

**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**

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Commissioner

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IN THE MATTER OF)

SA)
FH #2017-0172)

FAIR HEARING DECISION

The Appellant in this Fair Hearing is SA (hereinafter "SA" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegation of sexual abuse pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On September 12, 2016, the Department received a 51A report alleging sexual abuse of F (hereinafter "F" or "the children"), S (hereinafter "S" or "the children"), T (hereinafter "T" or "the children") and Su (hereinafter "Su") by the children's mother VC (hereinafter "VC") and the Appellant. On October 24, 2016, the Department received a second 51A report alleging sexual abuse of F, S, T by the Appellant, sexual abuse of T by VC, physical abuse of S by VC, and sexual abuse of F by the Appellant's friends, names unknown. The Department conducted a response and, on November 18, 2016, the Department made the decision to support the allegation of sexual abuse of F, S and T by the Appellant and VC; the Department supported sexual abuse of S by VC's previous boyfriend TM (hereinafter "TM"). The Department unsupported allegations of sexual abuse of Su, unsupported physical abuse of S by VC and unsupported sexual abuse of F, S, and T by the Appellant's friends. The Department notified the Appellant and VC of its decision and their right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing originally scheduled, for May 11, 2017 was rescheduled at the request of Counsel for the Appellant. The Hearing was held on June 8, 2017, at the DCF Fall River Area Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the Fair Hearing to afford the Appellant the opportunity to submit additional information. Additional documentation was submitted by the Appellant. The information contained on the flash drive was reviewed, entered as evidence and considered by the Hearing Officer in the decision making

of the case. The record closed on June 30, 2017.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
SA	Appellant
MS	Counsel for Appellant
VC	Children's mother/ Witness
SO	Department Supervisor

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 September 12, 2016
Exhibit B DCF Intake Report/51A Report, dated October 24, 2016
Exhibit C DCF Child Abuse/Neglect Non-Emergency Response, 51B Report, completed 11/18/2016

For the Appellant:

Exhibit 1 Flash drive including photos of children, correspondence from the children's Pediatrician, text message exchange between VC and SH

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. 2/28/16

Findings of Fact

1. The subject children of this Fair Hearing are F, S and T; at the time of the subject 51A report, F was seven (7) years old, S was four (4) years old and T was three (3) years old. (Exhibit A, p.1; Exhibit B, p.2)
2. The children's mother is VC. The father of F, S and T is BH (hereinafter "BH"). In addition to the subject children, VC and BH have an older daughter named A (hereinafter "A"). (Testimony SO; Testimony VC; Exhibit A, p.13, Exhibit B, p.10.)
3. The children have a younger half-sister named Su (hereinafter "Su") VC is the mother of Su; the Appellant is the father of Su. At the time of the subject 51A report, Su was twenty five (25) days old. (Exhibit 1, p.3; Testimony SO)
4. The Department's involvement regarding VC, BH and A dated back to October 2007. Presenting issues were domestic violence, alcohol and mental health issues regarding BH. On November 16, 2007 when V was ten (10) months old, the Department received Care and Protection custody of A. A's paternal aunt SH (hereinafter "SH") subsequently adopted A. (Testimony VC; Testimony SO; Exhibit A, p.13; Exhibit B, p. 10)
5. According to VC, since she and BH entered into a relation, she and SH did not get along. There had been "problems with {the aunt} over the years;" the relationship was strained. (Testimony VC; Exhibit 1) VC reportedly had visitation with A twice a year. (Testimony VC) The Department offered no information to refute VC's contention regarding the frequency of visits. (Fair Hearing Record)
6. In September 2011, the Department unsupported allegations of F neglect due to unsanitary conditions in the home and hygiene issues. (Exhibit A, p.13)
7. In June 2012, the Department unsupported allegations of neglect of F and S due to domestic violence between VC and BH and unsanitary conditions of the home. (Exhibit A, p.13)
8. From September 7, 2012 to March 30, 2013, the Department maintained an open case with VC and BH due to "deplorable home conditions." (Exhibit A, p.5, p.13; Exhibit B, p.9)
9. On January 4, 2013, the Department screened out allegations of neglect due to lack of supervision of F and S by VC and BH. (Exhibit A, p.13)
10. In March 2014, following an emergency investigation, the Department unsupported the allegations of neglect of F, S and T due to the reported condition of the home; the Department noted that the report "appeared vindictive" in nature. (Exhibit A, p.14)

11. In July 2014, the Department supported allegations of neglect of F, S and T by VC and BH due to domestic violence and "poor housekeeping." SH was present when the police arrived, following their receipt of a call from VC's friend. BH held a "machete" to VC and SH; additionally he threatened to kill himself. The Department noted concern with VC's continued relationship with BH. (Exhibit A, p.14)

12. From 2013-2015, the Department listed the Appellant in three (3) different cases with a role of alleged perpetrator, adult in home and adult out of home. At the time of the subject 51A response, the Appellant had an open case involving VC and an open case regarding another female and her children. At the time of the Fair Hearing, the Appellant had three (3) sons (ages 17, 15, and 11) and one (1) daughter (age 4) from a different relationships. According to the Appellant, the Care and Protection petition regarding his daughter was dismissed and he was pursuing custody of her. (Testimony Appellant) According to the Appellant, there were no prior allegations of sexual abuse made against him. (Testimony Appellant) The Department offered no information to refute this contention. (Testimony SO; Exhibit A; Exhibit B; Exhibit C)

13. According to the Appellant, he started his relationship with VC eight (8) to nine (9) months prior to his February 2016 incarceration.¹ (Testimony Appellant) This would place the commencement of their relationship in May/June 2015.²

14. On July 2, 2015, the Department received and subsequently unsupported allegations of sexual abuse and neglect of S, F and T. (Exhibit A, pp.10-12) The Appellant was not named as an alleged perpetrator.³ (Exhibit A, p.7; Exhibit B, p.6) The Department offered no information pertaining to this 51A investigation, nor was it referenced in the 51B report. (Exhibit A; Exhibit B; Exhibit C)

15. According to VC, her former boyfriend TM (hereinafter "TM") had been named as the alleged perpetrator of sexual abuse. As a result, VC discontinued her relationship with TM. VC took the children to their pediatrician for an examination. (Testimony VC) A July 6, 2015 correspondence from Dr. T indicated that S, F and T were "evaluated for sexual abuse; no signs were detected." (Exhibit 1)

16. In December 2015/January 2016, per a request from the Department, the Appellant agreed not be in the children's presence due to his drinking. (Testimony Appellant)

17. The Appellant's involvement with the Department as it pertained to the subject children began on May 12, 2016 wherein the Department named him as an alleged perpetrator of neglect. (Exhibit A, pp. 5-12; Exhibit B, pp. 6-10) The Department conducted a 51B-3 removal of F, S and T due to the "unsanitary conditions of the home and the Appellant's substance abuse. (Exhibit A, p.11) The Appellant was arrested and incarcerated due to reported issues of domestic violence which the Appellant denied. (Testimony Appellant; Testimony VC) The Department placed F, S and T in a DCF foster home. The Appellant readily admitted that he is an alcoholic. According to the Appellant, at the time of the Fair Hearing, he had been sober for one (1) year,

¹ The Appellant was released in March 2016. (Testimony Appellant)

² According to VC, sometime during the fall 2015, she entered into a relationship with the Appellant. (Testimony Appellant)

³ The Department did load VC as an alleged perpetrator. (Exhibit A, pp.5-6; Exhibit B, p.4)

attended AA and counseling services. (Testimony Appellant)

18. During the children's placement in their initial DCF foster home, there were no allegations of sexual abuse. (Testimony Appellant; Testimony VC; Testimony SO)

19. Sometime prior to the subject 51A reports, the Department placed S and T with their paternal aunt SH. F remained in DCF unrestricted foster care. Su remained in VC's care. (Exhibit A, p.3; Testimony VC; Testimony SO)

20. While the Appellant and VC contended that the Appellant was not a caregiver for the children, maintaining that he was never left alone with the children and never assisted with bathing or toileting requirements, (Testimony Appellant; Testimony VC) I find that the Appellant does meet the Department's definition of a caregiver. The Appellant and VC were involved in a dating relationship since the spring/ summer 2015. (Testimony Appellant; Testimony VC) While the Appellant maintained his own apartment during his relationship with VC, he converted half of his parlor into a bedroom for the children when they stayed over. When the Appellant's boys were not visiting, the children could also sleep in their bed(s). (Testimony Appellant) VC reported that the Appellant often stayed at her apartment; additionally, there were many times that she and the children stayed over the Appellant's home. (Exhibit C, p.4) The Appellant and VC took the children to the park where they played games and did activities with the children. T called the Appellant "da da;" F and S called the Appellant "Daddy {S.}" (Testimony Appellant) In light of the aforementioned, the Appellant was deemed a caregiver pursuant to Departmental regulation and policy. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016)

21. On September 12, 2016, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging sexual abuse of F, S, T and risk of sexual abuse of Su by the Appellant and VC. At the time of the subject 51A report, the Appellant was incarcerated at the ██████████ House of Correction.⁴ (Exhibit A, p.3; Testimony SO)

22. S disclosed to SH that Daddy {S} took his clothes off in front of her, put his underwear on her head, rubbed her vagina using his two (2) fingers, kissed her neck and chest. S stated that Daddy S did the same thing to F and T. S reported that she witnessed the Appellant lick T's vagina. A reported six (6) months prior, VC made A, F, T and S watch when she and the Appellant had sex. A reported that she attempted to cover her eyes, however, VC slapped her hands away from her face saying you have to watch, you have to learn what to do. A reported that VC told her that if she told the police or SH, VC would hurt her sisters. (Exhibit A, p.3; Testimony SO)

23. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to JG from the DCF Fall River Area Office. (Exhibit C; Testimony SO)⁵

24. At the time of the September 12, 2017 51A report, Su remained in VC's care and custody.

⁴ Separate 51A and 51B report were generated for A. (Testimony SO)

⁵ JG was not present at the Fair Hearing due to a family emergency. Her DCF Supervisor SO presented the 51A and 51B reports. (Testimony SO)

(Exhibit A, pp.14-15)

25. On September 19, 2016, the Juvenile Court awarded the Department temporary custody of Su. (Exhibit C, p.3)

26. On October 24, 2016, the Department received a second 51A report, which the Department incorporated into the pending 51B response. The mandated reporter alleged sexual abuse of F, S and T by the Appellant, sexual abuse of T by VC, sexual abuse of F by the Appellant's unnamed friends and physical abuse of S by VC. According to S, she and T had to sit on the Appellant's face until they peed. VC licked T "down there," until she was clean when she changed T's diaper. S reported that the Appellant and his friend laid on F naked. S made allegations of physical abuse by VC. According to the reporter, T stuttered and did not speak much. (Exhibit B, p.3; Testimony SO)

27. During the course of the subject 51A response, the Appellant was incarcerated; he was not interviewed by the Department.⁶ (Testimony SO; Exhibit B, p.3) The Appellant received his notification of the Department's support decision at the correctional facility. (Testimony Appellant)

28. At the conclusion of its response, the Department supported the aforementioned report for sexual abuse of the children by the Appellant and VC. The Department cited to the following information in coming to the aforementioned decision:

