

**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 Spears
Commissioner

Voice: (617) 748-2000
FAX: (617) 261-7428

IN THE MATTER OF)

JR)
FH #2017-0205)

FAIR HEARING DECISION

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

Procedural History

On January 11, 2017, the Department received two (2) 51A reports alleging neglect of C (hereinafter "C" or "the children") and M (hereinafter "M" or the "children") by the Appellant. The Department conducted a response and, on February 5, 2017, the Department made the decision to support the allegation of neglect by the Appellant. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on April 4, 2017, at the DCF Brockton 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 Department the opportunity to submit additional information. The Department provided supplemental documentation; the information was reviewed, entered into evidence and considered by the Hearing Officer in the decision making of the instant case. The record closed on April 18, 2017.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
JR	Appellant
JoR	Witness for Appellant/Appellant's mother
SR	Witness for Appellant/girlfriend
RW	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 1/11/2017@9:16am
Exhibit B: DCF Intake Report/51Report, dated 1/11/2017@1:13pm
Exhibit C: DCF Child Abuse/Neglect Non-Emergency Response, completed 2/5/2017
Exhibit D: Undated screen shots of text message exchanges between the Appellant and CMA

For the Appellant:

None

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 children of this Fair Hearing are C and M; at the time of the 51A reports, C was five (5) years old, M was two (2) years old. (Exhibit A, p.1; Exhibit B, p.1; Exhibit C, p.1)
2. At the time of the 51A report, C was diagnosed with autism, expressive language disorder and ADHD. At the time of the 51A report, C received multiple services to address these issues, including occupational therapy, speech therapy, and physical therapy. (Exhibit A, p.3; Exhibit C, p.2, p.5) The Appellant took C for his weekly speech and occupational therapy appointment at the [REDACTED] in [REDACTED] MA on his visitation day. (Exhibit C, p.2)
3. The children's mother is TP (hereinafter "TP"). The children's father is the Appellant JR. (Fair Hearing Record)
4. On or about May/ June 2015, TP ended her relationship with the Appellant due to a domestic incident. At that time, the Department supported allegations of neglect on behalf of the children as TP was holding them when the Appellant grabbed her hair and pushed her to the ground. (Exhibit A, p.4, p.6; Exhibit B, p.1, p.5; Testimony RW) TP reportedly had a restraining order against the Appellant which expired in November 2016. (Exhibit B, p.6)
5. In July 2016, the Appellant married CMA (hereinafter "CMA"). The Appellant and CMA separated on or about October/November 2016 after CMA learned that the Appellant was cheating on her when she was 2 1/2 months pregnant with their daughter A; A was born in November 2016. (Exhibit C, p.6)¹ According to the Appellant and CMA, the Appellant's use of alcohol increased following their separation. (Exhibit C, p.4, p. 6)
6. On or about December 2016, the Appellant began a dating relationship with SR; (hereinafter "SR") the Appellant and SR had known each other for approximately two (2) years. (Testimony SR) SR had two (2) children similar in ages to C and M; during his visitation time, the Appellant and the children stayed overnight at SR's home. (Exhibit C, p.4) The Appellant however remained living with his father, adult siblings and mother JR (hereinafter "JR"); C and M had their own bedroom at this residence. (Exhibit C, p.4; Testimony JR)
7. At the time of the 51A reports, the Appellant had Court ordered visitation with the children on Thursday overnights and every other Sunday. (Exhibit C, p.4)
8. The Appellant is the children's father and a regular caregiver; therefore, he was deemed a caregiver pursuant to Departmental regulation and policy. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016)
9. On January 11, 2017, the Department received two (2) reports from a mandated and a non-mandated reporter pursuant to M.G. L. c. 119, §51A. The first 51A report was filed by a non-mandated reporter and alleged physical abuse and neglect of the children; the second 51A report was filed by a mandated reporter and alleged neglect of the children by the Appellant. On January 5, 2017, the Appellant reportedly sent TP text messages that he planned to kill himself

¹ The Appellant had limited involvement with his newborn daughter A. (Exhibit C, p.4, p.6)

and made suicidal statements. This occurred when the children were with the Appellant and his girlfriend, SR, at her residence. When TP picked the children up at 10:50 pm they reportedly had not eaten and C remained in a diaper he had on since 2:00pm.² The child was reportedly soaking wet and had feces in his diaper all day. The reporter referred to the Appellant as “trashed.” The reporter noted a recent increase in the Appellant’s drinking. The reporter believed the Appellant was depressed and had also been smoking marijuana. The reporter noted that father had mental health issues, reporting that he was in an out-patient program when he was 16 years old at [REDACTED].³ The reporter also spoke of marks observed on the children. (Exhibit A, pp.3-4; Exhibit B, pp. 3-4; Testimony RW)

10. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to CR, Social Worker from the DCF Brockton Area Office. (Exhibit B; Testimony RW)

11. According to CMA, she was not comfortable with the Appellant having unsupervised access to A as he had a history of cutting as a teenager, his in time text message about jumping off a bridge and killing himself and her observation that he lost his patience with C and M. (Exhibit C, p.7)

12. The Department was in receipt of the aforementioned text message exchanges which reflected the Appellant writing that he believed he was having a panic attack, had a “huge feeling of depression...like all the time...except for when I drink...and even then I have more bad thoughts than good ones...I constantly feel like I want to just jump off a bridge...” In subsequent screen shots, the Appellant wrote that he felt as if he lost his children. (Exhibit D)

13. According to the Appellant, he regularly changed the children’s diapers; there were no “special diapers as alleged. The Department noted that that the Appellant had an ample supply of diapers at his residence. (Testimony Appellant; Exhibit C, p.4, p.9)

14. At the end of its response, the Department unsupported the allegation of physical abuse; the Department supported the aforementioned report for neglect of C and M by the Appellant. The Department based this determination on the following:

- TP’s report that during an overnight visit, the Appellant called her to pick up the children as he had been drinking. The Appellant was “trashed” when TP arrived at approximately 10:30pm.
- The Appellant’s admission that he was intoxicated.
- The Appellant’s report that he was drinking due to relationship issues.
- The Appellant’s history of mental health issues; citing the Appellant’s hospitalization for depression as an adolescent.
- The Appellant texting TP and CMA stating that he had suicidal thoughts. The Department’s view of the text messages which reflected that the Appellant was “stressed out and feels like jumping of the bridge all the time.” [Sic]
- The Appellant reportedly not changing the children's diapers while the children are in his

² The reporter stated that the aforementioned diapers were special order diapers through Medicaid and only available at the school. (Exhibit A, p.3) The Department was unaware of such specialized diapers. (Testimony RW)

³ The Appellant confirmed that at age sixteen (16) he was hospitalized at [REDACTED] for “seasonal depression.” (Exhibit C, p.5)

care.

- The response workers observation that the Appellant dropped the children off and C's diaper "was soaked and wet with urine."
- The Department concluded this constituted neglect as defined by its regulations and policies, specifically that the Appellant's untreated mental health issues and use of alcohol "compromised his ability to provide the children's wellbeing and safety," noting concerns for the need for adequate supervision in light of the children's ages and special needs. (Exhibit C, pp.8-10; Testimony RW)

15. Based on the aforementioned, I find that it was reasonable for the Department to determine that the in time concerns regarding the Appellant's mental health coupled with an increase in his alcohol consumption constituted a failure to provide the children with essential care. 110 CMR 4.32(2), DCF Protective Intake Policy #86-015 Rev. 2/28/16. However, there was no evidence that the Appellant placed the children in danger or posed substantial risk to their safety. DCF Protective Intake Policy #86-015 Rev. 2/28/16. (See Finding #16-#20 and Analysis)

16. On January 24, 2017, the Department met with the Appellant to address the reported concerns. The Appellant presented as "coherent, calm and appropriate" during this interview. When the response social worker encouraged the Appellant to seek counseling services, the Appellant stated that he was aware of resources within the community where he could obtain support. (Exhibit C, p.5)

17. The Appellant denied a suicidal intent, stating that he chose his words poorly when expressing his level of frustration. (Testimony Appellant) According to SR, she felt that at the time, the Appellant was "attention seeking", referring to this as a "dumb coping mechanism." (Testimony SR)

18. On January 5, 2017, the Appellant and the children were at SR's house with her two (2) children. (Testimony Appellant; Testimony SR) At approximately 8:00pm the children had Facetime with TP. The Appellant and SR had an argument after he texted CMA regarding her decision not to permit him to see his daughter A. The Appellant "had too much, (to drink) too fast." The Appellant's drinking was out of the ordinary as he would not drink when he had the children. The Appellant then contacted TP informing her that he had too much to drink, recognizing that he was not OK; the Appellant asked TP to come pick up the boys. (Testimony Appellant; Testimony SR) The Appellant was unsure whether SR had a drink or not. (Testimony Appellant) The Record was absent any information to suggest that SR was under the influence of alcohol. (Fair Hearing Record) The Department was unaware that SR was present. (Testimony RW; Exhibit C) SR reported that she offered to assume responsibility for the children; however TP would not permit this. (Testimony SR)⁴ The Appellant believed he made the right decision and wanted to place the children in a safe situation. (Testimony Appellant)

