

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

LINDA S. SPEARS
Commissioner

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(IN THE MATTER OF)
(LB)
()
(FH # 2017-0386)
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HEARING DECISION

Procedural History

The Appellant in this Fair Hearing is LB (hereinafter "LB" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support an allegation of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On July 26, 2012, the Department received three (3) 51A reports from mandated reporters regarding the same incident, each report alleging the neglect of Ke (hereinafter "Ke" or "the child") by the Appellant. The three (3) 51A reports were consolidated into one (1) 51B investigation. An investigation was conducted. On August 2, 2012, the Department made the decision to support the allegation of neglect of Ke by the Appellant. However, the Department did not inform the Appellant of its decision to support the allegations of neglect of Ke by the Appellant. The Appellant eventually learned of the support decision, and requested an appeal, which was allowed due to the initial lack of notice by the Department.

The Fair Hearing was conducted on June 21, 2017, at the Department of Children and Families' Park Street Area Office. All witnesses were sworn in to testify under oath. The record closed at the conclusion of the hearing on June 21, 2017.

The following persons appeared at the Fair Hearing:

Nicholas Holahan	Administrative Hearing Officer
LB	Appellant
KH	DCF Supervisor
MC	DCF Investigator

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 recorded on a digital voice recorder, pursuant to 110 CMR 10.26.

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

For the Department:

- Exhibit A: 51A Report, dated 7/26/12 at 10:51a.m.
- Exhibit B: 51A Report, dated 7/26/12 at 11:28a.m.
- Exhibit C: 51A Report, dated 7/26/12 at 12:30p.m.
- Exhibit D: 51B Report, completed 8/2/12

For the Appellant:

The Appellant did not submit any documentary evidence.

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

Statement of the Issue

The issue presented in this Fair 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 investigation, 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, 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, whether there was reasonable cause to believe that a child had been abused or neglected. 110 CMR 10.05

Findings of Fact

1. At the time of the 51A reports, Ke was three (3) years old. Ke is the biological son of LB; therefore, LB was a caretaker for Ke in accordance with the regulations and policies that governed these proceedings. (Exhibit A, pp.1-3; Exhibit B, pp.1-3; Exhibit C, pp.1-3; Exhibit D, pp.1; Testimony of MC; Testimony of Appellant)
2. The Appellant has three (3) other children, An, Am, and Kh. At the time of the 51A reports, their ages were 18, 12 and 11, respectively. (Exhibit C, p.1; Testimony of MC)
3. In July 2012, Ke attended a day camp. On July 26, 2017, Ke handed a small bag of a white powder, initially believed to be cocaine, to a camp counselor, stating his mother, the Appellant, gave it to him. (Exhibit A, p.3; Exhibit B, p.3; Exhibit C, p.3; Testimony of MC)

4. Ke was taken to [REDACTED] A toxicology screen was performed; results indicated there were no drugs in Ke's system. (Exhibit D, p.2; Testimony of MC)
5. Ke provided multiple accounts of how he obtained the bag of powder when he spoke with the Department. Initially, Ke indicated his mother had given him the bag of powder; then stated "Am gave it to me"; then stated "my teacher gave it to me." (Exhibit D, p.3; Testimony of MC)
6. The camp counselor reported Ke told her the Appellant gave him the baggie and when asked again where he got the baggie, Ke stated he walked into the Appellant's bedroom and found it on the floor. (Exhibit D, p. 5)
7. The police were given the powder substance; they were not able to tell if it was heroin or cocaine. The police conducted a field test of the bag of powder and the results were inconclusive. The police believed it was "really bad cocaine." The police alluded to a further test being conducted however; the results would take one (1) month. Subsequently neither the Department nor the Appellant obtained any other results. (Exhibit D, p.3; Testimony of MC)
8. The Appellant denied being contacted by the police after the investigation ended or being charged with a crime regarding the bag of powdery white substance. (Testimony of Appellant)
9. On August 1, 2012, the Appellant informed the Department she had searched her home and did not find any drugs. (Exhibit D, p.4)
10. During the course of its 51B investigation, the Department learned the Appellant's adult son, An, had a criminal record. The police informed the Department they believed the powdery white substance could have belonged to An and he was either using it or planning to sell it. (Exhibit D, pp.3-4; Testimony of MC)
11. The Appellant denied her son, An, had used, sold or brought any drugs into their home. (; Exhibit D, p.2; Testimony of Appellant)
12. The Department investigator and Appellant discussed Ke could have picked the baggie up on the playground and agreed there may never be a definitive answer as to how Ke obtained the bag with the white powder. (Exhibit D, p.4; Testimony of MC)
13. The family's grief counselor, who worked with the family for two (2) weeks due to the father's recent death, reported she never saw any signs of drugs in the home nor did she have any protective concerns regarding the family or concerns about drugs with the family. (Exhibit D, p.5; Testimony of MC)
14. In light of the totality of evidence in this case, I find that the Department did not have reasonable cause to support the allegation of neglect of Ke by the Appellant.

- a. A determination of neglect does not require evidence of actual injury to the child Lindsay v. Dep't of Soc. Servs., 439 Mass. 789, 794-795 (2003)
- b. The Department did not have sufficient evidence to support a finding that the Appellant neglected Ke under Department policies and regulations. There was no corroborated account of how Ke obtained the bag with the powdery white substance. Ke altered his account several times, first indicating the Appellant gave it to him; then his brother, Am; then a teacher. The field drug test conducted by the police on the substance was inconclusive. The police informed the Department they believed the bag belonged to An, the Appellant's older son. An in-home grief counselor had met with the family four (4) times just prior to the 51A filings; she never saw any signs of drugs and did not have any protective concerns.
- c. There was no reasonable cause to believe that the Appellant failed to provide the children with minimally adequate care under Department policies and regulations. 110 CMR 2.00, 4.32(2)

Applicable Standards

To "support" a report means that the Department has reasonable cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker did occur. 110 CMR 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. 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 § 51A." Id. at 63. This same reasonable cause standard of proof applies to decisions to support allegations under §51B. Id. at 64; M.G.L. c. 119, § 51B

"Neglect" is defined as failure by a caretaker, 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. This definition is not dependent upon location (i.e., neglect can occur while the child is in an out-of-home or in-home setting.) 110 CMR 2.00

"Caretaker" means a child's: (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with the responsibility for a child's health or welfare, (e) any other person entrusted with the responsibility for a child's health or welfare whether in the child's home, a relative's home, a school setting, a day care setting (including babysitting), a foster home, a group care facility, or any other comparable setting. As such "caretaker" includes (but is not limited to) school teachers, babysitters, school bus drivers, camp counselors, etc. The "caretaker" definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is him/herself a child (i.e. a babysitter). 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; or (b) that 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 Appellant; or (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 Appellant; 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

Analysis

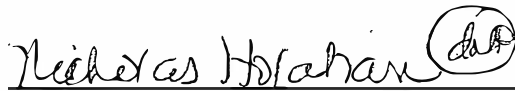
The Department supported the allegation of neglect of Ke by the Appellant based upon the child pulling a baggie of white powder from his pant pocket at summer camp and telling the staff he got it from the Appellant; Ke initially telling the Department the Appellant gave him the baggie of white powder; the Appellant was the sole caretaker of Ke and had no explanation as to how Ke got the baggie of white powder. During the course of its investigation the Department was not able to ascertain what the white powder was or where it came from as Ke changed the facts as to how and who he got the baggie from. Initially it was the Appellant giving it to him, then his brother, then a teacher and also that he found it on the Appellant's bedroom floor. The police performed a field test on the white powdery substance but the results were inconclusive as to what it was, and the police determined it could be "bad cocaine." Further testing was allegedly done on the white powder but neither the Department nor the Appellant was made aware of any new results. Ke did not test positive for any drugs. The Appellant denied having drugs in the home, and there was no corroborating evidence that An, or anyone else in the Appellant's home had drugs in the home. There was no definitive conclusion as to how Ke obtained the baggie or what was contained in the baggie.

The Appellant argued she did not give Ke the baggie of white powder. The Appellant denied drug use or that her children used drugs. There was insufficient no evidence by the Department that the Appellant failed to provide Ke with minimally adequate care or supervision or that any action or inaction by the Appellant led to Ke obtaining the substance; therefore, it cannot be held that the Appellant neglected her son.

Conclusion and Order


Based upon the evidence presented both at the time of the investigation and at the Fair Hearing, the decision of the Department to support the allegation of neglect of Ke, by Appellant, as defined in its regulations, was not reasonable, nor made in conformity with Department regulations, policies and procedures.

Therefore, the Department's decision to support an allegation of neglect of Ke by the Appellant is hereby **REVERSED**.



Nicholas Holahan
Administrative Hearing Officer

2/26/18
Date


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

Date

Linda S. Spears
Commissioner