

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111**

**Linda Spears
Commissioner**

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IN THE MATTER OF

SL #2017.0373

FAIR HEARING DECISION

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

Procedural History

On January 30, 2017, the Department received a report which alleged sexual abuse of B by the Appellant's boyfriend, MD. The Department screened-in the report and conducted a response. On February 19, 2017, the Department received three additional reports which alleged neglect and physical abuse of M by the Appellant, who is her mother and physical abuse of M by her paternal grandfather, JD. The reporters' concerns stemmed from a dispute between the Appellant and JD during a visit. The reports were incorporated into the ongoing response. On February 27, 2017, the Department made the decision to support an allegation of neglect of M by the Appellant. The Department notified the Appellant of its decision and her right to appeal.

Appellant made a timely request for a Fair Hearing under 110 CMR 10.06(4)(b). A hearing was held at DCF Robert Van Wart Area Office on June 16, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; TM, DCF Supervisor; AG, DCF Response Worker; SL, 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.

Prior to the conclusion of the hearing, the record was left open until June 16, 2017 to allow the Appellant to review documentation submitted by the Department and file a written response if desired.

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 January 30, 2017
- Exhibit B: 51A Report of February 19, 2017 (1:19PM)
- Exhibit C: 51A Report of February 19, 2017 (1:29PM)
- Exhibit D: 51A Report of February 19, 2017 (6:17PM)
- Exhibit E: 51B Report completed on February 27, 2017 by AG

For the Appellant(s):

- Exhibit 1: Appellant's Fair Hearing Request

Issue 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 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 mother. M's father is MD. The Appellant and MD had a three (3) year relationship during which M was born; the couple ended their relationship in November 2016. At the time of the report in question, M was one (1) year old, (Exhibits B-D; Exhibit B, pp. 5, 6)

2. In December 2016, the Probate Court appointed JD, M's paternal grandfather, her sole legal guardian. The Appellant had weekly, supervised visits with M; one two (2) hour visit each Sunday at the church JD and his family attended; and, a one (1) hour visit at McDonalds each Tuesday morning. (Exhibit B, p. 3; Exhibit E, p. 12)
3. During the Appellant's visits with M, the Appellant was a caregiver for M under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00
4. The Appellant has an extensive history of involvement with the Department. In addition to M, the Appellant has two other children, K (10 years old) and B (7 years old). K was in the Department's custody and placed in foster care and B was in the custody of his maternal grandmother. At the time of the report in question, the Department provided ongoing social work services to the Appellant, the children and their respective caregivers. (Exhibit E, pp. 1, 2; Testimony of AG)
5. JD and the Appellant do not have a good relationship. When the Response Worker spoke with MD about M, MD told the worker his parents were "dead set against [the Appellant]. The Appellant repeatedly accused JD of not providing proper care and treatment for M's chronic diaper rash. (Exhibit E, pp. 5, 7, 11, 12; Testimony of AG and Appellant)
6. On January 30, 2017, the Department received a report which alleged sexual abuse of B by MD. The Department screened in the report and conducted a response, which was assigned to Response Worker AG and in progress at the time of the reports in question. (Exhibit A; Testimony of AG)
7. On February 13, 2017, the DCF Response Worker and DCF Ongoing Social Worker visited the Appellant at her home regarding the matter concerning B. The Appellant started the visit by showing the workers photos of M's diaper rash that she noticed the previous day when visiting with M. The Response Worker and Ongoing Social Worker told the Appellant they would ask JD to take M to the doctor. (Exhibit E, p. 6; Testimony of AG and Appellant)
8. On February 13, 2017; the DCF Response Worker and DCF Ongoing Social Worker visited JD and his wife DD at their home regarding the matter concerning B. The worker asked JD to change M while she was at the home and did not observe a diaper rash when he did. During the visit, DD told the worker she had concerns about the Appellant's visits with M at church, including that: The Appellant "always has to change M's clothes" at the visits; and, the Appellant brought M downstairs to change her diaper and JD had to follow her downstairs to supervise. The ongoing social worker suggested the couple have one of the pastors supervise the visits. (Exhibit E, p. 7; Testimony of AG)
9. On February 19, 2017, the Appellant had a regularly scheduled visit with M at church. MD was also present at church that day. During the visit, the Appellant

noticed M's diaper needed to be changed. The Appellant and JD went downstairs to the basement of the church together. When the Appellant headed to the bathroom with M, JD objected to the Appellant being alone with M in the bathroom and asked the Appellant to give M to him so that he could change M's diaper. The Appellant did not wish to do so and there was a brief argument and struggle over who would change M. The Appellant refused to return M to JD. The Appellant texted MD to come downstairs, where he saw the Appellant with M and JD was on the opposite side of the room. The Appellant and JD both called the police and later filed reports with the Department. (Exhibit B, p. 3; Exhibit C, p. 3; Exhibit D, p. 3; Exhibit E, pp. 11-13; Testimony of AG)

10. When the police responded, the Appellant was outside with M. Neither the Appellant nor M had any marks on them and M "appear[ed] fine" but the Appellant was crying. The Appellant and JD each gave statements to the police. The statements provided by Appellant and JD were in general agreement except that the Appellant alleged JD grabbed M and grabbed the Appellant and spun her around while M was in her arms, which JD denied. The Appellant gave M to MD, who was at church that day, and MD gave M to JD. MD later told the Response Worker that when he asked his father what happened, his father commented "[The Appellant's] starting her shit again." (Exhibit 1; Exhibit D; Exhibit E, pp. 5, 11, 12)
11. On February 19, 2017, the Department received three (3) reports on behalf of M which alleged physical abuse and neglect of M by the Appellant and physical abuse of M by JD due to an incident which occurred during the Appellant's visit with M. The Department screened-in the reports, which were assigned to Response Worker AG and incorporated into the ongoing response involving B. (Exhibits B-D; Testimony of AG)
12. Two of the reports were filed by non-mandated reporters, which are presumed to be the Appellant and JD. The Appellant and JD's actions are described as follows:
 - a) "[JD] stated he asked [the Appellant] to hand over the child to him, and stretched out his hands to appropriately take the child from the mother" which caused the Appellant to spin away and fall against the wall (Exhibit B);
 - b) "[JD] went to grab the child by the right arm. JD held the child's arm and she started screaming. [The Appellant] went to grab the child back. [The Appellant described the incident as they were playing a tug of war...with the child]" (Exhibit C)
 - c) JD told a mandated reporter that he "was going to take the child to the bathroom and change the child" when the Appellant attempted to pull away from him and fell back into the wall with the child without JD touching them. (Exhibit D)
13. The totality of the evidence suggests that there was some type of brief physical struggle between the Appellant and JD to obtain and/or maintain control of M.

14. On February 21, 2017, the DCF Ongoing Social Worker spoke with a nurse at [REDACTED] where M received her care. The nurse noted that JD brought M to the practice on January 20, 2017, that M had "mild dryness and a very minor diaper rash" and that JD was properly taking care of the rash. (Exhibit E, p. 10; Testimony of AG)
15. On February 22, 2017, the DCF Response Worker phoned the Appellant regarding the incident at church. The Appellant stated that when she arrived, JD was "agitated" because she had told the Department about M's diaper rash. (Exhibit E, p. 11; Testimony of AG and Appellant)
16. On February 22, 2017, the DCF Response Worker spoke with JD about the reported incident. When asked what happened, JD responded "Just more of her drama". JD explained that he had agreed with DCF to "tighten up" supervision of M's visits with the Appellant, was not allowing M out of his sight and told her she was not allowed to change M's diaper by herself, which precipitated the reported incident. (Exhibit E, pp. 11, 12; Testimony of AG and Appellant)
17. The Appellant disputed that there were any changes to the terms of her visitation at the time of the reported incident; however, she was aware that the Ongoing Social Work Supervisor had spoken with JD about MD's visits with M and because of the investigation regarding B, that MD should always be supervised. The Appellant asserted that JD misconstrued what the Supervisor told him and took it to include her as well. (Exhibit E, pp. 11, 12; Testimony of Appellant)
18. On February 27, 2017, the Department supported an allegation of neglect of M by the Appellant. The Department determined that the Appellant failed to provide minimally adequate emotional stability and growth for M when she failed to comply with JD's request that she not change M's diaper, which actions precipitated an argument between the Appellant and JD. The Department asserted that during the argument, the Appellant was yelling, put M between herself and JD and caused M to become upset and cry.¹ The Department determined that the Appellant's actions created a substantial risk to M's safety and well-being. (Exhibit E, pp. 13, 14; Testimony of AG; 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)
19. In reaching the decision that the Appellant neglected M, the Department considered JD the more credible of M's caregivers. Both JD and the Appellant admitted there was a brief struggle over M, differing only as to whether JD grabbed M and whether the Appellant was yelling. Regardless of those differences, the evidence supports that when the police arrived, M "appeared fine" and only the Appellant was crying. I do not give full weight to either JD or the Appellant's statements as it regards M being grabbed, but find it plausible that there was some kind of physical contact between JD and the Appellant because JD was adamant about not allowing the Appellant to change M's diaper and where it is reported that JD "stretched out his hands to

