

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111**

**Linda Spears
Commissioner**

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IN THE MATTER OF

FM #2017 0096

FAIR HEARING DECISION

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

Procedural History

On January 4, 2017, the Department received a report via the DCF Child at Risk Hotline which alleged physical abuse of A by the Appellant, her father, after A disclosed the Appellant slapped her twice in the face and the reporter observed a visible handprint on A’s cheek. A disclosed that the Appellant slapped her after lecturing her about not sweeping the floor. The Department screened-in the report and conducted an emergency response. On January 12, 2017, the Department made the decision to un-support the allegations of physical abuse and add and support an allegation of neglect of A by the Appellant on the basis the Appellant used an inappropriate method of discipline. 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 April 6, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; KP, DCF Supervisor; JL, DCF Response Worker; KC, DCF Response Worker (observing); FM, Appellant; CM, Appellant’s Spouse/Witness.

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 January 4, 2017

Exhibit B: 51B Report completed on January 12, 2017 by LT

For the Appellant(s):

Exhibit 1: Photo of A and Handwritten Excerpts from A's Diary

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 A's father. A's mother is JC. At the time of the report in question, A resided with the Appellant, his spouse CM and their children O and Z. (Exhibit B)
2. As A's father, the Appellant was her caregiver under Department policy and regulations. DCF Protective Intake Policy #86-015; 110 CMR 2.00
3. A moved to Massachusetts from [REDACTED] when she was 12 years old. At the time of

the report in question, she had resided with the Appellant for three (3) years. A's mother, JC, continued to reside in [REDACTED]. JC signed a caretaker agreement which allowed A to be enrolled in school; however, there was not a formal custody agreement in place at the time of the report in question. (Exhibit B, pp. 3, 5; Testimony of JL and Appellant)

4. At the time of the report in question, A was 15 years old and was in the 10th grade and a member of the [REDACTED]. The Department did not contact or did not document contact with A's school. (Exhibit B, p. 4; Exhibit 1; Testimony of JL)
5. The Appellant was not involved with the Department. (Exhibit A)
6. A has regular contact with JC via telephone. A had regular contact with her paternal aunt, CC, and is close to CC and her children. A often spent weekends with CC and had a room at CC's home. (Exhibit B, pp. 3-6; Testimony of Appellant)
7. The Appellant does not have a good relationship with his family. The Appellant and his family members each gave different reasons for their strained relationship but overall agreed that there was limited meaningful contact between adult caregivers.¹ CM testified that neither she nor her relationship was accepted by the Appellant's family, in part due to cultural and racial differences, where the Appellant is [REDACTED] and [REDACTED] and CM is [REDACTED]. In regard to her relationship with A, CM understood why A [likely] felt closer to her paternal family members. (Exhibit B, pp. 3, 5, 7; Testimony of Appellant and CM)
8. CM was frequently A's primary caretaker due to the Appellant's second shift work schedule. CM testified that it was like "pulling teeth" to get A to do things at home, and that A was not communicative or accountable. As an example, during the Department's response, CM noted that A "has no interest in being part of the family" and often left the house with CC without saying that she was leaving, which the Appellant and CM both found disrespectful. In an effort to address A's behavior, the Appellant and CM took A to therapy; however, they stopped making therapy appointments because A was not engaging or learning from the experience. (Exhibit B, pp. 2, 3; Exhibit 1; Testimony of JL, CM and Appellant)
9. On or around December 16, 2016, JC came to Massachusetts without advance notice to the Appellant; JC left a note in the Appellant's mailbox "informing him she was in town and would like to spend time with [A]." During the visit, A was late to return home and found the doors locked upon her return. A has a key to the home but did not realize the deadbolt was locked; she returned to CC's home with her mother and went home the next day. (Exhibit B, pp. 4, 5; Testimony of JL, Appellant and CM)

¹ In part, CC opined to response workers that A briefly lived with her paternal grandmother when she came to the US and the Appellant was not initially involved with A's care; however, that the Appellant claimed A as a dependent on his taxes and did not give the money to his mother for A's care, which was a source of argument between them and the reason A went to live with the Appellant. (Exhibit B, p. 5)

