

THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
DEPARTMENT OF CHILDREN AND FAMILIES  
CENTRAL ADMINISTRATIVE OFFICE  
600 WASHINGTON STREET  
BOSTON, MASSACHUSETTS 02111

LINDA S. SPEARS  
Commissioner

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

( )  
( IN THE MATTER OF )  
( RB )  
( )  
( FH # 2017-0131 )  
( )

**HEARING DECISION**

**Procedural History**

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

On December 12, 2016 the Department received a 51A report from a mandated reporter alleging sexual abuse of D and J (hereinafter "D" or "J" or "Children") by RB. On December 12, 2016 the Department received another 51A regarding the same allegations and facts. The Department subsequently supported the allegations pursuant to M.G.L. c. 119, §51B. The Department informed the Appellant of its decision and his right to appeal. The Appellant made a timely request for a Fair Hearing under 110 C.M.R. 10.06

The Fair Hearing was held on May 24, 2017 at the Department of Children and Families' Cape Ann Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
RB	Appellant
RH	DCF Supervisor
MK	DCF Response Worker
EH	Appellant's Attorney

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 # [REDACTED]; dated 12/12/2016 at 1:41 p.m.
- Exhibit B: 51A Report # [REDACTED], dated 12/12/ 2016 at 6:10 p.m.
- Exhibit C: 51B Response, dated 1/4/2017

For the Appellant:

- Exhibit 1: Excerpt from previous 51B pp.3-5
- Exhibit 2: Excerpt from 51A Report # [REDACTED], pp.1-5, dated 9/14/2016
- Exhibit 3: Excerpt from previous 51B pp.2-5
- Exhibit 4: Excerpt from previous 51B pp.7-8
- Exhibit 5: Excerpt from previous 51B pp.12-14
- Exhibit 6: Excerpt from previous 51B pp.10-11
- Exhibit 7: Excerpt from previous 51A Report # [REDACTED], dated 9/22/2016
- Exhibit 8: Excerpt from previous 51A Report # [REDACTED], dated 11/17/2016
- Exhibit 9: Excerpt from previous 51B
- Exhibit 10: Case Dictation printout from 12/8/2016
- Exhibit 11: Excerpt from previous 51B
- Exhibit 12: Excerpt from 51A Report # [REDACTED], dated 12/12/2016 at 6:10 p.m.
- Exhibit 13: Excerpt from 51B Report, dated 1/4/2017
- Exhibit 14: Excerpt from 51B Report, dated 1/4/17
- Exhibit 15: Temporary Order from [REDACTED] Probate Court<sup>1</sup>
- Exhibit 16: Pictures and map printout of route taken on December 11, 2016

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

<sup>1</sup> Exhibit 15 is part of an impounded legal proceeding, and was therefore not considered as evidence for this Fair Hearing

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. RB was the father of D, J and F. At the time of the 51A reports: D was six (6) years old, J was four (4) years old and F was three (3) years old.<sup>2</sup> RB was a caregiver for D and J pursuant to Department regulation 110 CMR 2.00. (Exhibit A p.1-3; Exhibit B p.1-3; Exhibit C p.1; Testimony of MK; Testimony of Appellant)
2. RB was divorced from the Children's mother, KB (hereinafter "KB"). The Children resided with their maternal grandparents, who had physical custody of the Children. There were ongoing probate disputes between RB and KB regarding the Children. (Exhibit A pp.9-11; Exhibit C pp.1-2; Testimony of MK; Testimony of Appellant)
3. Since February 2016, there have been nineteen (19) 51A report filings, not including the present reports. The reports have cited the Appellant, KB or KB's boyfriend. None of the previous 51A reports regarding Appellant were supported. However, some allegations of neglect of the Children by KB were supported. (Exhibit C p.1; Testimony of MK)
4. On the weekend of December 9-11, 2016 the Appellant came from [REDACTED] to visit his children for a holiday visit. The Appellant was allowed to visit his children without supervision, however other adults were present most of the time the Appellant was with the Children. The 51A reports' arose from this December visit. (Exhibit A pp.1-3; Exhibit B pp.1-3; Exhibit C pp.1-2, 9-11; Testimony of MK; Testimony of Appellant)
5. After the visit with the Appellant, the Children spent time with their mother, KB. The following day, on December 12, 2016, a mandated reporter filed a 51A report regarding the Appellant's visit with the Children. The reporter stated J reported he, D and the Appellant played "private mission game". During this game, everyone took their clothes off and Appellant touched himself and J and D touched each other. J also told the reporter the Appellant touched him and stuck his finger in and stopped talking. (Exhibit A p.3; Testimony of MK)
6. Later on December 12, 2016 another 51A was filed regarding the same visit between the Appellant and J and D. However, neither child made any disclosures in this report. The reporter stated the Children recanted their stories and said "there was no inappropriate touching; no one took off their underwear in front of anyone." (Exhibit B p.3; Testimony of MK)

---

<sup>2</sup> F was not a subject of the 51A reports, dated 12/12/2016 and subsequent 51B report, dated 1/4/2017.

7. The Department Response Worker interviewed the three (3) children during the course of the 51B investigation. The interviews were conducted separately, no one else was present. None of the Children made a disclosure of sexual abuse by the Appellant. J and D remembered the game "private boy mission" but did not indicate it involved undressing or touching of their privates. Neither J nor D remembered making any disclosures to the initial 51A reporter. (Exhibit C pp.7-9; 17-18; Testimony of MK).
8. The Appellant denied any abuse and provided the Department with detailed information about how he spent his weekend visit with J and D. The Department was informed that almost all of the time he was with the Children there was at least one other adult was present. (Exhibit C, pp. 9-11; Testimony of MK)
9. D and J had histories of sexually acting out at school. Their behaviors included self-stimulation, "dry humping" and some physical aggression. These behaviors began approximately a year ago. (Exhibit C pp.11-12; Testimony of MK)
10. Previously, KB's boyfriend was the focus of sexual abuse allegations of the Children; however those allegations were not supported. (Exhibit A p.9; Exhibit C p.1; Testimony of MK)
11. The Department's Response Worker cited previous case history and unsupported allegations of sexual abuse regarding the Appellant as part of the decision to support the instant allegations. (Exhibit C pp.14-15; Testimony of MK).
12. The Appellant provided documentation and testimony outlining an ongoing conflict between the Appellant and KB regarding the Children. The Appellant cited previous 51A filings and actions taken by KB which impacted the Appellant's ability to have contact with the Children. (Exhibit 1; Exhibit 2; Exhibit 3; Exhibit 4; Exhibit 5; Exhibit 6; Exhibit 7; Exhibit 8; Exhibit 9; Exhibit 10; Testimony of Appellant)
13. The Appellant provided documentation regarding prior case involvement with the Department regarding KB's attempts to coach her children in making disclosures. (Exhibit 5 pp.12-13; Exhibit 6 pp.10-11; Testimony of MK; Testimony of Appellant)
14. In light of the totality of evidence in this case, I find the Department did not have reasonable cause to support allegations of sexual abuse of D or J by RB for the following reasons:
  - a. D and J's allegations were not reliable as there was no corroborating evidence of the Children's disclosures other than to the mandated reporter in the initial 51A report to support the allegations of sexual abuse of D or J by RB.
  - b. D and J were not consistent in their accounts of the alleged incident in either of the 51A reports. In the initial report they disclosed allegations of sexual abuse by RB; however in the second 51A report they did not disclose any allegations of sexual abuse.

- c. Neither D nor J made any subsequent disclosures, either to the Department's Response Worker or hospital staff at emergency room.
- d. Excepting small periods of time, other adults were present for most of the Appellant's December 2016 visit with the Children.
- e. The Children did not make disclosures to KB or to their Children's grandmother. The disclosures were made after spending time with their mother, KB.
- f. There is an ongoing probate conflict between KB and the Appellant.

### 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. 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)

"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 §51A." Id. at 63. This same reasonable cause standard of proof applies to decisions to support allegations under §51B. Id. at 64; M.G.L. c. 119, §51B

"Caregiver" means 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. DCF Protective Intake Policy #86-015, Rev. 2/28/16

"Abuse" is the non-accidental commission of any act by a caregiver which causes or creates a substantial risk of physical or emotional injury or sexual abuse to a child; or the victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver. This definition is not dependent upon location. Abuse can occur while the child is in an out-of-home or in-home setting. DCF Protective Intake Policy #86-015, Rev. 2/28/16

"Sexual Abuse" means any non-accidental 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

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

### Analysis


In this case, there was a probate dispute between the Appellant and the Children's mother, KB. In the past, it was shown that KB made attempts to coach the Children to make disclosures which were unfounded. The Department indicated they were aware of this during its response.

The initial statements made by the Children to the mandated reporter, alleging sexual abuse by the Appellant, were later in the day recanted. The Children made no additional statements regarding the alleged sexual abuse. There was no further corroborating evidence from other creditable sources to support the allegations initially made by the Children. To determine the reliability of multi-level hearsay, "look to the circumstances under which they were made" and consider the factors such as the hearsay statements themselves, the context in which they were made, and the detail of the statements. Edward E. v. Dep't of Soc. Servs., 42 Mass. App. Ct. 478, 484-485 (1997). The Children's retraction of their initial statements and lack of corroborating evidence undermines statements credibility. In this case, the Appellant has shown by a

preponderance of the evidence that the Department did not comply with its regulations and policy and did not collect facts sufficient to support a finding of sexual abuse by the Appellant.

**Conclusion and Order**

The Department's decision to support allegations of sexual abuse of D and J by the Appellant are hereby **REVERSED**.

Nicholas Holahan   
Nicholas Holahan  
Administrative Hearing Officer

12/19/17  
Date

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Linda A. Spears  
Commissioner