

Executive Office of Health and Human Services
Department of Children and Families
Central Administrative Office
600 Washington Street, 6th Floor
Boston, Massachusetts 02111

Linda S. Spears, Commissioner

Voice: (617) 748-2000

Fax: (617) 261-7428

IN THE MATTER OF: LB

Fair Hearing # 20170358

FAIR HEARING DECISION

Appellant, LB, appeals the decision of the Department of Children and Families, pursuant to M. G.L. c.119, §51B, to support allegations of sexual abuse of J.

Procedural History

On February 15, 2017, the Department of Children and Families ("Department") received a report, pursuant to M.G.L. c. 119, §51A, alleging sexual abuse of J by his grandfather, LB ("Appellant"). On March 16, 2017, the Department decided to support allegations of sexual abuse on behalf of J, pursuant to M.G.L. c. 119, §51B, by Appellant.

The Department notified Appellant of its decision and of his right to appeal. Appellant made a timely request for a Fair Hearing pursuant to 110 C.M.R. §10.06. The Fair Hearing was held on May 24, 2017 at the Department's Area Office in Hyde Park, Massachusetts. In addition to the Hearing Officer, the following persons appeared at the Fair Hearing:

HT	Appellant
RB	Witness/Wife of Appellant
RW	Department Response Supervisor
LF	Department Response Worker
DD	Attorney for Appellant

In accordance with 110 C.M.R. §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 digitally recorded. All witnesses were sworn in to testify

under oath. The record closed upon the conclusion of the oral evidence. The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

Exhibit A Intake Report – 51A Report

Exhibit B Child Abuse/Neglect Non-Emergency Response

For Appellant:

Exhibit 1 Fair Hearing request and DCF support letter

The Hearing Officer need not strictly follow the rules of evidence.... Only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 C.M.R. § 10.21

Statement of the Issues

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. 2/28/16

Findings of Fact

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

1. Appellant is the maternal grandfather of J, age thirteen. [Exhibit A; Exhibit B; Testimony of Appellant]
2. RB is the wife of Appellant. [Exhibit B]
3. SB is the mother of J. [Exhibit B]
4. Appellant and RB had custody of J until J was six years old. [Exhibit B. p.17]

5. At times, when J was in the custody of Appellant and his wife, Appellant would give J a shower and lotion his body. J wore his underwear when Appellant would lotion him. [Exhibit B, p.17]
6. SB obtained custody of J when he was six years old. Appellant and RB continued to have regular weekend and overnight visits with J. [Exhibit B, p.17]
7. As the grandfather of J and person who had custody of J until he was six years old and who continued to have caregiving responsibilities of J after his reunification with SB, Appellant is deemed a caregiver pursuant to the Department's Protective Intake Policy. See below. [Testimony of Appellant; Exhibits A and B]
8. In or about December 2016, J was placed at B, a residential program, and attending seventh grade. Appellant and his wife had supervised visits with J on the grounds of the B residential program. [Exhibit B, p.3]
9. At some time prior to J's placement at B, J and his cousin, T, had engaged in sexual activity. [Exhibit B, p.5]
10. While at B, J participated in treatment with a therapist and a therapeutic training and support worker. [Exhibit B, pp.3,9]
11. One day in or about early February 2017, J left school and went to Appellant's home unannounced and without permission. Appellant met J in the vestibule of his home, said "hello," told J he loved him, asked him what he was doing there, and told J he knew he wasn't supposed to be there and had to go back to school. Appellant offered J a ride back to school. J declined and walked back on his own. [Testimony of Response Worker; Exhibit B, p.18; Testimony of Appellant]
12. Appellant and RB believed that J had gone to the house to see his grandmother and his maternal aunt to wish them a "happy birthday." [Exhibit B, p.18; Testimony of Appellant; Testimony of RB]
13. At a therapy session, J was asked about why he had made the decision to go to Appellant's home. J reportedly stated that: he did not want to see Appellant anymore; there was a time when he was six years old that he had felt uncomfortable when Appellant was putting lotion on his body; Appellant had lotioned him "there" too. In response to a direct question as to whether Appellant had lotioned J's penis, J reportedly responded, "yea," dropped his head, and began to look at the floor. [Exhibit A]
14. In processing J's disclosure, SB recalled an event at the pediatrician's office when J was ten years old during which J jumped up, grabbed his buttocks, and screamed when the pediatrician attempted to check J's spine. [Exhibit B, p.2]
15. On February 15, 2017, the Department received a report, pursuant to M.G.L. c. 119, §51A, alleging sexual abuse of J by Appellant. [Exhibit A]

16. J, who was calm and well-spoken when interviewed by the response worker, did not want to participate in a forensic interview at the District Attorney's office relative to his disclosure. Although it made him feel uncomfortable, J did not believe the touching was sexual in nature. He wished to process his disclosure in therapy. [Exhibit B, pp.8,9,12,14]
17. At a later therapy session, J stated that: he would "freeze when guys touch his body;" the first time a guy rubbed his shoulders, he froze; he felt like he couldn't move and felt disgusting. J further disclosed that Appellant had touched him more than once. [Exhibit B, p.9]
18. The Department did not obtain any specifics from J relative his reported disclosure regarding the Appellant. [Fair Hearing record]
19. Appellant denied ever lotioning J's penis and denied any sexual abuse of J. [Exhibit B, 17; Testimony of Appellant]
20. On March 13, 2017, pursuant to M.G.L. c. 119, §51B, the Department supported allegations of sexual abuse of J against Appellant. [Exhibit B; Exhibit 1]
21. Based upon a review of the documentary evidence and testimony presented, I find that there was insufficient evidence to support a finding of sexual abuse of J by Appellant. There is no evidence that the allegations as set forth by J constituted a sexual offense under the laws of the Commonwealth, and the statement of J directly refuted that the Appellant's actions constituted sexual contact. [Fair Hearing Record]

Applicable Standards

Protective Intake Policy #86-015, 6/15/1986, as revised 2/28/2016

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 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.

Abuse

- (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.

Sexual Abuse

Any non-accidental 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.

A "Support" finding means:

Allegation(s)

- There is **reasonable cause to believe** that a child(ren) was abused and/or neglected; and
- The actions or inactions by the parent(s)/caregiver(s) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation or human **trafficking**.

110 C.M.R. §4.32 (2)

"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 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.

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 C.M.R. §10.05.

To prevail, the aggrieved party must show by a preponderance of the evidence that (1) the Department's or provider's decision was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the aggrieved party.... 10 C.M.R. §10.23.

Analysis and Conclusion

The Department's decision to support allegations of sexual abuse must be supported by reliable evidence. In this matter, the Department relied on the statement reportedly made by J that Appellant had lotioned him "there" and J's "yea" response when asked whether he meant his penis. There is no reliable evidence to corroborate J's disclosure or to make a determination that any touching by Appellant constituted sexual contact or a sexual offense under the laws of the Commonwealth.

To the contrary, J himself reported that, although the touching made him uncomfortable, he did not believe it was sexual in nature. J did not give any specifics relating to any touching by Appellant to the Department during its response. Appellant acknowledges assisting in showering J and lotioning him in the past on more than one occasion. He denies any sexual or inappropriate touching. After review and consideration of all the evidence presented, I find that the evidence in this case, in its totality, is insufficient to support the Department's sexual abuse decision.

The burden is on Appellant to show, by a preponderance of the evidence, that the Department's sexual abuse support decision was not in conformity with Department regulations and/or policy. I find that Appellant has presented persuasive evidence in this matter to allow for a reversal of the Department's support decision against him. I find the evidence insufficient to support a determination that Appellant sexually abused J.

Order

The Department's decision to support allegations of sexual abuse on behalf of J by Appellant LB was not made in conformity with Department regulations and policies and/or with a reasonable basis. Therefore, the Department's decision is **REVERSED**.

Antonia Chronis (e)
Antonia Chronis
Administrative Hearing Officer

10/18/17
Date

Cristina Tedstone
Cristina Tedstone
Deputy General Counsel

Date

Linda S. Spears
Commissioner