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

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IN THE MATTER OF

N. P.

FH # 2017 0040

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Ms. NP ("the Appellant"). The Appellant appealed the Department of Children and Families' ("the Department" or "DCF") decision to support a report of neglect pursuant to Mass. Gen. L., c. 119, sec. 51A. Notice of the Department's decision was sent to the Appellant on January 4, 2017, and she filed her appeal timely with the Fair Hearing Office on January 7, 2017.

The Fair Hearing was held on April 4, 2017, at the DCF Springfield Area Office. The following persons appeared at the Fair Hearing:

Linda A. Horvath, Esquire	Administrative Hearing Officer
NP	Appellant
Mr. JP	Witness/Appellant's Brother
BJ	DCF Special Investigator

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 regulation. 110 CMR 10.26

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

For the Department:

Exhibit 1: 12/2/16 51A Report
Exhibit 2: 12/27/16 51B Report with Attachments
Exhibit 2a: 2 Photographs—Daycare Pack-n-Play and mats (Taken by BJ)

Exhibit 2b: 3 Photographs at Daycare (Taken by grandparent of daycare child)
Exhibit 2c: 12/6/16 Release to Pediatrician of R, D, and L
Exhibit 2d: 12/16/16 (End date) Daycare Voucher for 4 children
Exhibit 2e: 12/2/16 Incident Report, [redacted].com

The Appellant did not submit documentary evidence into the Fair Hearing record.

Statement of the Issue

The issue presented in this Fair 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 investigation, the Department's decision or procedural action 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, 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, 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.

For reasons set forth below, the Department's decisions to support the Appellant for neglect are REVERSED.

Findings of Fact

1. The subject children of this Fair Hearing are the following:[1] (See, Exhibit 1, p.1.)

   a) The female child, L, who was 4 years old at the time of the 51A filing referenced below;
   b) The female child, R, who was 3 years old;
   c) The female child, D, who was 1 year old;
   d) The male child, J, who was 1 year old.

2. In December, 2016, the children were attending the Appellant's licensed, in-home daycare. (Exhibit 1, pp.1 and 3.)

3. The Appellant has been a daycare provider since 1996 (21 years). (Exhibit 2, p.6.) She has been with the program [redacted] Child Care Services ("the program") since

[1] L, R and D are siblings. (Exhibit 2, p.2.)

November, 2013. (Id. at p.4.) The Appellant never before had allegations of abuse or neglect filed against her as a daycare provider.[2] (Exhibit 1, p.4.)

4. J had only been at the Appellant's daycare for one week at the time of the 51A filing.[3] (Exhibit 2, p.4.) The three siblings (L, R, and D) had been in the Appellant's daycare since September, 2015. (Id. at p.3.)

5. On Friday, December 2, 2016, the Department received a 51A report pursuant to M.G.L. c. 119, s. 51A, alleging the neglect of all four children by the Appellant when she left D and J at the daycare supervised by her brother, Mr. JP, and took L and R in her car with her to pick up diabetes medication at the pharmacy as she was not feeling well. (Exhibit 1, pp.3 and 4.)

6. The Department screened-in the report as a non-emergency response. (Exhibit 1, p.4.)

7. The Appellant's testimony at the Fair Hearing was sincere and forthright. Considering the Appellant's demeanor and content of testimony, which was consistent with her explanation of events of the day in question, as she reported to program staff (Exhibit 1, pp.3 and 4), as reported to the DCF Investigator (Exhibit 2, p.6), and as corroborated by the child, L (Id. at p.8), and the Appellant's brother, Mr. JP (Exhibit 2, p.7; Testimony of Mr. JP), the Appellant is deemed credible.

8. The facts of the events of Friday, December 2, 2016, are as follows: J's grandfather[4] arrived at the daycare to find Mr. JP as the sole adult supervising D and J. The Appellant had asked her brother, Mr. JP, to watch D and J while she took L and R with her to the local pharmacy to pick up her diabetes medication as she was "feeling funny." After J's mother telephoned the program and notified them that the Appellant was not at the daycare, the reporter went to the daycare and stayed there until the Appellant (along with L and R) arrived back, approximately one hour later. This trip took the Appellant longer than anticipated due to a long line at the pharmacy. (Exhibit 1, pp.3 and 4; Exhibit 2, p.3; Testimony of Appellant.)

9. The Appellant was allowed to finish up the day at the daycare on December 2, 2016, but children were not allowed back in the daycare on the following Monday (Exhibit 1, p.3) pending the results of the DCF investigation. (Exhibit 2, p.11.) The four children went to substitute/back-up daycare following the 51A filing date. (Exhibit 2, p.2.)

10. The reporter never had issues with the Appellant's daycare even after performing several unannounced visits. The reporter opined, "[T]he kids love [the Appellant] and [the Appellant] is good to them." (Exhibit 2, p.3.)

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[2] The Appellant has an unsupported and closed DCF case from August, 2015, with respect to her grandson. (Exhibit 2, pp.1—2.)
[3] The Appellant was a substitute daycare provider for J's usual provider. (Exhibit 2, p.6.)
[4] Exhibit 2, p.2.

11. Mr. JP is CORI-checked by the program and is allowed to be in the Appellant's home/daycare. The reporter was aware that Mr. JP was at the Appellant's home daily to help care for his/the Appellant's elderly mother who lived there. (Exhibit 1, p.3; Exhibit 2, p.2; Exhibit 2e, p.2; Testimony of Appellant.) Mr. JP is aware of the "emergency protocol" of the daycare should an emergency arise as he was a retired first responder (Exhibit 2, p.3); he was CPR and First-Aid certified, and was a CPR instructor. (Exhibit 2e, p.2; Testimony of Mr. JP.) Mr. JP was also listed as the Appellant's emergency contact/back-up with the program with respect to the daycare.[5] (Testimony of Appellant; Testimony of Mr. JP.)

12. Mr. JP was not authorized by DEEC/the program to be the Appellant's licensed daycare assistant; he was not authorized to be caring for the daycare children. (Exhibit 1, p.4.)

13. The Appellant's diabetes diagnosis was recent at the time of the 51A filing (September, 2016), and the Appellant was still trying to maintain her blood sugar levels. On the day in question she was running low on insulin and was "feeling funny" (Exhibit 2, p.6), but she was well enough to drive. She drank orange juice but that was not sufficient. She went to her local pharmacy to pick up her prescription of insulin, and took L and R so as not to overwhelm Mr. JP with the care of four children;[6] she put D and J down for their naps before she left. They sat at the pharmacy for a while after telling the pharmacist that she wasn't feeling "right", and her blood sugar level was low. The pharmacist gave her glucose tablets, which she took immediately; she thereafter felt her levels were better. The Appellant was of the belief that the only individual authorized to pick up her prescribed diabetes medication was her, the patient. (Exhibit 2, pp.3 and 6; Testimony of Appellant.)

14. The DCF Investigator interviewed the child, L, who verified she went to the pharmacy with the Appellant to get the Appellant's medicine. (Exhibit 2, pp.5—6; 8.) The DCF Investigator did not interview R, J and D due to their ages. (Exhibit 2, p.4; Testimony of BJ.)

15. The mother of R, L and D[7] had no concerns regarding the events of the day in question and no concerns regarding supervision of her children in the daycare; she had high praise for the Appellant as a daycare provider. Her children call the Appellant "Auntie [N]" and Mr. JP, "Uncle [J]", and she was aware that Mr. JP is at the home often. She wanted her children back in the Appellant's care as soon as possible. (Exhibit 2, pp.2 and 5—6.)

16. On December 22, 2016, the Department supported the aforementioned report in accordance with M.G.L. c. 119, s. 51B for neglect on behalf of the four subject

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[5] Previously, the Appellant's mother was her emergency contact/back-up. (Testimony of BJ.)
[6] L and R are very attached to the Appellant and wanted to go with her. If she kept them at the daycare, they would have cried, which could have overwhelmed Mr. JP. (Testimony of Appellant.)
[7] The mother also had a fourth, older child enrolled at the Appellant's daycare. (Exhibit 2d.)

children by the Appellant due to a lack of minimally adequate supervision when she left D and J in the care of her brother, Mr. JP, who was an "unapproved caretaker." The supports for neglect of L and R were due to a lack of minimally adequate "other essential care" in the form of safety when the Appellant drove with L and R to a pharmacy to pick up her diabetes medication when she was "feeling funny." (Exhibit 2, pp.9 and 11.)

17. Any alleged DEEC violations by the Appellant were not part of the DCF support decisions in this matter, including a violation of sleeping guidelines[8] and a possible lack of parental permission to take the children off daycare premises. (Testimony of BJ.)

18. This was a "tough" decision for DCF, which could have gone "either way" (support or unsupport) in its decision-making.[9] (Testimony of BJ.)

19. I find the Department did not have reasonable cause to believe that the Appellant failed to provide minimally adequate care for the children and I further find that there was no evidence that the Appellant's actions or inactions placed the children in danger or posed a substantial risk to their safety or well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16 (See analysis)

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 of human trafficking." Protective Intake Policy #86-015, rev. 2/28/16.

A "caregiver" is defined, in part, as: (1) A child's parent, stepparent, guardian, or any household member entrusted with the 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." 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).

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[8] When J's grandfather entered the daycare, D was sleeping in a highchair, and J was sleeping in a stroller. (Exhibit 2, p.2.)

[9] It is uncontested that on the day in question, J's grandfather got angry and out of control after leaving the daycare with J and J's mother, and then returning to it to videotape the daycare; he was asked to leave by Mr. JP. (Testimony of Mr. JP; Testimony of BJ.) The mother of L, R, and D had nothing but positive things to say about the Appellant. (Testimony of BJ.)

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).

"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. Id. at 63. 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.

"Neglect" is defined as 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. Protective Intake Policy #86-015, rev. 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. 110 CMR 10.23.

Analysis

As the children's daycare provider, the Appellant was a "caregiver" pursuant to Protective Intake Policy #86-015.

Children D and J:

Considering the entirety of evidence in this matter, the Appellant did not fail to provide D and J with minimally adequate supervision by leaving them in the care of Mr. JP, simply by virtue of him being a DEEC unapproved caregiver, and the Appellant's action in this regard did not place the children in danger or pose a substantial risk to their safety or well-being.

The Appellant felt the need to pick up her diabetes medication because she was not feeling "right" on the day in question. She therefore called upon her brother, Mr. JP, as her back-up/emergency contact for the daycare, to watch these two children while she left the premises with the two other children. All of the children know Mr. JP as "Uncle [J]" and are familiar with him as he was at the daycare on a daily basis. In addition, as acknowledged by the program, as a CORI-checked, CPR-trained, First-Aid-trained, former first responder, Mr. JP was/is fully aware of emergency protocol should an emergency had arisen. The Appellant appropriately used Mr. JP as a back-up/emergency caregiver for the children considering the circumstances of that day, and there was no evidence that this action by the Appellant placed the children in danger or posed a substantial risk to their safety or well-being.

Children L and R:
Considering the entirety of the evidence in this matter, the Appellant did not fail to provide L and R with minimally adequate "other essential care," in the form of safety, by driving them to/from the pharmacy in order to pick up her diabetes prescription, and the Appellant's action in this regard did not place the children in danger or pose a substantial risk to their safety or well-being.

The Appellant purposefully brought L and R with her in order to not overwhelm Mr. JP with four children at the daycare. The Appellant argued she was well enough to drive; there is no evidence to the contrary. She knew her blood sugar levels were low as she was not feeling "right." There is no evidence she was feeling ill, sick, physically unstable, etc... She had been having difficulty maintaining her levels since her diagnosis a few months earlier, and felt the need to act on the issue. That was the Appellant's judgement call to make at the time in question, and the reason to use Mr. JP as her back-up/emergency contact. The fact that her trip to the pharmacy resulted in her feeling better proved it to be the right call.

Based upon the totality of evidence in this case, as discussed above and in the detailed findings of fact, the Appellant has shown by a preponderance of the evidence that the Department' did not have sufficient evidence to support the findings of neglect of the four children.

Conclusion

The Department's decision to support the 51A report of December 2, 2016, for neglect by the Appellant on behalf of the child L is **REVERSED.**

The Department's decision to support the 51A report of December 2, 2016, for neglect by the Appellant on behalf of the child R is **REVERSED.**

The Department's decision to support the 51A report of December 2, 2016, for neglect by the Appellant on behalf of the child D is **REVERSED.**

The Department's decision to support the 51A report of December 2, 2016, for neglect by the Appellant on behalf of the child J is **REVERSED.**

Linda A. Horvath, Esquire
Administrative Hearing Officer

Date: 8-1-17

Nancy S. Brody, Esq.
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spears, Commissioner