

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

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IN THE MATTER OF)
)
J. B.)
)
FH # 2017 0169)

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Mr. J.B. (hereinafter "JB" or "the Appellant"). The Appellant appealed the Department of Children and Families' ("the Department") decision to support allegations of neglect and sexual abuse pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On December 29, 2016, the Department received a 51A report alleging neglect and physical abuse of L, ("L" or "the child(ren)") and La, ("La" or "the child(ren)") by the Appellant. On January 10, 2017, the Department received a 51A report alleging sexual abuse of the children by the Appellant. The Department received an additional 51A report on January 10, 2017, alleging sexual abuse and physical abuse of the children by the Appellant. The Department subsequently supported the allegations of neglect and sexual abuse of the children by the Appellant.¹ The Department informed the Appellant of its decision and of his right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06.

After an stay of the first scheduled Hearing date, requested by the District Attorney's Office and allowed as required by the Department's regulations, the Fair Hearing was held on January 23, 2018, at the Department of Children and Families' Greenfield Area Office. Per his request, the Appellant participated in the Fair Hearing via telephone conference. All witnesses were sworn in to testify under oath. The record remained open until January 30, 2018, to allow for the submission of additional documents to be submitted and entered into the record.²

The following persons appeared at the Fair Hearing:

Anastasia King

Administrative Hearing Officer

¹ Allegations of physical abuse of the children by the Appellant were not supported by the Department. (Exhibit 4, p.7)

² Exhibits "5" and "A"

Mr. J.B.
Ms. S.H.

Appellant
DCF Response Worker

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 December 29, 2016
- Exhibit 2: 51A Report – dated January 10, 2018 @ 10:47 a.m.
- Exhibit 3: 51A Report – dated January 10, 2018 @ 11:28 a.m.
- Exhibit 4: 51B Response
- Exhibit 5: Police Report

For the Appellant:

- Exhibit A: Copy of Appellant's E-mail

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 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 children of this Fair Hearing are L, ("L" or "the child(ren)") a female child who was 12 years old at the time the 51A report was filed on December 29, 2016, and La, ("La" or "the child(ren)") a female child who was nine years old at the time the 51A report was filed on December 29, 2016. (Exhibit 1, p.1)
2. On December 29, 2016, the Department received a 51A report alleging neglect and physical abuse of the children by the Appellant. According to the report, the Appellant arrived to the area to visit with the children for the holidays. The Appellant, who is divorced from the children's mother, stayed at a motel. During the visits with the children, it was reported that the Appellant pushed one of the children into the pool while she was still clothed, slapped the children, and called them awful names. It was believed that the Appellant was also intoxicated. It was further reported that the Appellant did not allow the children to sleep, keeping them up until 3:30 a.m. The children subsequently called the mother and left a voicemail on the answering machine. In the background, the Appellant could be heard yelling at the children and what was believed to be slapping sounds. (Exhibit 1, p.2; Testimony of RW)
3. The 51A report was screened in by the Department as a Non-Emergency Response and assigned to DCF Response Worker, Ms. S.H., ("Response Worker" or "RW") to complete a 51B Response. (Exhibit 4, p.1)
4. On January 10, 2017, at 10:47 a.m., the Department received a 51A report alleging sexual abuse of the children by the Appellant. According to the report, while the reporter was interviewing the children in regards to the allegations of physical abuse and neglect, the children disclosed to the reporter that during their visits with the Appellant at the motel, the Appellant touched the children's breasts while the children were in the shower. La also reported that while she was in the shower, the Appellant touched her vaginal area. The children reported that they had not shared this information with their mother because they knew the incidences were inappropriate and that the mother would be upset. (Exhibit 2, p.3; Testimony of RW)
5. The 51A report was screened in by the Department as a Non-Emergency Response and the allegations of sexual abuse of the children by the Appellant were added to the ongoing 51B response. (Exhibit 2, p.5)
6. On January 10, 2017, at 11:28 a.m., the Department received a 51A report alleging sexual abuse of La and physical abuse of the children by the Appellant. According to the report, the reporter met with La the day before, as the child was anxious about her meeting with the DCF worker later in the day. The child was nervous and shaking about having to talk about what had occurred over the holidays with the Appellant. The child reported that during the visits with the Appellant, the Appellant had four bottles of alcohol and consumed one bottle in a day. The Appellant constantly yelled at the children and slapped them on the face

and on their legs throughout their visit with him. The Appellant told the children that he was going to kill the mother's boyfriend and his daughter, and grabbed L's knee, twisted it, and threatened to break her leg. L reported that the Appellant did not allow the children to shower unless he was present, and pinched the children's nipples and touched their breasts. L reported that they were afraid to say anything to the mother when she called because the Appellant would not let the children speak to the mother alone. (Exhibit 3, p.3; Testimony of RW)

7. The 51A report was screened in by the Department as a Non-Emergency Response and the allegations of sexual abuse and physical abuse of the children by the Appellant were added to the ongoing 51B response. (Exhibit 3, p.6)
8. The Appellant and Ms. J.B. ("JB" or "the mother") are the children's biological parents. (Exhibit 4, p.7; Testimony of Appellant) The Appellant was a "caregiver" as defined by Departmental regulation and policy 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.
9. The Appellant and the mother were divorced in 2010 and shared legal custody of the children. At the time of the reported incident, the Appellant resided in [REDACTED], and the children resided with the mother, who retained physical custody of them. (Testimony of Appellant)
10. The Appellant had made arrangements with the mother to visit with the children during a planned visit he was making to the area from December 24, 2016 until December 28, 2016. Due to the mother's concerns regarding the Appellant's misuse of alcohol, the mother and the children had a code word, "grapes", that was to be used by the children during any visits with the Appellants. The children were to use the word when they spoke to the mother if they believed the Appellant was intoxicated or if the Appellant's behaviors became concerning to the children. (Exhibit 4, p.3; Exhibit 4, p.4; Exhibit 5, p.1; Testimony of RW)
11. On January 9, 2017, the RW met with the mother and the children in their home. The RW first met with the mother privately and then interviewed the children, who asked to meet with the RW together. The mother was not present during the RW's interview with the children. The children's description of events that occurred during the two overnight visits the children had with the Appellant were consistent with the disclosures the children made to the mother. However, in addition, the children reported to the RW that during their visit, the Appellant had touched them inappropriately while they were showering. The children reported to the RW that they did not disclose this information to the mother because they knew what the Appellant did was inappropriate and the mother would be upset. (Exhibit 4, p.4; Testimony of RW)

12. As a result of the children's disclosures to the RW of the sexual abuse, a SAIN³ interview was conducted with the children on January 23, 2017. The children were interviewed separately. Although details the children provided slightly varied, the overall statements the children made remained consistent. (Exhibit 4, p.6; Exhibit 4, p.7; Testimony of RW)
13. The children had overnight visits with the Appellant at his motel on December 24, 2016 and December 26, 2017. The following occurred during these visits:
- The children called the mother at approximately 1:00 p.m. on December 25, 2016, telling her that the Appellant fell asleep and they were unable to wake him. The children requested that the mother come get them. The mother immediately went to the motel and picked up the children. Prior to leaving the motel, the mother left a note for the Appellant, sent him a text message, and left a message at the motel lobby so the Appellant would not worry where the children were when he woke up. (Exhibit 4, p.3)
 - When L asked the Appellant for a dollar, the Appellant threw a dollar in the motel's swimming pool, and told L to get it if she wanted it. When L reached for the dollar, the Appellant pushed her in the pool with her clothes and boots on. (Exhibit 4, p.4)
 - The Appellant kept the children up all night on December 24, 2016. The motel room had a king size bed. The Appellant slept in the middle and the children slept on either side of the Appellant. When the children would begin to fall asleep, the Appellant would slap the children on the buttock, bellies, and faces, saying things, such as "No, just listen to one more song", playing the music loud, or "Let's eat ice cream". The children did not know why the Appellant did not allow them to sleep. (Exhibit 4, p.4)
 - L witnessed the Appellant drink from a bottle that he had hidden in the motel bathroom. The Appellant told L that the bottle was throat medicine. L became worried and called the mother, used the code word, grapes, and asked the mother if "vodka" was throat medicine. (Exhibit 4, p.3; Exhibit 4, p.4)
 - The Appellant called L a liar and began slapping her in the face and buttocks when he found out that L had called the mother. The Appellant struck L's leg when she was on the floor, grabbed her leg and told L that he was going to break her knee. (Exhibit 4, p.4)
 - The Appellant said mean things to the children, i.e., telling La that she was ugly. The Appellant would strike the children when they did not respond to his questions as he wanted. (Exhibit 4, p.4)
 - La reported that she knew the Appellant was angry when L found the bottle in the bathroom and "could tell from his eyes that something was

³ 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. (Testimony of RW)

- going to happen”. Because of this, La called the mother and left the phone on the bed to record the message.⁴ (Exhibit 4, p.4)
 - The Appellant did not allow the children to use the bathroom or to shower with the bathroom door locked. During their visit with the Appellant, the children were taking a shower together. The Appellant entered the bathroom and poked the children on their breasts. During the SAIN interview, L demonstrated by poking herself in the breast area with one finger. (Exhibit 4, p.4; Exhibit 4, p.6; Testimony of RW)
 - La additionally disclosed that while she was in the shower alone, the Appellant came into the bathroom and also “touched my privates” and pinched her right breast. La identified where her “privates” were by putting her hand on her front vaginal area and saying, “right here”. La stated that L did not witness the incident because it was before L had entered the shower. (Exhibit 4, p.4; Exhibit 4, p.7)
14. The Department relied on the children’s statements when making its decision to support allegations of sexual abuse and neglect. The Department found the children to be credible reporters, and no evidence had been obtained during the 51B response to suggest that the children had been coached or were motivated to make false accusations against the Appellant. (Edward E. v. Dep’t of Soc. Servs., 42 Mass. App. Ct. 478, 484-485 (1997)) (Testimony of RW)
 15. This Hearing Officer finds the Department’s reliance on the children’s statements was reasonable, as the information the children provided was detailed and consistent each time they shared it, and despite the Appellant’s denials that the incident occurred as reported by the children, the Appellant failed to provide evidence to support his claim. (Fair Hearing Record)
 16. On January 25, 2017, pursuant to MGL c. 119, § 51B, the Department supported the allegations of sexual abuse and neglect of the children by the Appellant, basing its decision on information obtained during the 51B response. (Exhibit 4, p.8; Testimony of RW)
 17. A finding of abuse requires that the Department have reasonable cause to believe that a non-accidental commission of any act by a caretaker causes or created a substantial risk or physical or emotional injury, or constituted a sexual offense under the law of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. (See, definition of “abuse” below) Based on the reliable and consistent statements made by the children, this Hearing Officer finds that the Department had reasonable cause to believe that the incidences occurred as described by children, and the incidences were sexual in nature.

⁴ On January 9, 2017, the mother played two voicemail recordings for the RW. The first was of a man, who the mother identified as the Appellant, speaking incoherently. The second voicemail was a male voice saying, “you’re a liar” and noises that the RW believed may have been slapping sounds. A little girl crying could also be heard on the voicemail. (Exhibit 4, p.4)

18. In addition, based upon a review of the evidence presented in its entirety, and after consideration of all the facts and circumstances, I find that the Appellant did not take those actions necessary to provide the children with minimally adequate care, and the Appellant's actions or inactions placed the children in danger and posed substantial risk to their safety and well-being as required by the Department's intake policy when supporting and allegation of neglect. (110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16)
19. Therefore, this Hearing Officer finds that the Department's decision to support the allegations of neglect and sexual abuse of the children by the Appellant was based on "reasonable cause" and thus, made in compliance with its regulations and policies. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00 & 4.32) (See, "reasonable cause" and "Analysis" below.

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 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. (DCF 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. (DCF Protective Intake Policy No. 86-015 (rev. 02/28/2016.))

Abuse means the non-accidental commission of any act by a caretaker upon a child under age 18, which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the law of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. (110 CMR 2.00)

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..." (110 CMR 2.00)

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 . . . (DCF Protective Intake Policy No. 86-015 (rev. 02/28/2016.))

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

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))

The Appellant disputed the Department's decision to support allegation of sexual abuse and neglect and maintained that the allegations were false. However, the Appellant gave no reasonable explanation as to why the children would fabricate such allegations, and presented no evidence to suggest that the children had been coached to make false allegations against the Appellant, or were not reliable reporters.

After a review of all the evidence provided, no evidence was found to detract from the Department's finding. Therefore, despite the Appellant's denials, the Appellant did not present persuasive evidence in this matter to allow for a reversal of the Department's support decision. Based on the totality of the evidence, for reasons cited above, and in the detailed Findings of Fact, the Department's concerns were valid and rose to the level of "reasonable cause to believe" that neglect and sexual abuse did occur in this case, and that the abuse occurred as described by the children. As stated above, "reasonable cause" implies a relatively low standard of proof which, in the context of the 51B investigation, serves as 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))

Conclusion

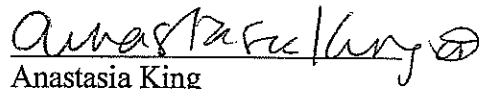
The Department's decision to support the allegation of **sexual abuse** of L by the Appellant was made with a reasonable basis and therefore, is **AFFIRMED**.

The Department's decision to support the allegation of **neglect** of L by the Appellant was made with a reasonable basis and therefore, is **AFFIRMED**.

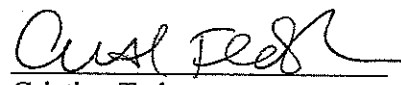
The Department's decision to support the allegation of **sexual abuse** of La by the Appellant was made with a reasonable basis and therefore, is **AFFIRMED**.

The Department's decision to support the allegation of **neglect** of La by the Appellant was made with a reasonable basis and therefore, 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, or within Suffolk County, within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, s. 14.)


Anastasia King
Administrative Hearing Officer

Date: 5-17-18


Cristina Tedstone
Deputy General Counsel
Director, Fair Hearing Unit