

**Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
600 Washington Street, 6th Floor
Boston, Massachusetts 02111**

Linda S. Spears, Commissioner

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IN THE MATTER OF: JM

Fair Hearing # 2017-0089

FAIR HEARING DECISION

Appellant, JM, 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 V, S, and C.

Procedural History

On December 1, 2016, the Department of Children and Families ("Department") received a report, pursuant to M.G.L. c. 119, §51A, alleging neglect on behalf of V, S, and C by their mother, JM ("Appellant"). On December 21, 2016, the Department decided to support the allegations of neglect, 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 March 21, 2017 at the Department's Area Office in Cambridge, Massachusetts. In addition to the Hearing Officer, the following persons appeared at the Fair Hearing:

JM	Appellant
KM	Department Supervisor
CJ	Department Response Worker

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 record remained open until April 10, 2017 to afford Appellant the

opportunity to submit additional documentary evidence. The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit A Intake Report – 51A Report
- Exhibit B Child Abuse/Neglect Non-Emergency Response

For Appellant:

- Exhibit 1 Fair Hearing requests and letters of support
- Exhibit 2 Letter of School Adjustment Counsellor
- Exhibit 3 Psychological Test Report
- Exhibit 4 EEC Investigation Report

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

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. 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: V, age one; S, age eleven; and C, age fourteen. [Exhibits A and B]
2. As the mother of V, S, and C, Appellant is deemed a caretaker pursuant to Department regulation 110 C.M.R. §2.00; [Exhibits A and B; Testimony of Appellant]

3. In October 2016, the Department opened a case with Appellant's family after supporting allegations of neglect. There had been concerns that Appellant was not meeting her children's educational needs due to her not meeting her own mental health concerns.¹ [Exhibit A]
4. Appellant smoked marijuana on her porch mostly every night to have some time to herself as she had "a lot going on in her head" and as it was relaxing. [Exhibit B, p.3]
5. S and C were aware of Appellant's marijuana use. [Exhibit B, p.3; Exhibit A]
6. At the time in question: S and C were each participating in therapy on a weekly basis; S had behavioral issues at school; S and C were both on IEPs and were struggling with homework. [Exhibit B]
7. On November 28, 2016, during a joint therapy session with S, Appellant reported that she smoked marijuana nightly to fall asleep. S reported that he and C watched the daycare children² during the day while Appellant napped. [Exhibit A; Exhibit B]
8. On December 1, 2016, the Department received a report, pursuant to M.G.L. c. 119, §51A alleging the neglect of V, S, and C by Appellant. The Department initiated a response to look into the allegations. [Exhibit A]
9. In the opinion of Appellant's primary care physician, Appellant had a level of dependency with marijuana use. [Exhibit B, pp.5-6]
10. Appellant did not have a medical use of marijuana card. [Exhibit B, p.3; Testimony of Appellant]
11. S and C reported that once or twice a week they watched the daycare children while Appellant napped. [Exhibit B, p.5]
12. Appellant denied ever sleeping during daycare hours. [Exhibit B, p.2; Testimony of Appellant]
13. On December 21, 2016, the Department supported allegations of neglect by Appellant of V, S, and C. [Exhibit B, pp.7-8]
14. The Department did not support allegations of neglect on of the daycare children by Appellant. [Exhibit 4; Testimony of Appellant]
15. I find the evidence insufficient to support a determination that Appellant neglected her children.

¹ The Department had previously closed a case with the family in August 2016 after substantiating concerns of neglect due to substance abuse by Appellant (marijuana use during pregnancy).

² Appellant operated licensed daycare out of her home from 7:15 a.m. to 6:00 p.m.

Applicable Standards and Analysis

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).

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

To “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.

A Substantiated Concern means:

- There is reasonable cause to believe that the child was neglected; and
- The actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)’s safety or well-being. (*Id.*)

Danger is 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. (*Id.*)

Risk is defined as the potential for future harm to a child. (*Id.*)

Substantial Risk of Injury is a situation arising either through intentional act or omission which, if left unchanged, might result in physical or emotional injury to a child or which might result in sexual abuse to a child. (*Id.*)

“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.) 110 C.M.R. §4.32 (2).

Caretaker means a child's:

(a) parent.... 110 C.M.R. §2.

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 CMR 10.05

To prevail, an Appellant must show by a preponderance of all of the evidence presented at the hearing, 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

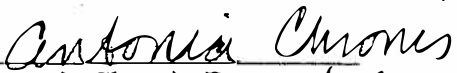
On the basis of the factual findings and standards set forth above and for the reasons set forth below, I reverse the Department's neglect support decision.

It was reasonable for the Department to have concerns relative to: Appellant's nightly use of marijuana (which was not condoned by her physician); the reports of the children that they watched the daycare children on occasion; and the children's struggles. Nevertheless, the Department did not gather information during its response to suggest that Appellant's use of marijuana was contributing to any concerning behaviors by the children or to their struggles in school. S and C were both participating in therapy and attending school consistently. The burden is on Appellant to show, by a preponderance of the evidence that the Department's decision to support an allegation of neglect was not in conformity with Department regulations and/or policy. The Appellant has presented persuasive evidence in this matter to allow for a reversal of the Department's support decision against her. The evidence insufficient to support a determination that Appellant neglected her children. The totality of the evidence suggests that Appellant provided V, S, and C with minimally adequate essential care. Furthermore, there was no evidence

that Appellant's actions or inactions placed the children in danger or posed a substantial risk to their safety and well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16

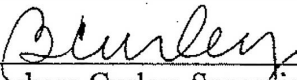
Order

The Department's decision to support allegations of neglect on behalf of V, S, and C was not made in conformity with Department regulations/policies and/or with a reasonable basis. Therefore, the Department's decision is **REVERSED**.



Antonia Chronis, Esq. *BC*
Administrative Hearing Officer

April 16, 2018
Date



Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner