

**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

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IN THE MATTER OF)

Ms. S.G.)

FH # 2017-0289)

) **FAIR HEARING DECISION**
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)

The Appellant (Ms. S.G.) in this Fair Hearing was a paraprofessional at the [REDACTED]. The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegations of neglect of A, pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On January 11, 2017, the Department received a 51A alleging the neglect of child A by unknown staff at the [REDACTED]. On January 12, 2017, a subsequent report was filed with the same allegations. The reports were screened in and assigned for a response. On February 10, 2017, the Department made the decision to support the allegation of neglect of the child by the Appellant. The Department notified the Appellant of its decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on May 18, 2017, at the DCF Cape Ann Area Office in Salem, MA. All witnesses were sworn in to testify under oath. The record remained open until May 26, 2017, to allow Appellant's Counsel to submit a written closing.

The following persons appeared at the Fair Hearing:

Ms. Lisa Henshall	Fair Hearing Officer
Ms. S.G.	Appellant
Atty. H.J.	Appellant's Counsel
Mr. W.A.	Field Representative
Mr. T.M.	Department Response Worker
Ms. R.U.	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 Child Abuse/Neglect Report dated 1/11/17
- Exhibit B Child Abuse/Neglect Report dated 1/12/17
- Exhibit C Child Abuse/Neglect Response dated 2/10/17
- Exhibit D Picture of the recording device that was found on the child
- Exhibit E Child's Individual Education Plan (IEP)

Appellant:

None

Appellant's Counsel submitted a closing argument which was reviewed by this Hearing Officer.

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; 110 CMR 10.05

Findings of Fact

1. The subject child of the Fair Hearing was A, who was seventeen (17) years old at the time of the reported incident. (Exhibits A, B & C)
2. The Appellant (SG) was a paraprofessional in the classroom where the child was enrolled and attended as a special needs student. Therefore, she was a caregiver, pursuant to

Departmental regulation. 110 CMR 2.00. (Exhibits A, B & C; Testimony of the Appellant)

3. The Department received two 51A reports, on January 11 and January 12, 2017, pursuant to M.G.L. c. 119, §51A, alleging neglect of the child by unknown staff. The child (A) was a special needs child with cognitive limitations and non-verbal. The child returned home on the day in question with a digital recorder on his person that had recorded 5-6 hours of the school day. Based on what was heard on the recording there were concerns that the child's feeding, toileting and educational and medical needs were not being met that day. The reports were screened in and assigned for a response pursuant to M.G.L. c. 119, §51B. (Exhibit A, pgs. 2, 4 & 5; Exhibit B, pgs. 2 & 4; Exhibit C, pgs. 5-6; Testimony of the Response Worker)
4. The child was diagnosed with Isodicentric 15, a Chromosomal disorder which resulted in him suffering from Autism, low muscle tone, Epilepsy, Scoliosis, and developmental delays. The child was ambulatory with assistance (one to one). The child had routine seizures which ranged from "looking off into space" to falling to the ground which had resulted in him sustaining severe injuries. (Testimony of the Response Worker; Exhibit C, pgs. 2, 20)
5. The child had limited language capacity "one word sentences" and therefore was unable to be interviewed by the Department. (Exhibit C, p. 2; Testimony of the Response Worker)
6. None of the other children in the classroom were interviewed. (Exhibit C)
7. The child was enrolled at this school as of the summer of 2016. (Testimony of the Response Worker; Exhibit C, p. 2)
8. The Appellant had been a paraprofessional at this school for 11 (eleven) years. The Appellant was still working as a paraprofessional at the time of the fair hearing. (Exhibit C, p. 13; Testimony of the Appellant)
9. The child was late to the school on the morning in question. The child did not take the bus to school he was transported by his mother. (Testimony of the Response Worker; Testimony of the Appellant)
10. The child returned home from school on the day in question with a digital recording device, later determined to be school property, in his pants pocket which was discovered by his parents. Due to the child's disabilities the child would have had no way to turn this record on or to put it in his pocket. The child's father listened to the recording. (Exhibit C; Testimony of the Response Worker)
11. There was no evidence to determine who placed the digital recorder in the child's pocket. (Testimony of the Response Worker; Fair Hearing Record)
12. The Appellant had not heard the recording as of the time of the fair hearing. (Testimony of the Appellant)