19. When TP arrived at approximately 10:30pm, the children were in bed; C was awake and M was dozing. TP carried M out while C walked out; neither child was crying. SR was present when this occurred. (Testimony Appellant)

⁴JR and SR cited historical and in time problems with TP. (Testimony SR; Testimony JR)

20. JoR had extensive interaction with TP, the children and the Appellant as they had all resided in her home for the three (3) years following C's birth. At the time of the subject 51A report, the Appellant continued to reside in his parents' home as he had done his entire life. JoR reported having seen no in time concerns of depression or suicidal intent, believing that he may have been texting because he was angry. JoR believed the Appellant had appropriate coping mechanisms and utilized SR, her and her husband as supports. JR spoke highly of SR and had no concerns regarding her caregiving ability, and referred to her as a "great role model." JoR spoke of the Appellant as a caring and attentive father. To her knowledge there were no special diapers; diapers were frequently changed. (Testimony JR; Exhibit C, p.5) SR corroborated this information. (Testimony SR) JoR was a nurse and stated she would be cognizant of any such concerns. JoR reported that the Appellant was an occasional drinker; she was not present during the reported incident. (Testimony JoR) I found JoR and SR to be well spoken, reasonable and thoughtful in their responses; I find their testimony to be credible.

21. Therefore, the Department's decision to support the allegation of neglect was not made in conformity with its policies and regulations. (110 CMR 2.00; 110 CMR 4.32; DCF Protective Intake Policy #86-015 Rev. 2/28/16)

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

"[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 "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. Id. at 64

“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)

Neglect is the 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

A finding of support requires that there be: 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. 2/28/2016

“Danger” is defined as a condition in which a caregiver’s actions or behaviors have resulted in harm to a child or may result in harm to a child in the immediate future. DCF Protective Intake Policy #86-015, rev. 2/28/16

“Risk” is defined as the potential for future harm to a child. DCF Protective Intake Police #86-015, rev. 2/28/2016

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

It is undisputed that the Appellant is a caregiver for C and M. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant appealed the Department's decision to support neglect based in large part on the events of January 5, 2017. On this date, the Appellant had overnight visitation with his children. He and the children planned to spend the night with the Appellant's girlfriend SR and her two (2) children. The Appellant admittedly had too much to drink and became intoxicated. While the Appellant's alcohol intake had increased during the several months preceding the reported incident, there was no evidence to indicate that the Appellant used alcohol during prior visits with his children; the Appellant denied using alcohol when with his children. The Appellant contacted the children's mother, TP, and asked her to come get the children due to his use of alcohol. The Appellant recognized that he was not a safe and appropriate caregiver at that time; the Appellant reached out to the children's mother. The Appellant believed that he acted responsibly to ensure the children's safety and well-being. Additionally, SR was present in the home and would have assumed the role of a caregiver; however she knew that TP would not agree to this. I find that the Appellant, in this instance, took the actions necessary to ensure that the children were properly supervised and cared for.

The Appellant admittedly was feeling stress due to relationship issues with the mothers of his children. This resulted in an increase in the Appellant's use of alcohol. Additionally, the Appellant sent text messages to TP and CMA writing that he felt like jumping off a bridge "all the time." While it was reasonable for the Department to be concerned about the Appellant's overall mental health and increased use of alcohol, there was no evidence that the Appellant placed the children in immediate danger or posed substantial risk to their safety.⁵ On January 5, 2017, the Appellant recognized that he should not be in the role of a primary caregiver and contacted the children's mother. SR's presence in the home mitigated any danger or risk to the children. The Appellant had shown by a preponderance of the evidence that the Department failed to comply with its regulation and policy when it made a finding to support the allegations of neglect.

"...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))

⁵Such 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)

Conclusion and Order

The Department's decision to support the 51A report of neglect on behalf of C and M by the Appellant is **REVERSED**.

Carmen Temme ^(dit)
Carmen Temme
Administrative Hearing Officer

5/24/18
Date

Susan Diamantopoulos ^(dit)
Susan Diamantopoulos
Fair Hearing Supervisor

Date

Linda S. Spears
Commissioner