

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

Linda S. Spears  
Commissioner

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**IN THE MATTER OF  
JS     FH #2017-0149**

**FAIR HEARING DECISION**

The Appellant in this Fair Hearing was JS. The Appellant appealed 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 December 2, 2016, the Department of Children and Families received an institutional 51A report by a mandated reporter alleging neglect of C by a daycare provider, JS. The Department conducted a non-emergency response and on December 22, 2016, the Department made the decision to support the allegation of neglect of C by JS. The Department notified the JS (JS or "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 held on April 14, 2017, at the DCF Central Office in Boston, Massachusetts. All witnesses were sworn in to testify under oath. The record remained open until April 28, 2017 to allow the Appellant time to submit additional documentary evidence

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira  
PK  
JS

Administrative Hearing Officer  
Appellant's Attorney  
Appellant

TS  
DD

Appellant's Support/Spouse  
DCF Special Investigator/Response Worker

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 1 Child Abuse/Neglect Report – Institutional dated 12/02/16  
Exhibit 2 Child Abuse/Neglect Non-Emergency Response completed 12/22/16  
Exhibit 3 Photos of Subject Child  
Exhibit 4 Incident Reports  
Exhibit 5 Sketch/Lay-Out of Appellant's Daycare  
Exhibit 6 Character Reference from NM  
Exhibit 7 Character Reference from AS  
Exhibit 8 List of Children of Appellant's Daycare

For the Appellant:

Exhibit A Copy of DCF 51A dated 12/02/2016  
Exhibit B Copy of DCF 51B dated 12/22/2016 and Copies of DCF Exhibits 3-8  
Exhibit C Affidavit from MH  
Exhibit D Additional Copy of Character Reference from AS  
Exhibit E FCC Check List  
Exhibit F Family Child Care References  
Exhibit G Additional Character References  
Exhibit H Collection of College Transcript, Accreditations, Certifications and Awards in Child Care

The Appellant submitted a Memorandum which was reviewed by this Hearing Officer and taken into consideration, along with all the evidence, in rendering this decision. 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

Issues 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. 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; 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, Rev. 2/28/16; 110 CMR §10.05

### Findings of Fact

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

1. At the time of the 51A report, C was eight months old. She resided with her parents in [REDACTED]. She also attended daycare provided by the Appellant in [REDACTED] (Exhibit A; Exhibit B; Exhibit 1; Exhibit 2)
2. The Appellant, JS, was a licensed daycare provider and was responsible for the subject child's supervision and wellbeing when placed in her care; therefore she was deemed a "caregiver" pursuant to Department policy and regulation. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16
3. The Appellant does not have previous history with the Department. (Exhibit A; Exhibit B; Exhibit 1; Exhibit 2)
4. On December 2, 2016, the Department of Children and Families received an institutional 51A report from a mandated reporter alleging neglect of the subject child by her daycare provider, JS. According to the mandated reporter, the child's mother picked C from daycare the previous day and noticed that the child had a rash on her back that looked like bite marks. Reportedly, the daycare provider told C's mother that it was probably from a "poopy diaper" or "asparagus" implying it was an allergic reaction. On December 2, 2016 the child's mother took her to the pediatrician who assessed the marks to be four bite marks. The child was observed to have one bite mark to be an inch and one to be ¾ inch top to bottom. The bites were assessed to have been done by a child, not an adult. (Exhibit A, p. 2; Exhibit 1, p. 2; Exhibit 3)
5. The report was screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, s. 51B. The allegation for the neglect of the subject child by the Appellant was supported on December 22, 2016. The allegation of neglect was supported because the subject child was free from any injuries when she was dropped off at the Appellant's daycare at 8:30am. When the child was picked up at 3:30pm by her mother and maternal grandmother; the Appellant pointed out to C's

mother that the child appeared to have rash due to recently introduced food to her diet. The Appellant denied that they were bite marks because C is never left unattended or exposed to other children. The following day the subject child's injuries were black and blue and the bite marks were present, which were confirmed by a physician who was able to count the teeth marks. The Appellant was unable to account for the injuries and was adamant that the child was never left unattended. The Department determined that the evidence gathered suggested that the child's injuries occurred at the daycare, which is suggestive of a lack of supervision by the Appellant in her role as a daycare provider. (Exhibit B, p. 11; Exhibit 2, p. 11)

6. The Appellant provided both private family daycare and was contracted via [REDACTED].<sup>1</sup> She had been a licensed provider since 2007. (Exhibit B, p. 2; Exhibit 2, p. 2)
7. When interviewed, the Appellant disclosed that she had been providing daycare in Massachusetts since 2007, relating that she had previously provided daycare in the State of Minnesota. (Exhibit B, p. 4; Exhibit 2, p. 4)
8. On the day of the alleged incident, the Appellant was caring for six children, including the subject child: P, age 3, G, age 2, E age 6 and her two grandchildren; M, age 8 and Ca, age 3. (Exhibit B, p. 4; Exhibit 2, p. 4; Exhibit 8)
9. The Appellant related that none of the other children had access to the subject child, unless she was in her arms. She would place C in a pack and play if she had to use the bathroom or prepare meals, so none of the children could get to her. (Exhibit B; Exhibit 2, p. 4; Testimony of the Appellant)
10. The Appellant had fed and changed C's diaper throughout the day, without incident. However, after her afternoon nap when she awoke at 2:30pm she noticed small bumps in the middle of her back when she was cleaning her. The Appellant related that subject child exhibited no sign of discomfort nor did she cry while napping. Two other parents were present as they had begun to arrive to pick up their children and also observed the bumps on the back, concluding that they looked like hives or a rash. (Exhibit B; Exhibit C; Exhibit D; Exhibit 2, p. 4; Exhibit 7)
11. The subject child had recently been given a scheduled vaccine and introduced a new food, asparagus. According to the Appellant, C's mother felt that the latter could have contributed to the bumps after the Appellant told her that C had diarrhea and bumps on her back. The Appellant filled out an incident report but the parents never signed it. (Exhibit B; Exhibit 2, p. 4; Exhibit 4)
12. The Appellant disclosed that G, age 2, had an issue with biting but had not done so for the past two months. Another child, P, age 3, had also an issue with biting but was no longer enrolled when C was attending the daycare. (Exhibit B; Exhibit 2, p. 5)

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<sup>1</sup> According to their website, [REDACTED] is a center for learning and child care program, primarily based out of the North Shore of Boston, MA.

13. The DCF Special Investigator observed the family daycare to be a big space with play stations and conducive to child care and learning. (Exhibit B; Exhibit 2, p. 5; Exhibit 5)
14. The subject child began attending the program on August 29, 2016 from 8:15am to 3:30pm. There had been two previous incidents that were noted by the Appellant regarding the child. One consisted of C having difficulties taking breast milk from the bottle and the other noted that C's mother was not supplying enough breast milk and that the food was not pureed appropriately. (Exhibit B; Exhibit 2, p. 5)
15. When interviewed, the subject child's maternal grandmother related that she went with her daughter to pick up C. Upon arrival she related that the Appellant informed them that C had a rash. According to maternal grandmother, her daughter observed C to have bite marks but the Appellant dismissed the accusation because C was never left "unattended," relating that she was over reacting and didn't need to see a doctor. (Exhibit B; Exhibit 2, p. 6)
16. KR, maternal grandmother, related that C was seen the next day by two physicians and two nurses, who determined the marks to be bite marks, being bitten five times by a two or three year old. She suspected that C was bitten over her clothes and that the provider was "covering up" for her grandson, Ca, age 3, relating that the Appellant looked "exhausted" that day and may have been "over her head" in caring for all those children. (Id.)
17. The DCF Special Investigator interviewed a parent, KO, who had a child, E, in the Appellant's daycare after school. She described the Appellant as "amazing" and credited her for all her three children being early developmentally and ahead of their peers. KO did not have any concerns regarding keeping the children safe and always did her due diligence in a professional capacity. (Exhibit B; Exhibit 2, p. 7)
18. During the investigation, the Appellant was visited unannounced by the EEC Investigator on December 15, 2016 and previously on January 25, 2016. No issues were noted by the EEC and it was related that the Appellant had "glowing recommendations." (Exhibit B; Exhibit E; Exhibit 2, p. 7)
19. The subject child's mother, AC, reiterated that maternal grandmother's statement in Finding #16. She added she has had some difficulties in the past with the Appellant, relating that C had gone all day at one point without a diaper change or not changing her enough due to issues with urinary tract infections. (Exhibit B; Exhibit 2, pp. 7-8)
20. The primary physician who medically assessed the subject child confirmed that there was no indication of rash or hives as suggested. She related that C was bitten by another child and had several bite marks. The subject child was seen again on December 7, 2016 for a follow up appointment where she observed that the bite marks were healing; there was no swelling and no signs of pain. (Exhibit B; Exhibit 2, p. 8)