¹ The Appellant testified that M began to cry when JD tried to take her away from the Appellant. (see Exhibit C, p. 2)

appropriately take” M from the Appellant (emphasis added), his own actions were contributory. Further, the evidence suggests that JD was biased against the Appellant and unlikely to paint her in a positive light, particularly where he perceived her as trying to falsely accuse him of failing to provide proper care for M. (Exhibit B; Exhibit E; Testimony of AG and Appellant)

20. After a review of all the evidence and for the following reasons, I find the Department did not have reasonable cause to support an allegation of neglect of M by the Appellant (also see Analysis):

- a) To the extent that the Appellant was involved in an escalated argument with JD over M, the Department did not demonstrate that the Appellant failed to provide *minimally* adequate care for M, including *minimally* adequate emotional stability and growth (110 CMR 2.00 and 4.32), and;
- b) The Department did not demonstrate that the Appellant’s actions placed M in danger or posed a substantial risk of harm to M’s safety or well-being. (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

“Neglect means 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition.” 110 CMR 2.00

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) 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

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

During the Appellant's visits with M, the Appellant was a caregiver for M under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

The Department supported an allegation of neglect of M by the Appellant. The Department determined that the Appellant failed to provide minimally adequate emotional stability and growth for M when she failed to comply with JD's request that she not change M's diaper, which actions precipitated an argument between the Appellant and JD. The Department asserted that during the argument, the Appellant was yelling, put M between herself and JD and caused M to become upset and cry. The Department determined that the Appellant's actions created a substantial risk to M's safety and well-being. (Exhibit E, pp. 13, 14; Testimony of AG; 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

The Appellant admitted that in retrospect, she could have done things differently, but argued that her actions did not constitute neglect.

This Hearing Officer is obliged to consider the totality of evidence, and whether there was enough evidence to permit a reasonable mind to accept the Department's decision

that the Appellant neglected M. In the instant case, it is undisputed that there was an argument between the Appellant and JD during which M was present. Prior to the reported incident, JD and his wife expressed concern about the Appellant's desire to change M's clothes and diaper during her brief visits with M, neither of which this Hearing Officer finds overtly harmful, even if annoying to JD. The evidence suggests that the underlying reason that JD did not wish the Appellant to change M's diaper was because the Appellant had repeatedly accused him of failing to properly treat M's diaper rash and JD was concerned that she would do something to M and try to blame it on him.

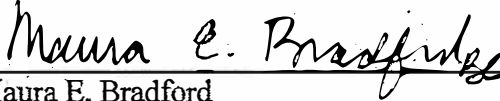
The Department recognized there was a poor relationship between JD and the Appellant and suggested someone other than JD supervise the Appellant's short visits with M, but before that was arranged, the tension between the Appellant and JD intensified and culminated in the reported incident. It is undisputed that there was an avoidable and unnecessary argument between JD and the Appellant; but with respect to the evidence, it did not demonstrably affect M's emotional stability and growth or posed substantial risk to her safety and well-being. For these reasons and those enumerated in the above Findings of Fact, this Hearing Officer has determined the Department's decision that the Appellant failed to provide minimally adequate emotional stability and growth and neglected M, was not based on reasonable cause 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. Additionally, there was no evidence that the Appellant's actions or inactions placed M in danger or posed a substantial risk to M's safety or well-being, as required to support an allegation of neglect. DCF Protective Intake Policy #86-015, rev. 2/28/16

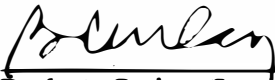
Conclusion and Order

Appellant has shown by a preponderance of the evidence that the Department's decision to support an allegation of neglect on behalf of M was not in conformity with Department regulations or made with a reasonable basis, therefore the Department's decision is REVERSED.

April 30, 2018
Date

Date


Maura E. Bradford
Administrative Hearing Officer


Barbara Curley, Supervisor
Fair Hearing Unit

Linda S. Spears
Commissioner