

THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
DEPARTMENT OF CHILDREN AND FAMILIES  
CENTRAL ADMINISTRATIVE OFFICE  
600 WASHINGTON STREET 6<sup>TH</sup> FL  
BOSTON, MASSACHUSETTS 02111

Linda S. Spears  
Commissioner

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

IN THE MATTER OF )  
 )  
 EC ) FAIR HEARING DECISION  
 )  
 FH # 20170120 )  
 )

The Appellant in this Fair Hearing was EC (hereinafter "EC" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support allegations of sexual abuse pursuant to M.G.L. c. 119, §§51A and B.

**Procedural History**

On December 2, 2016, the Department of Children and Families received a 51A report from a mandated reporter alleging sexual abuse of K (hereinafter "K" or "the child") by the Appellant. A non-emergency response was conducted and on January 9, 2017, the Department made the decision to support the allegation of sexual abuse of K by EC. 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 was initially scheduled for March 14, 2017, however; due to inclement weather, it was cancelled. The hearing was continued and held on May 23, 2017, at the New Bedford Area Office in New Bedford, MA. All witnesses were sworn in to testify under oath. The record was closed at the conclusion of the hearing.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira	Fair Hearing Officer
EC	Appellant
TH	Appellant's Attorney
PP	Witness
AM	DCF Response Worker

SO

DCF Area Program Manager

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 Department regulations 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 Report

For the Appellant:

None

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**

On the basis of the evidence, I make the following factual findings:

1. At the time of the filing of the 51A report, K was seventeen (17) years old. She resided with her mother, MP in [REDACTED]. The child would see her father, PP (hereinafter "PP" or "father"), on the weekends in [REDACTED] and occasionally the Appellant; as PP and the Appellant had a child together. (Exhibit A, pp. 1-3)

2. The Appellant and PP were involved with the Department due to three (3) previous investigations between March, 2008 and December, 2008 due to allegations of neglect of their daughter, A. The Department's concerns revolved around A's exposure to domestic violence and parental substance abuse. (Exhibit B, p. 1)
3. On December 2, 2016, the Department received a report from a mandated reporter alleging sexual abuse of K by the Appellant, pursuant to M.G.L. c.119, §51A. According to the mandated reporter, the child disclosed recurrent sexual abuse by the Appellant every weekend from when she was age six (6) to age twelve (12). The child further disclosed that the Appellant would handcuff her, tie her legs and put her hand over her mouth and "do things to her." Also reported was that K disclosed this to her mother, MP, about a month prior to the 51A being filed but MP was not sure what to do with the information. MP added there had been no previous concerns prior to K's disclosure. (Exhibit A, p. 3)
4. The report was screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, §51B. The allegation of sexual abuse of the child by the Appellant was supported by the Department at the conclusion of the response. The allegation was supported because the child maintained her disclosure to three (3) separate individuals as well as at a forensic interview, a SAIN<sup>1</sup>, that she was sexually abused by the Appellant between the ages of six (6) and ten (10) and a half. Subsequently, the Department made a decision they had reasonable cause to believe that the child was sexually abused while in the supervision of the Appellant. (Exhibit B, p. 8)
5. When interviewed, MP reported K was recently evaluated by a mental health crisis team and remained hospitalized for one (1) night. MP indicated that K's struggle was attributed to the sexual abuse that she endured by the Appellant. MP also reported K had been struggling with a boy that she was in a relationship with. MP acknowledged that K made the disclosure to MP and K's godmother. MP reported she knew that over the years K did not like visiting her father and that K's father chose the Appellant over his own daughter, when given an ultimatum. (Exhibit B, p. 2)
6. On December 23, 2016, the child underwent a forensic interview at the [REDACTED] [REDACTED]. Aside from the child, present was MP, the DCF Response Worker, a police detective from the [REDACTED] Police Department and the forensic interviewer doing the SAIN. (Exhibit B, p. 3)
7. During the SAIN interview, the child disclosed that the Appellant "molested" her multiple times. The child had difficulties remembering the Appellant's first name but related that the Appellant sexually abused her from the ages of six (6) to ten (10). K added that the abuse occurred on Sundays when she visited her father and when he was not home, in front of the TV. (Exhibit B, p. 3)

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<sup>1</sup> "SAIN" is an acronym for Sexual Abuse Intervention Network. Through a joint effort by the Department of Children and Families and the District Attorney's office, the interview of the alleged victim is conducted with members of a team to eliminate the need for several interviews.

8. The child further disclosed the Appellant would ask her to "play a game", hand cuff her hand in front of her, sitting face to face, taking her pants and underwear off. K added the Appellant touched her "private parts" but was unable to explain in detail as to the private part, relating only that it was the "front part" where she "peed." The Appellant then bought her a toy and told her not to say anything to anyone. (Exhibit B, p.3)
9. The child disclosed the first person she told about the sexual abuse was her ex-boyfriend during a conversation that they had as to whether she was a virgin. During the forensic interview the child struggled in her disclosure and often mumbled which prompted the interviewer to ask for clarification. (Exhibit B, p. 3; Testimony of the DCF Response Worker)
10. Following the SAIN interview, MP added that she began having difficulties with K when she caught her engaging in sexualized conversation with a boy over the telephone and it was during one of their, MP and K's, disagreements that K disclosed to MP about the sexual abuse by the Appellant. (Exhibit B, p. 4)
11. The [REDACTED] Police Department did not have probable cause to charge and arrest the Appellant. The assigned detective did not find K to be a credible reporter. It was his opinion that the child was making up a story in response to her mother, MP, finding out that she was no longer a virgin. (Exhibit B, p. 5)
12. The Appellant denied the allegations and reported that K's family always tried to make her something that she was not. The Appellant added that it was extremely rare that PP was not home and she was never the sole caregiver of the child; adding that K never spent overnights. (Exhibit B, p. 5; Testimony of the Appellant)
13. MP and PP had difficulties following their separation, which affected K. (Testimony of the Appellant)
14. The Appellant was not criminally charged nor was she notified by the Court or the District Attorney's Office in regards to the allegation that was supported by the Department. (Testimony of the Appellant)
15. The child was never left alone with the Appellant nor was the Appellant ever asked to be a sole caregiver of the child. The child never showed any fear or concern when she visited PP on the weekends. (Testimony of PP)
16. The child spent more time with PP and the Appellant on the weekend than with MP during the whole week. The child resorted to affection from boys and sought negative attention, including a suicide attempt in the past. (Testimony of PP)
17. The child's school guidance counselor reported K received special education services because of anxiety and stress in social situations. K often internalized issues and was on the "radar" of the whole school personnel. The child was in danger of not graduating high school. The guidance counselor added that school personnel always had two (2)

people when meeting with K about an issue. (Exhibit B, p. 7)

18. I find that K was not a credible reporter of facts.
19. The Department relied primarily on K's statements during the SAIN interview despite noted concerns by the Police Department and her school. (Fair Hearing Record)
20. The Department did not consider the factors that detracted from K's credibility. (Fair Hearing Record)
21. After review and consideration of all of the evidence, I find that the Department did not have reasonable cause to support the allegation of sexual abuse of K by the Appellant for the following reasons.
  - a. K's disclosure of sexual abuse was not supported by sufficient indicia of reliability. (See Edward E. v. Department of Social Services, 42 Mass.App.Ct. 478 (1997))
  - b. K was not a reliable reporter.
  - c. Evidence existed which detracted from K's disclosure of sexual abuse.
22. The Department's decision to support the allegations of sexual abuse by the Appellant was not in compliance with its regulations. (110 CMR 4.32, 4.37; DCF Protective Intake Policy #86-015 Rev. 2/28/16; See Analysis)

### Applicable Standards

A "support" finding of abuse or neglect means that 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) placed 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. 110 CMR 4.32(2) 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. 110 CMR 4.32(2)

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §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 §51B. Id. at 64; M.G.L. c. 119, §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

A "caregiver" means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child's health or welfare; and (e) 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

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, or (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, or (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

"Sexual abuse" is any non-accidental commission of any act by a caregiver upon a child that constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caregiver and a child for whom the caregiver is responsible. DCF Protective Intake Policy #86-015, rev. 2/28/16

"Substantial evidence" is defined as such evidence as a reasonable mind might accept as adequate to support a conclusion. DCF Protective Intake Policy #86-015, rev. 2/28/16

The Department regulations require that "[f]or any investigation and supported report of abuse, the Department *shall* record the identity of the alleged perpetrator when the report of abuse is referred to the District Attorney and there is substantial evidence indicating that the alleged perpetrator was responsible for the abuse." (emphasis added) 110 CMR 4.33 and 110 CMR 4.37

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

### Analysis

It is undisputed that the Appellant was a "caregiver" pursuant to Departmental regulation. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 02/28/2016

The Appellant, through counsel, contested the Department's decision to support the allegation that she sexually abused the child, K. The Appellant argued that the allegation stemmed from the child's attempt to hide from her mother, MP, she was no longer a virgin. The Appellant added that the child struggled with her disclosure during the forensic interview, often mumbling incoherent information and was vague as to how she was abused. The Appellant further argued that MP only raised this allegation as a concern during a therapy session after K had disclosed to her during an argument about a sexual relationship and/or talk with a boy. The Appellant argued that K's family had a poor history with her due to her relationship with K's father and their desire to tarnish her reputation and character, including multiple prior allegations that were never supported by the Department. (Fair Hearing Record) The Department's investigative response also revealed multiple collaterals (police and school) doubted her credibility and/or motivation to disclose. Her school guidance counselor noted that K was a child with special needs and was always met with two (2) school staff for everyone's safety. This evidence was not considered by the Department. I find the Appellant's argument persuasive. The circumstances presented in this case, viewed in light of the surrounding circumstances, did not support a finding of sexual abuse by the Department.

In making a decision to support a report of abuse or neglect, the Department must consider the entire record, including whatever in the record fairly detracts from the weight of the evidence supporting its conclusion. Arnone v. Commissioner of the Department of Social Services, 43 Mass. App. Ct., 33, 34 (1997); the record did not reflect that the Department did so in this subject investigation. Rather, the Department relied primarily on K's statements with no independent attempt to verify the information given.

After review and consideration of all of the evidence presented, the evidence in this case, in its totality, was insufficient to support the Department's decision. K's statements alone were not reliable (Edward E., 42 Mass. App.Ct. 478 (1997)) and there was no independent evidence presented to corroborate the allegations against the Appellant. Therefore, the Department did not have reasonable cause to believe that the Appellant sexually abused the child, K.

Conclusion and Order

The Department's decision to support the allegation of **sexual abuse** of K by the Appellant was not made in conformity with Department regulations and with a reasonable basis and therefore, the Department's decision is **REVERSED**.

Jorge F. Ferreira (dit)  
Jorge F. Ferreira  
Administrative Hearing Officer

Date: 5/2/18

Darlene M. Tonucci  
Darlene M. Tonucci, Esq.  
Supervisor, Fair Hearing Unit

Date: \_\_\_\_\_

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Linda S. Spears  
Commissioner