was approximately one year old. At the time of the reported incident, the Appellant and the mother shared legal custody of the child and the mother retained physical custody. (Testimony of Appellant)
6. Shortly before the 51A report was filed, the Appellant had successfully obtained scheduled and consistent visitation with the child through the probate court. (Testimony of Appellant)
7. As a result of the reported allegations, on November 14, 2016, the RW attended a SAIN¹ interview that was conducted with the child. The RW obtained the following information that was reported by the child during the interview:
 - "A couple years back", the Appellant "touched her on her privates with his hand on multiple occasions". When the child asked the Appellant to stop, the Appellant refused. (Exhibit 2, p.3; Testimony of RW)
 - The Appellant would look at the child while she was in the shower. (Exhibit 2, p.3; Testimony of RW)
 - The child was scared when this occurred. (Exhibit 2, p.3; Testimony of RW)
 - The child had recently disclosed the incidences to the mother because it had been on her mind. (Exhibit 2, p.3; Testimony of RW)
8. Although the child disclosed the reported incident to the mother, and again during the SAIN interview, the reported incident varied in timeframe, and the child provided no details of the abuse. In addition, there were no witnesses to the reported incident, and no independent or credible evidence was obtained by the Department to corroborate the child's statements. (Fair Hearing Record)
9. The RW spoke to the child's school counselor on November 29, 2016; the counselor only reported concerns regarding the child's attendance. No information was obtained by the Department during the 51B response to determine the reliance of the child's statements. (Fair Hearing Record)

¹ The Sexual Assault Intervention Network is a multi-disciplinary team including the District Attorney, victim-witness advocate, forensic interviewer and the Department. SAIN is a process wherein law enforcement and child advocates work together to streamline the handling of child abuse cases.

10. The Appellant was not interviewed during the 51B Response. (Testimony of RW)
11. On November 16, 2016, the RW met with Ka, ("Ka") the mother's adult daughter, and R, ("R") the mother's 16 year old son. Ka and R are the Appellant's former step-children. (Exhibit 2, p.2)
12. Ka and R, as well as the mother's boyfriend, Mr. S.K., ("SK") and the mother's parents, Mr. N.B., ("NB") and Ms. K.B., ("KB") resided in the mother's home at the time of the 51B response. (Exhibit 2, p.2)
13. Although Ka and R were aware of the reported incident, both denied to the RW that they had heard of anything similar happening prior to the child's disclosure. Ka also denied that the Appellant had ever touched her inappropriately, but knew of no reason why the child would lie about the reported incident. (Exhibit 2, p.7; Testimony of RW)
14. As a result of a reported sexual assault involving a friend of Ka's approximately 10 years prior to the 51B response, the Appellant was required to register as a Level II Sex Offender. However during the RW's interview with Ka, she questioned whether the allegations made by her friend were true. When speaking of the incident, Ka reported that it was "weird" because her friend made an advance on the Appellant and the Appellant had turned her down, and the allegation came out a few days later at school. (Exhibit 2, p.6; Exhibit 2, p.11; Testimony of RW)
15. The mother, who was aware of the Appellant's sex offender status, had no concerns that the child had been sexually abused prior to the child's disclosure. (Exhibit 2, p.6)
16. On December 2, 2016, pursuant to MGL, c. 119, § 51B, the Department supported allegations of sexual abuse of the child by the Appellant. The Department based its decision on the child's statements and the Appellant's Level II Sex Offender status. (Exhibit 2, p.12; Testimony of RW)
17. After consideration of all the evidence provided, I find that the Department did not have reasonable cause to support the allegations of sexual abuse of the child by the Appellant and its decision was not in compliance with its policy and regulations. (110 CMR 4.32)

Analysis

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** that 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. (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))

"[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

"Abuse" means the non-accidental commission of any act by a caregiver 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 caregiver and a child under the care of that individual, or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 2.00, DCF Protective Intake Policy #86-015, rev. 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 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

When reviewing a support decision, 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 Department's decision. (110 CMR 10.21(6))

The Department supported allegations of sexual abuse of the child by the Appellant, basing its decision on statements made by the child, as well as the Appellant's Level II Sex Offender status. However, this determination was not supported by the evidence presented. Although the Department may have determined that the statements made by the child were credible, the child's disclosures lacked any detail or description of the alleged abuse and varied regarding the timeframe of the reported incident. There were no witnesses to corroborate the child's statements, and the Department failed to obtain

independent and credible evidence, possibly by interviewing school personnel or other collateral contacts available, to determine the reliance of the child's statements; also noted was that the initial allegations were reported by the child's mother. Though understandable that the Appellant's status as a Level 2 Sex Offender was of concern to the Department, the mother was aware of the Appellant's sex offender status and had no prior concerns that the child was at risk while with the Appellant. In addition, Ka, during the RW's interview, appeared to question whether or not the Appellant had sexually abused her friend as previously determined and the Appellant had been granted visitation with the child.

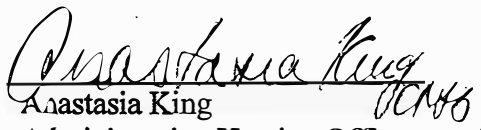
As a result, I find insufficient evidence necessary to support the allegation of sexual abuse of the child by the Appellant. A Hearing Officer's decision must be supported by substantial evidence; there must be substantial evidence supporting the hearing officer's conclusion that the Department had reasonable cause to believe the appellant committed the alleged abuse. (Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006))

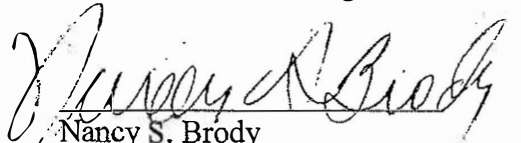
Given the information available, the Department did not have sufficient evidence to find reasonable cause to believe that the child was sexually abused by the Appellant, as defined in its regulations, policies and/or procedures, and therefore the decision was not made in conformity with Department policy and regulations.

Conclusion

The Department's decision to support the allegations of sexual abuse of the child by the Appellant is REVERSED.

Date: 3-22-18


Anastasia King
Administrative Hearing Officer


Nancy S. Brody
Supervisor, Fair Hearing Supervisor

Date: _____

Linda S. Spears,
Commissioner