- On September 16, 2016, S, F and A participated in a forensic interview; T was not interviewed due to her age. (Exhibit C, p.7)
- While F made no disclosures of sexual abuse, during her forensic interview she became "completely panicked and became so upset during the interview that she began to hyperventilate and stated that she felt sick. She was afraid to get into trouble. She stated that she was so upset that she wanted to punch someone." (Exhibit C, p. 2, p.7)
- S reported that the Appellant touched her front private area and her buttocks area. The Appellant touched her "peanuts" which she identified as his private part he pees with. The Appellant touched his peanuts to her vaginal area over clothes and that he touched her vaginal area with his hand under her clothes. He did this more than once. The Appellant took off his clothes in front of her. (Exhibit C, p.2, p.7)
- S reported that she observed the Appellant lick T on her front private and that T peed in the Appellant's mouth. During a second interview on September 22, 2016, S reported that T "peed" in the Appellant's mouth. She said the Appellant peed in T's mouth. According to S, this was the Appellant's idea. This occurred at the Appellant's home. (Exhibit C, p.2, p.7)
- A reported that T peed in the Appellant's mouth. (Exhibit C, p.3, p.7)
- VC made the children watch her and the Appellant have sex. According to A, VC tied her and her sibling's hands behind a chair so they could not get up. VC made them watch her and the Appellant have sex. VC and the Appellant took off all their clothes. VC

⁶ Per direction of the Department, DCF response workers do not provide their personal information while in a professional capacity as requested by a correctional facility; additionally phone interviews were no longer granted by the correctional institute. (Exhibit C, p.3; Testimony SO)

“suck{ed}” the Appellant’s “part;” A pointed to her groin area. A attempted to cover her eyes; however, VC slapped her hands away from her face saying “You have to watch, you have to learn what to do.” According to A, this occurred on ten (10) different occasions. A reported that VC threatened to hurt her sisters if she told the police or SH. (Exhibit C. pp. 2-3. p.7; Testimony SO)

29. A and S did not provide timeframes for when the alleged incidents took place. (Testimony SO; Exhibit C)

30. According to A, she waited “about a year” before she told anyone what happened about the ten (10) times that she and her siblings were tied to a chair and forced to watch the Appellant and VC engaged in sexual activity. (Exhibit C, p.3) The Hearing Officer notes the discrepancy between A’s statement at the forensic interview that VC tied her and her siblings hands behind their backs (Exhibit C, p.3, p.7) and her initial statement to the mandated reporter that she attempted to cover her eyes with her hands, which VC reportedly slapped away. (Exhibit A, p.3) A also stated that during a ‘recent’ visit at a park, VC told her and the children never to tell anyone their secrets and threatened to hurt them and kill Su. (Exhibit C, p.3) The record is absent any information regarding the date of the most ‘recent’ visit. (Exhibit C)

31. The Hearing Officer notes the inconsistency of A’s report that the aforementioned occurred ten (10) times and the Appellant and VC’s contention that the Appellant only saw A on two (2) occasions. (Testimony Appellant; Testimony VC) According to VC, she had three (3) visits with A in the two (2) years preceding the reported incident. (Testimony VC) The Department offered no information regarding the number of times that A visited the Appellant’s home. (Exhibit C)

32. According to the Appellant, the first time that A came to his home Saturday September 14, 2015; the Appellant had just learned of A’s existence the week prior when VC informed him SH adopted her and that she received visits with her twice a year. During that visit, SH came to his home to discuss VC’s visitation with A. (Testimony Appellant)

33. VC had park visits with the children and A on September 28, 2015 and October 17, 2015. (Testimony VC; Exhibit 1) The Appellant was present for a portion of a November 14, 2015 visit; submitted photographic documentation taken at the Appellant’s home. The Appellant's children were also visiting that day; VC took her children and the Appellant’s children to the park while the Appellant was at work. The Appellant saw A upon their return; he then ordered Chinese food for them. This visit lasted approximately 1 ½ hours. (Testimony Appellant; Testimony VC Exhibit 1) VC very briefly saw A on Christmas 2015 to exchange gifts. (Testimony VC)

34. At the forensic interview, A, S and F spoke about “Uncle {T},” aka “TM.” A and F spoke of concerns related to Uncle T; the Department did support sexual abuse of S by TM. During her forensic interview, S spoke of TM sexually abusing her, an allegation that the Department supported. S also made a statement that TM and VC were at the Appellant’s house when the Appellant reportedly sexually abused her. (Exhibit C, p.3) The record is absent any corroboration that TM visited the Appellant’s home. The Department did not interview TM during the course of the 51A response. (Exhibit C) During F’s forensic interview, she “seemed in a complete panic”

when speaking about Uncle T. F made no disclosure of sexual abuse by the Appellant. (Exhibit C, pp.2-3, p.7)

35. VC informed the Department that she had a “very sexual relationship” with the Appellant. There were many times when the children walked in on them having sex. According to VC, she and the Appellant were “loud.” On one (1) occasion, one (1) of the children walked in when she had the Appellant tied to the bed. VC denied that she permitted the children to watch or engaged in sexualized activity to involve the children. (Exhibit C, pp.4-5) VC and the Appellant acknowledged at Fair Hearing that the children had walked in on them while engaged in sexual activities. They did not permit the children to watch. (Testimony VC; Testimony Appellant) According to the Appellant, he did hear the foster father say in court that when the children returned to their home, there were some sexualized behaviors which subsequently subsidized. T was riding/humping an animal and said, “like Daddy S did to mommy.” (Testimony Appellant)

36. According to VC, the children were scheduled to return to VC’s care in October 2016. (Testimony VC) VC denied observing any sexualized behaviors with the children or having any concerns regarding the Appellant’s interaction with the children. VC believed that SH was “behind all of these allegations” as SH wanted to take the children away from VC. VC informed SH of the prior concerns regarding sexual abuse as it related to TM and the July 2015 51A report. VC reportedly informed her DCF social worker that she expected that false reports would be filed against her due to the impending return of the children. According to VC such a report was filed prior to A’s birth in August 2016; this report was unsupported. (Testimony VC) The Department unsupported unspecified allegations of neglect following a June 22, 2016 51A report. (Exhibit A, p.5, Exhibit B, p.4)

37. At some point during the 51A response, the Department removed the children from S and T from SH’s kinship home; SO did not know the reasons for the removal. (Testimony SO) S and T returned to their initial foster placement. (Testimony Appellant; Testimony SO) According to VC, the Department removed the children due to SH’s failure to inform the Department of the children’s sexualized behaviors; T reported that one of the children touched the other child in the bum. (Testimony VC)

38. The Appellant repeatedly denied that he sexually abused the children. While the Appellant “did not want to point fingers,” he believed SH influenced the children as it is the “only thing that makes sense” and that SH always wanted to take the children away from VC. (Testimony Appellant) No allegations of sexual abuse were made while the children were initially placed into DCF foster care. (Testimony Appellant; Testimony SO; Testimony VC) The reported allegations were made after S and T were placed in SH’s home. (Testimony Appellant; Testimony VC) No additional/new allegations were made following the children’s removal from the home of SH. (Testimony SO) VC expressed frustration that she was “not being heard” regarding her concerns that the children were coached. (Testimony VC)

39. The record is absent documentation that the Department contacted collaterals in effort to corroborate or further assess the children’s statements. While acknowledging that the reported child and the reporter are to be considered the primary sources of information, I find that the Department did not comply with 110 CMR 4.27(2) by failing to pursue obvious contacts which

were likely to yield some information to corroborate or disprove the allegations.

40. Neither the police nor the District Attorney's Office interviewed the Appellant regarding the reported allegations. No criminal charges were filed against the Appellant. (Exhibit C, p. 5; Testimony Appellant) The Department did not place the Appellant on the DCF Central Registry of Alleged Perpetrators. (Testimony SO; Exhibit C)

41. In light of the totality of evidence in this case, I find that there was insufficient evidence to support the allegation of sexual abuse of the children by the Appellant. The absence of corroborative information to support S and A's allegations regarding the Appellant and in light of new information presented at the Fair Hearing, I find that there is not reasonable cause to believe that the Appellant sexually abused the children. (110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/2016) (Fair Hearing Record)

Applicable Standards

"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; DCF Protective Intake Policy #86-015, rev. 2/28/16

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

"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).

“Abuse” means (a) the non-accidental commission of any act by a caregiver which causes or creates a substantial risk of physical or emotional injury or sexual abuse to a child; or (b) the victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver. This definition is not dependent upon location. Abuse can occur while the child is in an out home or in home setting. 110 CMR 2.00; DCF Protective Intake Policy, #86-015, rev. 2/28/2016

“Sexual Abuse” means any non-accidental act by a caregiver upon a child that constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caregiver and a child for whom the caregiver is responsible. 110 CMR 2.00; DCF Protective Intake Policy, #86-015, rev. 2/28/2016

A “support” finding of abuse or neglect means that there is reasonable cause to believe that a child(ren) was abused and/or neglected; and the actions or inactions by the parent(s)/caregiver(s) placed 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. 2/28/16

To prevail, an Appellant must show based upon all of the evidence presented at the hearing, by a preponderance of the evidence that: (a) the Department’s or Provider’s decision was not in conformity with the Department’s policies and/or regulations and/or statutes and/or case law and resulted in substantial prejudice to the Appellant, (b) the Department’s or Provider’s procedural actions were not in conformity with the Department’s policies and/or regulations, and resulted in substantial prejudice to the aggrieved party, (c) if there is no applicable policy, regulation or procedure, that the Department or Provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party; or (d) if the challenged decision is a supported report of abuse or neglect, that the Department has not demonstrated there is reasonable cause to believe that a child was abused or neglected 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. 2/28/16

Analysis

The Appellant, through Counsel, contested the Department’s decision to support the allegation of sexual abuse. In support of the Appellant’s position, Counsel made the following arguments:

- (1) The Appellant was not in the role of a caretaker;
- (2) The allegations were made when the children were placed with SH who disliked VC and threatened to take the children away from her;
- (3) The Department removing the children from SH’s home;
- (4) No additional allegations of sexual abuse following the children’s removal from SH;
- (5) The police not questioning the Appellant, no criminal charges filed against the Appellant and, no listing on the DCF Central Registry.

The initial issue for resolution is whether the Appellant was a caretaker for the children. The Department is the governmental agency charged with investigating complaints of child abuse and neglect. M.G.L. c. 119, §§ 51A, 51B. The Department's regulations however, limit its investigations and/or decisions solely to allegations of abuse and neglect perpetrated by a child's "caregiver." The Department has defined a "caregiver" as the child's "(a)parent, (b)stepparent, (c)guardian, (d)any household member entrusted with the responsibility for a child's health or welfare, (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 babysitting), a foster home, a group care facility, or any other comparable setting... The "caregiver" 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..." (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16) The Appellant and VC maintained that the Appellant was never alone with the children and did not assist with bathing or toileting activities; therefore, the Appellant was not a caretaker for the children.

Counsel for the Appellant objected to the Department's contention that the Appellant's role as a caretaker for the children "was implied" as VC and the children spent "ample" time with the Appellant and were at the Appellant's residence on a consistent basis. (Testimony SO) The objection was overruled as the Department's testimony regarding the factors/considerations in finding the Appellant to be in the role of a caretaker in its role is an essential factor in the decision making of the instant case and within the purview of a social worker's knowledge. In reviewing the agency's decision, the court gives due weight to "the experience, technical competence, and specialized knowledge of the agency [and] [its] discretionary authority [.]" G.L. c. 30A, § 14; See also, J.M. Hollister, LLC v. Architectural Access Bd., 469 Mass. 49, 55 (2014). Additionally, by the Appellant's own testimony regarding the frequency of his contact, the extent of his interaction with the children, F and S calling the Appellant "Daddy S" and T calling the Appellant "Da Da," the Appellant was a caregiver pursuant to 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.

Additionally, the Appellant through Counsel objected to the Department's testimony regarding the children's disclosures citing to totem police hearsay. The objection was noted and the testimony allowed. Although in child abuse cases, Massachusetts statutes and regulations allow the Department to rely on hearsay statements (See M.G.L. c. 119; 110 CMR 10.21), the "reliability of multilevel hearsay statements at a fair hearing is not established by the mere fact that they are made admissible as evidence by statute and regulation." The Department must look at the circumstances under which they were made. Edward E. v. Department of Social Services, 42 Mass.App.Ct.478, 484 (1997) Issues of credibility and reliability must be carefully considered and the facts and circumstances in such cases must be carefully reviewed. While allowing the testimony regarding the children's disclosures, the Hearing Officer carefully considered the credibility and reliability of their statements in conjunction with corroborative (if any) information.

To determine the reliability of multi-level hearsay statements, Courts "look to the circumstances under which they were made" and consider factors such as the hearsay statements themselves, the context in which they were made, and the detail of the statements. Edward E. v. Dep't of Soc. Servs., 42 Mass. App. Ct. 478, 484-485 (1997) The initial 51A was filed based on

information that S reportedly provided to SH. It is unclear in this 51A report whether A provided information directly to the reporter or whether this was information provided through SH. The record is absent collateral contacts to the mandated reporters in an effort to clarify and/or obtain additional information. The Department supported the allegations of sexual abuse of the children by the Appellant based on A and S's statements made during a forensic interview. The statements, if true, are indeed concerning. However, the Court in Edward determined that "Statements [made by a child] supported with little, if any, indicia of reliability do not attain trustworthiness through a process of repetition." Edward E. v. Dep't of Soc. Servs., 42 Mass. App. Ct. 478, 486 (1997) The record is absent any corroboration of S and A's statements in addition to other compelling information not known or accessed to the Department at the time of the 51A response.

Counsel for the Appellants arguments address the aforementioned concerns. The record is absent any information to reflect that the Department considered or knew of the Appellant's strained relationship with SH and any motivation or agenda that SH may have had to influence the children's statements. The timing of the allegations bore additional scrutiny as no disclosures or sexualized behaviors were observed when the children entered their initial foster care placements. The record is absent neither collateral contacts to the initial foster parents nor a contact with SH. The DCF response worker was unaware that S and T were removed from SH's home during the course of the 51A response and the reasons thereof. "As with virtually every case involving a child's allegation of sexual abuse, one of the primary issues in assessing the credibility of that allegation is whether there is any reason why the child would invent or fabricate such an allegation. If the evidence indicates a likelihood that there is such a reason, that would greatly tend to undermine the child's credibility..." Covell v. Department of Social Services, 766,784 (2003) Both the Appellant and VC voiced concern that the children were coached by SH.


In coming to its decision to support the allegation of sexual abuse of the children by the Appellant, the Department relied solely on the statements made by A and S. A's statement that she and the children were tied up and forced to watch the Appellant and VC engage in sexual activity on ten (10) occasions was inconsistent and conflicted with the testimony of the Appellant and VC regarding A visiting with the Appellant on only two (2) occasions. During the November 2015 visit, the Appellant's children were present; the second interaction was brief. The mandated reporter indicated that when A was made to watch, VC would slap A's hands away when she attempted to cover her eyes. This conflicted with A's statement during the forensic interview that she and the children were tied up in chairs while being forced to watch. Additionally, there was no corroboration of S's statement that VC's ex-boyfriend, TM, was at the Appellant's house when the Appellant reportedly sexually abused her. (Exhibit C, p.3) The Department did not interview TM during the course of the 51A. (Exhibit C, p.3)

"... When reviewing a support decision or an Alleged Perpetrator listing, 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 Departments decision." (110 CMR 10.21 (6)) The decision making regarding this case was admittedly absent information from the Appellant as the Department was unable to interview him due to his incarceration. The additional information provided at Fair Hearing coupled with the conflicting

and/or uncorroborated information provided by the children do not constitute "reasonable cause to believe" that the Appellant sexually abused the children. "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) Considering all the evidence and the circumstances, the Department did not have reasonable cause to believe and the decision to support the allegation of sexual abuse was not in conformity with its policies and/or regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

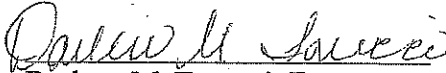
Conclusion and Order

The Department's decision to support the 51A report of sexual abuse on behalf of F, S and T by the Appellant is **REVERSED**.



Carmen Temme
Administrative Hearing Officer

1/5/18
Date


Darlene M. Tonucci, Esq.
Supervisor, Fair Hearing Unit

Date

Linda Spears
Commissioner