

**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 S. Spears
Commissioner**

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IN THE MATTER OF

JE #2017 0407

FAIR HEARING DECISION

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

Procedural History

On February 12, 2017, the Department's Special Investigation Unit (SIU) received a report which alleged neglect of K by the Appellant, a residential program staff member, after the Appellant gave K Nutella, which she was allergic to. K had a severe allergic reaction and required emergency medical care. The Department conducted a response and on March 6, 2017, made the decision to support an allegation of neglect of K by the Appellant. The Department notified the Appellant of its decision and his right to appeal.

Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. A hearing was held at the DCF Holyoke Area Office on May 23, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; BJ, DCF SIU Response Worker; JE, 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.

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 February 12, 2017
Exhibit B: 51B Report completed on March 6, 2017 by BJ

For the Appellant(s):

Exhibit 1: Request for Hearing and Letters of Support

Issue to be Decided

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record, 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 was a residential staff member at the [REDACTED] Acute Treatment ("[REDACTED]") Program. K entered the program on Friday February 10, 2017. (Exhibits A and B)
2. The Appellant was K's caregiver under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00
3. The Appellant was not involved with the Department prior to the report in question. J received positive references from individuals in community-based programs where the Appellant volunteered and [REDACTED] staff spoke highly of the Appellant. (Exhibit A; Exhibit B, p. 5; Exhibit 1; Testimony of BJ)
4. On February 10, 2017, K entered the [REDACTED] The Appellant conducted the intake. K's grandmother/guardian LG completed the intake with K. During the intake, LG told the Appellant K had numerous allergies that included,

among others, allergy to eggs, fish, tomatoes, nuts, seafood (including canned tuna) and fruits, including oranges. K is "very allergic" to nuts and oranges. K has an EpiPen in the event she has an allergic reaction. K is well-educated about her allergies. (Exhibit B, pp. 2, 3 and Appended Medical Record; Testimony of BJ and Appellant)

5. Between February 10, 2017 and February 11, 2017, the Appellant, other program staff and the other children at the program took precautions to help avoid K avoid exposure to allergens; they washed down surfaces where a snack of oranges was prepared and washed hands after preparing and eating the snack. Due to her allergies K was unable to eat the meals made for the other children or refused food she did not like. (Exhibit B, pp. 3-5; Testimony of BJ and Appellant)
6. On February 10, 2017, staff member KA made hot chocolate for K using cocoa and milk. On the evening of February 11, 2017, K asked the Appellant for chocolate milk with her granola bar snack. The Appellant went to the pantry and saw what he believed was a chocolate product¹ (Nutella) and did not see any other chocolate product. The Appellant used the Nutella to make chocolate milk for K. The Appellant admittedly made a mistake when he gave K Nutella. The Appellant was not aware that Nutella contained nuts²; he assumed staff KA used it to make K's drink the prior evening and did not read the label. (Exhibit A, p. 2; Exhibit B, pp. 4, 5; Testimony of BJ and Appellant)
7. After she ate the snack, K had problems breathing, went to the nurse and reported her throat "felt weird". K had an allergic reaction to the Nutella. The nurse recognized K was having an allergic reaction and called LG. LG told the nurse to use the EpiPen and call 911. K was fearful of the EpiPen and refused to be injected. The medication could not be administered until EMTs arrived and along with program staff were able to "corner" K in a room and administer the EpiPen. K's resistance to taking the EpiPen right away increased the severity of her allergic reaction. (Exhibit B, p. 6 and Appended BHN Investigation Report; Testimony of BJ and Appellant)
8. K was in the hospital for several hours when she experienced worsening symptoms. As a precautionary measure and due to the severe nature of her reaction, K was hospitalized in the Pediatric Intensive Care Unit.³ (Exhibit B, pp. 3, 8, 9; Testimony of BJ)
9. Prior to the reported incident, [REDACTED] restricted nut products in the residence due to the incidence of nut allergies in children admitted to the program,

¹ The Appellant described that Nutella looked like a chocolate sauce and when he did not see any other chocolate product, assumed that was what KA used.

² The SIU Response Worker testified that he knew Nutella was a "nut product" but was unaware what kind of nuts it contained; he testified Nutella is an increasingly popular product and "not everyone is very aware of it."

³ According to LG, K was unable to eat or drink due to the swelling in her throat and when she had a second reaction in the emergency room, they moved K to the ICU where medication and hydration was administered via IV. (Exhibit B, p. 3)

- but had loosened restrictions to meet dietary preferences of some children. Following the reported incident [REDACTED] required staff to complete additional training about food allergies and recommended separation and clear labeling of nuts and nut products going forward. (Exhibit B, Appended [REDACTED] Investigation Report; Testimony of BJ)
10. On February 12, 2017, the Department received a report which alleged neglect of K by the Appellant on the basis that he gave K Nutella, which caused an anaphylactic reaction and required K to be hospitalized. (Exhibit A)
 11. On March 6, 2017, the Department supported an allegation of neglect of K by the Appellant on the basis that the Appellant failed to provide "proper essential care" and negligently gave K a snack that contained nuts. The actions of the Appellant caused substantial risk to K's well being; it resulted in K having a severe anaphylactic reaction. (Exhibit B, p. 9; Testimony of BJ)
 12. In reaching the decision that the Appellant neglected K, the Department reasoned that the Appellant was aware of K's allergies, failed to take care in reading the Nutella label and was therefore negligent. (Exhibit B, p. 9, Supervisor Comment)
 13. At intake, K's grandmother also told the Appellant that she encouraged the program staff to call her if there were questions regarding K's allergies and also encouraged the staff to ask K herself, as K was very well educated about her allergies. (Exhibit B, p. 3)
 14. Following the reported incident, [REDACTED] terminated the Appellant. [REDACTED] terminated the Appellant without respect to the Department's decision. (Testimony of Appellant)
 15. I find the Department conducted the response in accordance with Department regulations and applicable statutes. 110 CMR 4.27; M.G.L. c. 119 §51B et seq.; DCF Protective Intake Policy #86-015, rev. 2/28/16
 16. After a review of all the evidence, I find that the Department had reasonable cause to believe that the Appellant failed to provide minimally adequate essential care for K, and that the Appellant's actions posed a substantial risk to K's well being. Therefore, the Department's support decision is affirmed. (110 CMR 2.00 and 4.32; 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, 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

The Appellant was K's caregiver 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 K by the Appellant on the basis that the Appellant failed to provide "proper essential care" and negligently gave K a snack that contained nuts, which resulted in K's severe anaphylactic reaction. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

While the Appellant deeply regretted the mistake that was made and argued that his actions were just that: a mistake, one which he had learned from, 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 K. It is undisputed that the Appellant knew of K's allergies, as he conducted the intake with K's grandmother upon K's admission to the program. Also, while at times before serving her a drink which contained nut products in it, he did take measures to reduce the likelihood of K's exposure to known allergens; he ultimately failed to remain vigilant, and in less than 36 hours from her admission to the [REDACTED] program the Appellant gave her a product containing nuts ("Nutella"), posing serious risk to K's well-being.

Appellant conceded at hearing that he should have read the label on the Nutella bottle. He also had two additional options at his disposal in trying to determine whether Nutella was a permissible food for K to eat, namely to contact K's grandmother or to ask K herself. Having not exhausted any of these options prior to serving her the drink he made which contained Nutella, he failed to provide K with minimally adequate essential care. The Appellant did not meet his burden of demonstrating that the Department failed to have reasonable cause to believe that he neglected K. 110 CMR 10.23 For these reasons and enumerated in the above Findings of Fact, this Hearing Officer finds the Department's decision to support an allegation of neglect was reasonable and supported by the evidence.

Conclusion and Order

Appellant has not shown by a preponderance of the evidence that the Department's decision to support an allegation of neglect on behalf of K was not made with a reasonable basis; therefore, the Department's decision is AFFIRMED.

8-31-17
Date

Maura E. Bradford
Maura E. Bradford
Administrative Hearing Officer

Cristina Tedstone
Cristina Tedstone
Deputy General Counsel