

**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 Spears
Commissioner

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

IN THE MATTER OF)

AR)
FH #2017-0043)

FAIR HEARING DECISION

The Appellant in this Fair Hearing is AR (hereinafter "AR" 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 December 12, 2016, the Department received a 51A report alleging neglect of J (hereinafter "J" or "the child") by his mother RR (hereinafter "RR"). The Department conducted a response and, on January 3, 2017, the Department made the decision to support the allegation of neglect of J by RR; the Department added and support neglect of J 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 originally scheduled for February 23, 2017 was rescheduled at the request of the Appellant. The Hearing was held on May 9, 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 Fair Hearing to afford the Appellant the opportunity to submit additional information. Supplemental documentation was submitted by the Appellant. The information was entered reviewed, entered into evidence and considered by the Hearing Officer. The record closed on May 30, 2017.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
AR	Appellant

TB Support for Appellant
SR Witness for Appellant/Appellant's mother
LR Department Response Social Worker
EG 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 12/12/2016
Exhibit B DCF Child Abuse/Neglect Non-Emergency Response, completed 1/3/2017
Exhibit C [REDACTED] Police Report, dated 12/12/2016

For the Appellant:

Exhibit 1 Appellant request for a Fair Hearing, dated 1/9/2017
Exhibit 2 Notarized statement of JS; Appellant's in time boyfriend, dated 5/11/2017
Exhibit 3 Notarized statement of JH, Appellant's uncle, dated 5/10/2017

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 child of this Fair Hearing is J; at the time of the subject 51A investigation J was five (5) years old. (Exhibit A, p.1; Exhibit B, p.1)

2. The child's mother is RR; at the time of the instant case, RR and the child resided in a split level home in ██████████, MA with the Appellant and her in time boyfriend JS (hereinafter "JS"). RR and the child resided on the upper level, the Appellant and JS resided on the lower level. The lower level was in the process of being remodeled to add a kitchen; the lower level was already equipped with a bathroom. The Appellant utilized the upstairs kitchen and would pass through the upper level as she exited the residence. The home is owned by SR who is the Appellant's and RR's mother. SR permitted her adult children to live in the residence; SR resided in ██████████, MA. (Testimony Appellant; Testimony SR; Testimony LR; Exhibit B)

3. The Appellant is the child's maternal aunt and she resided in the same residence as the child; the Appellant had been left in the role of a caretaker on prior occasions. While on the day of the reported incident, RR did not ask or tell the Appellant that she was leaving, the child informed the Appellant that his mother had left the residence and he did not know where she was: (Testimony Appellant) I find, in light of the Appellant's relationship with the child and the Appellant's knowledge that RR had left the home, that she met the standard for the Department's definition of a caregiver. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016)

4. On December 12, 2016, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging neglect of the child by RR. The reporter noted ongoing issues between RR and her boyfriend, BA; the week prior, SR obtained a 209A on RR's boyfriend. SR planned to extend the order on December 12, 2016. On this date, the maternal uncle (hereinafter "JH") arrived at the home after receiving a call from SR informing him that J was home alone; SR requested that HM go to the residence until SR could get there; JH contacted the police who responded to the home. The child informed the reporter that RR had been home when he went to bed the previous night. The police remained at the home until SR arrived to care for J. RR did not return prior to the police leaving the home. Additional concerns regarding RR were reported. (Testimony LR; Exhibit A, p.2; Exhibit C)

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

6. At the end of its response, the Department supported the aforementioned report for neglect of J by RR. The Department added and supported neglect of J by the Appellant. The Department based this determination of the following:

- RR left the residence to buy cigarettes, leaving Jayden by himself and awake.
- RR failed to inform the Appellant that she was leaving.
- The Appellant learned that J was alone when she went upstairs.
- The Appellant contacted SR to inform her that she could not remain with J as she had to attend scheduled college classes.
- The Appellant left the residence
- SR contact the maternal uncle JH to go to the residence as the child "may" have been left home alone
- Upon arrival, JH could not gain entry; JH contacted the police reporting that the child was home alone.
- RR returned to the residence after the police had left. (Exhibit B, p. 9; Testimony LR)