21. Numerous individuals wrote letters of recommendation or otherwise provided references for the Appellants prior to December 1, 2016. Likewise many wrote letters and affidavits in support of the Appellant after December 1, 2016, citing her years of dedication to the care of children since 2000, her professional and warm demeanor with children and families and confidence in her abilities as a daycare provider to keep children safe. (Exhibit C; Exhibit D; Exhibit F; Exhibit G; Exhibit 6; Exhibit 7)
22. The Appellant received numerous accreditations, certifications, awards and accolades since dedicating her life to the care of children. (Exhibit H)
23. The injuries that the subject child received are undeniable. They were bite marks on the subject child, which suggest there was a gap in supervision by the Appellant. (Exhibit 3; Testimony of the DCF Special Investigator)
24. I find that the Appellant's testimony and disclosure during the response in regards that the subject child did not exhibit any discomfort or crying during her care on the day of the incident not to be credible. (Fair Hearing Record)
25. The Appellant was adamant that the other child never had the possibility of coming into contact with the subject child but had no other reasonable explanation. However, she acknowledged that the subject child would be placed in a pack and play with other children around while she used the bathroom or prepared meals. (Testimony of the Appellant; Fair Hearing Record)
26. I find that the credible evidence shows that that the subject child, C, was left unsupervised at some point on the day of the alleged incident with toddlers with a known history to bite. Subsequently, this placed the child in danger of harm/injury. 110 CMR §2.00; DCF Protective Intake Policy #86-015 Rev. 2/28/16.
27. Based on the evidence at the time of the Response, I find that it was reasonable for the Department to determine that the Appellant's behavior constituted a failure to provide the subject child with minimally adequate supervision. 110 §CMR 4.32(2), DCF Protective Intake Policy #86-015 Rev. 2/28/16.
28. Therefore, the Department's decision to support the allegation of neglect was made in conformity with its policies and regulations. 110 CMR §2.00, 110 CMR §4.32, DCF Protective Intake Policy #86-015 Rev. 2/28/16

### **Applicable Standards**

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

Caregiver

- (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 person entrusted with responsibility for a child's health or welfare, whether in the child's home, 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. *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

Neglect is 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 a failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. (*Id.*)

Physical injury is defined as "(a) death; or (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or (c) soft tissue swelling or skin bruising depending on such factors as the child's age, circumstances under which the injury occurred, and the number and location of bruises..." (*Id.*)

Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." M.G.L. c. 30A §1(6); *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

To Support a finding means:

- There is reasonable cause to believe that 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 . . . (*Id.*)

Danger is 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. (*Id.*)

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

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; or (e) if the challenged decision is a listing on the alleged perpetrators list, that there is not substantial evidence indicating the person is responsible for the abuse or neglect of a child. 110 CMR §10.23

#### Analysis

It is undisputed that the Appellant was a "caregiver" pursuant to Departmental regulation. 110 CMR §2.00; *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

The Appellant, through counsel, denied and disputed the supported finding that she neglected the subject child, C. She argued that this instant matter is an isolated incident and that she has dedicated herself to child care since the year 2000. She related that the alleged neglect comes from marks that a doctor determined to be bite marks a day later and that the Department determined them to have happened at the Appellant's facility because she was unable to explain the bite marks under her supervision. The Appellant also argued that she was not properly notified of the allegation and the DCF decision, subsequently was unable to refute it properly, relating that it was a clear violation of 110 CMR §4.27(5). Additionally, the Appellant argued that the Department failed to make necessary collateral contacts to obtain information that could corroborate or detract from the Department's conclusion. The Appellant provided a voluminous amount of character references; affidavits; accreditations; certifications attesting to her experience and abilities as a day care provider, both private and contractually. Specifically, she noted a letter from an FCC manager from [REDACTED] reporting no prior concerns and even the Appellant lacking a DCF history, which argued that the Department failed to weigh in their decision making process. Other important collaterals, such as the other children and



