

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

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IN THE MATTER OF

MM #2017 0352

FAIR HEARING DECISION

Appellant, MM ("Appellant"), appeals the Department of Children and Families (hereinafter "DCF" or "the Department") decision to support an allegation of sexual abuse pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On February 16, 2017, the Department received a report which alleged sexual abuse of M by the Appellant, his father. The basis of the reporter's concern was M's disclosure to the reporter that the Appellant and three other men sexually abused him. The reporter provided a bulleted list of M's disclosures. The Department screened-in the report and conducted a response, which included a forensic interview of M. On March 17, 2017, the Department made the decision to support the allegation of sexual abuse of M by the Appellant. The Department notified the Appellant of its decision and his right to appeal.

Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. A hearing was held at DCF Holyoke Area Office on May 18, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; DCF Response Worker IC; DCF Ongoing Social Worker (OGSW) TS; Jennifer Thorn, Attorney for Appellant; MM, Appellant.

In accordance with 110 CMR 10.03, the Administrative Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement or bias in this case.

The Fair Hearing was digitally recorded and transferred to one (1) Compact Disc. The witnesses were sworn in to testify under oath.

The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply; only evidence which is relevant and material may be

admitted and may form the basis of the decision. 110 CMR 10.21

The following evidence was entered into the record:

For the Department:

- Exhibit A: 51A Report of February 16, 2017
Exhibit B: 51B Report completed on March 17, 2017 by IC

For the Appellant(s):

- Exhibit 1: Judgment of Dismissal, February 24, 2017, Probate & Family Court [REDACTED]
Exhibit 2: Court Order of April 7, 2017, Probate & Family Court [REDACTED]
Exhibit 3: 3A: 51A of February 16, 2017, Unredacted Copy
3B: 51B completed on March 17, 2017 by IC, Unredacted Copy, sections underlined by Appellant
Exhibit 4: Transcript of Testimony Provided by [REDACTED] and [REDACTED] on January 23, 2017 in Probate & Family Court, [REDACTED]

Issue to be Decided

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record, 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) 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. 110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16

Findings of Fact

1. The Appellant is M's father. M's mother is AA. At the time of the report in question, M was four (4) years old. The Appellant and AA are from [REDACTED]; they immigrated to [REDACTED] where M was born. (Exhibit A; Exhibit 1)
2. In September 2012, four months after M's birth, the Appellant divorced AA. The Appellant visited with M Wednesday through Saturdays every other week; the schedule based on his work week. The Appellant and AA communicated via text

messages regarding M's care. (Exhibit 1)

3. The Appellant was M's caregiver under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00
4. The Appellant is a medical doctor employed at [REDACTED] Hospital in [REDACTED]. AA is a pharmacist; however, was not licensed or certified to practice in [REDACTED] at the time of the report in question. The Appellant and AA speak [REDACTED]. M is bilingual in [REDACTED] (Exhibit 1; Testimony of IC)
5. In September 2015, the Appellant and AA were embroiled in a contested Probate Court trial regarding M's custody. In an Amended Judgment of Modification, the court provided for continued shared legal custody of M. (Exhibit 1; Testimony of Appellant)
6. Prior to the report in question, the Appellant was involved with the Department. On August 21, 2016 and August 22, 2016, the Department received 51A reports which alleged sexual abuse of M by the Appellant. The reports coincided with an ongoing Probate Court dispute over M's enrollment in private school ([REDACTED]). The Department conducted a response and supported the allegations. AA obtained an Abuse Prevention Order on M's behalf. AA withdrew M from [REDACTED] without the Appellant's knowledge or consent. (Exhibit A; Exhibit 2; Testimony of IC and Appellant)
7. As a basis for the Abuse Prevention Order, AA provided the following information to the Probate Court (Exhibit 1; Exhibit 4, p. 7-23):
 - a) That on Tuesday August 16, 2016, M disclosed to her that the Appellant licked his penis and demonstrated by licking his teeth and tongue;
 - b) That because M was scheduled to visit the Appellant for five days beginning on Wednesday August, 17, 2016, she called the Appellant and told him M was sick;
 - c) That M started his visit with the Appellant on Thursday August 18, 2016;
 - d) On Saturday August 20, she asked the Appellant to return M on Saturday so she could go to the park with friends, which the Appellant did;
 - e) That after his visit with the Appellant, M acted strangely, and while at the park he spat on AA, hid behind trees, slapped one of the other parents and AA separated him from the group. M told AA he was tired and she observed him "walking like a penguin";
 - f) M refused to interact with other children during the visit to the park;
 - g) On August 21, 2016, AA phoned her father, who is a physician, regarding M's behavior. AA stated her father told her to check M's anus. AA checked M's anus and stated what she saw was "horrible". AA described other behavior by M, that included crying hysterically at home that night and that she took a picture of M's anus. (Testimony of IC)

8. On Saturday August 20, 2016, AA took M to the [REDACTED] Police and recounted events between August 16 and August 20, 2016. AA was told to go to the [REDACTED] Police, where on August 21, 2016, an on-call judge issued an emergency restraining order. On Sunday August 21, 2016 AA took M to [REDACTED] where he was examined in the Emergency Department by [REDACTED] MD. (Exhibit A, p. 4; Exhibit 1; Exhibit 4, p. 7-23)
9. Dr. [REDACTED] examined M's anus and did not find anything unusual on her examination.¹ Later that day, AA phoned the [REDACTED] Social Worker and told her that M disclosed that "[the Appellant] had a mask on his penis and to put his penis in his anus (sic)". (Exhibit 1; Exhibit 4)
10. Between August 11 and August 20, 2016, MM and the Appellant exchanged text messages regarding M in which they argued over M's enrollment at [REDACTED] AA disagreed about M attending [REDACTED]. In the messages, AA did not mention M's behavior. (Exhibit 1; Exhibit B and 3B, p. 8; Testimony of IC)
11. On August 21, 2016 and August 22, 2016, the Department received two (2) reports which alleged sexual abuse of M by the Appellant; the Department screened-in the reports and conducted a response. (Exhibits A and 3A, p. 9; Testimony of IC)
12. On August 23, 2016, Dr. [REDACTED] examined M. Dr. [REDACTED] found no "independent, objective evidence of abuse". While he did not find any physical evidence of trauma or abuse, based upon information provided by AA and M's disclosure that the Appellant licked him, Dr. [REDACTED] concluded that there was "a strong historical basis to be highly concerned about sexual abuse". The Department supported the allegation of sexual abuse. (Exhibit A and 3A, p. 8; Exhibit 1, p. 26, Lines 17-20)
13. During Dr. [REDACTED] examination, she spoke with AA. The conversations with AA occurred within earshot of M. AA was a direct source of information for the physicians. (Exhibit 4, pp. 38, 39 and Direct Examination of [REDACTED] H [REDACTED], pp. 7, 8)
14. The Department's decision to support the August 2016 allegations was appealed through the Department's Fair Hearing process; the decision remained pending at the time of instant hearing.
15. Between August 16, 2016 and February 27, 2017, the Appellant had no contact with M as result of the active Abuse Prevention Order. (Exhibit 1; Exhibit 2; Testimony of Appellant)
16. Following the Department's August 2016 decision, M started therapy with therapist SF. SF's clinical assessment is contradictory. SF told DCF Response Worker IC that

¹ According to the transcript of Dr. [REDACTED] testimony in Probate Court, she entered a diagnosis of "sexual assault" which was the only code available for medical coding/billing, but that she did not determine M was sexually assaulted. (Exhibit 4)

during therapy, M made “bizarre and fantastic disclosures making it hard to discern what is fact and not”, but also stated that M was “very consistent with identifying that his father [is] kicking, threatening and hurting him” and that she did not believe M was coached. (Exhibit 3B, p. 3; Testimony of IC)

17. On September 29, 2016, October 3, 2016, and November 2, 2016, the Department received 51A reports which alleged sexual abuse of M by the Appellant. The Department screened-out the reports. In November 2, 2016, the Appellant filed a complaint for contempt which alleged that AA violated the [2015] Probate Court order when she unilaterally removed M from [REDACTED]. On December 8, 2016, a 51A report was filed which alleged neglect of M by the Appellant. The Department screened-out the report. AA filed the September 29th, October 3rd, November 2nd and December 8th 51A reports. (Exhibit B, p. 1; Exhibit 1; Testimony of Appellant)
18. On January 23, 2017, the Appellant appeared at an evidentiary hearing in Probate Court on his Motion to Vacate the Abuse Prevention Order and Motion of Contempt. Following the hearing, the Presiding Justice made comprehensive Findings of Fact. On February 24, 2017, the Presiding Justice issued a Judgment of Dismissal of the Appellant’s Motion of Contempt and ordered sua sponte for the parties to work with M’s therapist to “reintegrate [the Appellant] into contact and visitation with M”. (Exhibit 1)
19. In his Findings of Fact, the Presiding Justice addressed AA’s credibility, and found her not credible. After review and consideration of the facts derived from the evidentiary hearing, the Presiding Justice did not find M’s disclosures of sexual abuse credible. (Exhibit 1, Paragraphs 33, 35, 36, 37)
20. On February 16, 2017, prior to the issuance of the Probate Court decision and order, AA and her sister went to the DCF Holyoke Area Office where they filed a report that alleged sexual abuse of M by the Appellant. AA and her sister provided a list of 17 statements which they alleged M disclosed without any specific time or date. (Exhibit A and 3A; Testimony of IC)
21. Included among M’s statements were disclosures of sexual abuse of M by three other men, all of whom were the Appellant’s colleagues and physical abuse of M by ArA, another of the Appellant’s colleagues. (Exhibit A and 3A; Testimony of IC)
22. Based on AA and M’s statements that other adults were involved, the Department filed reports with the [REDACTED] and the DCF Springfield Area Office. (Exhibit B3, pp. 5, 6; Testimony of IC)
23. The Department screened-in the February 16, 2017 report and conducted a response. On March 6, 2017, M participated in a multi-disciplinary forensic interview. The interview was conducted with the assistance of an [REDACTED] interpreter. M did not reiterate or corroborate allegations made regarding the other adults mentioned by AA.

M stated the following (Exhibits A, 3A, B and 3B):

- a) That the Appellant "used to put his tongue on my pee-pee" and described that the Appellant "put it in his mouth and rolled it around" and "at first he used to put in mouth and water would go inside (sic)". M described the "water" was yellow;
 - b) That the Appellant's friend "A" licked M's penis;
 - c) When asked if touched anywhere else, he responded "put shot in poop". M repeatedly told the forensic interviewer that there was "a shot in his behind" and that it came from a penis and went to his behind. Then, that the "shot" was from Walmart;
 - d) That "there is condom on other pee-pee" (Testimony of IC)
 - e) M talked about other children being present when these things happened in the Appellant's basement.
24. The DCF Response Worker determined that M did not make any statements regarding the other adults AA included in the 51A report and where M made statements about one of the Appellant's colleagues ("A"), he was "vague". The Response Worker developed the impression that AA made statements that contradicted what was known to be true, including that AA continued to report that M's anus was "disrupted" without any evidence that it was. (Exhibit 3B; Testimony of IC)
25. On March 7, 2017, AA attempted to obtain a new Abuse Prevention Order on M's behalf. The order was denied. The Probate Court Justice, before whom AA had already appeared multiple times, denied the order and set a date for a hearing. AA told the DCF Response Worker the judge "was upset with her" and did not grant the order but scheduled a hearing instead. (Exhibit 3B, pp. 3, 6)
26. The DCF Response Worker and her Supervisor visited AA and M at AA's home. During the visit, AA told the Department workers that A "had been exhibiting sexualized behaviors, such as grabbing and squeezing his testicles and putting his finger in his rectum". During the visit, M spontaneously stated he "gets in trouble at dad's...my dad hurts me...he put mask on my penis²." (Exhibit 3B, p. 7; Exhibit A, p. 4, Item #5)
27. The Department met with the Appellant at his home. The Appellant denied the allegations and raised concern that AA and her family conspired against him. At the time, under advice of his Attorney, the Appellant did not offer any additional information. The Appellant's testimony at the hearing is consistent with his statements to the DCF Response Worker particularly as it regards the Probate dispute, AA's withdrawal of M from [REDACTED] AA's misuse of the money the Appellant had directed to M's tuition and the onset of disclosures by M which precipitated the Department's involvement.³ (Exhibit 3B, pp. 8-10; Exhibit Testimony

² IC testified that M made this statement following the exam with Dr. [REDACTED] that M had talked about a "mask on his penis" and in his own words called it a "condom" in [REDACTED] (see Exhibit 3A, p. 4, Item #5)

³ Here, the Appellant referred to AA's diversion of money provided for M's care and support to her family

of Appellant and IC)

28. The Department spoke with LP, a social worker at [REDACTED] LP is a veteran [REDACTED] social worker who worked with Dr. B [REDACTED] AA attended a group at the [REDACTED] facilitated by LP. LP observed that stories provided by AA are "so fantastical" and that AA insisted M was "extremely frightened and anxious" yet M "always appears to be happy and thoughtful". Contrary to statements by M's former therapist SF, LP did not see emotional and behavioral signs of trauma and expressed concern that AA was paranoid. (Exhibit 3B, p. 9; Testimony of IC and TS)
29. On March 13, 2017, the Department supported the allegation of sexual abuse of M by the Appellant. The basis for the Department's decision was M's consistent disclosure since August 2016 that the Appellant [licked his penis].⁴ (Exhibit 3B, p. 10; Testimony of IC)
30. Allegations of abuse against other adults were not supported by the Department or any other involved agency. (Testimony of IC)
31. During the response, AA added new disclosures purportedly made by M and stated M exhibited sexualized behavior which she attributed to sexual abuse by the Appellant. AA's statements that M was sexually abused by the Appellant, or that M disclosed sexual abuse by the Appellant and others, were not corroborated by any independent evidence and therefore AA's statements are not reliable. (Exhibit 3B, pp. 2,3 and 7; Covell v. Department of Social Services, 439 Mass. 766, 786-787 [2003]; Testimony of IC)
32. Regarding M's statements, the mere repetition of a statement by a child does not render it trustworthy. In cases where sexual abuse is alleged, the statements of very young children require independent corroboration. Edward E. v. Department of Social Services, 42 Mass.App.Ct. 478, 480 (1997); Care and Protection of Rebecca & another, 419 Mass. 67, 643 N.E.2d 26)
33. In the instant case, the Department gave significant weight to AA's statements that M made disclosures, despite evidence that suggested AA was motivated to make false allegations and repeatedly filed reports of abuse. AA's motivation to make false allegations and the timing of her reports to the Department must be considered. Covell v. Department of Social Services, 439 Mass. 766, 786-787 (2003)
34. Allegations regarding the other adults mentioned in the February 2017 51A report were not supported. IC spoke with the DCF Response Worker CE who investigated the related 51A reports. During her investigation CE discovered that at least one of

instead actions as "haram" or wrongful.

⁴ IC testified that the only consistent disclosure by M was that the Appellant licked his penis. Regarding the Department's decision, IC testified that it was only necessary to have reasonable cause to believe that something happened to M and the Department did not need "pure facts" to support the allegation.

the parties she interviewed did not know anyone named M. (Exhibit 3B, p. 6; Testimony of IC)

35. Following the completion of the response, IC appeared in Probate Court where she testified on April 7, 2017 relative to AA's petition for a new Abuse Prevention Order. During that hearing, IC learned that many of the statements made by AA were inaccurate, including that Dr. [REDACTED] found signs of abuse and that the Appellant could not have made statements to M since the Appellant had no contact with M after August 2016. (Exhibit 2; Testimony of IC)
36. The Appellant submitted documentary evidence at the Fair Hearing that included unredacted 51A and 51B reports (Exhibits 3A and 3B). The same reports submitted by the Department (Exhibits A and B) were improperly redacted to the extent that M's statements outside of the forensic interview and AA's statements were omitted in totality. I relied upon the unredacted copies of the reports submitted by the Appellant. The Appellant also submitted new documentation that was not available to the Department during the response, which included Probate Court transcripts from hearings that the Department participated in or later became aware of. In reaching a decision in the instant matter, I considered new information presented at the Hearing that was not available during the investigation. (see 110 CMR 10.21[6]; Exhibits A, B, 3A and 3B; Testimony of IC and TS)
37. Following the Department's decision, AA and M received supportive services from the Department. Ongoing Social Worker TD testified at the hearing regarding his involvement with the family. TD expressed concern that M's statements were coached by AA and that if M talked about "sexually inappropriate" topics, that M smiled and looked at AA after he said things. With advice of counsel, AA refused the Department's request to undergo psychological testing. The Department was concerned about M's exposure to AA's emotional breakdown. (Testimony of TS)
38. After a review of all the evidence and for the following reasons, I find the Department did not have sufficient evidence to support an allegation of sexual abuse of M by the Appellant:
 - a) Between August 16, 2016 and February 27, 2017, the Appellant had no contact with M as result of an active Abuse Prevention Order (Exhibit 1; Exhibit 2; Testimony of Appellant);
 - b) The Department's decision in the instant case relied upon M's unreliable statements;
 - c) The Department gave weight to AA's statements, which are deemed not credible;
 - d) The Department's decision was not made with a reasonable clinical basis (110 CMR 10.05 and 10.23);
 - e) The Department lacked credible evidence to support a decision that the Appellant sexually abused M under Department regulations and applicable policies. (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015,

rev. 2/28/16)

Applicable Standards

To “support” a report of abuse or neglect, the Department must have reasonable cause to believe that an incident of abuse or neglect by a caregiver occurred 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 2.00 and 4.32; 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.” Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caregiver; 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

“Abuse” means the non-accidental commission of any act by a caretaker upon a child under age 18, which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the law of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. 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

Analysis

The Appellant was M’s caregiver under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00 and 4.32

The Department supported an allegation of sexual abuse of M by the Appellant. The basis for the Department’s decision was M’s consistent disclosure since August 2016 that the Appellant [licked his penis].” DCF Protective Intake Policy #86-015, rev. 2/28/16; 110

CMR 2.00 and 4.32

The Appellant, through his Attorney, argued that the Department's decision was not reasonable or supported by substantial evidence.

First, with respect to the Department's assertion that there was sufficient evidence to support its decision, and that the evidence need only support reasonable cause to believe that "something" may have happened, this Hearing Officer notes that the court has determined there is "no abstract quantum of evidence that satisfies the "substantial evidence" test in all circumstances" and that which constitutes "substantial evidence" varies with the importance of the decision involved. (See Covell v. Department of Social Services, 54 Mass.App.Ct.805, 768 N.E.2d 564 [2002]) and where the consequences of a supported allegation of sexual abuse are concerned, the court has determined that such a decision "needs to rest on something more solid than exclusively hearsay". Arnone v. Commissioner of the Department of Social Services, 43 Mass. App.Ct. 33, 680 N.E.2d 945; MGL c. 30A, § 1(6); 110 CMR 10.05

This Hearing Officer is obliged to consider the entire administrative record, including evidence that supports and detracts from the allegations. In the instant case, the Department received a report which alleged sexual abuse of M and other children by the Appellant and other men. The basis of the report was statements purportedly made to AA and or her sister by M and reflected in a detailed list AA provided to the Department. Of 17 specific and wide-ranging descriptions of abuse, including drugging of children, sodomy, oral sex and physical abuse, M consistently repeated only one statement consistently – that the Appellant "licked his pee-pee." When he was evaluated by medical professionals, including a pediatric specialist in child abuse, there was no physical evidence of abuse, sexual or physical. In the instant case, the Department relied upon AA's claim that M disclosed sexual abuse to medical professionals, without regard to possible motivation to paint the Appellant in bad light.

During the Department's February 2017 response, the Department was not fully aware of inconsistencies in AA's statements and contradictions of what was known to be true. The Department later obtained information that tended to suggest AA was not reliable and retrospectively, testified that the information would have been considered if known at the time. After careful consideration of all the evidence, this Hearing Officer found AA unreliable and did not credit her statements. With respect to M, this Hearing Officer carefully reviewed the evidence. Given AA's manipulation of facts, concern that AA may have influenced M's statements and because of M's very young age, this Hearing Officer searched for evidence to corroborate M's hearsay statements and found there was insufficient evidence to support that the Appellant sexually abused M, noting that under the same set of facts, the Department unsupported allegations of abuse by other adults. For these reasons and those enumerated in the above Findings of Fact, this Hearing Officer has determined the Department's decision was not made with a reasonable clinical basis or supported by substantial evidence. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); also see Wilson v. Department of Social Services, 65 Mass. App.Ct. 739, 843 N.E.2d 691

Conclusion and Order

Appellant has shown by a preponderance of the evidence that the Department's decision to support an allegation of sexual abuse of M by the Appellant was not in conformity with Department regulations; therefore, the Department's decision is REVERSED.

5-17-18
Date

Maura E. Bradford
Maura E. Bradford
Administrative Hearing Officer

Susan Diamantopoulos
Susan Diamantopoulos
Fair Hearing supervisor

Date

Linda S. Spears
Commissioner