**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 )
( G.I. )
( FH # 2017-0137 )
( )

**HEARING DECISION**

## Procedural History

The Appellant, Ms. I, appeals the decision of the Department of Children and Families [hereinafter "the Department" or "DCF"], to support for neglect of her grandchild, N, pursuant to M.G.L., c.119, §51A § 51B.

On January 5, 2017, the Department received a 51A Report from a reporter alleging physical abuse of N by his mother's female friend named, A. N disclosed and was seen at school with injuries to his elbow and wrist reportedly caused by mother's friend. Although the Appellant had legal guardianship, she had allowed him to live with his mother, D.I. The reported allegations were screened in for a non-emergency response and assigned to response social worker, K.Z. On January 6, 2017, the Department received a 51A Report through the hotline from a reporter alleging neglect of sibling Ai by his mother, D.I. The reporter, who responded to the home, arrested the child's mother and two other parties, and found child, Ai, in the home during the process. The reported allegations were screened in on an emergency basis and assigned to emergency response social workers, R.T. and M.S., whose activities were made part of the on-going response of K.Z. On January 9, 2017, following the response, the Department unsupported the physical abuse of N; supported neglect of N by the Appellant, his mother, and his father; and, supported for neglect of Ai by his mother and father. These decisions were approved by management on January 19, 2017 and the clinical case, already active when the 51A Reports were filed, remained open.

The Department notified the Appellant of the decision and her appeal rights by letter dated January 19, 2017. The Appellant filed a timely request for Fair Hearing ["Hearing"] on February 4, 2017, pursuant to 110 CMR 10.06 & 10.08. The Appellant's request was granted and, following an on site continuance on April 18, 2017, her Hearing went forward on June 27, 2017 at the Department's South Central Area Office in Whitinsville, MA. Present were the DCF Supervisor, S.G.; the DCF Response Social Worker, K.Z.; the Appellant's Attorney, A.J.; and, the Appellant. The response social worker was sworn in under oath and testified. The Appellant did not testify; her attorney summarized the arguments. The proceeding was digitally recorded, pursuant to 110 CMR 10.26, and downloaded to a CD.

Admitted into evidence for the Department were the 51A Report of January 5, 2017 [Exhibit A-1], the DCF 51A Report of January 6, 2017 [Exhibit A-2], and the 51B Response Supported on January 9, 2017 and approved on January 19, 2017 [Exhibit B]. Admitted into evidence for the Appellant was the Probate and Family Court Order of June 24, 2014. [Exhibit 1] The record was closed on June 27, 2017.

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement, or bias in this case.

Pursuant to 110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

## Statement of 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 51B response, the Department's decision or procedural action, in supporting the 51A Report(s), violated applicable statutory or regulatory requirements, or the Department's policies or procedures, and resulted in substantial prejudice to the Appellant (s). 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(s). [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 [110 CMR 10.05] 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 Revised 2/28/16]

## Findings of Fact

1. D.I. and A.A. are the mother and father, respectively, of ten year-old Al, six year-old N, and four year-old Ai [Exhibit B, p.1]

2. The family has a lengthy history with the Department, which also includes the Appellant. [Exhibit A-1; Exhibit A-2; Exhibit B, pp.1-3]

3. The Appellant is the children's maternal grandmother. [Exhibit A-1, p.2; Exhibit B, p.11]

4. The Appellant has legal guardianship of the middle child, N, but according to the January 2017 reports from the Appellant and the child's parents, father had physical custody of N and the child was primarily living with him. [Exhibit A-1, p.2; Exhibit B]

5. The Appellant submitted a Probate and Family Court Order dated June 24, 2014 whereupon the Court ordered that the Appellant continue to serve as guardian of N and the child shall reside with his mother. [Exhibit 1] This flies in the face of more current information:

   (a) Mother has substance abuse and mental health issues well known to the Appellant prior to the 51B response of January 2017. [Testimony of the Response Social Worker; Exhibit B]

   (b) According to reports from the Appellant and father during the January 2017 51B response, both were aware that mother's contact with N was to be supervised. [Exhibit B]

   (c) When mother was contacted by the emergency response social workers on January 7, 2017, she said that the Appellant had guardianship of N, but N primarily stays with father, because he goes to school in [redacted]. She made no mention of having custody of N herself. [Exhibit B, p.9]

   (d) When the Appellant was contacted by the response social worker on January 6, 2017, she said that both boys [Ai & N] were living with their father, but she did not know the exact address. She said that the father had not been in N's life much over the last two years, but **she** wanted to give him a chance to be a father. [Exhibit B, p.4]

