

**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 Spears
Commissioner

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IN THE MATTER OF)

DS)
FH #2017-0392)

FAIR HEARING DECISION

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

Procedural History

On February 27, 2017, the Department received a 51A report alleging neglect of E (hereinafter "E" or "the child") by the Appellant and JN (hereinafter "JN"). The Department conducted a response and, on March 20, 2017, the Department made the decision to support the allegation of neglect by the Appellant and JN. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on June 20, 2017, at the DCF New Bedford Area Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the Hearing for the Department to submit a copy of the DCF Safety Plan, the referred to Probate Court Order and the service plan in effect; these items were requested by this Hearing Officer. The Appellant was also afforded the opportunity to submit additional documents. The Department submitted the documents requested by the Hearing Officer; the documents were entered into evidence, reviewed, and considered in the decision making of the instant case. The Appellant submitted no additional documents. The record closed on July 7, 2017.

The following persons appeared at the Fair Hearing:

Carmen Temme

Fair Hearing Officer

DS
JH

Appellant
Department Response Social Worker

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 DCF regulations. 110 CMR 10.26

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

For the Department:

- Exhibit A DCF Intake Report/51A Report, dated 2/27/2017
- Exhibit B DCF Child Abuse/Neglect Emergency/Non-Emergency Response, completed 3/20/2017
- Exhibit C DCF Service Plan, dated 11/14/2016-5/14/2017
- Exhibit D Probate Court Stipulation of the Parties
- Exhibit E DCF "Safety Contract" with JN, signed and dated 11/2/2016
- Exhibit F DCF "Safety Contract" with Appellant, signed and dated 10/26/2016

For the Appellant:

- Exhibit 1 Appellant's correspondence requesting Fair Hearing

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

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) 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. 2/28/2016

Findings of Fact

1. The subject child of this Fair Hearing is E; at the time of the subject 51A report, E was five (5) years old. (Exhibit A, p.1; Exhibit B, p.2)

2. E's mother is JN (hereinafter "JN"). The Appellant is E's father and primary caretaker; therefore, he was a caregiver pursuant to Departmental regulation 110 CMR 2.00 and DCF Protective Intake Policy #86-016, rev. 2/28/2016.

3. According to the Appellant, since May 29, 2009, he has remained clean from substances and in recovery. (Exhibit 1) Collaterals involved at the time of the subject 51A report had no concerns regarding the Appellant's sustained sobriety. (Exhibit A, p.2; Exhibit B, p.11)

4. Since 2013, the Department has had concerns regarding JN's mental health, use of multiple substances including narcotics, alcohol, cocaine, marijuana and her involvement with partners and/or friends who used heroin. Repeated incidents of domestic violence were also an identified concern. Since May 6, 2014, the Department maintained an open case regarding the child. (Exhibit A, pp.7-11; Exhibit B, pp.1-7)

5. During a March 2013 51A investigation, the Department noted that the Appellant was incarcerated at [REDACTED] (Exhibit A, p.12; Exhibit B, p.6) The Appellant blamed JN for his incarceration. (Testimony Appellant)

6. In 2014, JN obtained a restraining order against the Appellant. (Exhibit A, p.9; Exhibit B, p.3)

7. By January 2016, DCF records indicated that the Appellant had weekend visitation with the child. Following a January 20, 2016 51A report, the Department unsupported physical abuse of E by the Appellant; the Department supported neglect of E by JN. In March 2016, the Department screened out an allegation of neglect due to the child being present for a verbal altercation between the Appellant and JN. (Exhibit A, p.9; Exhibit B, p.3)

8. In September 2016, JN relapsed on cocaine and marijuana. On September 2, 2016, the Probate Court awarded the Appellant temporary custody of E. (Exhibit A, p 2, p.7; Exhibit B, p.2; Testimony Appellant)

9. At the October 12, 2016 Probate Court Hearing, the Appellant and JN stipulated to the following;

- Shared legal custody of E; physical custody to the Appellant
- Parenting time for JN to be supervised by the maternal grandparents
- The Appellant and JN to cooperate with DCF
- JN to provide urine screens; JN to sign releases so that DCF could release results to the Appellant
- Status of DCF case at next Court date
- Should JN test positive during her drug screens, JN's legal custody and parenting time be suspended until the next Court date. Exhibit D

