THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
600 WASHINGTON STREET, 6TH FLOOR
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Commissioner

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IN THE MATTER OF

GB #2017 0046

FAIR HEARING DECISION

Appellant, GB ("Appellant"), appeals the Department of Children and Families (hereinafter "DCF" or "the Department") decision to support allegations of negelct pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On December 14, 2016, the Department received a report which alleged neglect of D and Di by the Appellant, their father, after Di disclosed that his mother's eye was swollen closed because "dad punched her last night" and stated that his parents were "yelling and screaming at each other all night." The reporter noted that the Appellant reported that he and LB, his wife, were going through a separation. The Department screened-in the report and conducted an emergency response. On January 3, 2017, the Department made the decision to support allegations of neglect of D and Di. The Department notified the Appellant of its decision and his right to appeal.

Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. A hearing was held at the DCF Robert Van Wart Area Office on March 3, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; AG, DCF Response Worker; GB, Appellant; Ann Dargie, Attorney for Appellant.

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 digitally recorded and transferred to one (1) Compact Disc. The witnesses were sworn in to testify under oath.

The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply; only evidence which is relevant and material may be

admitted and may form the basis of the decision. 110 CMR 10.21

The following evidence was entered into the record:

For the Department:
Exhibit A: 51A Report of December 14, 2016
Exhibit B: 51B Report completed on January 3, 2017 by AG

For the Appellant(s):
No Documentary Exhibits were submitted by Appellant

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 Appellant is the father of D and Di. The children's mother is LB. At the time of the report in question, the family resided together in [redacted], MA; D was 7 years old and Di was 5 years old. (Exhibit A)

2. The Appellant and LB were married for 10 years at the time of the report in question. (Exhibit B; Testimony of Appellant)

3. As the father of D and Di, the Appellant is their caregiver under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16;110 CMR 2.00

4. The Appellant was not involved with the Department. (Exhibit B, p. 1)

5. In 2012, the Appellant discovered LB was communicating with another man on Facebook and believed she was having an extramarital affair. Prior to the report in question, LB desired a divorce; however, the Appellant wished to stay together, believing his children needed both their parents. (Exhibit B, pp. 5, 6; Testimony of

AG and GB)

6. During the 2012 argument, LB called the police. When police arrived, they heard the argument from outside the home. At the time, the Appellant explained he discovered his wife was "cheating on him through Facebook", then went upstairs where she was sleeping, grabbed her by the arm and brought her downstairs where he tried to push her out the door. The Appellant was arrested although the charges were later dropped. No reports pursuant to M.G.L. c. 119 §51A were filed with the Department in regard to the incident. (Exhibit B, pp. 2, 3, 6)

7. On December 13, 2016, the Appellant discovered the man was "back in the picture" and LB was talking to him on the phone. The Appellant became upset and took LB's phone which he returned. The two argued. The children were present and were crying and upset as the argument continued. LB called her mother and the Appellant took the phone again; in a mutual struggle for the phone, the phone broke. (Exhibit B, pp. 4, 5; Testimony of Appellant)

8. When the couple argued, it was customary for them to "take space" and take a ride with the children in the car. After the argument, the Appellant hugged D and apologized to him and then left the house with D and Di. (Exhibit B, p. 4; Testimony of AG)

9. On December 14, 2016, the Department received a report which alleged neglect of D and Di by the Appellant after Di disclosed to a mandated reporter that LB's eye was swollen shut because the Appellant punched her last night and stated that his parents were "yelling and screaming at each other all night." The Department screened-in the report and conducted an emergency response. (Exhibit A, p. 3; Testimony of AG)

10. The DCF Response Worker went directly to the children's school without notifying the Appellant or LB and interviewed the children separately. Di told the worker "my dad is not being nice to my mom" and when asked about how they fought, responded "they fight with their words." Di stated that "one time dad hurt my mom" and that he had "poked her in the eye." The worker did not ask Di to explain what he meant by "poke" or when the Appellant poked LB.[1] The worker did not develop any other concerns for Di during the interview and did not reach any determination in regard to the reliability of his statements. (Exhibit B, pp. 1, 2; Testimony of AG)

11. Di also told the worker that LB it him on the butt with a belt, which LB later denied. (Exhibit B, pp. 2, 5; Testimony of AG)

12. Di was worried by what he witnessed. Di stated he was worried that "Papi was going to poke mommy in the eye" and then "they would not have the house anymore" and that "Papi wants mommy to leave the house." (Exhibit B, p. 2)

[1] AG testified that Di's speech was hard to understand and she had to ask him to repeat himself; that she took "poke" at "face value" and not to mean anything other than poke.

13. D corroborated Di's statements in regard to a verbal argument between the Appellant and LB and that his parents were not getting along. D stated he was in his room when his parents argued and denied the argument became physical, although he recalled that "last year" his parents "fought with their bodies" and the police came. D was worried that his parents would fight again. (Exhibit B, p. 2; Testimony of AG)

14. The Principal of the school told the Response Worker that he was aware of "some violence" in the home because D told him that if the police come to the home again, they will lose the house. (Exhibit B, p. 2; Testimony of AG)

15. On December 14, 2016, the DCF Response Worker spoke with LB and later met her at the DCF Office. LB's account of the reported incident differs from the children's in that LB told the worker that the Appellant broke her phone, grabbed her by the arms and pushed her on the bed and that the boys were trying to hit the Appellant to defend her when that happened. D accidentally hit LB in the face. LB denied the Appellant hit her and had no visible injury to her eye. LB acknowledged stress in the home due to the intended marital separation/divorce and that the precipitant to the argument was her reconnection with "a [Facebook] friend". (Exhibit B, p. 4; Testimony of AG)

16. On December 14, 2016, the Response Worker spoke with the Appellant and discussed the reported concern. The Appellant corroborated that the prior night, he had argued with LB because she was talking with a man with whom he suspected she was having an affair. The Appellant denied that he hit LB[2], but corroborated the children were present, hit him and were upset and crying. The Appellant acknowledged stress in the home due to the intended marital separation/divorce. (Exhibit B, p. 5; Testimony of AG)

17. During their interview, neither child mentioned that they intervened in the altercation between their parents or hit their parents. Where any physical contact was mentioned, it was in regard to an incident "last year" that D recalled. (Exhibit B, pp. 1,2; Testimony of AG)

18. The evidence does not support D's statement that the police visited their home "last year". The only known response by police to the Appellant's home was September 21, 2012, at which time D was only two (2) years old. (Exhibit B, p. 2)

19. During the response, the Department spoke with collaterals familiar with the children, including the boys' after school program and pediatrician. There were no protective concerns for the children. (Exhibit B, p. 3; Testimony of AG)

20. On January 4, 2017, the Department supported allegations of neglect of D and Di by the Appellant. The basis of the Department's decision was that the children witnessed an altercation between their parents and tried to intervene on LB's behalf, thus the Appellant failed to provide minimally adequate emotional stability and growth for the children. The Department determined that additional assessment and intervention

[2] AG testified that she did not ask the Appellant if he grabbed LB and pushed her on the bed.

was warranted. (Exhibit B, p. 7; Testimony of AG)

21. The Department did not conclude that the Appellant's actions placed the children in danger or posed a risk to their safety and well-being. (see DCF Protective Intake Policy #86-015, rev. 2/28/16)

22. In order to support neglect, the Department must demonstrate reasonable cause to believe a child(ren) was neglected and that the actions or inactions of a caregiver placed the child(ren) in danger or posed substantial risk to the children's safety and well-being. (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

23. The Department determined that LB did not play a contributory role in the altercation. (Testimony of AG)

24. The Department opened a clinical case and conducted an assessment. The Appellant, LB and the children continued to reside in the home together, pending their divorce, without further issue. On April 5, 2017, the Department closed the case.[3] It is inferred that the Department resolved protective concerns for the children. (Testimony of AG and Appellant)

25. After a review of all the evidence and for the following reasons, I find the Department's decision was not made in accordance with Department regulations and applicable policies:

    a) The children were witness to a verbal/physical altercation between their parents which directly impacted them. The Appellant was the aggressor in the argument;
    b) The court has determined that the Department's determination of neglect does not require evidence of actual injury (Lindsay v. Department of Social Services, 439 Mass. 789 [2003]);
    c) Notwithstanding the argument they witnessed, there were no other reported concerns that the Appellant failed to provide them with minimally adequate care.
    d) The Department demonstrated sufficient evidence to support its decision that the Appellant neglected D and Di, as defined by its policy; however, the Department did not present evidence that the Appellant's actions placed the children in danger or posed substantial risk to their safety and well-being.[4] (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

[3] Information regarding the status of a clinical case (e.g. "open" or "closed" (including date) is provided within the Hearing Officer's work "tab" in the Department's computerized database.

[4] Such evidence, that the child was in danger or the 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 "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 the 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, p. 28, 29)

Applicable Standards

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 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 2.00 and 4.32; 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 caregiver; 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

"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. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00)

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 father of D and Di, the Appellant is their caregiver under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

The Department determined that the Appellant neglected D and Di. The basis of the Department's decision was that the children witnessed an altercation between their

parents and tried to intervene on their mother's behalf, thus the Appellant failed to provide minimally adequate emotional stability and growth for the children. 110 CMR 2.00 and 4.32

The Appellant, through his Attorney, argued that there was a mutual argument between the Appellant and LB but that the Appellant was unfairly held accountable. The Appellant asserted that D "got frustrated" with the Appellant and LB for arguing and that prompted him to hit the Appellant. The Appellant asserted that he has been vigilant with regard to the children's needs, including counseling, and that the Department did not demonstrate evidence to support its decision.

This Hearing Officer is obliged to consider the totality of evidence, and whether there was enough evidence to permit a reasonable mind to accept the Department's decision that the Appellant neglected the children. In the instant case, the Department demonstrated sufficient evidence to support its decision that the Appellant neglected D and Di, but did not determine that the Appellant's actions placed the children in danger or posed substantial risk to their safety and well-being.[5] For these reasons and those enumerated in the above Findings of Fact, this Hearing Officer has determined the Department's decision was not reasonable or made in accordance with Department regulations and applicable policies. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); see Lindsay v. Department of Social Services, 439 Mass. 789 [2003]; DCF Protective Intake Policy #86-015, rev. 2/28/16

Conclusion and Order

The Appellant has shown by a preponderance of the evidence that the Department's decision to support allegations of neglect on behalf of D and Di was not in conformity with Department policy and regulations; therefore the Department's decision is REVERSED.

4-2-18
Date

Maura E. Bradford
Administrative Hearing Officer

Nancy S. Brody
Supervisor, Fair Hearing Unit

Date

Linda S. Spears
Commissioner

[5] The Department satisfied the requirement to find "substantial concern" for the family, which would have allowed for the desired intervention and assessment, but without identification of the Appellant as the perpetrator of neglect.