6. On January 6 & 7, 2017, six year-old N reported living with his parents; a male named J, later identified by the response social worker and the police as J.T.; a male named C.S., whom mother later identified as her cousin; and, a female named A.L. The child reported that A.L. sometimes babysat when his mother was gone and mother identified A.L. as the girlfriend of C.S. N reported that he shares a bedroom with mother and sleeps with her. [Exhibit A-1, p.2; Exhibit B, pp.4-5, 7, 9, 14]

7. On Friday, January 6, 2017, the police responded to an apartment to serve an active arrest warrant on N's mother. J.T, the primary tenant, answered the door. He was known to the police from prior encounters. Also present in the apartment was the father and his son, Ai; a male sitting on a bed, later identified as J.L.; and, C.S. who had an active warrant for his arrest and was hiding in a closet off the kitchen because he said he was buzzed. Also discovered in the home was a female named A.L, who was hiding underneath a chair in the rear bedroom and had an active arrest warrant, and mother, who was hiding inside the clothes dryer and had two active arrest warrants. All three individuals were taken into custody. Before leaving the apartment, the police observed drug paraphernalia throughout the apartment which, based on the officer's training and experience, was consistent with crack cocaine use. When mother was searched at police headquarters, a ball of gold 'chore boy' brillo pad was found in one of her pant pockets, which was consistent with the use of crack cocaine. [Exhibit B, pp.13-14; Exhibit A-2, p.3; Testimony of the Response Social Worker]

8. Mother's warrants were for two counts of assault and battery, disturbing the peace. [Exhibit A-2, p.3]

9. Father had lied to the police, when asked if mother was in the apartment. [Exhibit A-2, p.3; Exhibit B, pp.13-14] Father bailed out mother and then on January 7, 2017 brought Ai to see his mother, since she would probably be going to jail. [Exhibit B, p.9]

10. The mother was actively using substances at this time and the children's father was protecting mother over the best interests of N [and Ai]. [Administrative Record]

11. Although N was not in the apartment at the [redacted] address, when the police responded on January 6, 2017, he had stayed there otherwise. [Testimony of the Response Social Worker]

12. The Appellant had seen the children the previous night, January 5, 2017. [Exhibit B, p.4]

13. A safety plan was put in place for N [and Ai] to remain with the Appellant. It was put in place for the weekend of January 7 to 9, 2017. Should the Appellant not follow the safety plan, a legal consult would occur, and the response social worker recommended removal of N from the Appellant's care and custody. [Exhibit B, pp.17-18]

14. On January 12, 2017, the Appellant spoke to the school superintendent and advised that N could be released to his mother, which was in direct conflict with a safety plan she signed with the Department and put in place over the weekend. The Department was concerned about the Appellant's ability to parent, as well as the ability of the children's father to keep the children safe. [Exhibit B, pp. 10, 12 & 14]

15. On January 9, 2017, the Department supported for neglect of N by the Appellant, his maternal grandmother, because she had legal guardianship of the child; was aware of mother's substance abuse, and allowed N to reside with his father and could not [or would not] provide an address for father. The Department learned that N was staying, not only with his father, but also with his mother and numerous other adults who were recently arrested due to outstanding warrants. The home that the family was staying in was found to have drug paraphernalia, including a crack pipe. The Appellant was advised on several occasions over the years not to allow the children to have unsupervised contact with their parents as this could place them at risk. Given that the Appellant is N's legal guardian, she is responsible. By permitting N to reside with his father, who continues to protect and cover up for mother, the Appellant placed the child's safety and well being at risk. Even on January 12, 2017, the Appellant told the school that N could be released to his mother. [Exhibit A-1; Exhibit A-2; Exhibit B; Testimony of the Response Social Worker] Exhibit B p.13;

16. The Hearing Officer finds that the Department had reasonable cause to believe and a reasonable basis, to make a decision on January 19, 2017, to support for neglect of N by the Appellant, his maternal grandmother and guardian. *See the Analysis.*

## Conclusion

A party contesting the Department's decision, to support for neglect, may obtain a Hearing to review the decisions made by the Area Office. [110 CMR 10.06] The Appellant requested a Hearing, which was granted and ultimately held on June 27, 2017.

Regulations, policies, and case law applicable to this appeal include, but are not limited to, the following:

After completion of its 51B investigation, the Department shall make a determination as to whether the allegations in the report received are supported or unsupported. 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. To support a report does not mean that the Department has made any findings with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker(s) did inflict abuse or neglect upon the child(ren) in question. Reasonable cause to believe is defined as 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. [110 CMR 4.32]

"[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 "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 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 children 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. One such example is neglect that has led to a serious physical or emotional injury. Protective Intake Policy #86-015 [2/28/16]

Substantial Risk of Injury: 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. Protective Intake Policy #86-015 [2/28/16]

Danger: 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. **Protective Intake Policy #86-015 [2/28/16]**

Safety: A condition in which caregiver actions or behavior protect a child from harm. Protective Intake Policy #86-015 [2/28/16]

The 51A report under appeal is supported for neglect. 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 out-of-home or in-home setting. [110 CMR 2.00]

The Court holds that the Department's determination of neglect *does not require evidence of actual injury to the child.* Lindsay v. Department of Social Services, 439 Mass.789 (2003).