13. The Department listened to the recording in its "entirety" documenting in the response *selected* heard interactions. The following are the concerns upon the Department's review of the recording:
- a) Significant periods of time where the child (A) was not interacted with;
 - b) Limited interaction the child and staff;
 - c) Concern that the child was not fed on the day in question;
 - d) During the course of the day little could be heard from the child however at the end of the day on the bus ride home the child's vocalizations indicated he was interacting more than he had throughout the course of the day- "interactive and verbal;"
 - e) The Department was able to differentiate between this Appellant and the other paraprofessional (HR) on the recording after interviewing them about specific topics that came up on the recording and determining speech patterns;
 - f) The intern (M) who was assigned to the room was rarely heard on the recording and described as a quiet person so much of the conversation was between two parties who were determined to be the Appellant and the Paraprofessional SG; (Exhibit C, pgs. 3 & 5 ; Testimony of the Response Worker)

The recorder was date stamped however a copy of the recording was not entered into evidence and there was no evidence that this audio recording had been, or could be, authenticated and was therefore, I find, open to misinterpretation.

14. During this specific school day the classroom was short staffed. There were four students and each student was to have a 1:1; that is one staff to one child. However on this day there was only three staff in the classroom. (Fair Hearing Record; Exhibit C, p. 11)
15. In order to walk child (A) he required a 2:1 staffing ratio for safety purposes. The Appellant and HR were the two paraprofessionals in the room on the day in question along with a substitute paraprofessional, a college student who was assigned to work with another student. The lead teacher and another paraprofessional were off that day. There was a Nurse in and out of the classroom that day. Therefore the child was not walked as it was a safety concern. (Exhibit C, pgs. 3, 13-14, 17; Testimony of the Response Worker; Testimony of the Appellant)
16. The child had an IEP that was not adhered to on the day in question. For instance, he was not walked to the school bus as they were short staffed and two staff is required to walk him safely. I find that while concerning this was attributed to the staffing issue on that specific day and was not an indicator that the Appellant was neglecting the child. (Exhibit E; Testimony of the Response Worker; Testimony of the Supervisor; Fair Hearing Record; Testimony of the Appellant)
17. The child was on a special diet and brought his lunch to school daily and required assistance eating when using utensils but not with snacks or sandwich type foods. (Exhibit C, p. 7; Testimony of the Appellant)
18. Documentation had been sent home with a smiley face sticker next to lunch to indicate

that the child had eaten which was standard procedure after task were completed throughout the day. (Exhibit C, p. 15; Fair Hearing Record)

19. It was undisputed that the Appellant was the child's 1:1 on the day in question at lunch time. The Appellant was responsible for feeding the child on the day in question. The Appellant did not recall if she had fed the child but had no reason to think she had not. There are procedures in place to ensure that these tasks occur. The child did not return home with his lunch and if there is food left it would have been sent home with the child. (Exhibit C, pgs. 12-14, 17; Testimony of the Response Worker; Testimony of the Appellant)
20. The Department determined because they could not hear any sounds associated with his feeding that this indicated that he was not fed. On the recording the Appellant and HR did have a conversation about who was feeding the child on the day in question, which the Appellant could not recall but said it was possible. (Testimony of the Response Worker; Exhibit C) I find that there was no evidence that the child was not fed that day.
21. DCF Response Worker met with Appellant thirteen days after the reports were filed. It was undisputed that the Appellant was out of sorts on the day in question as her child had been diagnosed with Cancer and she attributed this to her inability to recall some of the events of the week of the reported incident when meeting with the Department. (Exhibit C; Testimony of the Response Worker; Testimony of the Appellant)
22. There was no evidence that the child had seizures the day in question despite what was heard on the recording. The Appellant did testify that the other male in the classroom did have a seizure the day in question. (Fair Hearing Record; Exhibit C, pgs. 6, 20-21; Testimony of the Response Worker; Testimony of the Appellant)
23. The Department could not confirm that the child had seizures but based their decision on the "parents" (father) strong beliefs after listening to the recording. (Fair Hearing Record; Testimony of the Response Worker)
24. Another male student in the classroom had seizures daily and as a result had a Nurse with him at all times while in the classroom. (Testimony of the Appellant)
25. There was no evidence that there had been any prior concerns about the care of this child or other children in the classroom. (Exhibit C; Testimony of the Response Worker)
26. It was undisputed that the child had been toileted on the day in question. The Appellant took him to the bathroom as soon as he arrived that day. The child also has a device that allows him to ask to use the bathroom. (Testimony of the Appellant; Testimony of the Response Worker; Exhibit C, p.14)
27. It was undisputed that there were time periods where the child went longer without interaction with staff than normal but was specific to the day in question and the lack of staff. When the child was settled the Appellant would take this time to catch up on her classroom related notes. (Exhibit C; Testimony of the Appellant)

