

**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**

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Commissioner

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IN THE MATTER OF)

FM)
FH #2017-0315)

FAIR HEARING DECISION

The Appellant in this Fair Hearing was FM (hereinafter "FM" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegation of sexual and physical abuse pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On January 13, 2017, the Department received a 51A report alleging sexual abuse of A (hereinafter "A" or "the child") by an unknown person. On January 19, 2017, the Department received a second 51A report alleging neglect of A by SP (hereinafter "SP"); the 51A report alleged physical abuse and possible sexual abuse of A by the Appellant. On February 6, 2017, the Department received a third 51A report alleging physical abuse and sexual abuse of A by the Appellant. The Department conducted a response and, on February 17, 2017, the Department made the decision to support the allegation of neglect by SP and sexual and physical abuse of A by the Appellant. The Department notified the Appellant and SP of its decision and their right to appeal¹.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing originally scheduled for April 12, 2017 was stayed at the request of the District Attorney. The Fair Hearing was rescheduled and held on November 1, 2017, at the DCF Taunton Area Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the Fair Hearing to afford the Appellant the opportunity to submit additional information. The Appellant submitted supplementary information, which was reviewed, entered into evidence and considered in the decision making of the instant case. The record closed on December 8, 2017.

¹ SP was not a party to this appeal.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
FM	Appellant
SP	Appellant's wife/Child's mother (hereinafter "SP")
RM	Department Supervisor (hereinafter "RM")

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: DCF Intake Report/51A Report, dated 1/13/2017
- Exhibit B: DCF Intake Report/51A Report, dated 1/19/2017
- Exhibit C: DCF Intake Report/51A Report, dated 2/6/2017
- Exhibit D: DCF Child Abuse/Neglect Emergency/Non-Emergency Response, completed 2/17/2017
- Exhibit E: E-mail exchange between RM and Office of the [REDACTED]

For the Appellant:²

- Exhibit 1: Release of Information authorizing Dr. T's office to release information to [REDACTED] signed by SP, dated 5/11/2012
- Exhibit 2: A's medical records from [REDACTED], dated 1/16/2012-2/1/2013
- Exhibit 3: Excerpts from DCF 51A and 51B reports with Appellant's written comments
- Exhibit 4: Copy of USPS Priority Mail labels, delivery date of 12/31/2016
- Exhibit 5: Pictures of A and CQ
- Exhibit 6: Pictures of assigned DCF Social Worker AHP and her parents, reportedly obtained from public options on Facebook
- Exhibit 7: DCF Intake Report/51A Report, dated 1/19/2017, regarding F
- Exhibit 8: DCF Child Abuse/Neglect Emergency/Non-Emergency Response, completed 2/7/2017, regarding F
- Exhibit 9: Family Conference Form re: F, dated 2/23/2017
- Exhibit 10: Business Card for Detective JA [REDACTED]
- Exhibit 11: Flash drive, depicting video of A taken by Appellant, viewed at Fair Hearing

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

² This Hearing Officer renumbered the Appellant's exhibits following the Fair Hearing

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. 2/28/2016

Findings of Fact

1. The child of this Fair Hearing was A; at the time of the 51A reports, A was nine (9) years old. (Exhibit A, p.1; Exhibit B, p.1; Exhibit C, p.1; Exhibit D, p.1)
2. The child's father is MQ (hereinafter "MQ"); at the time of the 51A reports, MQ was married to CQ (hereinafter "CQ") (Exhibit A, p.2; Testimony Appellant)
3. The child's mother is SP; SP and the Appellant had been in a relationship since SP was age twenty-one (21); the Appellant and SP were married. (Testimony Appellant; Testimony SP) In 2003, following a motor vehicle accident, SP suffered a brain injury resulting in difficulty with memory, processing and managing her emotions. (Exhibit A, p.6; Exhibit D, p.6; Testimony SP; Exhibit 7, p.2) At the time of the 51A reports, SP received disability payments due to her brain injury. (Exhibit 8, p.3)
4. In November 2011, SP gave birth to A's half- brother, F (hereinafter "F"); the Appellant is F's father. (Exhibit A, p.7; Exhibit 7; Exhibit 8; Testimony Appellant)
5. On January 9, 2012, following a 51A report filed by anonymous reporters, the Department unsupported allegations of neglect and physical abuse of A and F by the Appellant, SP and MQ. A denied the reported concerns that he was hit with a belt, the use of hot sauce and being driven by an adult under the influence of alcohol. The Department noted the Appellant and SP's discord with their neighbors. (Exhibit A, p.7)
6. On January 16, 2012, SP brought A to see his pediatrician due to respiratory infections. The pediatrician also documented SP's concern with A's hyperactivity and self-injurious behaviors; SP wanted the child evaluated; the pediatrician referred A to "SAHCFCFAF" (acronym unknown) (Exhibit 2)
7. On January 20, 2012, the Department screened out allegations of physical abuse of A by the Appellant. On two (2) occasions, the report alleged that while in the doctor's office, the child stated that the Appellant pulled his ears. The Department noted that a month prior, the child

denied that the Appellant hit him, reporting he was sent to his room without toys for punishment. (Exhibit A, p.7)

8. On January 27, 2012, A's pediatrician saw him for his four (4) year old immunizations. (Exhibit 2)
9. On February 6, 2012, A's pediatrician saw him for a cough. (Exhibit 2)
10. On February 9, 2012, the Department screened out a 51A report alleging physical abuse of A by SP and neglect of F by SP. SP reportedly dropped A two (2) months prior, due to fatigue. Additionally, SP reportedly hit A with a belt. The Department determined that the non-mandated reporter's information was not current as she had not seen the family since December 2011 and the Department had addressed the reported concerns during the aforementioned 51A investigation. (Exhibit A, p.7)
11. On February 10, 2012, A's pediatrician saw him for a cough. (Exhibit 2)
12. On March 30, 2012, A's pediatrician saw him for a cough. (Exhibit 2)
13. On April 24, 2012, A's pediatrician saw him for abdominal pain, vomiting and diarrhea. (Exhibit 2)
14. On May 11, 2012, the Appellant signed a Release of Information authorizing A's pediatrician to release information to [REDACTED]. (Exhibit 1)
15. On June 9, 2012, A's pediatrician saw him for abdominal pain, vomiting and diarrhea. (Exhibit 2)
16. On June 19, 2012, A's pediatrician saw him for penis irritation when urinating. SP noted concern that MQ may have "done something to him" because they showered together. "Mother went for sexual abuse complaint and he was seen at the ER for it." (Exhibit 2) According to SP, after A told her that he took showers with MQ she addressed this with MQ who in turn "turned everything around on her and began making up lies about {FM}." (Exhibit 8, p.3; Testimony Appellant; Testimony SP) SP then terminated A's visitation with MQ. (Testimony SP)
17. On August 21, 2012, A's pediatrician saw him for a sore throat. (Exhibit 2)
18. On August 24, 2012, A's pediatrician saw him for sore throat, cough, stomach pain and headache. (Exhibit 2)
19. On September 27, 2012, the Department determined there to be no/minimal concern following an Initial Assessment of SP's responses to A's difficult behaviors. SP struggled with handling A's "challenging behaviors" which included biting and not listening. His challenging behaviors occurred at home and at school. At this time, the family received counseling services through [REDACTED]. A was diagnosed with ADHD;

Oppositional Defiant Disorder was being considered as a diagnosis. A's treatment provider noted that A "exhibit{ed} more behaviors after visiting with dad because he sees things at dad that {A} will exhibit." [Sic] (Exhibit A, p.6)

