

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
BOSTON, MASSACHUSETTS 02111**

Linda S. Spears
Commissioner

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IN THE MATTER OF)
)
Mrs. N.N. & Mr. D.N.) **FAIR HEARING DECISION**
)
FH # 2017-0179 & # 2017-0122)
)

The Appellants in this Fair Hearing are the parents (mother and father) of the subject child (R) who will be referred to as the Appellant1 or NN and Appellant2 or DN. The Appellants appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegations of neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On October 19, 2016, the Department received a 51A alleging the neglect of four children by the Appellants.¹ A subsequent report was filed on December 5, 2016, alleging neglect of the oldest child by her biological father and this report was screened in and incorporated into the pending response as permitted by Department policy.² The Department conducted a response and, on January 5, 2017, the Department made the decision to support the allegation of neglect of R and unsupport on behalf of all of the other reported children. The Department notified the Appellant of its decision and their right to appeal.

The Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on March 30, 2017, at the DCF Lowell Area Office. The Appellants had originally been scheduled for separate hearing dates. It was agreed upon by all parties that the hearing would be consolidated and that Appellant2 Counsel would represent both Appellants. All witnesses were sworn in to testify under oath. Counsel presented a written and verbal closing argument and the record closed at the conclusion of the hearing.

¹ The four children were all the biological children of Appellant1 and the youngest three were Appellant2 children.

² This report was entered into evidence by the Department but was irrelevant with respect to the decision the Appellants were appealing. This allegation was unsupported on by DCF January 5, 2017.

The following persons appeared at the Fair Hearing:

Ms. Lisa Henshall	Fair Hearing Officer
Mrs. N.N.	Appellant1 (mother)
Mr. D.N.	Appellant2 (father)
Atty. M.T.	Counsel
Ms. L.C.	Department Supervisor
Ms. E.W.	Response Worker1
Ms. M.S.	Response Worker2

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	Child Abuse/Neglect Report dated 10/19/16
Exhibit B	Child Abuse/Neglect Report dated 5/05/16
Exhibit C	Child Abuse/Neglect Investigation dated 1/10/17
Exhibit D	Affidavit ³

Appellant:

Exhibit 1	Letter to the school department notifying them of the intention to home school dated May 29, 2014
Exhibit 2	Letter dated March 27, 2017 that child' educational progress reports had been received

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

³ The Department submitted an exhibit from a Juvenile Court proceeding. Pursuant to M.G.L. c. 119, s. 38 and Juvenile Court Standing Order 1-84, said documents are confidential, and cannot be copied or released absent permission of the court. As this Hearing Officer does not have any indication that permission of the court was sought or granted in conjunction with the submission of said documents, these exhibits will not be entered into evidence.

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 child of the Fair Hearing was (R), who was seven (7) years old at the time of the reported incident. (Exhibits A, B & C)
2. The Appellants are the child's parents; therefore, they are caregivers pursuant to Departmental regulation 110 CMR 2.00. (Fair Hearing Record; Exhibit C; Testimony of the Appellants)
3. Appellant1 had three prior screened out reports with the Department and Appellant2 was involved in a prior case but not as an alleged perpetrator of abuse or neglect. (Exhibit A, B & C)
4. The Department received a 51A report on October 19, 2016, pursuant to M.G.L. c. 119, §51A, alleging neglect of the children by the Appellants due to lack of supervision. The report was screened in, pursuant to M.G.L. c. 119, §51B, and assigned for a response. (Exhibit A, pgs. 3 & 7; Testimony of the Response Worker)
5. During the course of the response a Care and Protection Petition was filed for access to the three youngest children as the Appellants did not respond to the Department's attempts to meet with them. (Testimony of the Response Workers; Testimony of the Supervisor; Exhibit C)
6. The reported child R was the oldest of the three youngest children, so she is Appellant2's oldest child. (Testimony of Appellant2; Exhibit C)
7. It was undisputed that the reported child was not officially enrolled in school at the time of the response. (Testimony of Response Worker1)
8. The Appellants had contacted of their intentions to home school the child and were instructed to notify ██████ Public Schools in writing. (Testimony of Response Worker1; Exhibit 1; Testimony of Appellant1)
9. The Appellants had a curriculum (educational plan) that Appellant2, his sister and a tutor for the family, was using to homeschool the child. (Testimony of Appellants; Exhibit C, p. 10)
10. The Appellants created the curriculum after being in touch with other homeschoolers and researching other curriculum. (Testimony of the Appellants; Testimony of the Response

Worker1)

11. There was no evidence that the child was not being homeschooled. (Exhibit C)
12. ██████████ was described as being one of the most "lenient" states as far as homeschooling (Testimony of Appelant2; Testimony of the Supervisor)
13. The Appellants were unaware that they needed to submit a homeschooling plan to the school department for approval as they never received a response after submitting their letter of intent. (Testimony of the Appellants)
14. When the Appellants realized that they had been remiss they completed the required steps to have the child approved to be homeschooled. (Fair Hearing Record; Exhibit C, p.12; Testimony of the Appellants)
15. The curriculum the Appellants had been using was approved by the school committee. I find that the Appellants were providing the child with education. (Testimony of the Appellants; Fair Hearing record)
16. The child was up-to-date medically and there were no other concerns about the child. (Exhibit C, p. 15)
17. At the end of its response, the Department supported the aforementioned report for neglect of the child by the Appellant.⁴ The Department based this determination on the child "not being properly enrolled as a home school student in the public school system." The Department argued that the Appellants unwillingness to meet with them and resulting in a Care and Protection for access indicated that there was "risk." The Department was also concerned that the Appellants would not follow up. The Department concluded this constituted neglect as defined by its regulations and that they had to file for access to get information 110 CMR 2.00 (Exhibit C, p. 16; Testimony of the Supervisor)
18. Based on the credible evidence, I find that the Department did not have reasonable cause to believe that child (R) was neglected per the Department's definition as the Appellants did not fail to provide the child with minimally adequate care; with respect to her education. 110 CMR 2.00.
 1. There was no evidence presented that the Appellants were not educating the child;
 2. The Appellants had developed a curriculum and had engaged a tutor;
 3. The Department did not review the curriculum, make contact with the tutor nor was there any evidence that the child was interviewed about the home schooling;
 4. The curriculum the Appellants had been using was approved by the school committee;
 5. The Appellants were scared of DCF and failed to meet with them thus a Care and Protection for access was required;
 6. The Appellants' were remiss in that they had not properly enrolled the child in home

⁴ The other allegations on behalf of the other three children were unsupported.

schooling, however I do not find that they failed to provide the child with minimally adequate care;

7. There were no other concerns noted and the child was up-to-date medically.
8. The Department did not present any evidence that the Appellant failed to provide the child with minimally adequate care. (Exhibit C; Fair Hearing Record; DCF protective intake policy #86-015 p. 28, revised February 28, 2016, Fair Hearing Record, See Analysis)

Applicable Standards and 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.

- 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) 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.

“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 the 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; G.L. c.119, s 51B

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, “caregiver” includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. 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. 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 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. 110 CMR 10.23

On the basis of the factual findings and standards set forth above and for the reasons set forth below, I reverse the Department’s neglect support decision.

The Appellants, the mother and father of the child, were “caregivers,” pursuant to Departmental regulation. 110 CMR 2.00

The Appellants, as argued by Counsel, contested the Department’s decision to support the allegation of educational neglect on behalf of their child. The Appellants argued that the supported decision of neglect in this case should be reversed. The Appellants disputed that child was not receiving an education as they had created and implemented a curriculum and notified the school department of their intentions to home school but were unaware that there was more involved in the enrollment process. Appellant1 made contact with the school department and was instructed to send a letter of her intentions to home school, which she did. (See Exhibit 1; Fair Hearing Record) The educational plan that the Appellants had been using was deemed effective and ultimately approved by the school committee. I found their argument persuasive.

The Department argued that their concern was that it took the Department going to court for access to get the Appellants to meet with them and get answers, which increased their concern. The Department argued that the Appellants failure to officially enroll the child to be home schooled constituted neglect as Appellants failed to take at least minimal actions to provide essential care including education. The Department was concerned that there would be no follow through by the Appellants on the educational plan and kept the case open for an assessment.

While the Department presented evidence that the Appellants had failed to officially enroll the child for home schooling they did not provide evidence that the child’s educational needs were not being met by the Appellants. There was no evidence that the child was not receiving

minimally adequate care, specifically in the form of an education.

Based on a review of the evidence, presented in its totality, there was no reasonable cause to believe that the Appellant's actions constituted neglect as defined by the Department's regulations. (See Findings)

Conclusion and Order

The Department's decision to support the 51A report for neglect of the child (R) by the Appellants is **REVERSED**.

Lisa A. Henshall

Lisa Anne Henshall
Fair Hearing Officer *BC*

April 16, 2018
Date

Barbara Curley

Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner