EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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IN THE MATTER OF)
)
M. O.) **HEARING DECISION**
)
FH # 2017-0150)

Procedural Information

The Appellant in this Fair Hearing is Ms. M.O. (hereinafter "the Appellant"). The Appellant appeals the Department of Children and Families' ("the Department" or "DCF") decision to support allegations of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On November 28, 2016, the Department received a 51A report filed by a mandated reporter, alleging neglect of N ("N" or "the child") by the Appellant;[1] the allegations were subsequently supported.[2] The Department informed the Appellant of its decision and of her right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06.

The Fair Hearing was held on March 23, 2017, at the Department of Children and Families' Worcester West Area Office. All witnesses were sworn in to testify under oath. The record closed at the end of the hearing.

The following persons appeared at the Fair Hearing:

Anastasia King	Administrative Hearing Officer
Ms. M.O.	Appellant
Ms. T.C.	Appellant's Attorney
Mr. T.B.	DCF Response Worker

[1] Based on information obtained during the 51B response, allegations of neglect of the child by the Appellant's assistant, Ms. O.O., were added and subsequently supported by the Department. However, Ms. O.O. is not a party to this appeal. (Exhibit 3, p.10; Testimony of TB)
[2] The 51A report also included allegations of sexual abuse of the child by Mr. W.M. that were subsequently supported by the Department. However, Mr. W.M. is not a party to this appeal. (Exhibit 3, p.11)

In accordance with 110 CMR 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 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 1: 51A Report – dated November 28, 2016
Exhibit 2: 51A Report – dated December 12, 2016[3]
Exhibit 3: 51B Response
Exhibit 4: Copy of Daycare Schedule

For the Appellant:
Exhibit A: Two Motions by Appellant's Attorney
Exhibit B: Appellant's Memorandum of Law
Exhibit C: Letter from [redacted]
Exhibit D: Copies of Two E-mails
Exhibit E: 13 Letters of Support
Exhibit F: Copy of Child Care License
Exhibit G: DCF Correspondence to Appellant
Exhibit H: Photocopies and Color Prints of Appellant's Daycare
Exhibit I: Observation Reports from AB and [redacted]

Pursuant to 110 CMR 10.21, 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.

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) 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

[3] On December 12, 2016, the Department received a 51A report alleging neglect of A ("A") by the Appellant and sexual abuse of A by Mr. W.M. However, the allegations were not supported by the Department and did not pertain to the subject child. (Exhibit 2, p.3; Exhibit 3, p.11)

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. The subject child of this Fair Hearing is N ("N" or "the child"); a female child who was six years old at the time the 51A report was filed on November 28, 2016. (Exhibit 2, p.1)

2. On November 28, 2016, the Department received a 51A report filed by a mandated reporter, alleging neglect of the child by the Appellant and sexual abuse of the child by the Appellant's husband. The reporter stated that an e-mail and phone call were received by the child's biological mother, Ms. A.V. ("AV" or "the mother"), stating that during that past weekend, the child disclosed sexual abuse by the Appellant's husband while she was attending the Appellant's daycare. According to the mother, the child last attended the daycare three years ago. The child told her mother and the child's father, Mr. S.K. ("SK" or "the father"), that the Appellant's husband asked her to "bite him there". The child stated that she did it, but added that she did not like doing it, did not like the taste, and did not want to get germs. The reporter further stated that it was unsure how in-depth the parents questioned the child and that police had been notified. (Exhibit 1, p.3; Testimony of TB)

3. The 51A report was screened as a Non-Emergency Response and assigned to DCF Special Investigation's Response Worker, Mr. T.B., ("Response Worker" or "TB") to complete a 51B Response. (Exhibit 3, p.1)

4. The Appellant has been married to Mr. W.M. ("WM" or "the husband") for 11 years. The husband has no criminal history and has retained the same employment for 20 years. The husband is not employed by the daycare and does not supervise the daycare children. (Exhibit 3, p.4; Testimony of Appellant)

5. The Appellant's only prior institutional DCF history involved unsupported allegations of neglect in 2002. (Exhibit 3, p.2; Testimony of Appellant)

6. The Appellant and husband have no personal DCF history. (Exhibit 3, p.2; Testimony of Appellant)

7. The Appellant had been a licensed daycare provider for 19 years and was in the process of obtaining her Bachelor's degree in Early Childhood Education at the time of the 51B response. (Testimony of Appellant)

8. The Appellant was a home based licensed daycare through the Department of Early Education and Care ("DEEC"), and was the child's daycare provider at the time of the reported incident. (Exhibit F; Testimony of TB; Testimony of Appellant). The Appellant is deemed a "caregiver" as defined by Departmental regulation 110 CMR 2.00.

9. The Appellant employed one daycare assistant, Ms. O.O. ("OO" or "the assistant). The assistant was the Appellant's former sister in law and was employed at the daycare for 14 years. Appellant's Assistant usually cared for the infants while Appellant cared for the older children. The infants and older children were in separate spaces. The daycare space consisted of Kitchen, Dining room, and two front rooms. Appellant always had eyes on the children, unless her assistant stood in the opening between the two locations where infants and older children were for example if the children were napping and Appellant was on the computer. (Exhibit 3, p.3; Testimony of Appellant)

10. The child began attending the Appellant's daycare when she was three and a half months old and remained at the Appellant's daycare until she began kindergarten at the age of five. (Exhibit 3, p.3; Testimony of Appellant)

11. The Appellant was very close to the child's family as well as to the other daycare families and attended many of the activities the children participated in outside of daycare. (Exhibit 3, p.3; Exhibit 3, p.4; Testimony of Appellant)

12. On December 5, 2016, the mother and father reported that two weeks before, the child blurted out that the Appellant's husband had made her "bite him where his pee comes out". Before the child's disclosure, the mother and father had never had any concerns regarding the level of care the Appellant provided the child, and the child never appeared uncomfortable or unwilling to attend the Appellant's daycare or exhibited any other behavioral change indicative of recurrent sexual abuse. (Exhibit 3, p.3)

13. A SAIN[4] interview with the child was conducted on December 5, 2016. The child reported that when she was three or four years old, she and her friend "A" were sexually abused by the husband in the bathroom or in a room by the bathroom where the children took naps at the Appellant's daycare. The child stated the husband would open his pants, take out his penis, and instruct the child and "A" to bite him there. The child further stated that the Appellant would walk by but did not say anything, although added that she did not know if the Appellant saw anything. Although the child was unable to provide an exact number as to how many time she was "made to bite the husband's thing", she stated that it occurred on more than one occasion. (Exhibit 3, p.3)

14. On December 19, 2016, TB spoke to A's father who stated that A attended the Appellant's daycare from an early age until she started kindergarten in September of 2016. The father did not report any concerns regarding the level of care A received and did not report that A expressed any fear or unwillingness to attend the Appellant's daycare at any time. (Exhibit 2, p.6)

15. Because A had not made any disclosures of sexual abuse by the husband, a SAIN interview with A was not conducted. (Exhibit 3, p.10; Testimony of TB)

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[4] The Sexual Assault Intervention Network is a multi-disciplinary team including the District Attorney, victim-witness advocate, forensic interviewer and the Department. SAIN is a process wherein law enforcement and child advocates work together to streamline the handling of child abuse cases.

16. On December 13, 2016, TB, along with DEEC Investigator, Mr. F.L. met with the Appellant and the assistant. Both the Appellant and the assistant denied that the husband entered the daycare area of the home during operating hours. Though no concerns were noted, when the DEEC Investigator interviewed approximately a dozen parents or caretakers whose children were attending or had attended the Appellant's daycare, five reported to have observed the husband in the home during drop off or pick up of the children. The husband was observed in the kitchen, watching television in the living room (not part of the daycare), or on the computer. (Exhibit 3, p.8; Testimony of TB)

17. DCF Response Worker and DEEC Investigator interviewed fifteen parents (including E and A's parents) whose children were presently or had attended the daycare. None of the parents reported any concern with the care of the children or had ever observed any behavioral change or other indication of neglect while children were at the daycare. Several of the parents had children in the daycare over a number of years. (Exhibit 3)

18. Appellant and OO described WO as rarely in the daycare and then usually only when he returned from work as he passed through the kitchen on his way to a finished basement where he watched TV or napped. Several parents noted that WO was seen in the home in the kitchen or at the computer which were counted as daycare space or in non-day space such as the living room or in the driveway or yard.

19. Due to the contrary reports made by the parents and caregivers MO and OO during the DEEC Investigator's interviews, about how frequently WM was observed in the daycare and non-day parts of the home the Department did not find the Appellant or the assistant to be reliable reporters. (Exhibit 3, p.13)

20. The Department relied on the child's statements when making its determination to support the allegations of neglect of the child by the Appellant. (Exhibit 3, p.12; Testimony of TB)

21. I did not find the Department's reliance on the child's statements to be reasonable. During the SAIN interview the child maintained that on more than one occasion the husband exposed his penis to her and A, instructing both to "bite him there" when she attended the Appellant's daycare. The incidences occurred approximately two or three years before the child's first disclosure. However, no evidence was presented that the child expressed fear or appeared unwilling to attend the daycare following the reported incidences. In addition, although the child reported that A was also present, A had never made any disclosures of being sexually abused by the husband. Additionally reported child N in making her disclosure said she was unsure if Appellant knew about the alleged sexual abuse. As a result, despite the contrary reports made by the Appellant and the assistant as to the husband's presence in the daycare during operating hours, without corroborating evidence to support the child's claim, I did not find the Department's reliance on the child's statements when making its determination to be reasonable.

22. On January 30, 2017, pursuant to MGL c. 119, § 51B, the Department supported allegations of neglect of the child by the Appellant. The Department based its decision on information obtained during the 51B response. (Exhibit 3, p.13; Testimony of TB)

23. After consideration of all the evidence provided, this Hearing Officer finds that the Department did not have reasonable cause to believe that neglect of the child occurred in this instance, and that the Appellant's actions or inactions placed the child in danger or posed substantial risk to her safety or well-being as required by the Department's intake policy when supporting for neglect. (110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16)

24. Therefore, this Hearing Officer further finds that the Appellant's actions did not constitute neglect as defined in its regulations, and its decision was not in compliance with its regulations. (110 CMR 2.00 & 4.32) (See, "Analysis")

Analysis

In order to "support" a report of abuse or neglect, the Department must have reasonable cause to believe that an incident of abuse or neglect by a caretaker occurred.

"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 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 "caregiver" 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) schoolteachers, 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 himself/herself a child (i.e. baby-sitter). (110 CMR 2.00)

"Neglect" is defined as 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 an out-of-home or in-home setting.) (110 CMR 2.00)

To prevail, an Appellant must show by a preponderance of the evidence that the Department's decision or procedural action was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the Appellant. If there is no applicable policy, regulation or procedure, the Appellant must show by a preponderance of the evidence that the Department acted without a reasonable basis or in an unreasonable manner, which resulted in substantial prejudice to the Appellant. (110 CMR 10.23)

When reviewing a support decision, the Hearing Officer may consider information available during the investigation and new information subsequently discovered or provided that would either support or detract from the Department's decision. (110 CMR 10.21(6))

When making its decision to support the allegations of neglect of the child by the Appellant, the Department relied on statements made by the child. However, without any corroborating evidence, the Department's reliance on the child's statements was not reasonable. The child's first disclosure occurred approximately two to three years following the reported incident, at which time the child maintained that on more than one occasion the husband exposed his penis to her and her friend, A, and instructed both to "bite him there" when she attended the Appellant's daycare. However, A has never disclosed being sexually abused by the husband and no evidence was presented that the child or A had ever expressed fear or appeared unwilling to attend the daycare following the reported incidences.

Despite the Department's conclusion, there was not sufficient evidence to support allegations of neglect of the child by the Appellant, and the Department failed to provide independent evidence to support the child's claim. As a result, the evidence presented was insufficient to demonstrate that the Appellant failed to provide the child with minimally adequate care, and that the Appellant's actions or inactions placed the child in danger or posed a substantial risk to her safety or well-being as required by the Department's intake policy when supporting for neglect. (Protective Intake Policy 86-015 (revised 2/28/16))

Therefore, based on the totality of the evidence, for reasons cited above, and in the detailed Findings of Fact, the evidence was insufficient to support the Department's determination that the Appellant's actions rose to the level necessary to support the allegations of neglect. 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 that neglect occurred in this instance. (Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006))

The Appellant has shown by a preponderance of the evidence that the Department acted without reasonable basis or in a reasonable manner, and resulted in substantial prejudice to the Appellant.

Conclusion

The Department's decision to support the allegation of **neglect** of the child by the Appellant was not made with a reasonable basis and therefore, **REVERSED.**

This is the final administrative decision of the Department. If Appellant wishes to appeal this decision, she may do so by filing a complaint in the Superior Court for the county of Suffolk or for the county in which Appellant lives within thirty (30) days of the receipt of this decision. (See, M.G.L. c.30A, §14). In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.

Anastasia King (EP)
Anastasia King
Administrative Hearing Officer

Date: August 7, 2017

Barbara Curley (EP)
Barbara Curley, Supervisor

Date: _____

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Linda S. Spears,
Commissioner