10. On October 17, 2016, the Department received a 51A report wherein JN alleged that two (2) weeks prior the Appellant banged her head against the car window during an argument; E was reportedly in the vehicle. The report also alleged that the Appellant was verbally abusive to JN. According to JN, she had been pregnant with the Appellant's child; JN terminated the pregnancy. According to JN, the Appellant used "sex as a controlling factor in their relationship." (Exhibit

A, p.7; Exhibit B, pp.1-2)

11. On October 28, 2016 and November 2, 2016, the Appellant and JN respectively signed a DCF safety plan agreeing that they would "cease all psychological [sic] contact and refrain from domestic violence..." Additionally the Appellant and JN agreed that they would have "no contact outside the perimeters of necessary communication regarding the medical and educational concerns or matters related to visitation related to {E}..." (Testimony JH; Exhibit E, Exhibit F)

12. On November 7, 2016, the Department supported the allegation of neglect of E by the Appellant and JN due to E's exposure to domestic violence. The Department noted that the Appellant and JN ignored previous recommendations regarding their contact and continued relationship. The Department noted concerns that E was "desensitized" to the "ongoing violence." Additionally, JN displayed signs of withdrawal symptoms during the 51A response. The Department recommend that visitation with JN be supervised until she engaged in substance abuse treatment. (Testimony JH; Exhibit A, p.8; Exhibit B, p.2)

13. On December 22, 2016, the Appellant signed the DCF Service Plan agreeing (in part) that he would "follow written safety plan developed by the Department. Father will not be in the presence of Mother in [sic] less it is at a police station to drop off or pick up {E}." (Exhibit C, p.5, p.9) JN signed this same Service Plan on December 2, 2017. (Exhibit C, p.4, p.9)

14. In December 2016, JN entered substance abuse treatment at [REDACTED] following a relapse; JN admitted to her relapse. In January 2017, JN entered the [REDACTED] treatment program. (Exhibit A, p.2)

15. On February 27, 2017, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging neglect of E by JN and the Appellant. According to JN, on Wednesday, February 22, 2017, the Appellant took her to obtain heroin with child in the car. JN reportedly bought heroin so that she would test positive and could enter into a treatment program. The Appellant and the child were not with JN when the transaction was made; the Appellant and E were in a store. According to JN, the Appellant would only permit her visitation with the child if she engaged in sexual acts with him. According to the mandated reporter, JN was diagnosed with bi polar, mood disorder and PTSD. Additionally, should JN test positive for any substance, visits with the child would be suspended pending the April 2017 Probate Court date. The Appellant permitted JN to visit with the child prior to JN entering [REDACTED] in December 2016. (Exhibit A, p.2; Testimony JH)

16. At the time of the subject 51A report, JN was in the [REDACTED] treatment program. (Exhibit A, p.2)

17. The Appellant was aware of JN's October 2016 and December 2016 inpatient substance abuse treatment. (Testimony Appellant)

18. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to JH (hereinafter "JH") Social Worker from the DCF New Bedford Area Office. (Testimony JH; Exhibit B)

19. According to the Department, JN was in a detoxification program twenty-four (24) days prior to the reported incident. (Testimony JH)

20. On Wednesday February 22, 2017, the Appellant permitted JN to have an overnight visit at JO's (hereinafter "JO") home. According to JN, JO was a friend of hers. (Exhibit B, p.8, p.9; Testimony Appellant) JN had been staying with JO since June 2016. The Appellant met JO during the summer of 2016. According to the Appellant, JO was an active member of [REDACTED] and had ten (10) years substance free. For this reason, the Appellant permitted JN to visit with E. The Appellant admittedly did not know him well, but knew that he had custody of his nine (9) year old son. (Testimony Appellant)

21. The Appellant made the determination to permit JN to have an overnight visit as he felt JN had been clean for one (1) month and this was enough time.¹ Prior to this, he had permitted day visits, the week prior there was an overnight visit. (Testimony Appellant)

22. On February 22, 2017, JN called the Appellant during her visitation with E at JO's home.² (Exhibit B, p.9) According to the Appellant, JN called at approximately 8:30 pm, after E's bedtime. She informed him that she could no longer stay with JO and that JO "pulled strings" to get her into a treatment program, as she was homeless. The Appellant told her that she needed to get high in order to enter a facility. The Appellant and JN got into "a slight argument;" the Appellant asked if she was getting high. According to the Appellant, he said that he was coming to get E and to meet him outside. JO then called the Appellant and informed him that JN was not high and to leave E there. The Department reportedly knew that JO was supervising the visits. (Testimony Appellant)

