

**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 Spears  
Commissioner

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

IN THE MATTER OF )  
)  
)

**FAIR HEARING DECISION**

SG & MJ )  
FH #2017-0144 )  
)

The Appellants in this Fair Hearing are SG (hereinafter "SG" or "Appellants") and MJ (hereinafter "MJ" or "Appellants"). The Appellants appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegation of neglect pursuant to M.G.L. c. 119, §§51A and B.

**Procedural History**

On December 28, 2016, the Department received a 51A report alleging neglect of H (hereinafter "H" or "the child") by the Appellants. The Department conducted a response and, on January 13, 2017, the Department made the decision to support the allegation of neglect by the Appellants. The Department notified the Appellants of its decision and their right to appeal.

The Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing originally scheduled for March 28, 2017 was stayed at the request of the District Attorney. The Hearing was rescheduled and held on December 7, 2017 at the DCF New Bedford Area Office. All witnesses were sworn in to testify under oath. The record closed at the conclusion of the

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
SG	Appellant
MJ	Appellant
SM	Attorney for Appellants

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 DCF regulations. 110 CMR 10.26

The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit A DCF Intake Report/51A Report, dated 12/28/2016
- Exhibit B DCF Child Abuse/Neglect Emergency/Non-Emergency Response, completed 1/13/2017

For the Appellant:

- Exhibit 1 Additional Motion to Dismiss, ██████ Juvenile Court, dated 12/1/2017
- Exhibit 2 ██████ County Public Docket Report re: SG; File Date: 3/7/2013-Case Disposition Date 9/26/2017
- Exhibit 3 ██████ County Public Docket Report re: MJ; File Date: 3/7/2013-Case Disposition Date 9/26/2017

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. 2/28/2016

### Findings of Fact

1. The subject child of this Fair Hearing is H; at the time of the subject 51A report, H was six (6) years old. (Exhibit A, p.1; Exhibit B, p.1)

2. The Appellants are the child's parents and primary caregivers; SG is H's mother and MJ is H's father. (Fair Hearing Record) Therefore, the Appellants are deemed caregivers pursuant to Departmental regulation 110 CMR 2.00 and DCF Protective Intake Policy #86-016, rev. 2/28/2016.

3. JG has an older son L (hereinafter "L") by a prior relationship. (Exhibit B, p.9)

4. On December 31, 2012, the Appellants incurred the following charges regarding L:

- Rape of a Child, statutory
- Indecent Assault and Battery on a Child Under 14
- Reckless Endangerment of a Child
- Entice Child Under 16

Additionally, JG incurred charges of Incest. (Exhibit 2, Exhibit 3)

5. Following the aforementioned charges, the Department received no subsequent 51A reports regarding H until the subject 51A report.<sup>1</sup> (Testimony AF)

6. On or about January 2013, the [REDACTED] Probate Court, with the Appellants consent, granted the maternal grandmother MG (hereinafter "MG") temporary guardianship of H; SG accompanied MG to Probate Court. A ninety-day return date was scheduled for April 2013. (Exhibit A, p.6; Exhibit B, pp. 2-3, pp.7-9; Testimony AF)

7. MG did not appear for the April 2013 Hearing date in [REDACTED] Probate Court. As a result, the Court dismissed the guardianship petition; custody of H reverted to SG. (Exhibit A, p.7; Testimony AF)

8. On December 28, 2017, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging neglect of H by the Appellants. During the course of a separate 51A response involving MG as a DCF foster parent, the mandated reporter learned that H resided with SG; H frequently visited with MG. When contacted by the mandated reporter, SG did not permit the reporter to interview H, prior to contacting her attorney as she had pending criminal charges. The Department noted concern with H returning to the Appellants' care absent Probate Court intervention.<sup>2</sup> (Exhibit A, p.2; Testimony AF)

9. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to AF (hereinafter "AF"), Social Worker from the DCF New Bedford Area Office. (Testimony AF; Exhibit B)

<sup>1</sup> The Department redacted all DCF history pertaining to the Appellants and H. (Exhibit A, pp. 4-6)

<sup>2</sup> A separate 51A report was filed with the DCF Special Investigation Unit, alleging neglect of H by MG. (Exhibit A, p.7)

10. The Appellants and MG reported that they believed that the 2013 guardianship was a temporary arrangement. All reported that they believed that absent subsequent contact by the Department and Probate Court, H could return to the Appellant's care. (Exhibit B pp. 2-3, p.7) H returned to the Appellants' care following the expiration of the temporary guardianship petition. (Exhibit B, p.7)

11. MG informed the Department that following the ninety-days, SG informed her that "the case against her was dropped and that the only child she couldn't have contact with was {L}." The Department writes that MG "realizes now that {SG} lied to her." (Exhibit B, p.3)

12. On January 13, 2017, the Department supported the aforementioned report for neglect of H by the Appellants. The Department based this determination on the following:

- The 2013 allegations of sexual abuse of L by the Appellants
- Due to the Appellant's failure to return Probate Court in April 2013, the Appellants "were not properly assessed and additional recommendations were not made as {H} was not to return to their care unless otherwise directed by Probate Court. Failure to attend Court as scheduled did not allow for further involvement or direction by the Court or Department who had previously been involved in decision making."
- SG "mislead{ing}" MG that H could be returned to the Appellant's care following the ninety-day temporary guardianship.
- H returning to the Appellant's care "despite the agreement made with the Department that she would remain in the care of {MG}.
- H remaining "at risk of abuse or neglect" as the Department was unaware of the Appellants participation in services/treatment to address the allegations of sexual abuse of L. (Exhibit B, pp.8-9; Testimony AF)

