

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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Commissioner

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(IN THE MATTER OF)
(G.C.)
(FH #2017-0291)
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HEARING DECISION

Procedural History

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

On January 20, 2017, the Department received a 51A Report from a mandated reporter alleging neglect of nearly three year-old G by his parents. Based upon concerns expressed to a mandated reporter by the child’s father, M.M., a mandated reporter filed a 51A alleging that the Appellant, mother of the child, was breastfeeding and smoking marijuana; that the Appellant was self-medicating and had a history of Bi-Polar Disorder. The reporter expressed concerns that the father may also have some mental health concerns and that father was making conflicting and confusing statements. The 51A Report was screened in for a 51B non-emergency response and assigned to response social worker, K.T. On February 17, 2017, following the 51B response, the Department unsupported the allegations of neglect by the father and supported for neglect of G by the Appellant because G was exposed to the Appellant’s marijuana usage through breastmilk and also because the Appellant was not in treatment for her diagnosis of Bi-Polar Disorder. The family’s DCF case was closed because the Appellant had stopped smoking marijuana, had arranged to engage in treatment to address her mental health, and the Department had filed a report with DCYF in ██████████ where the Appellant and child were living. The Department notified the Appellant of the neglect finding and her right of appeal by letter dated February 17, 2017. Through her attorney, the Appellant filed a timely request for Fair Hearing [“Hearing”] on March 9, 2017, pursuant to 110 CMR 10.06 & 10.08. The Appellant’s request for Hearing was granted and held on May 3, 2017 at the Department’s Hyde Park Area Office in Hyde Park, MA. Present were DCF Supervisor, J.G.¹; the Appellant; and, the Appellant’s Attorney, S.P. The Supervisor 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 was the DCF 51A Report of January 20, 2017 [Exhibit A] and the corresponding 51B Response Supported on February 17, 2017 [Exhibit B]. Admitted into evidence for the Appellant was a

¹ Neither the 51B response social worker, K.T., nor the supervisor who approved the response were present at Hearing. [Administrative Record]

May 1, 2017 Letter from the Appellant's Therapist [Exhibit 1] and the Parties' [REDACTED] Consent Order [Exhibit 2]. The Hearing record was closed at adjournment.

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.

Pursuant to 110 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 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 issues are whether there was reasonable cause to believe that a child had been abused or neglected; and, whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being, or the person was responsible for the child being a victim of sexual exploitation or human trafficking. DCF Protective Intake Policy #86-015 Rev. 2/28/16, 110 CMR 10.05.

Findings of Fact

1. The forty five year-old Appellant and forty three year-old M.M. are the mother and father, respectively, of nearly three year-old G. [Exhibit A, p.2; Exhibit B, p.1 ; Testimony of the Appellant] I find the Appellant a caregiver to G based upon DCF policy and regulation. (DCF Protective Intake Policy #86-015 Rev. 2/28/16, 110 CMR 2.0)
2. This family has no prior history with the Department. [Exhibit B, p.1]
3. The Appellant and father were separated and in the midst of a divorce, when the 51A Report of January 20, 2017 was filed with the Department. Father was living in [REDACTED] at his parents' home and the Appellant and child were living in [REDACTED] at their fixer upper. [Exhibit B, pp. 2-3 & 5]
4. The 51A Report of January 20th was filed with the Department because father took G to his pediatrician in [REDACTED] to test G, because the Appellant smoked marijuana and breastfed their son. While there, he shared this and concerns for the Appellant's mental health. [Exhibit A, p.2; Exhibit B, pp.2 & 6]

5. On February 17, 2017, the Department supported for neglect of G by the Appellant for smoking marijuana and then breast-feeding, and not being in treatment for her Bi-Polar Disorder. The Department found that the Appellant failed to provide G with minimally adequate emotional stability and growth and other essential care and closed the family's case because the Appellant had stopped using marijuana, had arranged to engage in treatment for her mental health, and the Department had filed a report with the [REDACTED] DCYF [Department of Children, Youth, and Families]. [Exhibit B, pp.7-8; Testimony of Supervisor]
6. The Hearing Officer found insufficient evidence in the record to establish that G was in danger or at significant risk of injury from the Appellant, and therefore the Department's decision to support for neglect is reversed.
 - a) On February 3, 2017, the 51B response social worker, K.T., interviewed father and viewed G at the paternal grandparents' home in [REDACTED]. G was visiting his father at that time. G was appropriately bonded to his father and there were no marks or bruises noted. [Exhibit B, pp. 2-3]
 - b) On February 15, 2017, J.P., a child protection investigator [CPI] from DCYF in [REDACTED] interviewed the Appellant and viewed G at their home in [REDACTED]. The Appellant and G were well bonded and no concerns were noted. The child was appropriately dressed and appeared well cared for. [Exhibit B, p.5]
 - c) The clinical social worker, M.P., providing therapy to the Appellant, had observed the Appellant's interactions with G on several occasions and found their relationship loving, healthy and appropriate. [Exhibit 1]
 - d) During the February 15th visit with CPI, the Appellant acknowledged being a regular user of marijuana, but said she stopped about one month ago [January 2017] because of the pending court hearing for custody scheduled for April 2017. The CPI reviewed with the Appellant, that if she resumed usage, she should plan for appropriate supervision of her child. [Exhibit B, p.6]
 - e) The use of marijuana is now legal. [Exhibit B, p.2]
 - f) The Appellant denied using marijuana in the presence of G. [Exhibit B, p.6]
 - g) The CPI did not observe the Appellant to be under the influence of illicit substances nor did he see any paraphernalia in the residence during his visit. [Exhibit B, p.6]
 - h) The child was not tested [for substances] during his visit to the pediatric office on January 20, 2017. The child would not pee [Exhibit B, p.6] and there is no evidence on the record to show that father or anyone else followed up with another appointment to accomplish this task. [Administrative Record]

- i) Father expressed concern, on January 26, 2017 and/or February 3, 2017, that the Appellant had a lot of anxiety and had not been taking medication because she was breast feeding. Previously she had been on mood stabilizers, but had not taken them because she wanted to breast feed. He reported the Appellant's anxiety caused anger flashes which were directed at him, but not G. He also reported that she was very protective of G and rarely let him out of her sight. He said he did not think she posed any risk to G, but he was concerned her mental health will get worse and he just wanted her to get help. [Exhibit B]
- j) During the visit with the CPI, the Appellant acknowledged being diagnosed with Bi-Polar Disorder twenty years prior, said she was not taking medication, and said she was not participating in counseling for this disorder. The CPI also reported that the Appellant did [not]² appear to be experiencing any mental health related issues at the time of the February 15, 2017 visit. The Appellant reported that her mental health is well managed. [Exhibit B, p.6]
- k) The Appellant stated at Hearing she is not Bi-Polar; she was diagnosed in error twenty years ago, and has not been on meds. Father lied about this. [Testimony of the Appellant]
- l) Regarding the issue of Appellant's mental health, this is a he said/she said issue against the background of a divorce in process.
- m) The Hearing Officer received no psychiatric evaluation to establish or discredit that the Appellant has or had a diagnosis and was or should have been prescribed mood stabilizing medication. [Administrative Record]
- n) Since February 2017, the Appellant has been seeing clinical social worker, M.P. Initially, she sought support for stress resulting from the divorce, but then began treatment as a reported survivor of domestic violence. [Exhibit 1] The Appellant previously informed the CPI, that her relationship with father ended because of his verbal and physical abuse. [Exhibit B, p.5]
- o) On April 11, 2017, the ██████████ family court awarded the parties joint legal custody, the Appellant kept physical custody; and, father reasonable rights of visitation. [Exhibit 2]
- p) As part of this order, the Appellant and father are to engage in co-parenting counseling. [Exhibit 2, p.2]
- q) Mediation on the divorce continues. [Exhibit 2]

² The Hearing Officer reasonably infers that the CPI omitted the word, not, when he typed up his interview with the Appellant.

Applicable Standards and 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 3, 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]

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]

Neglect" is defined as 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. **110 CMR 2.00 & Protective Intake Policy #86-015 [2/28/16]**

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 children 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. One such example is neglect that has led to a serious physical or emotional injury. **Protective Intake Policy #86-015 [2/28/16]**

Substantial Risk of Injury: A situation arising either through intentional act or omission which, if left unchanged, might result in physical or emotional injury to a child or which might result in sexual abuse to a child. **Protective Intake Policy #86-015 [2/28/16]**

Danger: 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. **Protective Intake Policy #86-015 [2/28/16]**

Safety: A condition in which caregiver actions or behavior protect a child from harm. **Protective Intake Policy #86-015 [2/28/16]**

A substantiated concern finding means there was reasonable cause to believe that the child was neglected and the actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being. Examples include neglect that resulted in a minor injury and the circumstances that led to the injury are not likely to recur, but parental capacities need strengthening to avoid future abuse or neglect of the child; neglect that does not pose an imminent danger or risk to the health and safety of a child; and, educational neglect. **Protective Intake Policy #86-015 [2/28/16]**

An unsupported finding means there is not reasonable cause to believe that a child(ren) was abused and/or neglected, or that the child(ren)'s safety or well-being is being compromised; or the person believed to be responsible for the abuse or neglect was not a caregiver, unless the abuse or neglect involves sexual exploitation or human trafficking where the caregiver distinction is not applied. **Protective Intake Policy #86-015 [2/28/16]**

Caretaker 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, "caretaker" includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The "caretaker" 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 him/herself a child, i.e., a baby-sitter. [110 CMR 2.00]

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 Appellant in the matter under appeal. See Findings #1 to #6 (a) – (q) and the following discussion.

The Appellant was and continues to be a *caretaker* of her nearly three year-old son, G, as defined herein and at 110 CMR 2.00.

Based on the record as a whole, the Hearing Officer finds insufficient evidence in the record to demonstrate that the Department complied with its protective intake policy, where a support finding means, in part, that the Appellant posed danger to the child or substantial risk to his safety or well-being. There is a lack of clarity regarding the Appellant's mental health. There is no evidence to show the child has been impacted either by her mental health, if true, or by the Appellant's regular use of marijuana. The [REDACTED] and the [REDACTED] are both involved with the Appellant and G and hopefully will further assess this particular situation. The Appellant met her burden of proof in this appeal. [110 CMR 10.23]

Order

The Department's decision of February 17, 2017, to support the 51A Report for neglect of G by the Appellant, is REVERSED.

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

B. Curley
Barbara Curley, Supervisor
Fair Hearing Unit

June 11, 2018
Date

Date

Linda S. Spears
Commissioner