

**Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
600 Washington Street, 6th Floor
Boston, Massachusetts 02111**

Linda S. Spears, Commissioner

**Voice: (617) 748-2000
Fax: (617) 261-7428**

IN THE MATTER OF: ND

Fair Hearing # 20170276

FAIR HEARING DECISION

Appellant, ND, appeals the decision of the Department of Children and Families, pursuant to M.G.L. c.119, §51B, to support allegations of neglect on behalf of A.

Procedural History

On January 6, 2017, the Department of Children and Families (“Department”) received a report, pursuant to M.G.L. c. 119, §51A, alleging neglect of A by her biological mother, SF, and by her adoptive mother, ND, (“Appellant”). On January 11, 2017, the Department received a second report, pursuant to M.G.L. c. 119, §51A, alleging neglect of A by SF. On January 30, 2017, the Department decided, pursuant to M.G.L. c. 119, §51B, to support allegations of neglect on behalf of A against Appellant.¹

The Department notified Appellant of its decision and of her right to appeal. Appellant made a timely request for a Fair Hearing to appeal the decision of neglect pursuant to 110 C.M.R. §10.06. The Fair Hearing was held on July 6, 2017 at the Department’s Area Office in Lynn, Massachusetts. In addition to the Hearing Officer, the following persons appeared at the Fair Hearing:

MB	Department Supervisor
ND	Appellant/Adoptive Mother
MN	Family Partner
CC	Care Coordinator

¹ The Department also supported allegations of neglect against SF. Those allegations are not under appeal here. Therefore, the allegations as they pertain to SF are not addressed in this decision.

In accordance with 110 C.M.R. §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 digitally recorded. All witnesses were sworn in to testify under oath. The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit A Intake Report – 51A Report, 1/6/2017
- Exhibit B Intake Report – 51A Report, 1/11/2017
- Exhibit C Child Abuse/Neglect Non-Emergency Response

For Appellant:

- Exhibit 1 Fair Hearing request/Department support letter
- Exhibit 2 Police records
- Exhibit 3 2016-2017 Kindergarten report
- Exhibit 4 Medical appointment record
- Exhibit 5 Court documents

The record closed upon conclusion of the oral evidence.

The Hearing Officer need not strictly follow the rules of evidence....Only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 C.M.R. § 10.21

Statement of the Issues

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 investigation, 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) 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

On the basis of the evidence, I make the following factual findings:

1. SF is the biological mother and Appellant is the adoptive mother of A, age six at the time in question. [Exhibits A, B, and C]
2. As the adoptive mother of A, Appellant is deemed a caregiver pursuant to the Department's Protective Intake Policy. *See below.* [Testimony of Appellant; Exhibits A, B, and C]
3. SF and Appellant divorced in October 2012. [Exhibit A, p.7]
4. In January 2016, Appellant attempted to enroll A in individual therapy. At that time, Appellant and SF had joint custody of A. SF would not give her consent for A to engage in therapy. [Exhibit C, p.9]
5. Since February 24, 2016, Appellant had been involved intermittently in services for victims of domestic violence. Appellant reported years of abuse by SF and expressed concerns about SF's care of A. [Exhibit C, p.12]
6. Appellant also was engaged in services with an individual therapist. [Exhibit C, p.9]
7. On November 4, 2016, after being evicted from her apartment, SF and A moved back in with Appellant. SF asked Appellant for another chance to work on their relationship. A enrolled in kindergarten on November 11, 2016. [Testimony of Appellant; Exhibit A; Exhibit C, pp.3,4]
8. Appellant and SF fought and yelled at each other and said "bad words" against each other in A's presence. A had to tell them to "stop" a lot of times. A denied seeing SF and Appellant hit each other, although one time she had seen SF on top of Appellant. It made A feel very sad. A denied that Appellant or SF said bad words to her. [Exhibit C, p.4]
9. On January 4, 2017, the police responded to Appellant's apartment for a report of an adult yelling at a child. There was no answer. [Exhibit A, p.9]
10. On January 5, 2017, the police responded to a report of a disturbance at Appellant's apartment. No one answered the door. The following day, the police spoke with neighbors who reported hearing constant fighting between the adults in the home. A neighbor also reported hearing yelling and derogatory language towards the child in the home several times a week for the past two months. Neighbors also recently reported hearing an infant crying in the home.² [Exhibit A]
11. On January 6, 2017, the Department received a report, pursuant to M.G.L. c. 119, §51A, alleging neglect of A by Appellant and SF. The Department initiated a response to look into the allegations. [Exhibit A]

² The Department conducted a separate response related to another adult and her child who had temporarily stayed in Appellant's home prior to the subject response. This decision does not address any allegations related to the other adult and/or her child.

