

THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
DEPARTMENT OF CHILDREN AND FAMILIES  
CENTRAL ADMINISTRATIVE OFFICE  
600 WASHINGTON STREET  
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LINDA S. SPEARS  
Commissioner

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(  
( IN THE MATTER OF )  
( YS )  
( )  
( FH # 2017-0062 )  
(

HEARING DECISION

Procedural History

The Appellant in this Fair Hearing is YS. The Appellant appeals the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support an allegation of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On December 12, 2016 the Department received a 51A report from a mandated reporter alleging neglect of Ye ("Child") by YS; the allegation was 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 C.M.R. 10.06

The Fair Hearing was held on April 18, 2017 at the Department of Children and Families' Park Street Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
NW	Appellant's Attorney
YS	Appellant
AA	Interpreter
BT	DCF Supervisor

In accordance with 110 C.M.R. 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 on a digital voice recorder, pursuant to 110 CMR 10.26

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

For the Department:

Exhibit A: 51A Report

Exhibit B: 51B Response

*The Department also submitted documents from the ongoing Care and Protection court proceeding, but these have not been allowed into evidence as they originate from a confidential Juvenile Court proceeding.*

For the Appellant:

*The Appellant did not submit any documentary evidence*

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)

**Statement of the Issue**

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. DCF Protective Intake Policy #86-015 Rev. 2/28/16

**Findings of Fact**

1. YS is the father of Ye. JM is the mother of Ye. At the time of the instant 51A, Ye was ten months old. (Exhibit A p.1-2, Exhibit B p.1-2, Testimony of BT, Testimony of Appellant)
2. Ye was born with spina bifida. He is feed through a gastric tube. At the time of the instant 51A report, Ye also had a tracheotomy tube to assist with his breathing. At the time of the Fair Hearing, he had undergone fourteen corrective surgeries. (Exhibit B p.4, Testimony of BT, Testimony of Appellant)

3. Upon discharge from the hospital, the family was referred to visiting nurse services. The visiting nurse was to assist the parents with care of Ye, in particular for the usage and maintenance of the tracheotomy and gastric tubes. (Exhibit A p.2, Exhibit B p.3-5, Testimony of Appellant, Testimony of BT)
4. YS and JM had been dissatisfied with some of the visiting nurses and had requested new ones. A few weeks prior to the incident that gave rise to the instant 51A, visiting nurse SB did not properly insert Ye's tracheotomy tube. Ye turned blue with both parents present. The problem was addressed and Ye's skin tone returned approximately 60-90 seconds later. (Exhibit B p.4, Testimony of BT, Testimony of Appellant)
5. Due to Ye's medical complications, the parents have been advised that loud noises and commotions could impact the child negatively. I find that there is no clarifying evidence to describe what level of loud noise might have an impact on Ye. I further find that there is no evidence to describe exactly what impact(s) a loud noise might have on Ye. (Exhibit B p.4, Testimony of BT, Testimony of Appellant)
6. JM has a history of involvement in relationships with domestic violence. However there have been no reported concerns about domestic violence between YS and JM. (Exhibit A p.7, Testimony of BT)
7. On 12/1/2016 there was an argument between the Appellant, JM and the visiting nurse, SB. At some point during this argument, JM called the police. After the police responded and spoke with the parties, YS left the home. Ye was not upset by the noises made by the commotion. This incident gave rise to the instant 51A. I find that this incident did not compromise Ye's health. I further find that this argument did not rise to the level of domestic violence. (Exhibit A p.2, Testimony of BT, Testimony of Appellant)
8. Other than the incident on 12/1/2016, both parents have been complying with medical professionals and are able to manage Ye's care. (Exhibit B p.4-6, Testimony of BT, Testimony of Appellant)
9. I find that there is not reasonable cause to believe that YS neglected Ye for the following reasons:
  - a. There is no accurate description of what level of noise or commotion might have a negative impact on Ye.
  - b. There is no accurate description of what impact a noise or commotion might have on Ye.
  - c. Ye was not negatively impacted by the incident on 12/1/2016.
  - d. There are no concerns regarding YS or JM's ability to provide medical care to Ye.

#### **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 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." 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.

"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." 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

"Caregiver". A caregiver is a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or 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.

"Neglect". Neglect is 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.

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.

Analysis

In this case, the Department has supported the allegation of neglect based on the Appellant's actions during an apparent argument between the Appellant, JM and the visiting nurse, SB. The Department argues that the Appellant made loud noises in the area of Ye, and that these loud noises could have a negative impact on Ye due to the child's medical complications.

However, the Department has failed to provide any discernible reference to what could be considered too loud a noise, or what the actual impact might be on Ye. Thus it is not possible to discern if the Appellant's actions crossed any dangerous threshold on the day in question. This is further underscored by the visiting nurse's observations that Ye was not negatively impacted as a result not only the Appellant's actions, but rather by the arrival of the police and the ensuing commotion.

The incident in question is the sole basis for the Department's decision to support the allegation of neglect. There were no other concerns alluded to in the submitted documentation or testimony by the Department's representative.

Conclusion and Order

The Department's decision to support the allegation of neglect of Ye by the Appellant is hereby REVERSED.

Nicholas Holahan  
Nicholas Holahan  
Administrative Hearing Officer *BC*

May 27, 2018  
Date

Barbara Curley  
Barbara Curley, Supervisor  
Fair Hearing Unit

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Date

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Linda S. Spears  
Commissioner