the two parents (AS and MH) who first saw C prior to her mother picking her up and observed the marks to be a rash or a hive were never contacted. Finally, the Appellant argued that she always kept the older children away from C, except when she would use the bathroom or prepare meals, during which time she would keep C in a pack and play. The Appellant argued that the Department failed to weigh the efforts she made to prevent any biting incident to occur and that this failure to seek out any substantial evidence to disprove the reported incident was of substantial prejudice to the Appellant. The Appellant, through counsel, cited an unpublished Superior Court decision in *Doe v. Dep't of Children and Families* which found, “[f]urther detracting from the weight that should have been granted [certain evidence] was the ample evidence in the [caretaker’s] favor.” 2014 Mass. Super. LEXIS 2016, 15 (Suffolk County, Dec. 10, 2014). The court noted in *Doe v. Dep't of Children and Families* that an Appellant with a “heretofore blemishless record” that any evidence that might possibly suggest neglect is undercut by the overwhelming evidence showing the Appellant’s capabilities, in this instant matter being Appellant JS, arguing that a single incident does not provide a reasonable cause to believe that there has been neglect. I find the Appellant’s argument to be unpersuasive.

The Appellant was the caregiver of C at the time of the incident. The Appellant had six children under six in her care, including C, during the time of the incident. The Appellant acknowledged that G, age 2, used to bite but had not had an incident in two months. Also present was her three year old grandson. The Department was able to confirm with C’s pediatrician that C was bitten several times and that it was either a two or three year old child. There is no indication that C has a two or three year old sibling living at home. The Appellant failed to provide a plausible explanation as to how C sustained those injuries and was adamant that that C was always supervised, except when she was using the bathroom or preparing meals. The evidence shows that the Appellant also is licensed to care for eight children but is the sole provider in her family based day care. Subsequently, it is reasonable to determine that C sustained her injuries while at day care, given the history of one other child who had access to C while the Appellant either took a bathroom break or was preparing meals for the child. While this hearing officer finds it reasonable to place a child in a pack and play if an adult is occupied, in this instant matter C was an infant with much older children, one with a history of biting and all capable of going into the pack and play. This lack of vigilance allowed the subject child to be unsupervised and be placed in danger by other toddlers, one who is a known biter. Subsequently, the Appellant failed to provide minimally adequate supervision and neglected the subject child, despite the Appellant’s unblemished record. 110 CMR §2.00; *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

As related, the Appellant argued that she was substantially prejudiced through the course of the Department’s response to the allegation, citing that she was not properly notified of the allegation as well as the actual decision, which hampered her ability to refute it. She also related that the Department failed to make appropriate collateral contacts that could have either corroborated or unsupported the Department’s decision. In this instant matter I find that the Department made their due diligence in contacting available collaterals to gather substantial evidence to make their decision. Additionally, the Appellant was given the opportunity to provide a large amount of exhibits (Fair Hearing) to consider any

detraction from the original decision. Note as well that the court has ruled that “the weighing of evidence, including credibility determinations, is for the fair hearing officer.” (Covell v. Dep’t of Soc. Servs., 439 Mass. 766, 809 (2003)) I also find that there was no substantial prejudice to the Appellant. Notwithstanding the timeliness of proper notification to the Appellant regarding the allegation and the investigative decision, the Appellant made a timely appeal and was provided with an administrative hearing to argue her case and present evidence contrary to the Department’s. (Wilson v. Dep’t of Soc. Servs., 65 Mass. App. Ct. 739, 748 (2006)) Finally, the Appellant cited an unpublished decision by the Massachusetts Superior Court; i.e. Doe v. Dep’t of Children and Families. To reiterate, this is an unpublished decision, case specific and with no precedential value. Subsequently, it has no relevance to the instant matter at hand.

In making a determination on the matter under appeal, the Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker, if there is a reasonable basis for the decision (110 CMR §10.05). After review of the testimonial and documentary evidence presented, I find that the Appellant has not demonstrated any failure by the Department to follow its regulations, policies, or procedures with respect to the decision to support the report of neglect. 110 CMR §10.06(8); DCF Protective Intake Policy #86-015, Rev. 2/28/16.

Based on the totality of the circumstances, and the evidence gathered, I find that the Department’s determination that the Appellant’s actions constituted neglect was based on “reasonable cause” and made in conformity with Departmental policies and regulations. 110 CMR 4.32; DCF Protective Intake Policy #86-015, Rev. 2/28/16

### Conclusion and Order

The Department’s decision to support the allegation of **neglect** of C was made in conformity with Department regulations and policy and is therefore **AFFIRMED**.

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

Jorge F. Ferreira

Jorge F. Ferreira  
Administrative Hearing Officer

1/23/18

Date

Susan Diamantopoulos

Susan Diamantopoulos  
Fair Hearing Supervisor