20. At that time, A visited with MQ every other weekend. MQ informed the Department that he had no concerns regarding SP parenting A. SP often contacted MQ to assist with disciplining A. (Exhibit A, p.6)
21. While having difficulty managing A's behaviors, the Department wrote that SP "sought out services to support her." A's treatment provider planned to increase services going forward. (Exhibit A, p.6; Exhibit 2) This Hearing Officer noted that during this period, A was routinely visible within the community and visited with MQ every other weekend. (Exhibit A, p.6; Exhibit 2)
22. On October 30, 2012, A's pediatrician saw him for his five (5) year well child visit. A's pediatrician noted that MQ was involved with the family; the pediatrician did not document any concerns or delays (Exhibit 2)
23. On December 3, 2012, the Department screened out the allegation of neglect of A by his paternal grandfather. A took money out of his grandfather's pocket; as punishment, the grandfather pulled down his own pants. (Exhibit A, p.6)
24. On January 17, 2013, SP brought A to see his pediatrician who documented the following concerns: hyperactivity, hitting, extreme defiance, aggressive behaviors (stabbed grandmother with a pencil two (2) weeks prior) no remorse, disrespectful, hyperkinetic, unable to control at home and school, declining grades, social difficulties interacting with peers and difficulty falling asleep. A's pediatrician diagnosed him with ADHD. A's pediatrician provided SP with a Parent Evaluation form and the [REDACTED] Evaluation form, to be returned in four (4) weeks' time. (Exhibit 2)
25. The Appellant submitted a video depicting A having a prolonged temper and significant tantrum, wherein he was shrieking, banging his head/hand, demanding his Legos during an in-home meeting with a community provider.³ (Exhibit 11) According to the Appellant, these behaviors were typical for A. The Appellant videoed A "because he was so aggressive and to protect" himself. (Testimony Appellant)
26. On February 4, 2013, the Department received a 51A report alleging sexual abuse of A by an unknown person. On February 26, 2013, the Department supported allegations of sexual abuse of A by an unknown person due to A's sexualized behavior in school and aggressive behaviors at home, which included hiding knives under his bed and "verbalizing cruel and violent acts." The Department referred the matter to the District Attorney's Office and to [REDACTED] for a trauma evaluation. The Department unsupported the allegation of neglect of A by SP as she may not have "grasped the severity of the situation as it was unfolding;" the Department cited to SP's brain injury. The Department noted that SP had been cooperative with services and A maintained consistent involvement in therapy at

³ While having no specific date, the recorded incident occurred prior to A residing with his father, MQ. (Testimony Appellant)

[REDACTED] From February 4, 2013 to November 2013, the Department maintained an open case with the Appellant, SP and A. (Exhibit A, pp.4-6; Exhibit B, pp.4-8; Exhibit C pp.4-8)

27. On February 28, 2013, the Department screened out allegations of physical abuse and neglect of A by the Appellant who reportedly hit A with a foam pipe and “forcibly” grabbed him by the arm in order to put him in time out. The Department noted concern that SP and the Appellant could not manage A’s behaviors. The Department wrote, “this child is out of control and services are now in place to try to help family manage him.” (Exhibit A, p.6)
28. On September 20, 2013, the Department unsupported allegations of physical abuse of A by SP. During A’s trauma evaluation A reported SP spanked him hard with a belt and he was unable to sit down all day. The Department noted that A was unable to provide details as to where and under what circumstances this reportedly took place. A denied to the DCF investigator that this occurred and denied that he made this statement. (Exhibit A, p.6; Exhibit 7, p.6)
29. On November 22, 2013, the Department closed its case with the Appellant, SP, A and F after MQ received sole legal and physical custody of A due to SP’s inability to manage A’s acting out behaviors. (Exhibit A, p.5; Exhibit B, p.4; Exhibit C, p.4)
30. Following the Probate Court awarding MQ custody of A, SP had supervised visitation “for a while” before “visitation was stopped.” (Exhibit D, p.3) According to MQ, when A visited with SP, “his behaviors would escalate, and he would struggle whenever he came home.” (Exhibit D, p.3) This Hearing Office noted that this contention mirrored a statement made by A’s prior therapist regarding A’s escalated behaviors when he returned from a visit with MQ. (See Finding #19).
31. According to MQ, sometime in 2013, A was hospitalized at [REDACTED] due to his sexualized behaviors and possible victimization, which had previously been investigated by the Department. Thereafter, on several occasions, A required inpatient hospitalization. His last hospitalization occurred sometime in 2015 when he was inpatient at [REDACTED] for three (3) weeks following an incident at school wherein he took off all his clothes and flipped over chairs. (Exhibit D, p.3)
32. Sometime in 2014, A was placed at the [REDACTED] as he struggled behaviorally and emotionally in his local school placement. (Exhibit B, p.3; Exhibit D, p.3)
33. On May 4, 2016, the Department listed A as a non-reported, out of the home child on an unsupported 51A report completed by the DCF Fall River Area Office. The Department unsupported allegations of neglect of F by SP. Professional and non-professional collateral contacts had no concerns for F’s care. (Exhibit A, p.5; Exhibit 7, p.6) According to the Appellant and SP, F did well in their care, indicative of a positive home environment. (Testimony Appellant; Testimony SP; Exhibit 9)
34. At the time of the 51B response, MQ reported that he had irregular contact with A while he

resided with SP. MQ reported that when he learned of A's concerning behaviors, he approached the Taunton Probate Court who awarded him custody of A. (Exhibit D, p.3) This contention however was inconsistent with the Department's aforementioned documentation that MQ visited with the child every other weekend; that SP frequently contacted MQ for assistance with A's behaviors; and A's pediatrician's documentation that MQ was regularly involved with A. (See Findings #19-21) Additionally, the Appellant testified that MQ lived close by; he would often be an hour late to pick up the child. The Appellant assisted with driving A to visit; MQ was reportedly frequently high. (Exhibit D, p.4; Testimony Appellant)

35. At the time of the 51A reports, the Appellant and SP had not seen A for two (2) years. (Exhibit D, p.3, p.4; Testimony Appellant; Testimony SP) According to SP, she planned to petition the Probate Court for visitation after she successfully completed counseling services. SP reported seeking counseling services due to her depression at not seeing A for two (2) years. (Testimony SP; Exhibit D, p.3)
36. On or about December 30, 2016, SP reportedly received a telephone call from MQ asking for their address as A wanted to send SP a gift; this was reportedly a ploy to obtain their in time address.⁴ Shortly thereafter, a 51A report was filed. (Testimony Appellant; Testimony SP; Exhibit 4)
37. At the time of the 51A reports, A had multiple community support services in place that included IHT, ICC, and family support services. According to MQ, for the year preceding the 51A reports, A reportedly had been doing well. MQ was "surprised that this was happening now, because they have had no concerns regarding any behaviors." (Exhibit D, p.3)
38. At the time of the 51A reports, A was in the 4th grade at the ██████████ and was doing well. A had made positive gains with his impulsivity and irritability. According to a staff member at the ██████████ "since opening up about his stepfather," A became more "irritable." (Exhibit D, p.3, p.11)
39. On January 13, 2017, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging sexual abuse of A by an unknown perpetrator. CQ found and viewed a ninety (90) second video on A's phone depicting A pulling down his pants and showing his buttocks to his cousin, S (hereinafter "S"). When S did the same to A, he stated, "No only I can do that." A then pulled down his pants further and asked S to touch his "privates." S stated "No gross." A replied that he would give S "chips or "ice cream" if she did it. A stated "Touch it. It feels fuzzy like a Teddy Bear." Due to the angle of the camera it was unclear whether S touched A's privates. At one point, S left the room. A went to the camera, started to smile and adjusted the camera; the video then ended. The 51A report indicated there were other times when A was caught on top of S. A stated that S hid a toy from him when questioned what he was doing; this was a noted behavior of S's.⁵ According to the mandated reporter, in 2012/2013 A participated in a forensic interview after a student saw A in the school bathroom putting his privates in the mouth of another student. The matter

⁴ The gift was reportedly a "cheap", \$7.00 purse. (Testimony Appellant; Testimony SP; Exhibit 4)

⁵ A 51A report on behalf of S was filed with ██████████ where S resided. (Exhibit A, p.3)

was reported to the authorities. The DCF Fall River Area Office conducted an investigation. (Exhibit A, p.3; Testimony RM) (See Finding #26)

40. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to AH, (hereinafter "AH"), Social Worker from the DCF Taunton Area. (Exhibit D; Testimony RM)
41. At the time of the 51A report, A was diagnosed with PTSD and Bipolar; A's psychiatrist prescribed him a mood stabilizer. The reporter did not know the outcome of the trauma evaluation completed by ██████████ program two and a half years prior to the 51A report. (Exhibit B, p.3; Testimony RM)
42. On January 19, 2017, the DCF Taunton Area Office received a second 51A report alleging physical abuse and possible sexual abuse of A by the Appellant and neglect by SP. A reported that when he resided with the Appellant and SP, the Appellant once told him that he would kill MQ and CQ and use their heads as teddy bears. The Appellant reportedly threw A against the wall, slapped his face, kicked A after putting A's hand and foot together in a handcuff, stuck his finger down his throat and hit SP in front of A. SP was reportedly present and did nothing. According to MQ and CQ, when A first came to live with them, A drew pictures of female genitalia and touched himself. (Exhibit B, p.3) The historical record was absent documentation of the latter contention. (Exhibit D)
43. The Appellant and SP denied that the Appellant was left alone or in the role of a caregiver for the child when A resided with them. The Appellant reported he worked to support the family for five (5) to seven (7) days per week. By the Appellant's admission, he did take the children out to eat. While SP functioned as the child's primary caregiver, the Appellant as the child's stepfather who resided in the home with the child and his mother was a caregiver pursuant to Departmental regulation 110 CMR 2.00 and DCF Protective Intake Policy #86-016, rev. 2/28/2016. (Testimony Appellant; Testimony SP; Exhibit D, p.11; Exhibit 8, p.3)
44. On January 19, 2017, the DCF Fall River Area Office received a 51A report alleging neglect of A's half-brother, F, by the Appellant and SP and possible sexual abuse of F by the Appellant based on the aforementioned allegations made by A as reported to the Taunton DCF Area Office. (Exhibit 7)
45. On January 23, 2017, the Appellant and SP presented at the DCF Fall River Area Office after receiving notification of the aforementioned 51A report. The Appellant was upset that a 51A report had been filed. The Appellant spoke of A's difficult and challenging behaviors when he resided with them. He reported that MQ "was always giving them a hard time" and did not help with the situation. The Appellant told SP that he did not want anything to do with A and he never should have lived with them. According to SP, she had not had visitation with A for two (2) years and MQ made "it difficult for her to stay in contact with {A} or provide her with any information." The DCF Fall River supervisor noted that throughout their conversation, the Appellant "was often loud in his speech and was upset by the Department's involvement. Although he became loud at times he was not inappropriate or threatening in any manner." F was noted to be clean and well dressed; his behaviors appeared to be age appropriate. (Exhibit 8, p.2)

46. During a subsequent home visit, the Department met individually with SP. According to SP, when A resided with them he was sent to his room or had something taken away for punishment. SP had no prior concerns of physical abuse and denied seeing marks on A when he resided with her and the Appellant. Additionally, SP denied domestic violence; she reported that she was free to do as she wanted and the Appellant exerted no control over her. During the subject 51A response, SP had been in counseling services for the preceding two (2) months for depression due to having no contact with A. (Exhibit 8, p.3)
47. On January 24, 2017, A informed AH that when he resided with the Appellant and SP four (4) to five (5) years prior, the Appellant hit him a lot on the arms and legs with a belt. The Appellant reportedly stuck his fingers down A's throat, locked him in his room and would not let him out. A did not feel safe with the Appellant and SP. (Exhibit D, p.4)
48. On February 1, 2017, during his forensic interview at the [REDACTED] A added the Appellant left marks on his arms and legs and hurt him "really bad." A reported on one (1) occasion, the Appellant took him by the shirt and threw him against the wall. The Appellant reportedly told him that he would stab a knife in his head and cut it off if he told anyone what happened. In addition to MQ and CQ being allowed to see his private parts if he had a rash, A also reported that his cousin, S, did once. The forensic interviewer re-directed A, and did not explore this further. (Exhibit D, p.7)
49. On February 6, 2017, the Taunton DCF Area Office received a third 51A report from a mandated reporter, alleging physical and sexual abuse of A by the Appellant, adding additional details to the initial 51A report. According to the child, when SP was not at home, the Appellant made him take off his pants and the Appellant touched the child's penis. Additionally, the Appellant reportedly took off his pants and made the child touch his penis. This reportedly occurred before and after A was four (4) years old. While unable to recall how many times this occurred, the child reported that it happened more than once. (Exhibit C, p.3)
50. On February 7, 2017, the DCF Fall River Area Office unsupported the allegations of neglect and possible sexual abuse of F. Involved community collaterals and SP's relatives had no protective concerns for F who was visible within the community and doing well. F did not disclose any abuse and reported that he felt safe with the Appellant and SP. (Exhibit 8, pp.6-7)
51. On February 10, 2017, the Appellant and SP arrived at the [REDACTED] unannounced and spoke with the assigned Detective "voluntarily." The Appellant and SP reported sending A to his room and taking away items as discipline techniques. The Appellant and SP denied all reported allegations. (Exhibit D, p.10, p.13; Testimony Appellant; Exhibit 10)
52. On February 17, 2017, at the conclusion of its investigation, the DCF Taunton Area Office supported physical and sexual abuse of A by the Appellant. (Exhibit D, p.13) The Department based this determination on the child's disclosure wherein he reported the following:

- When residing with the Appellant and SP in ██████████ the Appellant slapped him, threw him against the wall, stuck his fingers down his throat and hit him with a belt, which left marks.
- A's report to the mandated reporter and the forensic interviewer that the Appellant made him take off his pants and touched his "front private." Additionally, the Appellant made him look at naked pictures on the computer.
- The Department noted that the Appellant and SP laid blame on MQ and CQ for the disclosure. (Exhibit D, p. 4, p.7, p.13, Testimony RM)

53. The DCF Supervisor wrote, "{A} first began to exhibit sexualized behaviors four years ago. At that time, there was no disclosure made. It was also at that time {A} was hospitalized and his father obtained custody. {A} has consistently been in treatment and maintained the same therapist for 2.5 years. This is a safe and productive therapeutic relationship for {A}. A's therapist reports he is making progress and doing well. {A} had made clear and consistent disclosures to multiple professionals throughout the response." (Exhibit D, pp.13-14)

54. SP denied she ever had concerns regarding the Appellant's care or interaction with A; SP denied ever seeing marks or bruises on the child. (Exhibit 8, p.3) The Appellant repeatedly pointed out that A was visible within the community, including school, therapy, his pediatrician and father; there were no observations of marks or bruises on the child. (Testimony Appellant; Exhibit A, pp.4-6; Exhibit D)

55. The Appellant maintained that he ever "mistreated" A despite A being a "bad" kid. The Appellant denied there was a lock on A's bedroom door as reported by the child. The Appellant submitted a photograph of a folding door that did not lock which was reportedly on his bedroom. (Exhibit 3; Exhibit 11)

56. According to SP, she believed that MQ "put these things in A's head" as he and CQ were unable to have children of their own. (Testimony SP)

57. At the conclusion of the 51A response, the ██████████ did not plan to file criminal charges against the Appellant; the ██████████ deferred to the District Attorney's office. (Testimony RM; Exhibit D, p.10) An October 10, 2017 e-mail exchange between the District Attorney's Office and RM reflected the following: "...we did not criminally charge because the victim had a host of disabilities and would likely not withstand the rigors of criminal trial competency...it was not a credibility issues. He reported that {the Appellant} hit him with a belt and spatula...threw him into the floor and wall...stuck fingers in his throat...showed him pictures of naked people...touched his front private after taking his pants and underwear off...bio mom also hit him with a belt and her hand..." (Exhibit E; Testimony RM)

58. The Department "had no reason to doubt" A's credibility; (Testimony RM) the record however was absent specific inquiry of involved community service providers regarding this issue. Additionally, the record was absent information regarding A's affect/demeanor when speaking of the alleged abuse and/or corroboration thereof. (Exhibit D)

59. While the Department had "no reason to doubt" A's credibility, at the time of the subject 51A

investigation, SP had filed a new petition for custody of A. (Testimony RM)

60. While noting that the Department concluded that there was “reasonable cause to believe,” that A was sexually and physically abuse by the Appellant, I find that the evidence, when viewed and considered in its totality, was insufficient to determine that physical abuse and sexual abuse occurred. 110 CMR 2.00, 4.32 (Fair Hearing Record) (See Analysis)

Applicable Standards

A “support” finding of abuse or neglect means that 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) placed 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

A “caregiver” means a child’s (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child’s health or welfare; and (e) any other person entrusted with responsibility for a child’s health or welfare whether in the child’s home, a relative’s home, a school setting, a child care setting (including babysitting), a foster home, a group care facility, or any other comparable setting. As such, the term “caregiver” includes, but is not limited to school teachers, babysitters, school bus drivers and camp counselors. The “caregiver” definition should be construed broadly and inclusively to encompass any person who at the time in question is entrusted with a degree of responsibility for the child. This specifically includes a caregiver who is a child such as a babysitter under age 18. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Abuse” means (1) the non-accidental commission of any act by a caregiver which causes or creates a substantial risk of physical or emotional injury or sexual abuse to a child; or (2) the victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver. This definition is not dependent upon location. Abuse can occur while the child is in an out-of-home or in-home setting. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Physical injury” is defined as death; or fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or soft tissue swelling or skin bruising depending on such factors as the child’s age, circumstances under which the injury occurred, and the number and location of bruises. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Emotional Injury” is defined as: An impairment to or disorder of the intellectual or psychological capacity of a child as evidenced by an observable and substantial reduction in the child’s ability to function within a normal range of performance and behavior. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Substantial Risk of Injury” is defined as: 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. DCF Protective Intake Policy #86-015, rev.

2/28/16

“Sexual abuse” is any non-accidental commission of any act by a caregiver upon a child that constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caregiver and a child for whom the caregiver is responsible. 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 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)

“[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §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 §51B. Id. at 64; M.G.L. c. 119, §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 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 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 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/2016

Analysis

The Appellant argued that he was not in the role of a caregiver for A as he was never home as he worked full time. Due to the Appellant’s role as the child’s in home stepfather, the Appellant was deemed a caregiver for A. 110 CMR 2.00; DCF Protective Intake Policy #86-015, 2/28/16

The Appellant vehemently denied and contested the Department’s decision to support the allegations of physical abuse and sexual abuse. The Appellant contended that the relationship between assigned DCF Social Worker AH(P) as the daughter of a DCF employee SH, in

conjunction with CQ being a social worker, resulted in a prejudiced view against him. (Exhibit 5; Exhibit 6; Testimony Appellant) Barring the Appellant's speculation to this end, the record was absent sufficient evidence to support such a contention.

The Appellant and SP argued and maintained MQ and CQ influenced A's disclosures. Barring SP's contention that MQ and CQ were unable to have children fueling their influence on A, this contention was deemed plausible due to the timing of A's disclosures. One was left to ponder how and why A wanted to send SP a gift to December 2017, especially in light of the forthcoming allegations. Under this pretense, MQ contacted SP to obtain her in time address. This scenario of events was questionable following a (2) two year span of time wherein SP did not see A; per SP's contention, MQ did not facilitate visitation between SP and A. Additionally, SP planned to pursue recourse through the Probate Court to resume visitation with A. Shortly thereafter, on January 13, 2017, the Department received the first of several 51A reports regarding the Appellant and A.

By all accounts, the alleged physical and sexual abuse occurred prior to MQ obtaining Probate Court custody of A in November 2013. Up until this time, the Appellant, SP and A had intermittent involvement with the Department who unsupported/screened out all allegations of physical abuse by the Appellant and/or SP. In addition to DCF involvement following reported allegations of physical abuse, A was visible within his community. At that time, his pediatrician for a variety medical/emotional concerns saw A frequently; A received in home therapy; saw a psychiatrist and was in school. Of particular significance was MQ's in time report that he had no concerns for A despite seeing him every other week. Considering the magnitude of A's 2017 report of physical abuse, the record was absent any documentary evidence to indicate that marks or bruises were viewed on the child by any involved adult.

In December 2012, the Department received a 51A report wherein the child's grandfather pulled down his pants after the child took money from his pocket; the Department did not conduct an investigation regarding this reported incident. In February 2013, the Department supported sexual abuse of A by an unknown person due to his sexualized behaviors both at home and at school. Thereafter A completed a trauma evaluation; the record was absent information regarding the outcome/conclusion of said trauma evaluation. The record reflected that the Appellant and SP cooperated with the in time community services. As stated above, A was seen regularly by his pediatrician, with SP bringing A in to evaluate her concerns regarding his behaviors and upon learning that MQ showered with the child. Up until SP discontinued MQ's visitation following her concerns of he and A showering together, the record reflected that MQ saw A on a regular basis and communicated with SP regarding A's behaviors. MQ's 2017 representation that he had minimal involvement with A and learned of A's behaviors during his when he approached the Probate Court was not supported by the evidence.


The Court has determined that in making a decision that a report is supported, the Department must consider the entire record, including whatever in the record fairly detracts from the weight of the evidence supporting its conclusion. Amone v. Commissioner of the Department of Social Services, 43 Mass. App. Ct. 33, 34 (1997) In the instant case, the testimonial and documentary evidence submitted by the Appellant coupled with the DCF documented history was compelling and diminished A's credibility and raised concern for MQ's motivation.

“...When reviewing a support decision or an Alleged Perpetrator listing, the hearing officer may consider information available during the 51A response investigation and new information subsequently discovered or provided that would either support or detract from the Department's decision.” 110 CMR 10.21 (6) The evidence, when reviewed and considered in its entirety was insufficient to determine that the Appellant sexually or physically abused A. 110 CMR 2.00; 4.32


A Hearing Officer's decision must be supported by substantial evidence; there must be substantial evidence supporting the hearing officer's conclusion that the Department had reasonable cause to believe the Appellant committed the alleged abuse. Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006) The first regulatory standard required by the Department to support the reported allegations was whether there was “reasonable cause to believe” that the Appellant's actions constituted physical and/or sexual abuse. Considering all the evidence and the circumstances, the Department did not have reasonable cause to believe and the decision to support the allegation of physical abuse and sexual abuse was not in conformity with its regulations. A finding of support requires that there be: reasonable cause to believe that a child(ren) was abused and/or neglected; 110 CMR 2.00, 4.32 *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. As the evidence was insufficient to meet the Department's first regulatory standard, the second prong of its regulatory standard does not apply. DCF Protective Intake Policy #86-015, rev. 2/28/2016

Conclusion and Order

The Department's decision to support the 51A report of physical and sexual abuse on behalf of A by the Appellant is **REVERSED**.


Carmen Temme
Administrative Hearing Officer

6/7/18
Date


Darlene M. Tonucci, Esq.
Supervisor, Fair Hearing Unit

Date

Linda S. Spears
Commissioner