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EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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(IN THE MATTER OF M.O. FH #2017-0269)

HEARING DECISION

Procedural History

The Appellant, M.O., appeals the decision of the Department of Children and Families [hereinafter "the Department" or "DCF"], to support for neglect of her son, H, pursuant to M.G.L., c.119, §§51A & 51B.

On January 5, 2017, the Department received a 51A Report from a mandated reporter alleging neglect of seven (7) year old H by the Appellant, in connection with a physical altercation that occurred at the home that morning between the Appellant and her boyfriend, J.A. The 51A Report was screened in for a 51B non-emergency response and assigned to response social worker, M.P. On January 23, 2017, following the 51B response, the Department supported for neglect of H by the Appellant due to the child's exposure to physical and verbal altercations in the home and to the Appellant's drinking, and because the Appellant declined to participate in substance abuse treatment or counseling to change the situation. The Department opened the family's case for assessment. The Department notified the Appellant of the decision and her right of appeal by letter dated January 30, 2017. The Appellant filed a request for Fair Hearing ["Hearing"] on March 8, 2017 through her former attorney. [110 CMR 10.06] The Appellant's request for Hearing was granted and held on May 9, 2017 at the Department's South Central Area Office in Whitinsville, MA. Present were the DCF Intake Supervisor, A.S.; the DCF Response Social Worker, M.P.; the Appellant's Attorney, D.J.; and, the Appellant. The response social worker and Appellant were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a CD. Admitted into evidence for the Department is the DCF 51A Report of January 5, 2017 [Exhibit A] and the corresponding 51B Response Supported on January 23, 2017 [Exhibit B]. Admitted into evidence for the Appellant is the Abuse Prevention Order of January 5, 2017 [Exhibit 1]. The Hearing record was closed on May 29, 2017, without further submission from the Appellant.[1]

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement, or bias in this case.

[1] The Appellant's Criminal Docket and Father's Motion to Change Custody and Resulting Court Order were not submitted as discussed at Hearing.

Pursuant to110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney-client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Standard of Review

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, 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, 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 thirty two (32) year old Appellant and her ex-husband, R.O., are the biological mother and father, respectively, of their seven year-old son, H. [Testimony of the Appellant; Exhibit A, p.3; Exhibit B, p.6] H had visitation with his father every other Friday, and every Saturday and Sunday, and every Wednesday. [Exhibit B, pp.2-3 & 6]

2. The Appellant had a relationship with her boyfriend, J.A., on and off for the last five years. [Testimony of the Appellant]

3. On Thursday, January 5, 2017, a little after 7:00 a.m., father dropped H off at the Appellant's home after an overnight and the Appellant, in turn, fed the child breakfast, got his backpack ready, and put him on the bus for school. [Testimony of the Appellant; Exhibit B, p.3] At 9:15 a.m., the police responded to a call from the Appellant's then live-in boyfriend, J.A., and arrested the Appellant for assault and battery on the boyfriend because she punched him in the face causing injury. This occurred after he "reported slammed" her head in the door, although no injuries were sustained. [Exhibit A, p.3; Testimony of the Investigator]

4. The Appellant did not dispute punching her boyfriend, but said she responded in that manner because he had " this look in his eyes", as he had in the past, which made her again feel he would be volatile and out of control. [Testimony of the Appellant]

5. The Appellant told the police on January 5, 2017 and the response social worker on January 12, 2017 that her boyfriend hit her with a flashlight one or two months prior to the incident. [Exhibit A, p.3; Exhibit B, p.3]

6. The Appellant claimed that she has never initiated the physical violence, but only tried to stop her boyfriend from hurting her. [Testimony of the Appellant]

7. On January 5, 2017, the boyfriend sought and obtained a no abuse, no contact restraining order against the Appellant, in connection with the incident of January 5, 2017. The restraining order lapsed on February 24, 2017. [Exhibit 1; Exhibit B, p.3]

8. The boyfriend was out of the home due to the restraining order. [Exhibit B, pp.4-5] He reported he is no longer seeing the Appellant, but like the Appellant at Hearing, reported his belongings were still at her home. [Exhibit B, p.5; Testimony of the Appellant]

9. The Appellant was arrested and arraigned in court in connection with the incident of January 5, 2017. [Exhibit A, p.3] The Appellant did not submit her criminal docket to validate the reported dismissal of her case.