28. The child had a sensory board and empty fill pieces, where he fits the pieces into the slot, as well as an iPad to work with educationally. (Testimony of the Appellant)
29. At the time of the hearing the child was no longer attending this school. The child had not returned to the school since the day the recording was found. (Testimony of the Appellant; Exhibit C, p. 15)
30. After completing its response, the Department supported the allegation of neglect of the child (A) by the Appellant stating that she failed to provide the child with minimally adequate care specifically for failing to provide him with food, supervision, education and medical care. It appeared the child was not monitored as closely as he should have been with his medical conditions. (Testimony of the Response Worker)
31. Based on the evidence, I find that the Department did not have reasonable cause to believe that the child was neglected by the Appellant. 110 CMR 2.00, Protective Intake Policy #86-015 Rev. 2/28/16
- a. The classroom was a special needs classroom which had four students each of whom required 1:1 and had significant medical, development and special needs;
 - b. On the day in question the classroom was short staffed and things were done differently to ensure safety;
 - c. All of the allegations were a result of listening to digital recording device that had somehow and by someone (unknown) been put in the child's pocket and recorded the events of the day;
 - d. The recording was not entered into evidence;
 - e. While it appeared that someone in the classroom may have had a seizure there was no evidence that it was this child and not another student that also had seizures;
 - f. There was also no evidence that the child did not have appropriate supervision that day or that his educational needs were not being met on the day in question;
 - g. Based on the lack of evidence there was no reasonable cause to believe that the child was neglected. (Fair Hearing Record)

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. 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 the 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; G.L. c.119, s 51B

A "caregiver" means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with the responsibility for a child's health or welfare, and (e) 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 day care setting (including baby-sitting), a foster home, a group care facility, or any other comparable setting. As such, "caregiver" includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The "caregiver" definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is himself/herself a child (i.e. baby-sitter). 110 CMR 2.00

"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.

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, (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

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.

The Appellant, a paraprofessional in the child's classroom, was a "caregiver," pursuant to Departmental regulation. 110 CMR 2.00

The Appellant, through Counsel, contested the Department's decision to support the allegation of neglect on behalf of the child (A) and argued that the supported decision of neglect in this case should be reversed.

The Department argued that the Appellant was neglectful in that she failed to provide the child with minimally adequate food, supervision, education and medical care.

The Appellant's argument was persuasive as the majority of the information was obtained from a digital recording device that someone placed in the child's pants pocket when he arrived to school on the day in question. The child was late to school on the day in question and was brought in by his mother, which is when the recording appeared to start. The recording itself was not entered into evidence and despite the Department's thorough documentation and testimony there was not enough evidence to determine that this was reliable information.

I credit the Appellant's argument that the recording was unconsented to and therefore illegal under MGL 272, sec.99. The recording has never been authenticated.

On the day in question the classroom was short staffed, the structure was not what it had been the day prior when the lead teacher was present and there were concerns that may have been internal, school protocol issues that weren't properly followed. It remains unclear, but perhaps the Appellant did not follow school protocol but there was no evidence that she failed to provide the child with minimally adequate care.

There was no evidence that this child suffered a seizure that day despite his father saying that it sounded like his son. There was another male student in the classroom who also suffered seizures. The typical structure of the day was altered due to staffing and safety concerns.

There was no evidence that the child was denied food, education or supervision on the day in question despite this being how the recording was interpreted and therefore what actually did or did not happen that day was speculative. The Department speculates that because they did not hear certain things happen that they did not.

Based on a review of the evidence, presented in its totality, there was no reasonable cause to believe that the Appellant's actions constituted neglect or that she failed to provide him with minimally adequate care. 110 CMR 2.00 (See Findings)

Conclusion and Order

The Department's decision to support the 51A report for neglect of the child A by the Appellant is **REVERSED**.

