

**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**

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Commissioner

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IN THE MATTER OF

FE

FH#2017-0399

**FAIR HEARING DECISION**

The Appellant in this Fair Hearing is FE (hereinafter "FE" 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 22 and March 3, 2017 the Department received three (3) 51A reports alleging neglect of Am (hereinafter "Am" or "the children"), An (hereinafter "An" or "the children") and T (hereinafter "T", or "the children") by the Appellant and a coworker PF (hereinafter "PF"). The Department conducted a response and, on March 26, 2017, the Department made the decision to support the allegation of neglect of the children by the Appellant. 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 16, 2017 at the DCF Central Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the Hearing to afford the Department and the Appellant the opportunity to submit supplementary information. Both parties submitted additional information, which was reviewed, entered into evidence and considered in the decision making of the instant case. The record closed on July 14, 2017

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
AR	DCF Legal Intern/observing
FE	Appellant
JN	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 2/22/2017, 3:40pm
Exhibit B	DCF Intake Report/51A Report, dated 2/22/2017, 4:10pm
Exhibit C	DCF Intake Report/51A Report, dated 3/3/2017
Exhibit D	DCF Child Abuse/Neglect Non-Emergency Response, completed 3/27/2017
Exhibit E	Diagram of the [REDACTED] residence
Exhibit F	[REDACTED] Overnight Protocol
Exhibit G	[REDACTED] Overnight Counselor Responsibilities
Exhibit H	Email Summary of Incident on February 21, 2017, from PF, dated 2/21/2017
Exhibit I	Email notification to JN of the DCF screen in decision, dated 2/23/2017
Exhibit J	Client Information Sheet for T
Exhibit K	DCF Notice of Response to Provider, dated 2/24/2017
Exhibit L	DCF Response Outcome Notification, Support, dated 3/28/2017
Exhibit M	Video recording of reported incident

For the Appellant:

Exhibit 1	Letter from JH, Direct Care Supervisor, [REDACTED], dated 6/13/2017
Exhibit 2	Letter from RM, Direct Care Supervisor, [REDACTED], Dated 6/13/2017
Exhibit 3	Appellant's response to DCF 51A and 51B reports and video footage, dated 6/26/2017
Exhibit 4	Appellant's request for 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. 2/28/16

### **Findings of Fact**

1. The subject children of this Fair Hearing are Am, An and T; at the time of the subject 51A report Am was fifteen (15) years old, An was twelve (12) years old and T was twelve (12) years old. (Exhibit A, p.1; Exhibit B, p.1; Exhibit C, p.1; Exhibit D, p.1)

2. At the time of the subject 51A response, the children were placed at the [REDACTED] in [REDACTED] [REDACTED] is a program run by the [REDACTED] and services children with significant emotional and behavioral issues. (Testimony JN)

3. At the time of the reported incident, the Appellant was the Direct Care Supervisor for the unit; therefore, he is deemed a caregiver pursuant to Departmental regulation 110 CMR 2.00. (Testimony JN; Exhibit D, p. 7)

4. The Appellant worked at [REDACTED] for thirteen (13) years without an incident report being filed. (Testimony JN; Testimony Appellant; Exhibit D, p.4)

5. On February 22, 2017, the Department received two (2) reports from mandated reporters and on March 3, the Department received a third 51A report filed by a non-mandated reporter pursuant to M.G. L. c. 119, §51A, alleging neglect of the children by the Appellant and PF due to improper supervision. The Appellant and PF did not complete the required checks on the residents; the reported children viewed the Appellant and PF asleep. The children exited the program at 4:30 am. The children walked to a local convenience store where they purchased snacks. On their way back to the program, a program staff member observed the children walked and drove them back to the program. The children returned to the program at 6:15am. The Appellant and PF were unaware that the children left the program. The children were not injured. (Exhibit A, p.3; Exhibit B, p.3; Exhibit C, p.3)

6. The 51A reports were assigned for a response, pursuant to M.G.L. c. 119, § 51A to JN (hereinafter "JN") Response Worker from the DCF Special Investigations Unit. (Testimony JN;

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<sup>1</sup>Am is referred to as "Big AJ" and An is referred to as "Little AJ" in the 51B report. (Exhibit D)

Exhibit D)

7. The night prior to the reported incident the Appellant worked a 10:30pm to 12:00 pm shift. Thereafter the Appellant needed to take his daughter to the hospital due to an illness. Following his daughter's discharge, they returned home. The Appellant's wife then needed to go to work; the Appellant continued to care for their children. The Appellant was unable to rest prior to starting his next shift. On February 21-22, 2017, the Appellant worked the 10:30 pm to 9:00am shift. The Appellant knew that the program was short-staffed and he did not feel that he could call out. (Testimony Appellant; Exhibit 3, Exhibit 4))

8. The Appellant admittedly feel asleep sometime after he took his position in the living room where he was watching television. The Appellant woke up after hearing the noise when the children returned to the program. The Appellant immediately informed other staff to contact the administrator on call to report the incident. (Testimony Appellant)

9. The unit is L shaped with nine (9) bedrooms. There are five (5) bedrooms located in the hallway and four (4) bedrooms located in the living room/kitchenette area. During the overnight shift, one (1) staff is positioned in the living room area supervising the four (4) bedrooms in that location while the other staff is positioned nearby where they can monitor the five (5) hallway bedrooms. Staff would be positioned at the end of the hallway either by the back door or by the laundry/closet area. From these positions, staff could monitor and supervise the hallway area where the children's bedrooms were located. (Exhibit D, pp.3-4; Exhibit E; Testimony JN