10. The boyfriend told the responding police that he and the Appellant have drinking problems, and told the response social worker on January 26, 2017 that the Appellant drinks every day. [Exhibit A, p.3; Exhibit B, pp.5-6] The boyfriend expressed concern about the Appellant's drinking, as has her family. [Exhibit B, p.3]

11. Because there was no documentary evidence supporting counsel's argument that the results of a breathalyzer is not reliable and therefore no longer used in court, the Hearing Officer finds it credible that the Appellant blew .11 on the portable breathalyzer the morning [of January 5, 2017]. The Appellant was intoxicated and "it was mid-morning" [Exhibit A, p.3]

12. The Appellant was a self-acknowledged alcoholic. [Testimony of the Appellant; Exhibit B, p.3] She informed the response social worker on January 12, 2017 that this translated into her drinking for the purpose of getting drunk three to four nights a week, when H is either with his father or sleeping. [Exhibit B, p.3; Testimony of the Appellant]

13. The Appellant maintained at Hearing that she drank when H is sleeping; occasionally and rarely. However, she never drank to the point of being drunk, but would get buzzed. It depends on how one defines intoxication. She has a high tolerance. [Testimony of the Appellant]

14. The Appellant told the responding police, the response social worker, and testified at Hearing that she had been drinking Crown Royal Whiskey up until about 3:00 a.m. on January 5, 2017. She testified that she then went to sleep and woke up when father brought H home. [Exhibit A, p.3; Exhibit B, p.3; Testimony of the Appellant]

15. The Appellant testified that, when father dropped H off at her home on January 5, 2017, he had contact with her and had no concerns. [Testimony of the Appellant] When interviewed on January 26, 2017, father told the response social worker that he always walked H into the home and ensured that he at least heard the Appellant talking before he left; however, he made no mention that he was in the Appellant's home the morning of January 5, 2017, that he came into contact with the Appellant, and that he had no concerns. [Exhibit B, p.6; Testimony of the Response Social Worker]

16. Father did report that the Appellant was intoxicated, when she dropped H off to him a few years back. [Exhibit B, p.6]

17. The Appellant never engaged in substance abuse counseling and, although she engaged in AA with her mother, she did not believe in praying for her sobriety. [Exhibit B, p.3] AA did not work for her. [Testimony of the Appellant]

18. Based on Findings #10-#17, the Department had reasonable cause to believe that the Appellant was intoxicated when she put H on the school bus the morning of January 5, 2017, before the police responded.

19. H did not witness the physical altercation of January 5, 2017 because he had been put on the bus and was not in the home when it occurred. This is undisputed by all parties. [Exhibit B; Testimony of the Response Social Worker; Testimony of the Appellant]

20. Although not a witness on this occasion, H informed the response social worker on January 12, 2017 that the boyfriend drank alcohol and he called the cops on his mother. He said that the boyfriend did this at night, when his mother was sleeping, and "tries to lie his way out of it," and then that is when the fighting starts. H stated that is when he had to help his mother out by telling her what to say. H reported having witnessed the boyfriend punching and slapping his mother, and his mother slapping the boyfriend. [Exhibit B, pp.4 & 8; Testimony of the Response Social Worker]

21. Although the Appellant denied that H was present during their physical altercations, the child reported otherwise. [Testimony of the Appellant & Exhibit B, p.4 v. Exhibit B, pp.4 & 8]

22. The child intervened and was protective of the Appellant during physical or verbal altercations. [Testimony of the Response Social Worker]

23. Despite the fact that the Appellant was an active self-reported alcoholic at the time, H said he never saw the Appellant drink alcohol or her acting funny to the point that it scared him. [Exhibit B, p.4]

24. H has been depressed, frustrated, and played with imaginary friends. However, the response social worker was unable to verify this was attributable to his home environment. The child's doctor and school recommended counseling. [Exhibit B, p.5; Testimony of the Response Social Worker]

25. Although there was evidence in the record that the child's father was concerned and willing to go to probate court [Exhibit B, p.6], there is no documentary proof, as stated by the Appellant's attorney, that Father motioned the court for a change in custody and the parenting plan and the motion was not allowed.

Analysis

A party contesting the Department's decision, to support a 51A Report for neglect, may obtain a Hearing to review the decision made by the Area Office. [110 CMR 10.06] The Appellant requested a Hearing, which was granted and held on May 9, 2017.

Regulations, policies, and case law applicable to this appeal include but are not limited to the following.

