

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF SOCIAL SERVICES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111

Linda S. Spears
Commissioner

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IN THE MATTER OF

EC FH #2017-0353

FAIR HEARING DECISION

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

Procedural History

On March 9, 2017, the Department received a 51A report alleging neglect and physical abuse of S and P by their mother, EC. The Department conducted an emergency response and on March 15, 2017, the Department made the decision to support the allegations of neglect of the subject children by the Appellant. The Department notified EC (EC or "Appellant") of its decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR §10.06. The hearing was held on May 25, 2017, at the DCF South Central Area Office in Whitinsville, MA. All parties were sworn in to testify under oath. The record remained open until June 9, 2017 to allow both parties an opportunity to submit any additional documentary evidence.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira
EK
CG
EHP
EC

Administrative Hearing Officer
DCF Supervisor
DCF Response Worker (Observing)
DCF Response Worker
Appellant

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 Department regulations 110 CMR §10.26.

The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

- Exhibit A Child Abuse/Neglect Report -- dated 03/09/17
- Exhibit B Child Abuse/Neglect Emergency Response completed 03/15/17

For the Appellant:

- Exhibit 1 Term 3 Progress Report (Subject Child "S")
- Exhibit 2 Character Reference

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

Issues to be Decided

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record as a whole, and on the information available at the time of and subsequent to the response, the Department's decision or procedural action, in supporting the 51A report, violated applicable statutory or regulatory requirements, or the Department's policies or procedures, and resulted in substantial prejudice to the Appellant. If there is no applicable statute, policy, regulation or procedure, the issue is whether the Department failed to act with a reasonable basis or in a reasonable manner, which resulted in substantial prejudice to the Appellant. For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issues are whether there was reasonable cause to believe that a child had been abused or neglected; and, whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being, or the person was responsible for the child being a victim of sexual exploitation or human trafficking. *DCF Protective Intake Policy #86-015, Rev. 2/28/16; 110 CMR §10.05*

Findings of Fact

On the basis of the evidence, I make the following factual findings:

1. At the time of the 51A report, S was twelve years old and P was ten years old. They both resided with the Appellant in [REDACTED]. Their father, MC, resided out of the home and lived in [REDACTED]. The subject children had a visiting arrangement with their father. (Exhibit A; Exhibit B)
2. The Appellant is the mother of the subject children; therefore she was deemed to be a "caregiver" pursuant to Department policy and regulation. 110 CMR §2.00; *DCF Protective Intake Policy #86-015, rev. 2/28/16*

3. The family did not have any previous history with the Department. (Exhibit A, p. 5)
4. On March 9, 2017, the Department of Children and Families received a 51A report from a reporter alleging neglect and physical abuse of the subject children by the Appellant. According to reporter, the subject child, S, sustained injuries to her left ear lobe, jaw, chest and elbow after a physical confrontation with her mother. Allegedly, the Appellant would not allow S to get her snacks and lunch for school. The Appellant also changed the code on the garage door, which prevented her from getting into the home. The other subject child, P witnessed the incident and S reported that the Appellant also hits him. S further disclosed that the Appellant had locked her out of the home before during the winter while she was wearing shorts and a t-shirt. Following the allegation, the Department made a discretionary D.A. referral. (Exhibit A, pp. 2, 3 and 6)
5. The report was screened in and assigned for an emergency response, pursuant to M.G.L. c. 119, § 51B. The allegation for the neglect of the subject children by the Appellant was supported on March 15, 2017. The allegation of neglect was supported because the Department determined that it had reasonable cause to believe that the Appellant made hurtful statements to S, including threatening to cut her hair, which escalated into an altercation. The Appellant also changed the garage door code and told S that she was no longer welcome in her home. These intense arguments were witnessed by P. The Department determined that these actions negatively impacted the subject children's emotional stability and growth. The allegation that the children were physically abused was not supported by the Department. (Exhibit B, pp. 9-10; Testimony of the DCF Response Worker)
6. The Department confirmed with the mandated reporter that S disclosed that P gets hit by the Appellant as a form of punishment and that S tries to protect him. The reporter also alleged that P disclosed that S had an active role in the reported incident, disclosing that S and the Appellant struggled over a phone and that the Appellant threatened to cut S's hair as consequence. He related that he did see scissors on the table and that the Appellant was pushed by S. The subject child P did try to intervene but was pushed by his sister, S. (Exhibit B, p. 3)
7. According to MC, S was not allowed back to school until she was medically cleared due to the observed injuries. The school nurse had concerns that S had a concussion and that her elbow needed to be looked at. (Exhibit B, p. 4)
8. When interviewed, MC related that he shared joint legal custody of the subject children with the Appellant and that the Appellant had physical custody of the children. The incident occurred while the child was preparing to go out for basketball banquet with her parents, who are separated. (Exhibit B, p. 4, Testimony of the Appellant; Testimony of the Response Worker)
9. The subject child, S disclosed to the Response Worker that she injured her head by hitting her head on the wall during the incident. She was observed to have an

- "egg" on her forehead while waiting to be examined by a pediatrician. The child, S, acknowledged that she was angry at the Appellant over doing her hair and that she reacted by hitting her head against the wall out of anger but had never injured it like she did during this incident. (Exhibit B, pp. 4-5)
10. S further disclosed that the incident revolved around when she had straightened out her hair as she prepared to go to a basketball banquet. The subject child disclosed that the Appellant became angry because S had not taken a shower and had not used hair product, causing an altercation. (Exhibit B, p. 5)
 11. The subject child related that the Appellant pulled hair while she tried to get away from the Appellant as she wanted to cut the hair of the child, S, as she did not want to get into the shower. (Id.)
 12. The subject child, S, was diagnosed with a contusion to the elbow but no concussion. (Id.)
 13. MC disclosed that he was concerned that he was concerned about the "emotional abuse" that the children receive from the Appellant, relating that she plays "mind games." He recalled having his clothes thrown out of the home before their divorce as he was in transition of moving out of the home. (Id.)
 14. When interviewed, the Appellant related that S had banged her head before in the past when angry. She also acknowledged that she said she was going to cut her hair because hygiene has been an issue with S, relating that she had called S while she was preparing for the basketball banquet, and that she needed to wash her hair and use the hair product to prevent breaking as she often complains of this when the hair dried. She related that she was going to cut three inches. (Exhibit B, p. 6)
 15. According to the Appellant, both she and S were in the bathroom and S was arguing with her and using profanities. The Appellant proceeded to leave and went into her bedroom and S followed, opening the door and hitting her in the face with a pillow. She tried to take her cell phone as form of discipline, which escalated into a struggle. She denied punching S or pulling her hair but acknowledged that P was present and was supporting the Appellant's actions and tried to intervene. (Exhibit B, p. 6; Testimony of the Appellant)
 16. The Appellant further related that S banged her head four times on the wall and both she and her son, P, tried to stop her. She related that S was full of rage and attributed her menstrual cycle to her dysregulated behavior. (Exhibit B, p. 7)
 17. The subject child, S, was engaged in psychotherapy to address her issues and the outcome of her divorce from the subject children's father. (Id.)
 18. The Appellant acknowledged having changed the garage door code in the past because the code needed to be changed. However, the children were aware of an extra key hidden outside that they could use to gain entry to the house. (Exhibit B, p. 7; Testimony of the Appellant)

19. The Appellant also acknowledged being angry at S and that S does not know how to let go and follows her yelling obscenities. She related that she wanted to leave the home, so she threw S's clothes in a main area of the floor and that she had tipped the child's mattress over out of anger for S having broken her bedroom door during the altercation. The Appellant related that S's room is often in disarray and denied ever hitting P or S but related that she did kick her once in the past as a response for being kicked by S. (*Id.*)
20. The subject child, S was excelling academically when the incident occurred with near perfect attendance. The Appellant was described as great parent, transitioning from a divorce and providing for the needs of her children. S was described as a child with significant behavioral problems and challenging, which the Appellant has made efforts to address. (Exhibit 1; Exhibit 2)
21. It is uncontested that EC and S engaged in an altercation following the Appellant's attempt to discipline and redirect the subject child's behavior. Additionally, S has a history of challenging behavior and has assaulted her mother, the Appellant, in the past. There is no indication that either child was significantly impacted by this incident. Subsequently, I find that the Department has failed to demonstrate how the Appellant neglected the subject children in this instant matter, pursuant to the Department regulation and policy. 110 CMR §2.00; *DCF Protective Intake Policy #86-015 Rev. 2/28/16.*
22. I find that there is no substantial evidence that the Appellant placed the subject children in danger or posed substantial risk to their safety through their actions. *DCF Protective Intake Policy #86-015 Rev. 2/28/16.*
23. Therefore, the Department's decision to support the allegation of neglect was not made in conformity with its policies and regulations. 110 CMR §2.00, 110 CMR §4.32, *DCF Protective Intake Policy #86-015 Rev. 2/28/16.*

Applicable Standards

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)

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. Care and Protection of Robert, 408 Mass. 52, 63-64 (1990). "[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A. *Id.* at 63. 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.

Caregiver

- (1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
- (2) Any person entrusted with responsibility for a child's health or welfare, whether in the child's home, 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. *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

Neglect is failure by a caregiver, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; malnutrition; or a failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. (*Id.*)

To Support a finding means:

- There is reasonable cause to believe that child(ren) was abused and/or neglected; and
- The actions or inactions by the parent(s)/caregiver(s) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being . . . (*Id.*)

Danger is a condition in which a caregiver's actions or behaviors have resulted in harm to a child or may result in harm to a child in the immediate future. (*Id.*)

A Substantiated Concern means:

- There is reasonable cause to believe that the child was neglected; and
- The actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the children(ren)'s safety or well-being. (*Id.*)

A Fair Hearing shall address (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party; . . . In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 CMR §10.05

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; or (e) if the challenged decision is a listing on the alleged perpetrators list, that there is not substantial evidence indicating the person is responsible for the abuse or neglect of a child. 110 CMR §10.23

Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion". M.G.L. c. 30A, §1(6)

Analysis

It is undisputed that the Appellant was a "caregiver" pursuant to Departmental regulation. 110 CMR §2.00; *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

The Appellant denied and disputed the supported finding that she neglected the subject children. She argued that in this instant matter, she was trying to manage a challenging child with a history of difficult behaviors, including opposition and defiance. The Appellant argued that S was the person who instigated the altercation due to her escalating behavior when she was trying to help prepare her for an event. The subject child acknowledged that she is the one who hit her own head against the wall and evidence suggests that she has done it before. (Fair Hearing Record) Both children have experienced difficulties since their parents divorced and S has required counseling to address her behavior since her parents separated. The Appellant further argued and acknowledged that she was angry and frustrated with S, who had threatened to leave and did leave, staying with her father during the course of the Department's emergency response. She did not deny tipping her daughter's mattress over or throwing her clothes and acknowledged that she could have done things differently when reacting to S's oppositional behavior. Finally, the Appellant further argued and showed that S is an excellent student, very involved socially in her school through sports and peer network. No protective concerns were expressed but S's difficult behavior was noted through documentary evidence. I find the Appellant's argument to be persuasive.

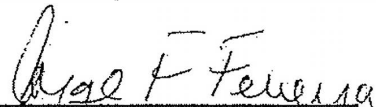
Considering the entirety of the record in this case, I find that the Appellant has provided minimally adequate care and supervision of the subject children and has kept them safe. While it was reasonable for the Department to be concerned about the emotional impact of the argument and altercation between the Appellant and S had on both children, there is no evidence that it placed them in immediate danger or posed substantial risk to their

safety during the arguments.¹ While this Hearing Officer finds the Appellant's reaction to S's behavior to be inappropriate; i.e. throwing her clothes on the floor, tipping her mattress, it hardly fits the definition of neglect. (*See definition of neglect*) The evidence also shows the Appellant has made attempts to help S with behavioral difficulties, arranging for counseling prior to the Department's intervention. There is no indication of any impact to the subject child P, who was cited to have identified S as the source of the altercation and past documents of him being the victim of S's rage as well. (Fair Hearing Record) The Appellant has shown by a preponderance of the evidence that the Department failed to comply with its regulations and policy when it made a finding to support the allegations of neglect.

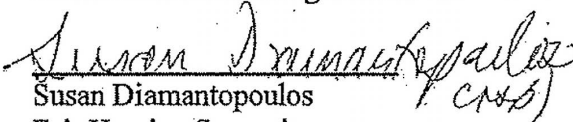
In determining whether the Department had reasonable cause to support a finding of neglect by Appellant, the Hearing Officer must apply the facts, as they occurred, to the definition of neglect as defined by Departmental regulation; new information presented at the Hearing, if not available during the investigation, can be considered as well. 110 CMR §2.00 and §10.06

Conclusion and Order

The Department's decision to support the 51A report of neglect of the subject children by the Appellant was not made in conformity with Department regulations and with a reasonable basis and therefore, is **REVERSED**.



Jorge F. Ferreira (CRS)
Administrative Hearing Officer



Susan Diamantopoulos (CRS)
Fair Hearing Supervisor

5-17-18
Date

Date

Linda S. Spears
Commissioner

¹ Such evidence, that the children were in danger or the Appellants' actions posed a substantial risk to the child's safety or well-being would be necessary for the Department to support the allegations, as opposed to the Department making a finding of "concern" which would also require that the children were neglected, but that there is a lower level of risk to the children, i.e. the actions or inactions by the Appellant create the potential for abuse or neglect, but there is no immediate danger to the child's safety or well-being. (See DCF Protective Intake Policy #86-015, Rev. 2/28/16, pp. 28, 29)