Caretaker means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with the responsibility for a child's health or welfare, and (e) any other person entrusted with the responsibility for a child's health or welfare whether in the child's home, a relative's home, a school setting, a day care setting (including baby-sitting), a foster home, a group care facility, or any other comparable setting. As such, "caretaker" includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The "caretaker" definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is him/herself a child, i.e., a baby-sitter. [110 CMR 2.00]

Caregiver is defined as:
(1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
(2) 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 an 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 the age of 18. [Protective Intake Policy, #86-015, Revised 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. [110 CMR 10.23]

Upon review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Department on the matter under review. See Findings #1-#16 and the below discussion.

The Appellant was a *caretaker/caregiver* of her six year-old grandson, N, as those terms are defined herein, and at 110 CMR 2.00 and in the Department's Protective Intake Policy respectively.

Based on the record and giving due weight to the clinical judgment of Department social workers, the Hearing Officer finds that the Department demonstrated that there was "reasonable cause to believe" that the Appellant failed to provide N with minimally adequate emotional stability and other essential care, such as a safe, stable home environment, and was therefore neglectful. Reasonable cause implies a relatively low standard of proof which, in the context of 51B, serves as a threshold function in determining whether there is a need for further assessment and/or intervention See Care and Protection of Robert.

Despite the fact that there was a probate court order in effect in 2014 that the Appellant continue to serve as guardian of N and the child live with mother, it is reasonable to infer, given recent evidence, that there have been changes such that mother now must be supervised when in contact with her child. See also FF #5. As guardian, the Appellant holds legal responsibility for N's safety and well-being, when she made a decision for N to live with his father. The Department learned that N was staying, not only with his father, but also with his mother and two other adults – all three of whom were recently arrested due to outstanding warrants. The home that N had been staying in was also found to have drug paraphernalia, including a crack pipe. The Appellant had been advised on several occasions over the years not to allow the children to have unsupervised contact with their parents as this could place them at risk. The Appellant was aware that mother's contact with N had to be supervised and aware of mother's history of substance abuse and mental health issues, and of the legal and DCF history of family members.

Although there is no direct evidence that N's emotional stability and growth was affected by this living arrangement, the Court held that the Department's determination of neglect *does not require evidence of actual injury to the child.* See Lindsay v. Department of Social Services.

Pursuant to 110 CMR 2.00 and the Department's Protective Intake Policy, the Hearing Officer finds that the actions of the Appellant, as the legal guardian and caretaker/caregiver of N, also posed substantial risk to this six year-old child's safety and well-being,

The burden is on the Appellant to show, by a preponderance of the evidence, that the Department's decision of January 9, 2017, to support for neglect of N by the Appellant, was not in conformity with Department's regulations and policy. The Hearing Officer did not find any information offered by the Appellant through counsel to be substantial or compelling to such an extent that the Department acted unreasonably and/or abused its discretion in making its decision in this matter. As the Appellant did not testify, this led the Hearing Officer to draw a negative

inference[1]. Therefore, based on the evidence at Hearing, the Hearing Officer finds that the Department's decision was made in conformity with its regulations, supported by sound clinical judgment, and made with a reasonable basis. The Appellant failed to meet her burden of proof. [110 CMR 10.23]

## Order

**1. The Department's decision of January 9, 2017, to support the 51A Report for neglect of N by the Appellant, his maternal grandmother and guardian, is AFFIRMED.**

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he may do so by filing a complaint in the Superior Court for the county in which he lives within thirty (30) days of the receipt of this decision. (See, M.G.L. c.30A, §14.)

Frances I. Wheat

Frances I. Wheat, MPA
Administrative Hearing Officer

Date: 1/22/18

Susan Diamantopoulos
Fair Hearing Supervisor

[1] Administrative fact finders are generally permitted to draw adverse inferences from a defendant's failure to testify in civil actions. Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976). In cases where the burden of proof was higher than that required in the instant matter, the Court has determined that a negative inference can be drawn from a party's failure to testify if "...a case adverse to the interests of the party affected is presented so that failure of a party to testify would be a fair subject of comment..." Adoption of Nadia, 42 Mass.App.Ct. 304 (1997), Custody of Two Minors, 396 Mass. 610, 616, 487 N.E.2d 1358 (1986), quoting Mitchell v. Silverstein, 323 Mass. 239, 240, 81 N.E.2d 364 (1948).