7. The Department based the aforementioned determination on the [REDACTED] Police report filed on December 12, 2016. Despite repeated efforts, LR was unable to speak directly with the mandated reporter to corroborate the Appellant and SR's contention that JS was in bed in the lower level of the residence. (Testimony LR; Exhibit B) The Appellant and SR maintained that J was not left home alone; JS was present in the residence, albeit downstairs in bed when the Appellant left for school. (Testimony Appellant; Testimony SR; Exhibit 1) The Appellant instructed J to go downstairs should he need anything. (Testimony Appellant) The Department did not reach out to JS or JH during the course of the 51A response. (Testimony LR; Exhibit B)

8. I credit the Appellant's testimony that she never would have left J home alone as she loves him and is concerned for his safety. She had on occasions watched the child. On December 12, 2016, the Appellant had no idea that RR had left the residence. At approximately 8:30 am, the Appellant went upstairs to leave the residence. She saw the child who was playing with his Legos and told him she was leaving. When asked where RR was, J replied that he did not know. The Appellant called and texted RR with no success. As the Appellant was running late for her classes at UMass Dartmouth, the Appellant told J that John was downstairs in bed and to go downstairs if he needed anything. The Appellant then contacted her mother SR and informed her of the situation; SR contacted JH. The Appellant left the residence at approximately 8:45am. (Testimony Appellant; Testimony SR; Exhibit 1; Exhibit B, p.2, p.7) The Appellant provided consistent information during the 51B response and at the Fair Hearing. She presented as mature and sincere in her care and concern for the child.

9. The notarized statements from JH and JS further corroborated the Appellant's repeated contention that JS was in the home and that she did not leave the child home alone. (Exhibit 2; Exhibit 3) While the Department attempted to contact the mandated reporter in an effort to corroborate that JS was in the home when the police responded, I find that the Department did not comply with 110 CMR §4.27(2) by failing to pursue additional and obvious contacts which were likely to yield some information to corroborate or detract from the allegations.

10. JH contacted the police because he was unable to gain entry into the residence as the storm door was broken and there was a trick to unlocking the latch. (Testimony Appellant; Testimony SR)

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

Applicable Standards and Analysis

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. 2/28/16

"[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

"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)

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

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. 2/28/16

The Appellant disputed the Department's decision to support the allegation of neglect. The Appellant argued that on the date of the reported incident, she had not been left in the role of a caretaker for J and J was not left in the residence alone. This Hearing Officer gave careful consideration as to whether the Appellant was indeed a caregiver for J. At no point did RR inform the Appellant that she was leaving the home. The Appellant learned this as she walked upstairs and said good bye to J. After learning that RR was not home, she was the adult present with this knowledge. At that point, she became the person "who at the time in question is entrusted with a degree of responsibility for the child." 110 CMR 2.00 This Hearing Officer however clearly notes that there was no communication from RR; it was by the nature of the Appellant's relationship with the child and due to both being household members that the Appellant minimally met the caregiver definition.

Upon learning that RR had left the residence, the Appellant called and texted RR on multiple occasions; she received no reply. As the Appellant was already running later for classes, she contacted SR to inform her of the situation. SR contacted JH who resided close by to go to the home to go and remain at the residence until her arrival. The Appellant told J to go downstairs to tell JS if he needed anything. The Appellant informed JS of the situation; JS was in the home when JH and the police arrived.

"...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...supervision..." of J Z. (110 CMR 2.00)

Additionally, there was no information that the actions or inactions by the Appellant placed Z in danger or posed substantial risk to his safety or well-being, and without such information, the Department lacked the evidence necessary to support findings of abuse or neglect. DCF Protective Intake Policy #86-015, rev. 2/28/16

Considering all the evidence and the circumstances, the Department did not have reasonable cause to believe and the decision to support the allegation of physical abuse and neglect was not in conformity with its policies and/or regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

Conclusion and Order

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

Carmen Temme
Carmen Temme *BC*
Administrative Hearing Officer

April 17, 2018
Date

Barbara Curley
Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner