

**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)
(T.G.)
(FH #2017-0301)
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HEARING DECISION

Procedural History

The Appellant, Mr. T.G., appeals the decision of the Department of Children and Families [hereinafter "the Department" or "DCF"], to support for neglect of J, pursuant to M.G.L., c.119, §§51A & 51B.

The Department received four 51A Reports in October 2012. The first 51A Report filed on October 4, 2012 was the only report that pertained to the Appellant; that of his neglect of his eight year-old son, J. All of the four 51A Reports alleged physical abuse of J by his mother, M.M., and the last report also neglect of J by his mother. The 51A Reports were screened in for a non-emergency 51B investigation and reassigned to DCF Investigator, M.T., as part of a single investigation. On November 2, 2012, following the investigation, the Department supported for neglect of J by the Appellant [and mother] for [their] failure to provide J with minimally adequate emotional stability and growth. Both parents were described by professionals contacted during the investigation to have placed J in the middle of their acrimonious relationship, which had an emotionally negative impact on the child. There was no co-parenting. In addition, the Department supported for physical abuse of J by his mother, i.e. emotional injury. The decisions were approved by management on November 7, 2012 and the family's case opened for assessment.

The Appellant, through his current attorney, filed an exceedingly untimely request for Fair Hearing ["Hearing"] by letter dated March 10 2017, pursuant to 110 CMR 10.06, which was granted, and the Hearing held on May 16, 2017 at the Department's South Central Area Office in Whitinsville, MA. Present were DCF Supervisor, B.M., DCF Supervisor, A.S, who presented the Department's case in lieu of her Investigator and knew the case well, the Appellant's Attorney, J.I., the Appellant, and, the Appellant's Witness/Mother, B.G. Supervisor A.S. the Appellant, and the Appellant's mother through Face Time, a video chat app, were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to compact disk [CD].

Admitted into evidence for the Department was the DCF 51A Report of October 4, 2012 [Exhibit A-1], the DCF 51A Report of October 5, 2012 [Exhibit A-1]; the DCF 51A Report of October 15, 2012 [Exhibit A-3]; the DCF 51A Report of October 17, 2012 [Exhibit A-4]; and the corresponding 51B Investigation Supported on November 2, 2012 and approved on November 7, 2012. Admitted into evidence for the Appellant are Pictures of J and a Picture of the Appellant with J [Exhibit 1], and an Exchange of Emails between the Appellant and Mother, June 2009 [Exhibit 2]. The Hearing record was closed on June 6, 2017.

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 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, 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 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 was abused and neglected. [110 CMR 10.05]

Findings of Fact

1. The Appellant and his ex-wife, M.M., are the biological father and mother, respectively, of then eight year-old J. The Appellant has since remarried. [Exhibit A-1, p.2; Exhibit B, pp.1, 10 & 12; Exhibit 1]
2. The Appellant and the child's mother were married from 2001 to 2005. The Appellant filed for divorce in 2004 and the divorce was finalized in 2005. [Testimony of the Appellant]
3. The Appellant and mother divorced over issues of verbal abuse. [Exhibit B, p.19]
4. There were custody battles. [Testimony of Appellant's Mother]
5. At the relevant time, the child was in the shared legal and physical custody of both of his parents. [Exhibit B, p.10; Exhibit A-2, p.2; Testimony of the Appellant]

6. The Appellant and mother have a history with the Department. The 51A Reports filed against each reflect some similarities to the present circumstances under review: [Exhibit B, p.21]
 - (a) On January 12, 2012, there was a 51A Report containing allegations of physical abuse and neglect of J by his mother, and neglect of J by the Appellant. J was brought to the hospital for aggressive behaviors. J disclosed that his mother was punching him in the stomach with an open hand and twisting his arm, and that mother was giving him extra medication. Father was neglectful for not believing the child. The report was screened in and unsupported. [Exhibit A-1, p.5; Exhibit A-2, p.4; Exhibit A-3, p.5; Exhibit A-4, p.5; Exhibit B, p.1; Testimony of Supervisor]
 - (b) On January 13, 2012, a 51A Report was filed for physical abuse and neglect of J by his mother; mother slapped and punched the child with an open hand. This was unsupported. [Exhibit A-1, p.5; Exhibit A-2, p.4; Exhibit A-3, p.5; Exhibit A-4, p.5; Exhibit B, p.1; Testimony of Supervisor]
 - (c) On January 21, 2011, a 51A was filed alleging physical abuse of J by the Appellant; the Appellant grabbed and pulled the child. It was screened in for an IA [Initial Assessment] resulting in No/Minimal Concern. [Exhibit A-1, p.5; Exhibit A-2, p.4; Exhibit A-3, p.5; Exhibit A-4, p.5; Exhibit B, p.1; Testimony of Supervisor]
7. In October 2012, eight year-old J made disclosures of being punched and/or slapped by his mother to four separate mandated reporters. [Exhibit A-1; Exhibit A-2; Exhibit A-3; Exhibit A-4; Exhibit B, pp.2-4.] There is conflict in the record as to whether the Appellant coached J to make this disclosure against mother and whether the child was a reliable reporter of information. [Exhibit B]
8. In the late afternoon of October 4, 2012, during a counseling session, J told his individual therapist/counselor that his mother struck him with a closed hand on his cheek after she had been drinking to excess. There were no marks or bruises on the child. The counselor did not believe that J had been coached into providing this disclosure. A 51A report was filed on October 5, 2012 on this matter. [Exhibit A-2; Exhibit B, p.15]
9. According to the reporter of the October 4, 2012 51A Report, the Appellant and J's mother had a conflictual divorce and there was a lot of tension between them. They were mean and verbally hostile toward each other and put the child in the middle of their discord. Today, the child's individual therapist/counselor disclosed that mother is an alcoholic and can become very hostile when she drinks. The therapist/counselor told the reporter this in passing as he left the office tonight. Today, J told the reporter this information. Today, the Appellant also disclosed that mother is an alcoholic and can become very hostile when she drinks. The Appellant also disclosed for the first time that J had been telling him that mother had been hitting him on a regular basis, since their divorce three to five years ago. However, the Appellant self-disclosed that he had not believed the child and did nothing to ensure his safety. The reporter opined that J's allegations were genuine and that there was a risk that mother may be hitting the child; however, the reporter also found it ironic that J and the

Appellant made these allegations a week after the mother attempted to file a false restraining order against the Appellant. The reporter found that both parents can be very inappropriate and unreasonable at times and felt that these allegations happened in the context of the parents' divorce. [Exhibit A-1, p.2]

10. The Appellant acknowledged not reacting to past allegations of abuse of J by his mother, but said he did react appropriately in October 2012, when J told him on the 15th that his mother hits him when she drinks alcohol and the child expressed fear to him of returning to her care that Sunday. Because J was so upset, the Appellant took the child to ██████████ Hospital for an emergency mental health screening for a possible psychiatric hospitalization. [Exhibit B, pp.10-11; Testimony of the Appellant]
11. Per the reporter of the 51A Report of October 15, 2012, J was visiting with the Appellant over the weekend and when told he was going to be returning to his mother's care, reportedly started throwing shoes and brooms at his stepmother/Appellant's wife. The child was seen by the reporter and claimed that he did not want to return to mother because she often hurt him; often hitting him in the face. No marks were seen on his body. A decision was made to hospitalize J at ██████████ [Exhibit A-3]
12. Per the reporter of the October 17, 2012 51A Report, J disclosed yesterday that his mother punched him in the face, threatened to stab him, drinks four large glasses of wine each night, is mean to him when she drinks, and punches him when she is sober. Today the child disclosed that he does not feel safe with mother and wanted to live with the Appellant, and that his mother does drugs, i.e. beer and wine. The reporter said that J's parents are divorced and is unsure if the Appellant put the child up to saying these things. [Exhibit A-4]
13. J went inpatient at ██████████ from October 15, 2012 to October 19, 2012. [Exhibit B, pp.5 & 12] He was diagnosed with ADHD [Attention Deficit Hyperactivity Disorder] and mood disorder for which there were varied opinions about the cause. [Ibid, p.12; Testimony of the Appellant]
14. The Appellant went to probate court and received physical custody of J until October 29, 2012, which was extended by the court until November 5, 2012. [Exhibit B, p.10]
15. On November 2, 2012, the Department supported for neglect of J by the Appellant and his mother, and for physical abuse of J by his mother; emotional injury. The Appellant [and mother] were found neglectful because he [and she] failed to provide the child with minimally adequate emotional stability and growth. The child's emotional growth was stymied by the parents concerns over their own personal issues toward each other, resulting in the child requiring intensive counseling and psychiatric help. The parents were not co-parenting and were placing J in the middle of their issues. [Exhibit B, pp.20-22; Testimony of Supervisor]
16. In making the finding of neglect, the Department relied on information the Investigator gleaned from professionals involved with the family, notably J's individual outpatient counselor/therapist, D.M., the child's outpatient psychiatrist, Dr. V.M. and ██████████

██████████ Staff, the parents' court referred parent coordinator, Dr. P.W., and, the child's pediatrician, Dr. R.H. [Exhibit B; Testimony of Supervisor]

17. The Investigator contacted J's outpatient counselor, D.M., on October 22, 2012. The counselor was aware that the child's parents do not like one another at all. He reported that J has expressed anger toward each parent, since the child had been in counseling with him. He found that J is very angry, in general. [Exhibit B, pp.15-16]
18. According to the Appellant, J's psychotropic medications were not changed at ██████████. J's inpatient ██████████ psychiatrist and his own psychiatrist, Dr. V.M., believed that the child's medications were not the cause of his behavior. The ██████████ psychiatrist said that environmental stressors were the cause. [Exhibit B, pp.10-11]
19. The Investigator made contact with the ██████████ covering case manager for J on October 19, 2012, who said that she and other ██████████ staff "have had suspicions that [J] may be saying things about his mother that [the Appellant] tells him to say." [Exhibit B, p.9].
20. The Investigator made contact with the family's parent coordinator, Dr. P.W., on October 25, 2012. She had been working with the parents since 2009. She reported, based on information received from the Appellant, that the Appellant displayed anger toward mother. She was aware that the parents' hatred toward each other completely interfered with each parents' care and love for their son, J. She referred the parents to a group led by D.F. for helping high conflict divorced couples learn improved coping skills and ensuring that the child is never placed in the middle of such high conflict divorced parents, such as the Appellant [and mother]. [Exhibit B, pp.16-17]
21. The Investigator made contact with J's pediatrician, Dr. R.H. on October 26, 2012, who had known the family for a significantly long time and was aware of the family dynamics. She reported that J "is being pulled in two different directions" by both parents, since the parents divorced. J has required psychiatric services "for a long time" due to being placed in the middle of the parents. She also reported that J's "parental unit, to include both parents, have been extremely divisive concerning [J's] care". [Exhibit B, p.18]
22. The Appellant denies coaching J and denies saying anything negative to J about his mother. [Testimony of the Appellant]
23. The Hearing Officer finds that the Appellant and mother's conflictual divorce and overt, verbal hostility toward each other have not been in the child's best interests. Their acrimonious relationship placed J in the middle of their issues and compromised his emotional stability as per the examples set forth below.
 - (a) There was no dispute that J exhibited behavioral issues at both homes, at the relevant time. [Exhibit B, p.10]

- (b) The child was hospitalized twice in 2012; See Findings #6 (a) and #13, had an outpatient psychiatrist, an outpatient individual counselor; was on psychotropic medications, and, was only eight years old at the time. [Exhibit B; Testimony of the Appellant]
 - (c) J's third grade teacher reported that J could be a bully with other children, especially at recess time and had not been truthful with her within this context. She saw J respond to another child in a negative manner and, when she attempted to address the behavior with him, he still denied his culpability, even if the event was witnessed first hand by a teacher or other school staff. [Exhibit B, p.13]
 - (d) The school adjustment counselor was aware that J had become a bully with other children in school, and reported he has put other children down verbally on a consistent basis. [Exhibit B, p.14]
 - (e) During an interview with Investigator M.T. on October 22, 2012 at his school, J reported that the Appellant "thinks that my mother is an alcoholic". The child defined an alcoholic as a person who drinks alcohol and becomes mean. J then reported that his mother is an alcoholic because she is mean. [Exhibit B, pp.13-14; Testimony of the Supervisor]
 - (f) J was aware of divorce proceedings. [Exhibit B, p.14-15; Testimony of the Supervisor]
 - (g) J's stepmother/Appellant's wife, R.G., reported that J's "whole demeanor changes when a subject comes up about his mother. He becomes angry and expresses contempt when talking about her. [Exhibit B, p.17]
24. At his Hearing of May 16, 2017, the Appellant denied that he placed J in the middle of the conflict, rather, mother was the one who did this. He argues that he shielded J from mother's behavior and got J professional help. [Testimony of the Appellant]
25. The Department does not dispute that mother was neglectful [Exhibit B, pp.20-22], but no one was saying during the investigation that mother was solely responsible for placing J in the middle of the conflict, rather, it was the parents. [Testimony of the Supervisor]
26. The Hearing Officer finds that the Appellant also shares responsibility for placing his own issues about mother before the best interests of his son, J. The Hearing Officer finds it unlikely that mother taught the child to be contemptuous of her. In addition, J was privy to the Appellant's opinion that mother is an alcoholic and, as a consequence, assumed that same position. The facts demonstrate that the Appellant has been angry at the child's mother. In addition, the Hearing Officer found the stepmother's interview with the Investigator troubling as to her negative view of mother. Based on the evidence, it can reasonably be inferred that, if not coached, the child was privy to conversations about his mother while spending time with the Appellant and his wife. Although the Appellant's home may be the more stable environment for J, as reported by the parent coordinator, the Hearing Officer does not find this negates the central issue under appeal.

27. The Department recommended that, should there be further strife between the parents to retard their ability to effectively co-parent J, that placement of J with a third party could be considered. [Exhibit B, p.22]
28. In 2013, the Appellant was awarded full legal and physical custody of J. Mother has no visitation. [Testimony of the Appellant]
29. The Appellant reported at Hearing that J still has a therapist, plays sports, is on an IEP at school, has friends, but still is very moody and struggles in school. He has always been a handful and a difficult child. [Testimony of the Appellant]

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 16, 2017.

Regulations 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]

"[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

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]

The Court has also held that the Department's determination of neglect does not require evidence of actual injury to the child. Lindsay v. Department of Social Services, 439 Mass. 789 (2003).

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 Department in the matter under appeal. See Findings #1 to #29 and the below discussion.

The Appellant was a *caretaker* of his eight year-old son, J, at the relevant time, in keeping with the term defined herein and at 110 CMR 2.00.

Based on the record as a whole and giving due weight to the clinical judgment of Department social workers, the Hearing Officer finds that the Department had "reasonable cause to believe" that the Appellant, in addition to the child's mother, failed to provide son, J, with minimally adequate emotional stability and growth, and was therefore neglectful. "Reasonable cause to believe" is a relatively low threshold. See Care and Protection of Robert. The credible and reliable evidence in the record demonstrates that the Appellant was engaged in a contentious custody battle with the child's mother whereupon they were hostile and verbally abusive to each other and angry, and placed J in the middle of this, against his best interests. The Hearing Officer is not convinced that mother is the only culpable party here. The child was impacted by the domestic. See Finding #23-#26 in particular, but not exclusively. Even if there were no evidence

of injury to the child, the court has upheld the Department's determination of neglect in another case. See Lindsay v. Department of Social Services. The Appellant failed to meet his burden of proof in this case. [110 CMR 10.23]

Order

1. The Department's decision of June 2, 2017, to support the 51A Report for neglect of J by the Appellant, his father, is AFFIRMED.

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he may do so by filing a complaint in the Superior Court for the county in which she lives within thirty (30) days of the receipt of the decision. (See, G.L., c. 30A, §14)

Frances I. Wheat (S)
Frances I. Wheat, MPA
Administrative Hearing Officer

Date: 2-15-18

Susan Diamantopoulos
Susan Diamantopoulos
Fair Hearing Supervisor