13. Upon review of the of the testimonial and documentary evidence, I find that the Department did not have reasonable cause to believe that the Appellant neglected H. 110 CMR 2.00; 4.32

14. Following the Appellant's 2013 criminal charges, a stay away order was issued for L as a condition of their bail; there was no order made on behalf of H. (Testimony AF)

15. There was no written agreement or time frame made between the Appellants and the Department regarding the Probate Court and guardianship. The verbal agreement between the Appellants, MG and the Department was noted in the prior 51A report. (Testimony AF)

16. The Department did not conduct an assessment of the family as the case closed following the Probate Court awarding MG temporary guardianship. (Testimony AF)

17. The Department interviewed H at school. H presented as happy, healthy and well dressed. She was well spoken and friendly; she did not present as fearful when responding to AF's focused questioning, including sexual abuse. H reported no protective concerns regarding the Appellants; she identified the Appellants, MG and her teachers as safe people. (Exhibit B, p.4; Testimony AF)

18. At the time of the subject 51A response, H maintained consistent attendance at her school;

staff had no concerns or issues regarding H. (Exhibit B, p.4; Testimony AF)

19. At the time of the subject 51A response, H's pediatrician had no concerns for the child. (Exhibit B, p.7; Testimony AF)

20. In September 2017, the Department filed a Care and Protection Petition on behalf of H. (Testimony SG; Testimony AF)

21. On September 26, 2017, following a jury trial, the Appellants were found Not Guilty of the aforementioned charges. (Exhibit 2; Exhibit 3)

22. On December 1, 2017, following a review of the Court Investigator's report, Appellant's Motion to Dismiss, and stipulations of all parties, the Presiding Justice of the Bristol County Juvenile Court dismissed the Care and Protection Petition. (Exhibit 1)

23. In light of the totality of evidence in this case, I find that there was insufficient evidence to support the allegation of neglect of H by the Appellants, as there was no reasonable cause to believe that neglect occurred. Additionally there was no evidence that the actions or inactions by the Appellant placed N in danger or posed substantial risk to her safety or well-being. (110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/2016) (Fair Hearing Record)

### Applicable Standards and Analysis

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 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

Neglect is the 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. 110 CMR 2.00

"[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

“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)

A finding of support requires that there be: 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. 2/28/2016)

“Danger” is defined as 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. DCF Protective Intake Policy #86-015, rev. 2/28/2016

“Risk” is defined as the potential for future harm to a child. DCF Protective Intake Police, (rev. 2/28/2016)

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) 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. 2/28/2016

It is undisputed that the Appellants were caretakers for H. 110 CMR 2.00

The Appellants, through Counsel contested the Department’s decision to support the allegation of neglect. The Department’s decision-making to support neglect of H by the Appellants was based on H returning to their care and custody absent, review by the Probate Court. Following the 2013 allegations of sexual abuse and criminal charges filed against the Appellants, the Appellants agreed to the Probate Court granting MG temporary guardianship of H; the Court ordered granted MG ninety (90) day guardianship of H. The DCF New Bedford Area Office agreed with this plan and entered into a verbal agreement with the Appellants and MG. Thereafter, the DCF New Bedford Area Office had no subsequent contact with either party. The Appellants and MG

did not return to Probate Court for the April 2013 review date. According to both parties, they believed that either the Probate Court or the Department would be in touch with them. The Department based its decision-making on H returning to the Appellants care and custody absent further assessment and oversight by the Probate Court. Additionally, the Department cited a lack of knowledge regarding any services that the Appellants may have engaged in. The Department determined that absent these interactions/interventions, the Appellants placed H "at risk of physical abuse or neglect." The absence of a written agreement created confusion for the Appellants and MG. It is a reasonable inference that during a time of significant stress coupled with involvement with various agencies/organizations that recommendations/directives might have been misunderstood/misinterpreted. As the Department had no subsequent contact with the Appellants and MG, they had no guidance going forward. Additionally, the Department offered no evidence to indicate that recommendations had been made for the Appellants to engage in services/counseling.

110 CMR 2.00 defines neglect as "the 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. The statutory definition of neglect does not include the "risk of neglect;" "risk" is a component of abuse, not neglect. The Department must demonstrate that neglect *occurred* (emphasis added); the Department submitted no evidence to reflect this. 110 CMR 2.00, 4.32 H's school and pediatrician had no concerns for her safety or well-being. H presented as happy and healthy; she denied any protective concerns or issues. A hearing officer's decision must be supported by substantial evidence; there must be substantial evidence supporting the hearing officer's conclusion that the Department had reasonable cause to believe the appellant committed the alleged abuse. Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006)

"...When reviewing a support decision or an Alleged Perpetrator listing, the hearing officer may consider information available during the 51A response investigation and new information subsequently discovered or provided that would either support or detract from the Departments decision." (110 CMR 10.21 (6))

The evidence was insufficient to determine that the Appellant failed to provide less than "...minimally adequate...care" Z. (110 CMR 2.00)

Additionally, there was no information that the actions or inactions by the Appellants placed H in danger or posed substantial risk to her safety or well-being, and without such information, the Department lacked the evidence necessary to support findings of abuse or neglect.

Considering all the evidence and the circumstances, the Department did not have reasonable cause to believe and the decision to support the allegation of neglect was not in conformity with its policies and/or regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016

Conclusion and Order

The Department's decision to support the 51A report of neglect on behalf of H by the Appellants is **REVERSED**.

Carmen Temme  
Carmen Temme *BC*  
Administrative Hearing Officer

March 27, 2018  
Date

Barbara Curley  
Barbara Curley, Supervisor  
Fair Hearing Unit

\_\_\_\_\_  
Date

\_\_\_\_\_  
Linda S. Spears  
Commissioner