

**Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
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Linda S. Spears, Commissioner

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IN THE MATTER OF: MK

Fair Hearing # 20170034

FAIR HEARING DECISION

Appellant, MK, appeals the decision of the Department of Children and Families, pursuant to M. G.L. c.119, §51B, to support allegations of neglect on behalf of T and S.

Procedural History

On November 10, 2016, the Department of Children and Families ("Department") received a report, pursuant to M.G.L. c. 119, §51A, alleging neglect of T by her mother, MK ("Appellant"). On November 22, 2016, the Department received a second report, pursuant to M.G.L. c. 119, §51A, alleging neglect of S by Appellant. On December 14, 2016, the Department decided to support allegations of neglect on behalf of T and S, pursuant to M.G.L. c. 119, §51B, by Appellant.

The Department notified Appellant of its decision and of her right to appeal. Appellant made a timely request for a Fair Hearing pursuant to 110 C.M.R. §10.06. The Fair Hearing was held on February 28, 2017, at the Department's Dimock Street Area Office in Roxbury, Massachusetts. In addition to the Hearing Officer, the following persons appeared at the Fair Hearing:

MK	Appellant
MR	Department Response Worker
PH	Department Supervisor

In accordance with 110 C.M.R. §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 digitally recorded. All witnesses were sworn in to testify

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

For the Department:

Exhibit A Intake Report – 51A Report, 08/04/2016 – 11:28 AM
Exhibit B Intake Report – 51A Report, 08/04/2016 – 11:34 PM
Exhibit C Child Abuse/Neglect Response

For Appellant:

Exhibit 1 Fair Hearing request/Department support letter

The record closed upon conclusion of the oral evidence.

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

Statement of the Issues

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. 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; 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 Rev. 2/28/16, 110 CMR 10.05.

Findings of Fact

On the basis of the evidence, I make the following factual findings:

1. Appellant is the mother of two daughters, T, age fourteen, and S, age six at the time in question. [Exhibit A; Exhibit B; Exhibit C]
2. As the mother of T and S, Appellant is deemed a caregiver pursuant to the Department's Protective Intake Policy. See below. [Testimony of Appellant; Exhibits A, B, and C]

3. T came to the United States from Congo, where she had been living with her father, in or about 2013 to live with Appellant. [Exhibit C, p.3]
4. S participated in Early Intervention for speech issues. [Testimony of Appellant]
5. In August 2015, the Department became involved with Appellant's family after supporting allegations of physical abuse of T and S by the Appellant. Appellant had acknowledged using physical discipline with her daughters. The Department's case remained open at the time in question. CS was the family's ongoing social worker. [Exhibit A, p.5]
6. In or about the 2015-2016 school year, S attended kindergarten at the [REDACTED] school, a parochial school in Boston. [Testimony of Appellant; Exhibit C]
7. In October 2016, Appellant and S's father divorced. [Testimony of Appellant]
8. In her interactions with Appellant and her daughters, CS observed that Appellant had a good relationship with T and S, they communicated and laughed with each other, and the children did not seem afraid of Appellant. CS also observed that Appellant was having a hard time coping with her divorce. Appellant was good at meeting with CS and with making T and S available to meet with CS. [Exhibit C, pp.5,7]
9. T missed her father and her home country. This made her sad. [Exhibit C, pp.2,4]
10. CS had made two referrals for in home therapeutic services for the family. Appellant had not followed through with the referrals. [Exhibit C, pp.5,7]
11. In or about February 2016, Appellant transferred S to the [REDACTED] school, a Boston public school, without informing the [REDACTED] school that S would not be returning there. The [REDACTED] school director reported that S was pulled from their school after school staff spoke with Appellant about getting counselling for S because she was having urine accidents. Appellant reported that she pulled S from the [REDACTED] school because the school failed to address bullying concerns. [Testimony of Appellant; Exhibit C, p.7]
12. In or about March 2016, Appellant re-enrolled S at the [REDACTED] school. Appellant reported that this was because the [REDACTED] school was a "nightmare," the [REDACTED] school was more structured, and S missed her friends at the [REDACTED] school. [Testimony of Appellant; Exhibit C, p.7]
13. On November 9, 2016, T left the house without saying goodbye to Appellant. Appellant was upset and felt that T was being rude. Later that day, Appellant was angry and told T that she did not like her and sometimes hated her and that T made her sick as T had left the house without saying goodbye. [Exhibit C, p.4]

14. At school on November 10, 2016, T reported feeling sad and wanting to scratch herself after an argument with Appellant. T denied wanting to kill herself. The school social worker contacted Appellant suggesting that Appellant follow up with an outpatient therapist for T. Appellant contacted the police and EMS. EMS responded to the school and transported T to the hospital for evaluation. Appellant met T at the hospital. The hospital found that T did not meet the criteria for admission. Appellant became upset as she wanted T evaluated and maybe put on an anti-depressant. Appellant made a statement to the effect of asking if she knocked T up over the head, would that get T some help. [Exhibit A, p.2; Exhibit C, p.4; Testimony of Appellant]
15. On November 10, 2016, the Department received a report, pursuant to M.G.L. c. 119, §51A alleging the neglect of T by Appellant. [Exhibit A]
16. At some point, Appellant apologized to T and acknowledged that she had been wrong to speak to T the way she had on November 9, 2016. [Exhibit C, pp.4-5]
17. On November 14, 2016, Appellant reported to S's school counsellor that she was bipolar and was not taking her bipolar medication. [Exhibit C, p.7; Exhibit B]
18. On November 15, 2016, Appellant met with staff at the [REDACTED] school after an incident in which S got very emotional and poked another child very hard with a pencil. Appellant stated that she was going to pull S out of the school. S did not return to [REDACTED] school. [Exhibit B]
19. On November 22, 2016, the Department received a second report, pursuant to M.G.L. c. 119, §51A alleging the neglect of S by Appellant. [Exhibit B]
20. Appellant enrolled S at the [REDACTED] school with a scheduled start date of November 18, 2016. S actually started on November 22, 2016. At some point shortly after starting at the [REDACTED] school, S tried to "destroy" the classroom and wanted to do "what she wants to do." [Exhibit C, p.6; Testimony of Appellant]
21. T reported: being comfortable living with Appellant and S; having a good relationship with Appellant; sometimes being scared by Appellant's loudness; sometimes being unhappy because she was homesick; wanting to speak English better and get better grades in school; and wanting to feel better and not be sad. T reported being able to communicate with Appellant and going to talk with Appellant when she was feeling down. [Exhibit C, pp.4,5]
22. S reported liking living with Appellant and T and being happy when going to school and Toys R Us and playing with her toys. [Exhibit C, p.5]
23. On November 28, 2016, T and S had their annual physical examinations.
 - T was up to date on her immunizations. The pediatrician noted that T's affect was odd. The pediatrician had concerns regarding T's cognitive functioning and mood as T did not comprehend what she was saying and that is was more than a

- language issue/barrier. The pediatrician gave Appellant a letter to give to T's school requesting a CORE evaluation. The pediatrician also made a referral for therapeutic services for T.
- S had persistent expressive language delay. During her examination, S made poor eye contact. The pediatrician made a referral for S for therapy for anxiety. [Exhibit C, p.6]
24. By December 7, 2016, T had begun receiving school based counseling once a week. T was disorganized at school and unable to follow what was going on in the ESL classroom. [Exhibit C, p.7,8]
25. On December 14, 2016, pursuant to M.G.L. c. 119, §51B, the Department supported allegations of neglect on behalf of T and S against Appellant. [Exhibit C]
26. Appellant signed the paperwork for the school to initiate the process for a CORE evaluation of T. [Testimony of Appellant]
27. At the time of the Fair Hearing, in addition to weekly counseling, T was participating in an afterschool program at school. [Testimony of Appellant]
28. At the time of the Fair Hearing, S was participating in group counselling at school. [Testimony of Appellant]

Applicable Standards and Analysis

Protective Intake Policy #86-015, 6/15/1986, as revised 2/28/2016

Caregiver

- (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.

A "Support" finding means:

Allegation(s)

- 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.

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*. 110 C.M.R. §4.32 (2).

“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 and supervisor’s clinical base of knowledge. Id.

Neglect means failure *by a caretaker*, 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. This definition is *not* dependent upon location (*i.e.*, neglect can occur while the child is in an out-of-home or in-home setting.) Id.

A Fair Hearing shall address (1) whether the Department’s or provider’s decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;.... In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 C.M.R. §10.05.

To prevail, the aggrieved party must show by a preponderance of the evidence that (1) the Department’s or provider’s decision was not in conformity with the Department’s policies and/or regulations and resulted in substantial prejudice to the aggrieved party.... 10 C.M.R. §10.23.

On the basis of the factual findings and standards set forth above and for the reasons set forth below, I reverse the Department’s neglect support decisions.

Neglect of T

The Department based its decision to support allegations of neglect on behalf of T on the actions of Appellant on November 9 -10, 2016. Appellant recognized the inappropriateness of her words and apologized to T for the statements she made to T on November 9, 2016. As for Appellant’s actions in calling an ambulance to transport T to the hospital on November 10, 2016 and in asking if she needed to knock her child in the head to get her help, perhaps her actions were rash. However, Appellant’s actions seem

to have been in an effort to get help for T. While it was reasonable for the Department to be concerned about the emotional impact of Appellant's actions on T, there is no evidence that the actions of Appellant placed T in danger or posed a substantial risk to T's safety or wellbeing.¹ T was comfortable living with Appellant, had a good relationship with her, felt able to communicate with her, and talked with her when feeling down. During the Department's investigation, T began participating in counselling at school.

Appellant has shown by a preponderance of the evidence that the Department failed to comply with its regulations and policy when it made a finding to support allegations of neglect. After considering all the evidence, I find that the Department did not have reasonable cause to support the allegations of neglect of T by Appellant. The totality of the evidence indicates that the actions of Appellant did not place T in danger or pose substantial risk to her safety or well-being.

Neglect of S

The Department based its decision to support allegations of neglect on behalf of S on the actions of Appellant in changing S's schools several times over the course of two academic years. It is reasonable to believe that consistency and stability in the school environment are important for a young child and that by failing to provide that consistency, Appellant was failing to provide S with minimally adequate essential care. Nevertheless, there is no evidence that the actions of Appellant in changing S's schools placed S in danger or posed a substantial risk to S's safety or wellbeing. In the Department's Protective Intake Policy, educational neglect is listed as an example of a "substantiated concern" as opposed to a reason to support an allegation of neglect.

Appellant has shown by a preponderance of the evidence that the Department failed to comply with its regulations and policy when it made a finding to support allegations of neglect. After considering all the evidence, I find that the Department did not have reasonable cause to support the allegations of neglect of S by Appellant. The totality of the evidence indicates that the actions of Appellant did not place S in danger or pose substantial risk to her safety or well-being.

Other concerns

The Department enumerated concerns relative to whether Appellant was taking her bipolar medication and relative to Appellant's lack of engagement in services. Again, the Department failed to show how these concerns placed the children in danger or posed a substantial risk to their safety or well-being. The Department had had an open case

¹ Such evidence, that the child was in danger or Appellant's actions posed a substantial risk to the child's safety or well-being would be necessary for the Department to support the allegations, as opposed to the Department making a finding of "substantiated concern" which would also require that the child was neglected, but that there is a lower level of risk to the child, i.e. the actions or inactions by Appellant create the potential for abuse or neglect, but there is no immediate danger to the child's safety or well-being. See DCF Protective Intake Policy #86-015, Rev. 2/28/16, pp. 28, 29

with Appellant's family prior to the subject investigation and had been working with the family since August 2015. T and S were up to date medically and were attending school, although S had changed schools several times. As of the time of the Fair Hearing, both children were receiving services at school.

Conclusion and Order

The Department's decisions to support the allegations of neglect of T and S by Appellant, MK, were not made in conformity with Department regulations and with a reasonable basis. Therefore, the Department's decisions are **REVERSED**.



Antonia Chronis,
Administrative Hearing Officer

BC

April 16, 2018
Date



Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner