

**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
FAX: 617-261-7428

(
(IN THE MATTER OF)
(MK)
()
(FH # 2017-0284)
()

HEARING DECISION

Procedural History

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

On December 27, 2016, the Department received a 51A report from a mandated reporter alleging neglect of G ("Child") by MK; the allegation was subsequently supported. 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 C.M.R. 10.06

The Fair Hearing was held on May 12, 2017 at the Department of Children and Families' Central Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
LL	DCF Special Investigator
JJ	Appellant's attorney
MK	Appellant
AC	Attorney for AB Daycare
JA	Director of AB Daycare

In accordance with 110 C.M.R. 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 Report
- Exhibit B: 51B Response

For the Appellant:

- Exhibit 1: Picture of Daycare Area
- Exhibit 2: Picture of Daycare Area
- Exhibit 3: Picture of Daycare Area
- Exhibit 4: Picture of Daycare Area
- Exhibit 5: Picture of Daycare Area
- Exhibit 6: Picture of Daycare Area
- Exhibit 7: Attendance Sheet for 12/27/2016
- Exhibit 8: Picture of Daycare Area
- Exhibit 9: Letter from Appellant
- Exhibit 10: Picture of Daycare Area
- Exhibit 11: Picture of Daycare Area
- Exhibit 12: Picture of Daycare Area
- Exhibit 13: Picture of Daycare Area
- Exhibit 14: Picture of Daycare Area
- Exhibit 15: Email letters of reference
- Exhibit 16: Annual Review for Appellant 2015-2016
- Exhibit 17: Letter from LM
- Exhibit 18: Letter from MK

The record was left open for the submission of a video surveillance DVD.

- Exhibit 19: Video surveillance DVD

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 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. DCF Protective Intake Policy #86-015 Rev. 2/28/16

Findings of Fact

1. On December 27, 2016, a 51A report was filed alleging the neglect of two year old G, by the Appellant, who was a staff member at the daycare program that G attended. (Exhibit A)
2. At the time of the 51A report, MK had been a staff member of the daycare for over five years. Although she had taken a leave of absence, she had been working continuously at AB daycare since February 2015 as a part-time teacher. On December 27, 2016 she was working as a teacher with the toddler group at the AB daycare. (Exhibit B p.2, Testimony of LL, Testimony of JA, Testimony of Appellant)
3. At the time of the 51A report, G had been attending the daycare for a month. He was assigned to the toddler group at the AB daycare. (Exhibit B p.2, Testimony of LL, Testimony of Appellant)
4. At the time of the 51A report, MK was the staff member assigned to the toddler group at the AB daycare. The lead teacher of the toddler group was CW. Also working with the toddler group that day was an assistant teacher, JL. In accordance with the regulations and policies that govern these proceedings, I find that MK was a caregiver for G. (Exhibit B p.2, Testimony of LL, Testimony of JA, Testimony of Appellant)
5. AB daycare is situated in a large open room that is divided into two group areas: Preschool and Toddler. On December 27, there were seven toddlers and 3 preschool children present. (Exhibit B p.2, Testimony of LL, Testimony of Appellant)
6. Although the children were assigned to the toddler and preschool groups, the staff might share responsibilities and group areas for supervising the children during a particular shift. (Exhibit B p.3-4, Testimony of LL, Testimony of Appellant)
7. On December 27, 2016, G made his way out of the AB daycare, and onto the street. AB daycare is located in an urban area. G was on the street for approximately twenty minutes before he was observed by a passerby who notified the police. G was then escorted back to AB daycare. I find that G was without minimally adequate supervision for approximately twenty minutes. (Exhibit A p.2, Exhibit B p.1-2 Testimony of Appellant)
8. On December 27, 2016, at approximately 9:30 am, G arrived with his father at the AB daycare in an agitated state. The toddler lead teacher, CW, spent approximately twenty minutes with him to assist his transition and then brought him to an area where three other boys were playing with trains, where G settled down. CW then

went into the office and took a 10 minute break. While CW went on her break, the Appellant remained in the toddler classroom. I further find that the Appellant made no effort to ascertain the whereabouts of G, even though she knew that CW had been providing him with individual care prior to her break. (Exhibit B p.4, testimony of LL)

9. At approximately 10am on that day, JL was supervising two girls at the art table. The Appellant was supervising three boys at a "[REDACTED]" tent that had been erected in the toddler area. (Exhibit B p.2-4, Testimony of LL, Testimony of Appellant)
10. During the Department's response, CW told the Response Worker that after calming G down, she brought him over to where the Appellant was playing with the three other boys at the [REDACTED] tent. However, the Appellant told the Response Worker that although she remembers CW leaving for a break, she does not remember seeing the reported child or what he was doing. (Exhibit B p.3-4, Testimony of LL, Testimony of Appellant)
11. After G left the toddler play area, he pushed his way through double doors, walked up some stairs, exited the building through an open door to the outside, and then left the yard area. He was subsequently found by a passerby who called the police. (Exhibit A p.2, Exhibit B p.1-2, Testimony of LL, Testimony of Appellant)
12. Within a few minutes of G leaving the toddler area, his absence was noticed by JL and MK. The staff began to look through the daycare center play areas. However, they delayed looking beyond this area because they did not believe it feasible that G had managed to push open the double door and make his way outside. (Exhibit B p.2-5, Testimony of LL, Testimony of Appellant)
13. I find the Department had reasonable cause to believe the Appellant neglected G for the following reasons:
 - a. On December 27, 2016 the Appellant was a caregiver for G.
 - b. The Appellant was responsible for supervising the children in her classroom, including G.
 - c. G left the daycare center and was eventually able to get to the street.
 - d. G was left without minimally adequate supervision for approximately twenty minutes.

Applicable Standards

A "support" finding means 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.

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

“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 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

“Caregiver”. A caregiver is a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or 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.

“Neglect”. Neglect is 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.

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.

Analysis

Almost all of the facts in this case are not in dispute. The Appellant was a teacher with the toddler group at the [REDACTED] daycare. On December 27, 2016 at approximately 9:30am G arrived at the daycare in an agitated state. The lead teacher for the toddler group, CW, spent some time with G to calm him down and assist in his transition. Subsequently, CW went on a break, leaving MK as the senior teacher supervising the toddler group.

The accounts differ as to whether or not CW informed the Appellant that she was transitioning G to the area that MK was supervising. However, the Appellant knew that CW had been providing one to one supervision of G due to his agitated state. When CW told MK that she was going on break, it was incumbent upon the Appellant, as one of the remaining teachers, to ascertain G's whereabouts. The Appellant failed to do so.

While it appears that the actions that the Appellant and other staff took after G's absence was noted were appropriate, it does not change the fact that G's exit from the daycare went unnoticed, which led to him not having any supervision for approximately twenty minutes.

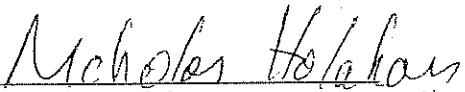
At the Fair Hearing, the Appellant provided considerable evidence in regards to whether or not the Appellant had line of sight to the child as he left the play area. Further, the Appellant provides evidence implying the unlikelihood that any toddler could have circumvented the various barriers in place to prevent a child from leaving the daycare area. While I take note of this evidence, it does not exempt the responsibility of a caregiver to know that whereabouts of children under his/her care. In this case, the Appellant did not initially make any effort to ascertain G's whereabouts once CW went on break. If she had, it would have rendered moot any of the other factors the Appellant attempts to raise.

The Department does not need to show actual injury to support an allegation of neglect. The Massachusetts Supreme Judicial Court considered a scenario remarkably similar to this case with its holding in Lindsay v Department of Social Services, 439 Mass. 789 (2003). The court determined that the Department could support an allegation of neglect if for example a toddler left unsupervised to cross a heavily traveled street may emerge totally unscathed, but may also be run over and killed. (Id. at 795). In this case, MK failed to provide G with minimally adequate supervision when two year old G was able to leave the classroom and gain access to the street. Thus, the Appellant's inactions placed G at substantial risk of serious injury.

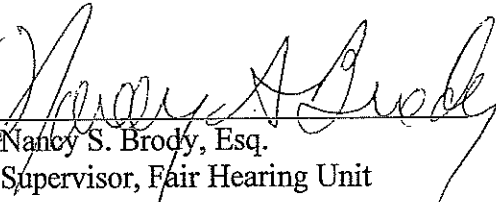
Conclusion and Order

The Department's decision to support the allegation of neglect of G by the Appellant is hereby AFFIRMED.

This is the final administrative decision of the Department. If Appellant wishes to appeal this decision, she may do so by filing a complaint in the Superior Court for the county in which she lives, or in Suffolk County, within thirty (30) days of the receipt of this decision. See, M.G.L. c.30A, §14. In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.


Nicholas Holahan
Administrative Hearing Officer

11-27-17
Date


Nancy S. Brody, Esq.
Supervisor, Fair Hearing Unit