

**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)

Ms. R.A. & Mr. E. A.)

FH # 2017-0190)

) **FAIR HEARING DECISION**
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The Appellants in this Fair Hearing is the mother of the subject child and her husband who will be referred to as the Appellant1 or RA and Appellant2 or EA. The Appellants appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegations of neglect and physical abuse supported on behalf of the child by the Appellant's husband (E) pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On December 13, 2016, the Department received a 51A alleging the neglect of child (C) by the Appellants and physical abuse of the child by Appellant2. The Department conducted a response and, on January 13, 2016, the Department made the decision to support the allegations of neglect by the Appellants as well as the allegation of physical abuse and the case remained open. The Department notified the Appellants of its decision and their right to appeal.

Appellant1 made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on April 11, 2017, at the DCF Lowell Area Office. All witnesses were sworn in to testify under oath. The record remained open to allow the Appellants time to review the reports that they had not received prior to the hearing, and to determine if they required an additional hearing date. The record closed on April 21, 2017.

The following persons appeared at the Fair Hearing:

Ms. Lisa Henshall
Ms. R.A.

Fair Hearing Officer
Appellant (mother)¹

¹ The hearing was held via speaker phone as Appellant1 was unable to appear in person. Appellant2 did not testify

Ms. D.A.
Ms. A.P.

Department Supervisor
Response Worker

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 12/13/16
Exhibit B Child Abuse/Neglect Investigation dated 1/13/17

Appellant:

Exhibit 1 Letter from Appellant1 therapist dated 4/17/17
Exhibit 2 Letter from Appellant1 grandmother

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) 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 child of the Fair Hearing was (C), who was six (6) years old at the time of the

and was not on the phone for the hearing.

reported incident. (Exhibit A, p.1; Exhibit B, p.1)

2. The Appellant1 is the mother of the child and Appellant1 is married to Appellant2 and he is the child's step-father, therefore, they are caregivers pursuant to Departmental regulation 110 CMR 2.00. (Exhibit A; Exhibit B; Testimony of the Appellant)
3. The family had an open case with the Department of Children and Families at the time this report was filed. The family had history with DCF dating back to 2011. In 2011 there was a supported report of neglect due to domestic violence between Appellant1 and the child's biological father as well as concerns of Appellant1's inability to provide a safe and stable home environment for the child. In 2014, there was an unsupported report. In 2016, there were three reports filed: one was unsupported, one substantiated and one was supported. (Exhibit A, pgs. 8-9; Exhibit B, p. 1)
4. The Department received a 51A report on December 13, 2016, pursuant to M.G.L. c. 119, §51A, alleging neglect of the child by the Appellants and physical abuse of the child by Appellant2. At the time of the report that child was in the guardianship of his paternal grandmother and had been since February 2016. There were concerns that Appellant2 would hit the child with a belt and would hit him if he got up to use the bathroom at night. The child was told he would be visiting with his mother (Appellant1) and he reportedly became "tense and anxious" when talking about these visits. The report was screened in, pursuant to M.G.L. c. 119, §51B, and assigned for a response. (Exhibit A, pgs. 3 & 10; Testimony of the Response Worker)
5. The child had not seen Appellant1 since his birthday in [REDACTED] this visit was supervised by the paternal grandmother. The child had not seen Appellant2 in approximately a year prior to this report. (Exhibit B, pgs. 2, 3 & 7)
6. C had documented behavioral problems when he began residing with his grandmother. C is diagnosed with post-traumatic stress disorder (PTSD), Reactive Attachment Disorder (RAD) and Attention Deficit Hyperactivity Disorder (ADHD). C was prescribed medication and services were in place. (Exhibit B, pgs. 2 & 13)
7. C was psychiatrically hospitalized in the fall of 2016. (Exhibit B, p. 2) Prior to this hospitalization he would "self-harm" and bang his head. (Exhibit B, p. 4)
8. Appellant1 was engaged in therapy and prescribed medication for depression. (Exhibit B, p.7; Testimony of the Response Worker; Testimony of Appellant1)
9. After the child was told he would be having visits with Appellant1 his behaviors at school became concerning and he was, "dysregulated." C would yell and scream that he did not want to go back with his mother (Appellant1) and wished to remain with his grandparents. There was no evidence presented to determine what his specific concerns were. (Exhibit B, p. 4)
10. The child indicated he was happy to see his mother (Appellant1), whom he would be visiting with the day after DCF RW interviewed him. (Exhibit B, pgs. 4, 11 & 12) I find that it was evident that the child was conflicted about seeing Appellant1 based on his

behaviors. The child was concerned about returning to the Appellants' home.

11. Appellant1 and the child's paternal grandmother (guardian) were in probate court as Appellant1 was attempting to regain custody of the child. Appellant1 and the child's paternal grandmother had a contentious relationship. (Exhibit B, pgs. 4 & 7; Testimony of the Appellant)
12. The child was privy to conversations about Appellant1 and was aware of the upcoming probate court date. The paternal grandmother had "no filter" and had boundary issues. (Exhibit B, pgs. 11 & 12)
13. The child had two supervised visits with Appellant1 during the response (12/23 and 12/31/16) and there were not concerns noted. (Exhibit B, p. 13)
14. The Appellants disputed that the child was spanked; indicating that the child had been spanked with their hand. I find that the child was spanked with a belt without his underwear on by Appellant2. The child described this as being "the worst pain" and said that his buttock's was "red." (Exhibit B, pgs. 5, 7 & 8; Exhibit 2) I find the child's statements to be reliable, however I find that this does not rise to the level of physical abuse but was inappropriate physical discipline. Edward E. v. Department Social Services., 42 Mass. App. Ct, 478, 486 (1997)
15. The child disclosed concerning information about life with the Appellants but there was no context for his responses. There was no further questioning after he reported something. The child recalled that Appellant2 would "close" him in a room and shut off the lights. The child did report that the condition of the home where he had lived with the Appellants was concerning in that there was "trash all over the floor." (Exhibit B, pgs. 4 - 5; Exhibit 2) I find that without further details it is open to interpretation what this means and was information that was from when he lived with the Appellants ten months prior.
16. The child spoke of Appellant2 putting spicy stuff on his mouth when he was residing with the Appellants however there was no further evidence or explanation with respect to this comment. The Appellants were not interviewed about this.(Exhibit B, p. 5)
17. The Department failed to ask the Appellants about the concerns that the child brought up with respect to his concerns about the condition of the home. The Appellants disputed the allegations of physical abuse and that the child was ever locked in a room. (Testimony of the Appellant; Exhibit B)
18. At the end of its response, the Department supported the aforementioned report for neglect of the child by the Appellants and physical abuse of the child by Appellant2. The Department based the decision to support the allegation of neglect on the child's dysregulated behaviors when he learned of the pending visits to be held with Appellant1 (his mother). In addition the child described the Appellants' home, where he lived prior to being in his paternal grandmother's custody, as dirty with trash and bugs and spoke of being scared when he was put in a room, or locked in a room, with the lights out. With respect to the allegation of physical abuse the Department concluded that the child being on the buttocks with a belt by Appellant2 and that it was painful and red. The Department

concluded this constituted neglect and physical abuse as defined by its regulations 110 CMR 2.00 (Exhibit B; Testimony of the Response Worker)

19. This response was incorporated into the family's open case with the Department. (Exhibit B; Testimony of the Response Worker)
20. Based on the credible evidence, I find that the Department did not have reasonable cause to believe that child (C) was neglected per the Department's definition as the Appellant did not fail to provide the child with minimally adequate care. 110 CMR 2.00
 - The family has an open case with the Department due to ongoing concerns;
 - At the time of the response the child was in the custody of his paternal grandparents and had been for approximately ten (10) months;
 - The child did have an adverse reaction to hearing that he would be visiting with his mother (Appellant1) and there were concerns that the child was privy to information regarding the probate custody battle between the Appellant1 from the paternal grandmother;
 - There were concerns that the child was scared when he was put in a room without a light on but there was no other details regarding this. It remains unclear based on the lack of evidence if he was actually locked in a room;
 - The child spoke of the Appellants' house having bugs and trash on the ground again this was ten months prior and there was no other evidence regarding this and how the Appellants failed to provide the child with minimally adequate care;
 - Overall, there was insufficient evidence to find that the Appellants failed to provide the child with minimally adequate care;
 - The child was hit on his buttocks with a belt, was in pain by Appellant2 but there was no evidence that this rose to the level of physical abuse. It was inappropriate physical discipline. (Exhibit B; Fair Hearing record)
 - There was no evidence that either Appellants actions placed the child in danger or posed a substantial risk to his safety or well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16
21. The Department decision to support the allegation of neglect was not made in compliance with its policies and regulations.²

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 caregiver occurred.

² Such evidence, that the child was in danger or the Appellant's actions posed a substantial risk to the child's safety or well-being would be necessary for the Department to support the allegations, as opposed to the Department making a finding of "concern" which would also require that the child was neglected, but that there is a lower level of risk to the child, i.e. the actions or inactions by the Appellant create the potential for abuse or neglect, but there is no immediate danger to the child's safety or well-being. (See DCF Protective Intake Policy #86-015, Rev. 2/28/16, p. 28, 29)

- 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 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 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 #86-015, rev. 2/28/16; 110 CMR 2.00

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 laws of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. 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. 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 and physical abuse support decision.

The Appellants, the mother of the child, and her husband (Appellant2) were "caregivers," pursuant to Departmental regulation 110 CMR 2.00.

The Appellant contested the Department's decision to support the allegation of neglect on behalf of her child. The Appellant argued that the supported decision of neglect in this case should be reversed. The Appellant denied that either she or Appellant2 ever locked the child in a room. The Appellant also disputed that the child was ever physically abused by Appellant2. Appellant1 and the grandparents had ongoing issues and were involved with Probate Court. The Appellant1 argued that the child was privy to a great deal of what was going on between the Appellants and the grandparents.

While I found the child sincere his numerous statements lacked details or explanations. Without further evidence it is unclear what actually happened to the child that was less than minimally adequate. In addition, all of his concerns were regarding his home life from at least ten (10) months prior when he resided with the Appellants. Clearly, the child has experienced trauma and the child's behaviors when transitioning, or thinking about transitioning, between the grandparent's and his mother were concerning. However, there was insufficient evidence to determine that either Appellant failed to provide the child with minimally adequate care.

With respect to the concern of physical abuse, the child's statements were credible but the evidence indicated that while this was inappropriate discipline being used in the home there was no evidence that it rose to the level of physical abuse. 110 CMR 2.00

At the time of the fair hearing the child was residing with his parental grandparent's and the case was open for services with the Department due to prior supported reports.


Based on a review of the evidence, presented in its totality, the Department did not have reasonable cause to believe that the child was neglected or abused and that the Appellants' actions placed the child in danger or posed a substantial risk to his safety or well-being.

Therefore, there was insufficient evidence to support a finding of neglect and abuse. (See Findings)

Conclusion and Order

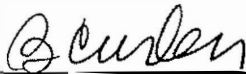
The Department's decision to support the 51A report for neglect of C by Appellant1 and Appellant2 is **Reversed**.

The Department's decision to support the 51A report for physical abuse C by Appellant2 is **Reversed**.



Lisa Anne Henshall
Fair Hearing Officer *AL*

April 17, 2018
Date



Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner