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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

SA #2017-0299

FAIR HEARING DECISION

SA appeals the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support allegations of neglect pursuant to G.L. c. 119, §§51A and B.

Procedural History

On January 11, 2017, the Department received a 51A report alleging neglect of Me and Ma by their father, AR, and his live-in partner, SA. The Department screened-in the report for a response. On February 14, 2017, the Department made the decision that the allegation of neglect of Me and Ma by AR and SA was supported. The Department notified AR and SA of its decision and their right to appeal.

SA made a timely request for a Fair Hearing to appeal the Department's decision. Her request did not indicate that AR also wished to appeal. A hearing was scheduled for May 9, 2017, and SA was sent notice of the hearing date. On April 3, 2017, SA contacted the hearing office to clarify that AR also wished to appeal and to request his name be added to the appeal. Her request was granted. On May 5, 2017, the attorney for both SA and AR requested a continuance due to the unavailability of a witness. His request was granted and a hearing was scheduled for July 18, 2017, in the DCF Area Office in Cambridge.

On the date of the schedule hearing, both AR and SA appeared along with their attorney who informed the hearing officer that SA has an active restraining order against AR. AR and SA were advised that their appeals would not be heard together. AR was advised that his appeal would be heard separately and he would receive notice of a new date.

SA's hearing was held on July 18, 2017, in the DCF Cambridge Area Office. SA, the Department response worker and the Department supervisor testified at the hearing. SA was represented by an attorney.

The Department submitted the 51A and B reports that are the subject of this appeal. (Exhibits A and B).

SA submitted the following documents which were entered into evidence at the hearing.

Exhibit 1: Child Abuse/Neglect Non-Emergency Response completed by the Coastal Response Unit on February 2, 2017.

Exhibit 2: Copies of text messages dated 2015.

Exhibit 3: Abuse Prevention Order, dated July 11, 2017.

Exhibit 4: Abuse Prevention Order and affidavit, dated October 23, 2013.

Exhibit 5: 51A report, dated January 11, 2017, filed in the Coastal DCF office.

Exhibit 6: Three photographs.

Exhibit 7: Photographs of SA's residences before and after December 2016.

The hearing was digitally recorded and transferred to compact disc.

The Hearing Officer attests to having no prior involvement, personal interest or bias in this matter.

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. 110 CMR 10.05.

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. AR (hereinafter "father") and SR (hereinafter "mother") are the parents of Me (born [REDACTED]) and Ma (born [REDACTED]) (Exhibit A, pp. 1-2).
2. Father works at [REDACTED] in the grounds Department. (Exhibit B, p. 2).
3. SA works at [REDACTED] as the associate director of housing operations. She lives in an apartment on campus. (Exhibit B, p. 2; Testimony of SA).

4. In May 2012, father and SA met and became involved in a relationship while father and mother were still married and living together. Mother learned of father and SA's relationship in December 2012. Father's relationship with SA caused or at least contributed to mother and father's separation in December 2012. (Exhibit B, pp. 2, 10; Exhibit 1, p. 4; Testimony of SA).
5. After they separated, mother and father shared legal custody of Me and Ma. Mother had physical custody of the children and father had them for visits every other weekend and one night a week. (Exhibit B, p. 3).
6. Mother and father do not get along. They don't speak to each other and they only talk via text or e-mail when they need to communicate. (Exhibit B, p. 3)
7. Mother obtained a restraining order against father in October 2013. Her affidavit states that father made threats to kill her. The order was scheduled to expire in 5 days. There is no evidence to indicate whether it was extended. (Exhibit 4).
8. By October 2013, father began staying at SA's apartment and the children stayed there with father and SA during their weekend visits with father. (Exhibit A, pp. 3, 6; Exhibit B, pp. 3, 4, 9; Exhibit 1, p. 4; Exhibit 4; Testimony of SA).
9. Since then, the children have reported that father and SA argue and yell at each other all the time and that SA swears at father. The arguing makes Me feel sad and Ma sometimes cries. They usually stay in the bedroom and put their headphones on when father and SA argue. SA often kicks father and the children out of the home when she is angry. (Exhibit A, p. 7; Exhibit B, pp. 3, 4, 9).
10. Mother and father's divorce was final in 2014. (Exhibit B, p. 2; Exhibit 1, p. 4).
11. On or around Easter 2014, father and SA had an argument while the children were present. Father sent a text message to mother saying SA was dangerous and crazy and she was hitting him. Father called mother crying stating that SA was hitting him in front of the children and she would not stop. He also said that she would not let him leave. Father did not have a car at the time and he asked mother to come and get him and the children and take them to his parents' home (paternal grandparents). (Exhibit A, pp. 3, 6; Exhibit B, p. 3; Exhibit 1, pp. 2, 4; Exhibit 2, text dated Monday, April 21; Exhibit 5, p. 2; Testimony of SA).
12. Following the above incident, father decided to return to SA's home. Mother did not want the children in that environment. She petitioned the court and obtained a "no contact" order on behalf of the children prohibiting SA from having contact with the children. The order was in effect for 6 months. (Exhibit A, pp. 3, 6; Exhibit 1, p. 2).
13. On Super Bowl Sunday 2015, father and SA argued when SA was accusing father of cheating on her with several different women. SA threw a candle at father during the argument. On that day, father called his mother (paternal grandmother) to come pick up him and the children. The children told mother about what happened. Afterward, mother

attempted to obtain a "no contact" order, but the court denied her request. (Exhibit A, p. 7; Exhibit B, p. 3; Exhibit 1, p. 2).

14. In early 2015, SA became pregnant with father's child. (Exhibit 1, p. 1).
15. Father and SA's son, M, was born on November 19, 2015. (Exhibit 5, p. 1).
16. In 2016, the children spent the Christmas holiday with father at SA's home. On Christmas day, father and SA were arguing because father was texting another woman. As a result of the argument, father brought the children to their paternal grandparents' house for the night and he returned to SA's apartment. He picked up the children the next day and brought them back to SA's apartment. Father and SA got into another fight. Me and Ma were in their bedroom. Ma had headphones on. Me heard a "punch" sound. She left her bedroom and saw father on the floor. He was crying and saying he was having trouble breathing. He told Me that SA hit him in the head. SA told father to get up and stop being so dramatic. At some point that day, father picked up a brick that was on top of a trash barrel and threw it at a tractor. Father then left with the children and went to paternal grandparents' home for the night. (Exhibit B, pp. 3, 4, 9, 10).
17. The children told mother what happened during their visit with father. (Exhibit A, p. 3; Exhibit B, p. 9).
18. Mother filed a motion to modify the visitation order so that SA would not be around the children. A hearing was held on January 11, 2017. Mother reported that the children witnessed a verbal argument between father and SA and they thought SA punched father. Father told the court that SA threw a towel at him while he was holding M, but he denied she punched him. He confirmed that he and the children left SA's home following the incident. (Exhibit A, p. 3).
19. On January 11, 2017, the Department received a 51A report alleging neglect of Ma and Me by father and SA based upon what mother reported in court. The Department screened-in the report for a response. (Exhibit A).
20. A second 51A report was filed in the DCF Coastal Area Office alleging neglect of M by father and SA based upon the same incident. That report was also screened-in for a response by the Coastal Area Office. (Exhibit 5).
21. The court did not modify the visitation order. The court ordered father to enroll in an anger management class. The next court date was scheduled for April 25, 2017. (Exhibit B, pp. 1, 3, 10).
22. The Department response worker spoke with mother and father. They provided some background information consistent with the above findings. (Exhibit B, pp. 2-4, 9-10).
23. The Department spoke with the children with mother present at their request. The children described the reported incident consistent with the above findings. They reported being exposed to frequent arguments and yelling between father and SA. They both said that they feel SA is more of the aggressor and that she screams and swears all the time. They

reported staying in the bedroom with headphones on when father and SA argue. Me reported that the arguing makes her sad. She said that Ma cries sometimes when they are fighting, but Ma denied that he cries. (Exhibit B, pp. 4-5).

24. The Department response worker spoke with father and SA. They stated that they were under a lot of pressure because they were moving to a new apartment on campus. They acknowledged that they were arguing on the day in question. The children were in their bedroom and M was asleep. SA stated that they are allowed to argue. Father stated that he was down on one knee and having a hard time breathing. He was hyperventilating from the argument. They denied any prior incidents of violence between them. Father denied throwing a brick in the presence of the children. They stated that mother is making the children say things because she wants to break them up because she (SA) is the one who broke up mother and father's marriage. (Exhibit B, pp. 9-10).
25. On February 14, 2017, the Department made the decision that the allegation of neglect of Ma and Me by father and SA was supported due to the children's exposure to on-going arguing between them. (Exhibit B, pp. 11-12).
26. During the Coastal Area Office's response, neither SA nor father specifically addressed the incident that led to the 51A report. They both reported having arguments at times and yelling during arguments. Father acknowledged that they swear at times. SA reported that the only thing they argue about is mother. Father acknowledged that he called mother to come get the children on one occasion when he and SA were arguing. They both denied their arguments ever become physical. (Exhibit 1, pp. 4-5).
27. Although the response workers from the two area offices spoke with each other and exchanged information, it is notable that the Coastal Area Office response worker did not speak directly with mother, Me or Ma during her response. (Exhibit 1; Exhibit B).
28. On February 2, 2017, the Coastal Area Office response worker made the decision that the allegation of neglect of M by father and SA was unsupported. The Department response worker did not believe that the parents' arguments had any impact on M given his age. (Exhibit 1, pp. 8-9; Testimony of the Department response worker).
29. On July 11, 2017, SA obtained a restraining order against father. The order was scheduled to expire on July 21, 2017, and a hearing was scheduled for that date. (Exhibit 3).
30. SA testified to the following at the hearing. She provided some background information. Regarding the December 2016, incident, she and father did have an argument after she noticed money missing from M's piggy bank and she accused him of stealing it. He initially denied taking the money, but then admitted to it. They argued and it escalated. She did not go into any further detail. She said she always got along with Me and Ma very well and they did a lot of activities together. She described Me as someone who "shoots from the hip" and Ma as more reserved. The children stayed at her apartment a few times a month when they had visits with father. There were occasions when she told father to leave when the children were there because she felt he was treating her badly. She did not provide any detail regarding how he was treating her when she asked him to

leave. She said she and father broke up a few months ago. She obtained the restraining order because she felt he was harassing her by calling her and sending text messages. She did not indicate she was fearful of him. Regarding the text from mother saying that she would show police the text father sent saying SA is dangerous and hitting him, she said father may have said that after their argument on Easter 2014. She denied ever hitting father or throwing anything at him. (Testimony of SA). I find SA's testimony to be fairly vague and evasive regarding her relationship with father and the extent of the conflict between them and I find her credibility questionable. Given their break up shortly after the Department's response and the recent restraining order, I believe that the extent of the conflict between father and SA is far more extensive than SA indicated in her testimony and in her statements to the Department response workers.

Analysis

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.” 110 C.M.R. §4.32(2)

“[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.

To prevail, an Appellant must show by a preponderance of the evidence that the Department’s decision or procedural action was not in conformity with the Department’s policies and/or regulations and resulted in substantial prejudice to the Appellant. If there is no applicable policy, regulation or procedure, the Appellant must show by a preponderance of the evidence that the Department acted without a reasonable basis or in an unreasonable manner, which resulted in substantial prejudice to the Appellant. 110 CMR 10.23

“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.

The evidence shows that the children spent their weekend visits with father at SA's home and they have done so for several years. I find that SA was a household member entrusted with responsibility for the children's welfare and, therefore, she was a caregiver for the children under Department regulations at the time in question. 110 CMR 2.00(5).

The Department determined that both father and SA neglected the children by exposing them to on-going arguments and this was having a negative impact on them.

First, SA denies punching father on December 26, 2016. She argues that mother misrepresented what the children said about the incident by initially telling the court that the children reported SA punched father. She then clarified that they thought SA punched father. She also told the response worker that the children heard a punch; however, Ma denied hearing anything because he was wearing headphones. SA contends that, although Me said she heard a punch there is reason to question her reliability because she was interviewed with mother present and she may have been attempting to support mother. She claims that this is supported by the fact that she said she wishes her parents were not divorced. SA also contends that mother's failure to call the Department herself and father's failure to call police as well as his denial that SA hit him while under oath in court indicate that SA did not punch father.

The evidence shows that mother has a motive to dislike SA and she and father do not get along. Although she may have attempted to exaggerate various events, I do not believe that the children's statements were fabricated due to influence by mother as evidenced by the fact that they did contradict some of what she reported. The Department response worker noted in her testimony that, although the children were interviewed in mother's presence, they did not look to her for guidance or otherwise appear to be influenced. This is particularly true for Me who did most of the talking. She is described by SA as someone who shoots from the hip which would suggest she is not likely to succumb to pressure to make a false statement.

Me was very clear and fairly detailed in describing what occurred. Much of what she reported, was not even mentioned by mother. She said heard a sound she thought was a "punch" sound. When she went out to see what happened, she saw father on the floor crying and saying he was having trouble breathing. Father said SA hit him in the head and SA told him to get up and stop being so dramatic. She said that father and SA actually started fighting on Christmas because father was texting another woman. She also noted that father threw a brick at a tractor and that the brick had been placed on top of a barrel to keep the raccoons out. Father corroborated Me's statement to some extent. He confirmed he was down on one knee and having a hard time breathing because he was hyperventilating because of the argument. That by itself suggests that the conflict was fairly intense. Although he denied that SA hit him during the court hearing, he did acknowledge that she threw a towel at him while he was holding the baby. He denied throwing a brick, but he acknowledged that there is a brick on top of a barrel to keep raccoons from getting into it.

SA points out that mother's account of the Easter 2014, alleged incident was not corroborated by paternal grandmother. Mother reported that father called her crying saying that SA was hitting him in front of the children. She brought him and the children to paternal grandparents and father

had a black eye. During her interview with the Coastal area office response worker, paternal grandmother denied witnessing any domestic violence between SA and father.

Although the children did not talk specifically about the Easter 2014, incident, there is evidence to indicate that a fairly significant argument occurred on that day whether father actually had a black eye or not. SA acknowledged in her testimony that an argument occurred that day and that was the incident that prompted father to tell mother that SA is crazy, dangerous and hitting him. Also, it was after that incident, that mother obtained a court order preventing SA from being around the children for 6 months.

SA argues that the Department's finding of neglect by SA is unreasonable in light of the Coastal area office's decision that the allegation was "unsupported." She notes that, in that response report, the supervisor's comment says that the report was vindictive in nature which shows that the supervisor in that case felt that mother was not credible. That report also notes that M's daycare had no concerns, there was no record of police responses to the home, mother and father have a very strained relationship and the court did not modify the visitation order. SA suggests that the focus of both investigations is the same and, given the vastly different perceptions of mother's credibility, there is too much uncertainty to conclude that SA is neglectful.

The Coastal area office's decision that the allegation of neglect of M was unsupported has little bearing on the decision in this case. The focus of the Coastal area office's response was to assess risk to M's safety and well-being while the focus of the response in this case was to assess risk to Ma and Me's safety and well-being and, in doing so, the Department relied heavily on the statements of the children. The Coastal area office supervisor's comment is referring to the opinion of someone whose name is redacted from the report. It does not necessarily reflect the opinion of the supervisor and, even if it did, that opinion would be have little validity since mother, Ma and Me were not even interviewed during that response and, therefore neither the response worker nor the supervisor in that case are in a position to evaluate their credibility.