After completion of its 51B investigation, the Department shall make a determination as to whether the allegations in the report received are supported or unsupported. To support a report means that the Department has reasonable cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker did occur. To support a report does not mean that the Department has made any findings with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker(s) did inflict abuse or neglect upon the child(ren) in question. Reasonable cause to believe is defined as 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 and supervisor's clinical base of knowledge. [110 CMR 4.32]

"[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

The 51A report under appeal is supported for neglect. Neglect means 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 out-of-home or in-home setting. [110 CMR 2.00]

Our courts have repeatedly recognized that witnessing domestic violence has a profound impact on the development and well being of children and constitutes a "distinctly grievous kind of harm." Custody of Vaughn, 422 Mass. 590,599, 664 N.E. 2nd 434 (1996), cited in John D. v. Department of Social Services, 51Mass.App. 125 ((2001), Adoption of Ramon, 41 Mass. App. Ct. 709, 714 (1996). Even with no indication or evidence that a child has been injured, either physically or emotionally by the domestic violence, the state need not wait until a child has actually been injured before it intervenes to protect a child. Custody of a Minor, 377 Mass. 879, 389 N.E.2d 68, 73 (1979).

The Court has also held that the Department's determination of neglect does not require evidence of actual injury to the child. Lindsay v. Department of Social Services, 439 Mass. 789 (2003).

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 the age of 18. [Protective Intake Policy, #86-015, Revised 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]

After review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Department in the matter under appeal. See Findings #1 to #25 and the below discussion.

The Appellant was a *caregiver* of her seven year-old son, H, during the morning of January 5, 2017 and at other times, as defined above and at 110 CMR 2.00. Protective Intake Policy, #86-015, Revised 2/28/16

Based on the record as a whole and giving due weight to the clinical judgment of Department

social workers, the Hearing Officer finds that the Department had "reasonable cause to believe" that the Appellant failed to provide H with minimally adequate supervision, emotional stability and growth, and other essential care and was therefore neglectful. See Care and Protection of Robert. The evidence in the record demonstrated that the Appellant was a self-reported alcoholic, who was actively drinking at the time, to the point of deliberately getting drunk, and engaged in verbal and physical altercations with her live-in boyfriend, J.A. The Appellant did not dispute this.

Counsel argued at Hearing that the Appellant was only a victim of her boyfriend's assaults; however, the Department found that the Appellant was also an aggressor in that the boyfriend sustained injury on January 5, 2017, but the Appellant did not; charges were brought against the Appellant, not the boyfriend; and, the boyfriend filed for and obtained a restraining order against the Appellant. In addition, H reported seeing the two hit each other; a grievous kind of harm. See John D. v. Department of Social Services, Adoption of Ramon, and Custody of a Minor.

The Appellant claimed that H never witnessed anything but verbal fighting between her and her boyfriend. The Hearing Officer finds the child's contrary account reliable. See Finding #20. There was no evidence of coaching, leading questions asked of the child, a history of the child lying or motivated to lie in the record.

Although the child denied having seen the Appellant drink or the Appellant acting in such a way that it scared him, the Hearing Officer finds, based on the Appellant's testimony, that the Appellant was an active alcoholic at the relevant time, getting drunk three to four nights a week, that she drank during the early morning of January 5, 2017, and blew a .11 breathalyzer test mid morning of January 5, 2017 after having gotten her child breakfast and putting him on the school bus. The Appellant testified that she only drank when H was with his father or the child was sleeping. The Department opined that the Appellant's parenting abilities would be stymied, if the child woke up and needed care as in a medical emergency. The Hearing Officer concurred. Even if there is no actual evidence of injury to the child from the Appellant's drinking, the Court has held that the Department's determination of neglect does not require this. See Lindsay v. Department of Social Services.

The Appellant failed to meet her burden of proof. [110 CMR 10.23] The Appellant provided little persuasive evidence at her Hearing.

The Department complied with it regulations and policies, in making a decision on this case, and had a reasonable basis for doing so.

Order

1. The Department's decision of January 23, 2017, to support the 51A Report for neglect of H by the Appellant, is AFFIRMED.

This is the final administrative decision of the Department. If the Appellant wishes to appeal these decisions, she may do so by filing a complaint in the Superior Court for the county in which she lives within thirty (30) days of the receipt of this decision. [See, M.G.L. c. 30A, §14].

Frances Wheat (SC)

Frances I. Wheat, MPA
Administrative Hearing Officer
Office of the General Counsel

Date: 12/28/2017

Sophia Cho, LICSW
Fair Hearing Supervisor