23. After the Appellant picked JN and E up on February 23, 2017, the Appellant again told her that she needed to get high in order to enter a program. JN purchased a bag of heroin while the Appellant and E went into a store. (Exhibit B, p.9)

24. According to the Appellant, it was possible that JN obtained drugs while in the convenience store. (Testimony Appellant) JN initially reported that she got high while in [REDACTED] with the Appellant and E; JN later recanted this statement. JN again reported that the Appellant would "force her to engage in sexual acts" if she wanted to see E. (Exhibit B, p.9)

25. At the end of its response, the Department supported the aforementioned report for neglect of the child by JN and the Appellant. Specific to the Appellant, the Department based this determination of the following:

- JN's February 22, 2017 telephone call to the Appellant wherein she indicated that she needed transportation to [REDACTED] as she was homeless. (Exhibit B, p.8, p.13; Testimony JH)
- The Appellant's acknowledgment that he knew JN was not going to [REDACTED] for

¹ The Appellant contended that the Probate Court issued an Order wherein the Department was to be the "relay person" for the results of JN's random urine screens. Additionally, the Appellant maintained that he received "no help" from the DCF New Bedford Area Office, that the results of JN's urine screens were not released to him, therefore he was unable to address this issue and that his "private" information was released to the school department. (Testimony Appellant)

² The Appellant testified that the date was February 21, 2017. (Testimony Appellant)

"homelessness" but rather due to her substance abuse. The Appellant's knowledge that that JN would not be admitted to the program absent recent drug use. (Exhibit B, p.8, p.13, Testimony JH; Testimony Appellant)

- The Appellant permitting JN to care take for the child overnight on February 22, 2017 absent confirmation that she was sober. The Appellant was aware of JN's repeated relapses including two (2) inpatient treatment admissions since November 2016 for opiate dependency. (Exhibit B, p.8, p.13; Testimony JH)
- Despite a history of "very concerning and dangerous domestic violence", the Appellant picked up and drove JN and the child through [REDACTED] and [REDACTED] the following morning prior to dropping E off with her babysitter. The most recent incident involved the Appellant hitting JN's head on the car door, witnessed by the child. The child reported that the Appellant and JN were always fighting. These incidents occurred despite the Appellant and JN being in separate relationships and not residing together. (Exhibit A, pp.7-10; Exhibit B, pp.1-4; p.8, p.13)
- The Appellant and JN agreeing not "to be together in the presence of {E}" via a signed DCF safety contract. The Appellant "breached this contract" when he picked up the child and JN on February 23, 2017 (Exhibit A, p.2; Exhibit B, p.8, p.9 p.13; Testimony JH)
- Contrary to the Probate Court agreement, the Appellant failed to terminate JN's visitation with the child despite JN's three (3) inpatient admissions into a substance abuse treatment program. (Exhibit A, p.2, Exhibit B, p.8, p.9, p.13; Testimony JH)
- The possibility that the child would be left without a caretaker should the Appellant or JN be arrested following JN's purchase of heroin and returning to the vehicle; the Appellant then drove the vehicle to [REDACTED]. (Exhibit B, p.13; Testimony JH)

The Department concluded that the aforementioned constituted neglect per its regulations and policies. (Exhibit B; Testimony JH)

26. According to the Appellant, he drove JN to the detoxification program, as he "wanted to see her go in himself." When dropped off at the program in [REDACTED] there was "a scene" wherein JN threw a phone at him. (Testimony Appellant) E reportedly had been dropped off at the babysitter's house. (Exhibit B, p.8)

27. After review and consideration of all the evidence, I find that the Department's decision to support the allegation of neglect was based on reasonable cause and made in conformity with its regulations and policies. Despite knowledge of JN's historical and ongoing/current issues with substance abuse and repeated relapses, the Appellant left E in the care of JN, without evidence that she was an appropriate caregiver, able to provide adequate supervision and/or other essential care for E during the February 22, 2017 overnight visit. 110 CMR 2.00, 4.32. Additionally, the following morning, the Appellant transported JN to obtain heroin with the child present in the vehicle. The Appellant's actions posed a substantial risk to the child's safety and well-being. DCF Protective Intake Policy #86-015, (rev. 2/28/2016) No new information provided by the Appellant detracted from the Department's original decision. (Fair Hearing Record)

Applicable Standards

Caregiver is defined as:

- (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. 110 CMR 2.00

Neglect is the 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 failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. 110 CMR 2.00

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

"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)

A finding of support requires that there be: 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. (DCF Protective Intake Policy #86-015, rev. 2/28/2016)

"Danger" is defined as 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. DCF Protective Intake Policy #86-015, rev. 2/28/2016

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Police, (rev. 2/28/2016)

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 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 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/2016

Analysis

It is undisputed that the Appellant was a caregiver for E. DCF Protective Intake Policy #86-015, rev. 2/28/2016

The issue for resolution in this case is whether the Appellant's actions constituted neglect per the Department's regulations and policies. The Department's decision-making was based in large part on the Appellant's actions on February 22 and February 23, 2017 and his continued involvement with JN.

JN's lengthy and significant struggle with substance abuse was an undisputed fact of the instant case. Despite multiple inpatient substance abuse treatment programs, JN had been unable to remain drug free for a significant period. Due to JN's substance abuse issues, the Appellant petitioned and the Probate Court awarded him temporary custody of the child. In the October 12, 2016 Stipulation of the Parties, the Appellant and JN agreed that should the Appellant become aware of JN's relapse, visitation with the child would be suspended pending the April 2017 Court date. The Appellant was aware that JN received inpatient substance abuse treatment in October and December 2016. The Appellant allowed visitation between JN and E. During a February 22, 2017 phone conversation with JN, the Appellant questioned whether JN was high while in the role of a caregiver for E during an overnight visit. The Appellant also knew that JN was planning to enter a detoxification program and needed to get high in order to do so. The Appellant relied on information given by JO, someone he admittedly did not know well, that JN was not using substances while caring for E at that time. Based solely on this information, the Appellant permitted five (5) year old E to remain in JN's care overnight. Doing so compromised E's safety and well-being.

The following morning the Appellant picked up the Appellant; E was with him. The Appellant made this decision despite having signed DCF Safety Plan and Service Plan that there would be no physical contact between him and JN. The Appellant and JN signed the safety plan after the October 2016 DCF 51A response and subsequent support decision on behalf of E by both parties due to another incident of domestic violence. During this altercation, E was present when the Appellant banged JN's head against the car window. Despite agreeing to the aforementioned plan of no contact, the Appellant made the decision to transport JN in his vehicle with the child present. Additionally, JN repeatedly stated that the Appellant forced her to engage in sexual acts if she wanted to visit with JN, suggestive of additional contact.

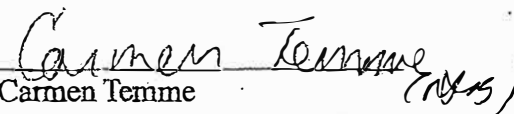
While the record is absent evidence that the child was exposed to domestic violence on February 23, 2017, the Appellant had E present in the vehicle when he transported JN to obtain drugs. Following JN acquiring the drugs, she returned to the vehicle. Where and when JN used the drugs was unclear as JN recanted her initial statement that she got high while they were all in [REDACTED]. While the record is absent sufficient evidence to indicate that the child was harmed, the Court has determined that the Department's determination of neglect does not require evidence of actual injury to the child. Lindsay v. Department of Social Services, 439 Mass. 789 (2003) The Department had "reasonable cause to believe" that the Appellant's actions provided the child with less than "minimally adequate... supervision, emotional stability and growth..." as defined by 110 CMR 2.00. Additionally, the Appellant's decision to leave E in JN's care on February 22, 2017 placed the five (5) year old child in danger and his subsequent actions on February 23, 2017 posed a substantial risk to the child's safety and well-being. DCF Protective Intake Policy #86-015, rev. 2/28/2016

The Appellant did not present persuasive evidence in this matter to allow for a reversal of the Department's support decision for neglect. The undersigned will not pass clinical judgment on the Department's broad discretion as delineated in the regulations.

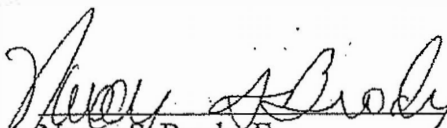
Conclusion and Order

The Department's decision to support the 51A report for neglect of E by the Appellant is **AFFIRMED.**

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he may do so by filing a complaint in the Superior Court in Suffolk County, or in the county in which he resides, within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, §14.) In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.


Carmen Temme
Administrative Hearing Officer

10-16-17
Date


Nancy S. Brody, Esq.
Supervisor, Fair Hearing Unit