10. Reporter stated that there is no staff on video from at least 3AM-6:15AM and there is no evidence that staff conducted the required checks or that staff were supervising the unit as required. Reporter stated that both staff admitted that they fell asleep and did not realize the children left the residence. (Testimony JN)

11 The [REDACTED] residential program is located in a rural residential area surrounded by woods. [REDACTED] is down the country road leading to the program. (Testimony JN) At approximately 6:10 am, staff member FC picked up AM on his way to work at the program at 6:10am; Am was approximately one (1) mile away from the program residence. An and T had left Am behind and continued to walk back to the residence. FC and Am arrived at the program as An and T arrived. (Exhibit D, p.3, p.5; Exhibit H)

12. At the end of its response, the Department supported the aforementioned report for neglect of the children by PF and the Appellant. The Department based this determination on the following:

- The Appellant and PF were employed as direct care staff at [REDACTED] responsible for the children's care and well-being. The children had significant emotional/behavioral issues which required a high level of supervision. (Testimony JN; Exhibit D, p.7)
- The Appellant and PF fell asleep during the overnight shift, thereby leaving the children without supervision. Overnight staff is required to remain awake, monitor the unit at all times and conduct fifteen (15) minute checks on the children in their care. (Exhibit D, p.3, p.7; Exhibit F; Exhibit G; Testimony JN)
- AJ reported PF was asleep covered in a blanket and lying across two (2) chairs; the

Appellant was asleep and snoring on a chair in front of the television. The Appellant and PF acknowledge that they fell asleep. (Exhibit D, p.4, p.5, p.7; Testimony JN)

- The video footage documented that while the Appellant and PF slept, the reported children walked about the unit for approximately one (1) hour and twenty seven (27) minutes; the children then exited the residence without staff knowledge. (Exhibit D, pp. 3-5, p.7; Exhibit M; Testimony JN)
- The children walked to [REDACTED] where they either purchased or stole snacks. The children were outside the program for one (1) hour and forty-seven (47) minutes without staff knowledge. (Exhibit D, p.4, p.6, p.7; Testimony JN)
- Video footage reflected that the children left the residence 4:27am and returned at 6:14am. During that time, the Appellant and PF had no idea that the boys were gone. The Appellant and PF were not seen on video from at least 3:00am-6:15am, indicative of the Appellant and PF failure to supervise the residents. (Exhibit D, p.7; Exhibit M; Testimony JN)

The Department concluded this constituted neglect as defined by its regulations and policies.

13. According to An, he heard the Appellant snoring on other occasions; however, he did state that the Appellant is usually awake watching television or playing Candy Crush. (Exhibit D, p.5)

14. I find the Appellant to be forthcoming, sincere, embarrassed and apologetic for the reported incident. He readily took ownership of having fallen asleep. (Exhibit 1, Exhibit 2, Exhibit 4; Testimony Appellant) The Department consistently described the Appellant as cooperative, honest and extremely remorseful; the Appellant was a highly regarded staff member. (Testimony JN; Exhibit D, p.4; Exhibit 1; Exhibit 2; Exhibit 3; Exhibit 4)

15. The Department's decision to support the allegation of neglect could result in a substantial prejudice against the Appellant. Following the supported 51A response, the Appellant continued to work in his position at the program. The Appellant became emotional as he spoke of the love and pride he had for his two (2) children; his son is diagnosed with autism and has made a great deal of progress. The Department's decision to support the allegation of neglect could result in a substantial prejudice against the Appellant should he seek other employment or when he participated in his children's school activities. (Testimony Appellant)

While acknowledging the Appellant's remorse and excellent employment record, due to the seriousness of the reported incident, the Department's decision to support the allegation of neglect was made in conformity with its regulations, policies and with a reasonable basis. 110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/2017

#### 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 18. 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

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

"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. 2/28/16

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Policy, (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. 2/28/16

### Analysis

It is undisputed that the Appellant was a caregiver for the children. 110 CMR 2.00

The facts of the instant case are largely undisputed. At the time of the subject 51A report, the Appellant worked as the Shift Supervisor for the [REDACTED] residential program. The program treats adolescents with significant emotional and behavioral issues. During his overnight shift on February 21-22, 2017, the Appellant fell asleep for approximately three (3) hours as did PF, the second staff member working the overnight shift. The video footage depicted the children initially wandering unsupervised throughout the unit, wherein they had access to potentially restricted or dangerous objects. The children then left the residence at 4:17 am and walked to a convenience store approximately one (1) mile away. They either purchased or stole snacks and returned to the residence at 6:17 am. Fortunately, the children were unharmed; the Court however 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).

For three (3) hours, these three (3) troubled youth had no supervision whereby they were left to their own devices. They walked at least two (2) miles in the dark before they returned to the residence two (2) hours later. Any number of tragic events was within the realm of possibility in light of the aforementioned scenario. While noting the Appellant's excellent work history, the personal events the Appellant experienced the day prior to the reported incident and the Appellant's genuine remorse, this Hearing Officer has no option except to affirm the Department's decision to support the allegation of neglect. The Appellant failed to provide the children with "minimally adequate...supervision..." when he fell asleep for three (3) hours while working the overnight shift; staff are required to remain awake and perform checks every fifteen (15) minutes. (110 CMR 2.00, 110 CMR 4.32) Due to An's statement to JN, the Appellant falling asleep may not have been an isolated incident; however, the duration that the Appellant may have been asleep was not explored. By virtue of the children's emotional and behavioral difficulties, being unsupervised for this extended period to include unfettered access to the unit and walking about the community in the dark placed the children in danger. DCF Protective Intake Policy #86-105.

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 Am, An and T 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

Carmen Temme

Administrative Hearing Officer

11/24/18

Date

Susan Diamantopoulos

Susan Diamantopoulos

Fair Hearing Supervisor