

**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

Voice: 617-748-2000
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IN THE MATTER OF

VD

2017-0203

Fair Hearing Decision

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

Procedural History

On November 18, 2016, the Department received two 51A Reports alleging the neglect and physical abuse of S (hereinafter "S") by her mother, VD. The allegations were screened in and were unsupported by the Department. During the Department's response to allegations for S, an allegation of neglect involving Appellant's younger child, P (hereinafter "P"), was added and subsequently supported by the Department.

The Department informed the Appellant of its decision and of her right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06.

The Fair Hearing was held on May 11, 2017 at the Department of Children and Families' Cape Ann Area Office in Salem, MA. The record officially closed on this date.

The following persons appeared at the Fair Hearing:

Carmen Colón
VD
RH

Fair Hearing Officer
Appellant
DCF Response Supervisor

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 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 Intake Report, dated November 18, 2016 @ 2:51p.m.

Exhibit B: 51A Intake Report, dated November 18, 2016 @ 3:16 a.m.

Exhibit C: 51B Report, dated January 6, 2017

For the Appellant:

Exhibit 1: Request for Fair Hearing

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 Fair 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 parents(s)/ caregiver(s) placed the child (ren) in danger or pose substantial risk to 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 Appellant is the biological mother of P in this matter; therefore, she was a caregiver pursuant to Departmental regulation and policies. DCF Protective Intake Policy #86-015, rev. 2/28/16
2. Appellant shared the family home with her daughter, S; her son, P; and P's father CP. (Exhibit A, B and C; DCF Testimony)
3. At the time of the Fair Hearing, the Appellant had an open ongoing clinician case with the Department. Appellant acknowledged involvement from a previous history of substance abuse dating back to 2009. (Appellant Testimony)

4. On November 18, 2016, the Department received two (2) separate 51A reports. One was filed by a mandated reporter. Both 51A reports alleged physical abuse of S by the Appellant. (Exhibits A & B; DCF Testimony) One 51A report alleged neglect of P by the Appellant. (Exhibit A; DCF Testimony) The allegations were screened in for a non-emergency response. (Exhibits A & B)
5. On or about November 22, 2016, the Department initiated its response. (Exhibit C)
6. During the Department's response period the DCF Response Social Worker (DCF RSW) interviewed the Appellant, S, and CP to discuss the reported allegations. During the interview with the family, the Department obtained the following information:
 - a. On the date of the reported event, the Appellant arrived home at around midnight. S was awake at this time and had yet to complete her chores which prompted an argument between VD and S. (Exhibit C. p.4)
 - b. The argument involved yelling on both Appellant and S's part; it escalated after VD told S she would take away her television as a consequence. (Exhibit C, p.3)
 - c. Per her own statements, Appellant did "grab" S but denied striking her.
 - d. CP was asleep as was P at the time of the incident. Neither CP nor P witnessed the event. (Exhibit C, p. 3)
 - e. CP was woken by the argument; called the police who responded to the home. Responding officers noted there were no marks or bruises on S. (Exhibit C, p.3; Appellant Testimony).
7. VD was not intoxicated at the time the police responded to the family home. (Exhibit B, p.2)
8. CP expressed concerns for his son, P, who was 2 years old to the DCF RSW. CP reported the Appellant was in bed sleeping on the couch when P got hold of pills; police responded to the home. (Exhibit C, pp. 4, 8).

9. The Department's interview with the Appellant was focused on what transpired between the Appellant and S. (Exhibit C; Appellant Testimony)
10. After the DCF RSW visit on December 7, 2016, no further contact was made with Appellant to discuss CP's disclosures involving P. (DCF Testimony; Exhibit C, p.2-9)
11. The Department did conduct further investigation into the alleged incident described by CP; they did not follow-up with the Appellant; nor did obtain a police report or any medical documentation regarding P to corroborate the allegation. (Exhibit C)
12. On December 9, 2016, DCF RSW contacted P's pediatrician's office. P was up to date medically. No concerns were noted. (Exhibit C, p.4)
13. On January 6, 2017, the Department supported the allegation of neglect of P by Appellant for "concerns that Ms. D did engage in at least a verbal altercation with her daughter S when she returned home from work. It is also of concern that P was able to get into Ms. D's diet pills while she was sleeping." (Exhibit C, p.6)
14. Based upon the evidence at the time the Department's investigation, I find that the Department had not conducted a proper investigation; there was no corroborating evidence – no police report, no medical record, no further questions asked of the Appellant – to support an allegation of neglect.
15. At the Fair Hearing, DCF testified they did not receive any confirmation that the incident regarding P and the bottle of pills occurred. (DCF Testimony)
16. At the Fair Hearing, the Appellant was forthcoming and provided testimony regarding the "pill bottle" incident. She had been asleep in the morning and P had gotten to her "Probiotic" pills in her room; they were in a non-childproof container, and P threw "all over" the couch. CP came home and saw P and the pills and began to yell and Appellant woke up. The Appellant was remorseful regarding the incident. (Appellant Testimony)
17. Based upon the evidence presented at the Fair Hearing by the Appellant, I find that the Department had reasonable cause to believe that the Appellant neglected P as she failed to provide minimally adequate care/supervision to P. P was able to get a bottle of pills, in a non-childproof bottle, open them and quite possibly could have ingested them. There was no evidence presented as to where the bottles of pills were kept, or how P could have gotten the bottle, or whether P actually ingested any pills. 110 CMR 4.32(2); DCF Protective Intake Policy #86-015, Rev. 2/28/16
18. However, there is no evidence that the child was in imminent danger. There is no evidence that the pills in the bottle posed substantial risk to P or that the Appellant placed P in danger or posed substantial risk to his safety through her actions. DCF Protective Intake Policy #86-015, Rev. 2/28/16

19. Therefore, the Department's decision to support the allegation of neglect was not made in conformity with its policies and regulations. 110 CMR 4.32(2); DCF Protective Intake Policy #86-015, Rev. 2/28/16

Applicable Standards

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 that 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

"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 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

"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

"Caregiver" means a child's: (1) a child's parent, stepparent, guardian or any household member entrusted with the responsibility for a child's health or welfare; or, (2) 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 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. 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, or (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, or (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 Department supported allegations of neglect of P by the Appellant, due to concerns for emotional stability and the level of supervision for P; that P was around arguing and was able to get to the Appellant's diet pills.

A determination of neglect does not require evidence of actual injury to the child. Lindsay v. Dep't of Soc. Servs., 439 Mass. 789, 794-795 (2003). While it was reasonable for the Department to be concerned about the emotional stability and level of supervision for P, there is no evidence that the Appellant placed P in immediate danger or posed substantial risk to his safety. The Department did not conduct a proper investigation regarding the circumstances surrounding P and the pills. The Department did not speak with the Appellant about this incident, even though she was at the home visit when CP advised them of this incident. The Department did not obtain police report regarding the incident nor did they follow-up with P's Pediatrician regarding this incident. Further, the DCF RSW was not able to address the concerns regarding the pills as they did not receive any confirmation the incident occurred. The record was absent regarding the incident. However, the Appellant was forthcoming, through her own testimony, that she had been asleep in the morning and P had gotten to her "Probiotic" pills in her room; they were in a non-childproof container, and P threw "all over" the couch. CP came home and saw P and the pills and began to yell and Appellant woke up. The Appellant expressed remorse regarding the incident.

Nevertheless, the Appellant has shown by preponderance of the evidence that the Department's decision to support the allegation of neglect not in conformity with the

Department's policies and /or regulations and resulted in substantial prejudice to the appellant.

Conclusion and Order

In conclusion, the Department's decision to support the 51A report of neglect of P by the Appellant is **REVERSED**.

Carmen Colón *(initials)*
Carmen Colón
Administrative Hearing Officer

12/28/17
Date

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

Date

Linda S. Spears
Commissioner