SA argues that, to the extent that the children have witnessed domestic disputes, it is far more likely that father is the aggressor because mother has had a restraining order against him in the past, SA currently has a restraining order against him and the court ordered him to attend anger management classes.

This is not persuasive. The existence of the restraining orders shows little, if anything, about father's temperament and propensity for physical aggression. First, with regard to mother's restraining order, she alleged a verbal threat by father after they separated. There is no evidence that he ever actually became aggressive with her. There is also no evidence that the order was extended after a hearing with both parties present. Regarding SA's restraining order, she did not submit her affidavit nor did she testify to any physical aggression by father as the reason she obtained the order. The order was issued only a few days prior to the fair hearing and a hearing with both parties present had not yet occurred as of the date of the fair hearing. I also find SA's claim disingenuous considering that she has maintained throughout this case that neither she nor father have been aggressive with each other and the allegations were fabricated by mother.

SA argues that the Department's decision is unjustified based upon the lack of third party concerns (school and pediatrician) or evidence that SA has any mental health, substance abuse or criminal history.

Although those are factors to be considered, the absence or presence of concerns expressed by collateral contacts or a concerning history is not necessarily dispositive in any given situation. Department regulations specifically require that the parent(s) or caregiver(s) of reported child(ren), the reported child(ren) and the reporter are to be considered the primary sources of information. 110 CMR 4.27(2). In this case, the Department relied primarily on the statements of the children in accordance with Department regulations.

Finally, SA argues that the Department failed to consider the difference in father and SA's physical size with father being much larger than SA. SA suggests that, given their size difference, it is unreasonable to conclude that father could not restrain her from physically abusing him.

I do not find the size difference between SA and father to be of any particular significance. While there may be circumstances in which a significant size difference would lead one to conclude that one party could not possibly have acted as alleged toward another, this is not such a case. The portion of the concerns involving physical abuse is fairly limited and consists of Me's report that father said SA hit him in the head on December 26, 2016, and mother's report that father said SA was hitting him on one occasion over three years ago. There are no details in the record regarding either incident and, therefore, there is no evidence that would indicate that SA could not possibly have hit father on either occasion.


The evidence shows that Me and Ma have been exposed to frequent arguing, including yelling and swearing between SA and father during their weekend visits. They are upset by the arguing. Me reported that the arguing makes her sad and that Ma cries when they argue. On December 26, 2016, they were exposed to an argument between SA and father. Me heard what sounded to her like a punch and when she went to see what happened she saw father on the floor saying he could not breathe and SA hit him in the head. The children have also been kicked out of the home with father when he and SA have been arguing. Our courts have found that witnessing verbal and physical conflict constitutes failure to provide children with minimally adequate emotional stability and growth. John D. v. Department of Social Services, 51Mass.App. 125 (2001). Even with no indication or evidence that a child has been injured, either physically or emotionally by the witnessed 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).

Considering all of the credible evidence, I find that SA failed to provide Me and Ma with minimally adequate emotional stability and growth and other essential care (a safe and stable environment) and, therefore, she neglected them under Department regulations. I also find that her actions have posed a substantial risk to the children's well-being.

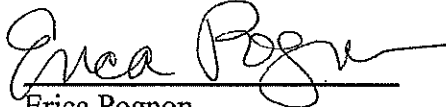
Conclusion and Order

The Department's decision to support allegations of neglect of Me and Ma by SA was made in conformity with Department regulations and with a reasonable basis and therefore, the Department's decision is AFFIRMED.

This is the final administrative decision of the Department. If the 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 within Suffolk County, within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, s. 14.)


Anne L. Dale Nialetz,
Administrative Hearing Officer

11/14/17
Date


Erica Pogon
Fair Hearing Supervisor