12. On January 10, 2017, Appellant obtained an emergency restraining order against SF and obtained custody of A. The order was in effect until January 24, 2017. [Exhibit B; Exhibit C, pp.3,8,10; Exhibit 2]
13. On January 11, 2017, the Department received a second report, pursuant to M.G.L. c. 119, §51A, alleging neglect of A by SF. The Department incorporated the report into the ongoing response. [Exhibit B]
14. On January 12, 2017, A's kindergarten teacher expressed concerns to the Department's response worker about A's lack of organizational skills and difficulty with paying attention. A was distracted a lot, could be silly, and needed reminders to pay attention. [Exhibit C, pp.3,4]
15. On January 20, 2017, A's teacher e-mailed Appellant about the positive changes she had seen in A (since Appellant and SF were no longer living together). A was more attentive and interested in school work. A appeared calmer overall, smiling and playing with her classmates. [Exhibit C, p.6]
16. On January 23, 2017, Appellant and A met with a therapist (as Appellant had custody of A through the restraining order). The next scheduled appointment was for February 1, 2017. [Exhibit C, p.9]
17. On January 24, 2017, the Court extended the restraining order for six months but removed A from the order. The Court ordered that A remain with SF on weekdays and with Appellant on weekends. SF was to drive and pick up A from school until the end of the school year. [Exhibit C, pp.5-6,12]
18. On January 30, 2017, pursuant to M.G.L. c. 119, §51B, the Department supported allegations of neglect against SF and Appellant. The Department based its decision to support allegations of neglect on the continuing exposure of A to the arguing/fighting between Appellant and SF. [Exhibit C]
19. SF did not take A to her February 1, 2017 therapy appointment. [Exhibit 4; Testimony of Appellant]
20. On March 27, 2017, there was a Probate and Family Court hearing relative to Appellant's Motion for Contempt as SF had not been bringing A to therapy appointments. [Testimony of Appellant; Exhibit 5]
21. As of the date of the Fair Hearing, A had last seen SF on March 31, 2017. [Testimony of Appellant]
22. On April 1, 2017, SF overdosed and had to be administered Narcan. SF's family sectioned SF to go into a substance abuse facility. [Testimony of Appellant]

23. In June 2017, at the request of Appellant, Appellant and A began receiving Community Service Agency wrap around support services. [Testimony of Appellant; Testimony of Care Coordinator]
24. Pursuant to DCF Protective Intake Policy, the evidence is insufficient to **support** a finding of neglect in this matter for the following reasons:
- Appellant and SF regularly fought, yelled, and used “bad words” in front of A;
 - A felt very sad because of her parent’s actions;
 - concerned neighbors called the police on two occasions due to the constant fighting, yelling, and use of derogatory language in Appellant’s home;
 - when Appellant and SF lived together, A was often distracted at school, could be silly, was not focused, and needed reminders to pay attention; after Appellant obtained a restraining order, A had a positive change in her behavior at school; she was more attentive, more interested in school work, and calmer overall;
 - a finding of neglect requires that the Department have reasonable cause to believe that a caregiver’s actions placed the child in danger or posed substantial risk to the child’s safety or well-being; DCF Protective Intake Policy #86-015, rev. 2/28/16
 - although Appellant took steps to care for A’s needs prior to the Department’s involvement (for example, by sending A to school and attempting to enroll A in therapeutic services), the evidence is sufficient to conclude that, by engaging in constant arguing with SF, Appellant failed to provide A with minimally adequate emotional stability and growth; nevertheless, the evidence indicates that the actions of Appellant did not place A in danger or pose substantial risk to her safety and well-being.

Applicable Standards

Protective Intake Policy #86-015, 6/15/1986, as revised 2/28/2016

Caregiver

- (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.

A “Support” finding means:

Allegation(s)

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; 110 CMR 2.00

“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 and supervisor’s clinical base of knowledge. *Id.*

“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

A Fair Hearing shall address (1) whether the Department’s or provider’s decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;.... In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 C.M.R. §10.05.

To prevail, the aggrieved party must show by a preponderance of the evidence that (1) the Department’s or provider’s decision was not in conformity with the Department’s policies and/or regulations and resulted in substantial prejudice to the aggrieved party.... 10 C.M.R. §10.23.

Analysis

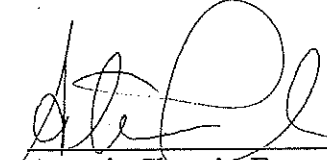
On the basis of the factual findings and standards set forth above and for the reasons set forth below, I reverse the Department’s neglect support decision against Appellant ND.

The burden is on Appellant to show, by a preponderance of the evidence, that the Department’s neglect support decision was not in conformity with Department regulations and/or policy. In order to support a finding of neglect, the Department must determine that there is reasonable cause to believe that Appellant neglected A *and* that Appellant’s failure to act placed A in danger or posed substantial risk to her safety or well-being. The totality of the evidence does not support a finding of neglect as defined by Department policies and regulations. *See* 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16. Appellant has presented persuasive evidence in this matter to allow for a reversal of the Department’s neglect support decision against her. The evidence is insufficient to support a determination that Appellant’s actions placed A in danger or posed substantial risk to her safety or well-being. Based on a review of the evidence presented at the Fair Hearing, including witness testimony and all

submitted documents, I find that the Department's decision to support allegations of neglect of N was not made in conformity with Department regulations and/or with a reasonable basis. See definitions of "reasonable cause," "support finding," and "neglect" above.

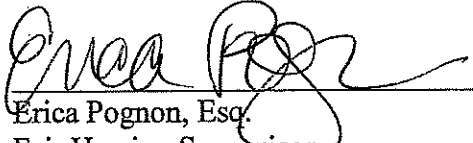
Conclusion and Order

The Department's decision to support the allegations of neglect of A by Appellant, ND, was not made in conformity with Department regulations and policies and/or with a reasonable basis. Therefore, the Department's decision is **REVERSED**.



Antonia Chronis, Esq.
Administrative Hearing Officer

4/13/18
Date



Erica Pognon, Esq.
Fair Hearing Supervisor

Date

Linda S. Spears,
Commissioner