10. During JC's visit, CC admitted that she and JC "[had] gone behind [the Appellant's] back "filing for a change of custody". (Exhibit B, p. 5; Testimony of JL and Appellant)
11. On December 20, 2016, a report was filed with the Department which expressed concern that: A could not eat what was bought for her siblings; the Appellant had slapped A on the face because she did not do the dishes; and, A was not brought on a vacation with the Appellant, stepmother and step-siblings. The Reporter stated that A eats, but is not allowed to eat what the other children eat. The report also stated that "Although the child is disappointed she can't go on vacation with the other siblings the child is left with a family friend." The report was screened out. CC later admitted that she filed the report. (Exhibit A, p. 5; Exhibit B, p. 5; Testimony of CM)
12. The Appellant grew increasingly frustrated with A's disrespect and disregard for his expectations. On January 4, 2017, A returned home from school and the Appellant confronted her about not doing her chores the previous evening. The Appellant told A that she did not have to like him or CM, but she is "required to show respect". When A "gave him a blank stare as if he did [not] exist", the Appellant reactively slapped A. (Exhibit B, pp. 5, 6, 8; Testimony of Appellant)
13. A recorded the incident on her cell phone and later told the Response Worker that her paternal grandmother "had asked her to always record and have photographs of all such encounters with [the Appellant]." (Exhibit B, pp. 3, 6, 7; Testimony of JL and Appellant)
14. In regard to the reported incident, CC told A to call the police. CC left work and picked up A, who at the time was babysitting for her younger half-sister, Z. CC picked up A and left Z with a neighbor who was not well known to CM and the Appellant. (Exhibit B, pp. 2, 4; Testimony of JL and CM)
15. Along with their other actions, the fact that A was encouraged to record interactions between her and the Appellant suggested that the paternal family had ulterior motives. (Exhibit B, p. 3; Testimony of JL)
16. On January 4, 2017, the Department received a report via the DCF Child at Risk Hotline which alleged physical abuse of A by the Appellant, her father, after A disclosed the Appellant slapped her twice in the face and the reporter observed a visible handprint on A's cheek. A disclosed that the Appellant slapped her after lecturing her about not sweeping the floor. The Department screened-in the report and conducted an emergency response. (Exhibit A; Testimony of JL)
17. On January 4, 2017, the DCF Response Workers met with CC and A at CC's home. A showed the Response Workers a picture on her phone "purported [to be] the result of the slap." The workers did not observe any marks on A's face when they met with her. A told the worker(s) that she "has no relationship" with the Appellant or CM and

while denying disobedience, admitted she sometimes “forgot” to do chores and that created friction between them. A opined about “lots of stuff” going on, including that the recently passed Christmas, the Appellant and CM were “going somewhere”² and left her a note giving her instructions about feeding the dog, cleaning the house, and the amount of food she is allowed to eat. A also discussed a conversation with the Appellant during which he told her “she was not planned for” and that her mother had shown A text messages from the Appellant that demonstrated that her parents’ relationship “has never been cordial”.³ (Exhibit B, pp. 3, 4, 7; Testimony of Appellant and JL)

18. Following the reported incident, A remained with CC. When Response Workers asked A what she wanted to happen, A stated she wished to live with CC. Although the Appellant initially expected A to return home, after a lengthy discussion with CM, consideration of A’s happiness, the continued struggles with A and the allegations now raised against him, the Appellant decided that he would not protest A remaining with CC. Following the reported incident, A remained with CC, who became A’s legal guardian. (Exhibit B, pp. 4, 5, 8; Testimony of JL)
19. On January 11, 2017, the Department determined that the allegation of physical abuse was not supported. The Department added and supported an allegation of neglect of A by the Appellant and closed the case. The Department determined that the Appellant used an “inappropriate form of discipline” and that use of physical discipline is contrary to proper development of a child and does nothing to advance appropriate behavior in the future and on this basis determined that the Appellant failed to provide minimally adequate emotional stability and growth for A and neglected A under Department regulations. (Exhibit B, pp. 10, 11; Testimony of JL; 110 CMR 2.00 and 4.32)
20. During the response, the Department did not inform the Appellant of the addition of the allegation of neglect or give the Appellant an opportunity to respond to the new allegation. (Testimony of JL and Appellant)
21. In reaching the decision that the Appellant neglected A, the Department determined that A was not defiant or aggressive, yet the Appellant “struck her in the face” and that it was the impression of the Response Worker’s Supervisor that “issues will likely arise in the future if monetary support is sought”. (Exhibit B, pp. 10, 11)
22. I find the Appellant credible. The evidence, including CC’s admission of a surreptitious plan to change A’s custody and A’s grandmother advising A to record

² CM testified that she, the Appellant, O and Z went to visit family for the day and the plan was for A to spend Christmas with CC as she had done previously and she left a note for A about completing chores and that there was food in the refrigerator that CM made and reminded A about so it would not go to waste.

³ The Appellant testified that one of his assignments in counseling was to have more one on one time with A. During a car ride, A asked him about her birth and he candidly talked with her and answered her questions. The Appellant understood that the information could be hurtful. The Appellant testified that he and CM had numerous sit downs with A about her happiness and asserted they had not failed to give A “what she needed to feel happy and comfortable.” (Testimony of Appellant; Exhibit B, pp. 4, 7)

interactions with the Appellant, supported the Appellant's assertion that the paternal family likely influenced A. Further, copies of pages from A's diary support CM's assertion that while A seemed like a quiet and shy child, her diary suggested otherwise.⁴ (Exhibit 1; Testimony of Appellant and CM)

23. The evidence suggested that the Appellant's attitudes toward physical discipline⁵ and the strained relationship with A, created the potential for abuse or neglect but there was no immediate danger to A's safety or well-being. (Testimony of JL)
24. After a review of all the credible evidence and for the following reason, I find the Department did not have reasonable cause to support an allegation of neglect of A by the Appellant (also see Analysis):

- a) In the instant case, the Department demonstrated evidence to support its decision that the Appellant neglected A (Lindsay v. Department of Social Services, 439 Mass. 789 [2003]);
- b) The Department did not have sufficient evidence to support the allegation of neglect. Under the conditions described, the Department demonstrated that the Appellant's actions created the potential for neglect; however, there was no evidence of danger to A or of a substantial risk to her safety or well-being.⁶ (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

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

⁴ In her diary, A refers to CM as "a stuck-up bitch" and notes "...basically you aren't my mom..." (Exhibit 1)

⁵ The Appellant testified that he was physically disciplined growing up, that it did not harm him and was his parental prerogative to use physical discipline. (Testimony of Appellant)

⁶ 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)

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 A’s father, the Appellant was her caregiver under Department policy and regulations. 110 CMR 2.00

The Department determined that the reported concern of physical abuse was not supported. The Department added and supported an allegation of neglect of A by the Appellant and closed the case. The Department determined that the Appellant used an “inappropriate form of discipline” and that use of physical discipline is contrary to proper development of a child and does nothing to advance appropriate behavior in the future and on this basis determined that the Appellant failed to provide minimally adequate emotional stability and growth for A and neglected A under Department regulations. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant illustratively argued that the Department’s decision was not based on reasonable cause or supported by sufficient evidence. The Appellant asserted that A and paternal family members assisted A in her disregard/disrespect of his household and colluded with A’s mother, JC, to obtain custody of A without prior notification to the Appellant.

With respect to the evidence, this Hearing Officer inferred that A had limited meaningful contact with the Appellant prior to coming to the US, particularly where the Appellant and JC did not communicate “cordially” and in light of the Appellant’s statements that A was the result of a brief relationship with A’s mother before his immigration to the US. The evidence supports that at 15 years old, A struggled to assimilate into the Appellant’s family and from A’s perspective, that she had no relationship with the Appellant and CM despite 3 years of living with them and their efforts to include her.

The evidence suggested that A was increasingly disrespectful of the Appellant and that paternal family members actively contributed to A’s disregard for the Appellant; collectively, these factors set the stage for the reported incident. It was undisputed that in a moment of frustration the Appellant slapped A. A did not complete her chores the previous evening and the evidence, including that she taped the reported incident, suggests she readily anticipated the Appellant being upset because she did not. Additionally, by the time of the reported incident, A’s mother and paternal aunt had already surreptitiously filed a petition in Probate Court and A’s mother assented to guardianship by the paternal aunt.

The Department does not condone the use of injurious physical discipline, but did not determine that the Appellant abused A given A’s lack of physical injury as defined by Department policy and regulations. The Department added and supported an allegation of neglect of A on the basis that physical discipline is contrary to the “proper development” of a child and constitutes a failure to provide minimally adequate emotional stability and growth. The Department’s determination that the Appellant neglected A, even without evidence of injury, is bolstered by Lindsay v. Department of Social Services, 439 Mass. 789 (2003), where the Court recognized that the Department’s unique mission requires intervention by the Department in order to prevent future injury. However, under Department policy, in order to support an allegation of neglect the Department must demonstrate that neglect has occurred *and* (emphasis added) that the caregiver’s actions placed a child in danger or posed substantial risk to a child’s safety and well-being. The Department did not satisfy the requirement. The Department adequately demonstrated that the Appellant’s actions created the *potential* (emphasis added) for neglect but not immediate danger to A’s safety and well-being. 110-CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

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 A. For the reasons stated above and enumerated in the above Findings of Fact, the Department’s decision to add and support an allegation of neglect was not supported by sufficient evidence. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); also see Wilson v. Department of Social Services, 65 Mass. App.Ct. 739, 843 N.E.2d 691

Conclusion and Order

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

4-2-18
Date

Maura E. Bradford
Maura E. Bradford
Administrative Hearing Officer

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

Date

Linda S. Spears
Commissioner