

**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)
(JR)
(
(FH # 2017-0187)
(

HEARING DECISION

Procedural History

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

On January 24, 2017 the Department received a 51A report from a mandated reporter alleging sexual abuse of S ("Child") by JR; the allegation was subsequently supported. 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 C.M.R. 10.06

The Fair Hearing was held on November 3, 2017 and March 7, 2018 at the Department of Children and Families' Park Street Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing on November 8, 2017:

NH	Administrative Hearing Officer
JR	Appellant
SA	Witness/Advocate
DB	DCF Supervisor

The following persons appeared at the Fair Hearing on March 7, 2018

NH	Administrative Hearing Officer
JR	Appellant
SA	Witness/Advocate
BT	DCF Supervisor
MA	DCF Response Worker

In accordance with 110 C.M.R. 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 on a digital voice recorder, pursuant to 110 CMR 10.26

The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

Exhibit A: 51A Report
Exhibit B: 51B Response

For the Appellant:

The Appellant did not submit any documentary evidence

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)

Statement of the Issue

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. DCF Protective Intake Policy #86-015 Rev. 2/28/16

Findings of Fact

1. JR is the adoptive father of S. At the time of the instant 51A, S was fourteen years old. I find that JR is a caregiver for S in accordance with the regulations and policies

that govern these proceedings. (Exhibit A p.1-2; Exhibit B p.1-2; Testimony of DB; Testimony of MA; Testimony of Appellant)

2. In the summer of 2015, the Appellant would have some of S' friends over to his house for occasional sleep-overs. During these sleep-overs, S and his friends would engage in a game of hide and seek with the Appellant. One of these friends was child X. (Exhibit A p.1-2; Exhibit B p.1-6; Testimony of DB; Testimony of Appellant)
3. On December 29, 2016 child X disclosed that he had been sexually abused by the Appellant. He disclosed that on one occasion, he fell asleep on a futon and awoke to the Appellant's hands down his pants. X also reported another incident where he and the Appellant were playing card games and the Appellant asked X to perform oral sex and when X said no, he was kicked out of the home. X also disclosed playing hide and seek games with the Appellant, and the other children including S. X stated that when the Appellant would catch a child, he would ask them to remove a piece of clothing. During a subsequent SAIN, X disclosed that the Appellant touched his penis while he was sleeping. This response was supported for sexual abuse of X by the Appellant on January 30, 2017. The 51A and subsequent 51B regarding the Appellant and X gave rise to the instant 51A and 51B regarding the Appellant and S. (Exhibit A p.2; Exhibit B p.1-2; Testimony of D; Testimony of BT; Testimony of MA)
4. During the instant 51B response, the Department Response worker asked S about the hide and seek games. S stated that he knew the difference between good and bad touches, and denied being touched inappropriately by anyone. S stated that he and his friends would initiate the hide and seek game. He stated that during the hide and seek game, the lights would be turned off and the Appellant would attempt to find the children. If the Appellant found a child, then that child would become a prisoner. S denied that the game involved anyone removing articles clothing. S stated that the only piece of clothing they might ever remove would be socks. (Exhibit B p.5; Testimony of DB; Testimony of MA; Testimony of BT)
5. During the instant 51B response and at the Fair Hearing, the Appellant denied having any sexual contact or sexually abusing S or any other child. He told the response worker that the children would initiate the game, not him. He also told the response worker that one of the mother's had threatened him, stating that she would ruin his life. At the Fair Hearing, the Appellant testified that child X has since recanted his disclosures and that X's parent is supportive of the Appellant and does not why this matter has persisted. (Exhibit B p.6-7; Testimony of Appellant)
6. At the Fair Hearing, the only evidence submitted by the Department in regards to X's disclosures and the subsequent related support decision was a paragraph of a record review. The Department testified that X's statements were consistent and credible, but did not actually present those statements into evidence, or indicate how they were determined to be credible. (Exhibit B p.1, Testimony of MA, Testimony of BT)

7. The Department did not have reasonable cause to believe that S was sexually abused by the Appellant for the following reasons:
 - a. S did not make any disclosures at any time to indicate that the Appellant sexually abused him.
 - b. S denied that he was sexually abused by the Appellant, or that he was ever naked during the supposed game of hide and seek.
 - c. There was no physical evidence of any sexual abuse of S.
 - d. The support decision from another 51B was not corroborated by the information gathered in the instant 51B.

Applicable Standards

A "support" finding means 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. DCF Protective Intake Policy #86-015 Rev. 2/28/16.

"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." 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 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 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

"Caregiver". A caregiver is a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or 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

"Abuse". Abuse is 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 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-of-home or in-home setting. 110 CMR 2.00; DCF Protective Intake Policy #86-015 Rev. 2/28/16

"Sexual Abuse". 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. 2/28/16

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.

Analysis

In this case, the Department has relied on the support decision of another response and information obtained therein to bolster the decision in the instant case. The Department points to commonalities between X and S' accounts of the hide and seek game, and argues that even though S denied any sexual abuse, the other support decision and the commonalities were sufficient to support the allegation of sexual abuse in this case.

In reviewing the Department's documents and testimony, there is not substantial evidence to support the Department's findings. S did not make any disclosures at any time that could be construed as sexually abuse. S denied that he was naked at any time during the supposed game.

During the 51B response and at the Fair Hearing, the Appellant raised the possibility that child X's mother had an agenda against him, and this may have influenced X's statements. The Department did not address this issue, which undermines the credibility of X's supposed disclosures.

Further, the Department essentially borrowed the facts and statements of the 51B response regarding X to bolster the instant 51B regarding S. However the Department did

not submit the other 51B into evidence, present that Response Worker as a witness and only provided testimony regarding X's statements and credibility that was not corroborated. Yet, S's statements refute many of the supposed statements provided by X. Therefore, the findings of the 51B regarding S are not sufficient to provide substantial evidence in the instant 51B response and Fair Hearing.

Conclusion and Order

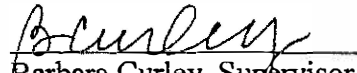
The Department's decision to support the allegation of sexual abuse of S by the Appellant is hereby REVERSED.

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 in which she lives, or in Suffolk County, 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.



Nicholas Holahan
Administrative Hearing Officer *BC*

May 27, 2018
Date


Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner