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EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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Commissioner

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(IN THE MATTER OF)
(M.R.)
(FH #2017-0408)
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HEARING DECISION

Procedural History

The Appellant, M.R.¹, appeals the decision of the Department of Children and Families [hereinafter “the Department” or “DCF”], to support for neglect of her maternal granddaughter, Ala, pursuant to M.G.L., c.119, §§51A & 51B.

On March 20, 2017, the Department received a 51A Report containing allegations of physical abuse of another granddaughter, Ale, by J.P. - mother’s boyfriend and Ala’s father, whom Ale referred to as dad or daddy or papa. Ale had gone to school, showed a mark on her arm, and told the reporter that she got her younger sibling, Ala, out of bed and Ala fell on the floor. Daddy was in the bathroom and heard the noise, ran into the room, yelled at Ale, and hit her with a belt. The 51A was assigned to response social worker, T.N., as a non- emergency response. Other staff assisted during the response: on-going social worker, B.K. and response social worker, W.W. On March 20, 2017, response social worker, T.N., interviewed Ale at her school; went to the family’s home where she interviewed the children’s mother and J.P. and viewed Ala when the Appellant and her husband arrived at the home with the child; and, then contacted her supervisor to report her findings. On March 20, 2017, following a legal consult, the Department removed Ale and her sister, Ala, from the home via an emergency care and protection, in connection with Ale’s disclosure of being hit with a belt and of witnessing physical violence between the JP and DR. On March 22, 2017, a 51A Report was filed with the Department with allegations of neglect of Ala by the Appellant, who is the child’s maternal grandmother and at the relevant time, her legal guardian. The concerns were that the Appellant, knowing of past concerns of domestic violence between the children’s mother and J.P., still allowed Ala to go to mother’s home unsupervised. J.P had been recently released from his incarceration and was living in the home. Department determined that this represented a lack of supervision. On March 23, 2017, following the 51B response, the Department supported for neglect Ala by the Appellant and for physical abuse of Ale by J.P. This decision was approved by management on March 24, 2017. The family’s case continues to be managed by an ongoing social worker. The Appellant learned of the decision and her right of appeal and filed a request for Fair Hearing [“Hearing”] on April

¹ There is conflict in the record as to what the Appellant’s last name is. The Appellant has referred to herself both as M.R. and M.C.

28, 2017, pursuant to 110 CMR 10.06. The Appellant's request for Hearing was granted and held on June 6, 2017 at the Department's South Central Area Office in Whitinsville, MA. Present were the DCF Supervisor, A.S.; the DCF 51B response social worker, R.N.; the Appellant's Attorney, N.M.; the Appellant; the Appellant's Spanish-English Interpreter, O.L.²; and the Appellant's Witness/Family's DCF On-Going Social Worker, B.K. The response social worker, Appellant through her interpreter, and the Appellant's witness were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a CD. Admitted into evidence for the Department was the DCF 51A Report of March 20, 2017 [Exhibit A-1], the DCF 51A Report of March 22, 2017 [Exhibit A-2], and the corresponding 51B Response Supported on March 23, 2017 [Exhibit B]. The Appellant made no submissions. The Hearing record was then closed.

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement, or bias in this case.

Pursuant to 110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney-client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Standard of Review

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. 110 CMR 10.05. For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issues are whether there was reasonable cause to believe that a child had been abused or neglected; and, whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being, or the person was responsible for the child being a victim of sexual exploitation or human trafficking. DCF Protective Intake Policy #86-015 Rev. 2/28/16,

Findings of Fact

1. Twenty six year-old D.R. is the mother of six year-old Ale and two year-old Ala. At the time of the 51B response, Ale's father, A.R., was incarcerated and Ala's father, J.P., who was mother's boyfriend, and had been recently released from prison. [Exhibit A-1; Exhibit A-2; Exhibit B, pp.4-5 & 8]

² The Appellant speaks and understands English, but prefers Spanish. [Exhibit B, p.8]

2. J.P. has a lengthy criminal history. He was incarcerated from February to June 2017 and then from June to July 2, 2017 and then until September 30th. At the relevant time, he had been released and was on probation for drug use and completing random screens twice a week. There were indications in the record that J.P. was incarcerated in the past for domestic violence and drug use. [Exhibit B; Testimony of the On-Going Social Worker; Testimony of the Response Social Worker]
3. Although the children's mother and J.P. reported that J.P. was at the home only on weekends, when mother worked and that he sometimes slept there, Ale separately and credibly informed the response social worker that J.P. lived with them and slept there nightly. [Exhibit B, pp. 3, 5 & 12; Testimony of Response Social Worker]
4. The family's ongoing social worker, B.K., assigned to the case since August 2015, was not aware that J.P. was living with mother, but said there was a safety plan established in 2015/early 2016 allowing him to be with the children only in a caretaking role. [Testimony of the On-Going Social Worker]
5. On Saturday, [March 18, 2017] while mother was working, J.P. was in the bathroom and heard a boom. He responded and picked up Ala, who was crying and on the floor. Ala had been on the bed and Ale had either let Ala out of bed or tried to get her or put her up there, and she fell off. J.P. and Ale, when interviewed by the response worker at separate locations, did not dispute this incident happened or that Ale was punished. Although J.P. denied this, Ale reported receiving a boo boo because J.P. hit her with a belt. The child was injured. On March 23, 2017, the Department supported for physical abuse of Ale by J.P.³ [Exhibit A-1, p.3; Exhibit B; Testimony of the Response Social Worker; Testimony of On-Going Social Worker]
6. The Appellant, when interviewed by response social worker, T.N., on March 20, 2017, said she did not believe J.P. hit Ale with a belt and thought the marks on the child were eczema. [Exhibit B, p.5; Testimony of Response Social Worker] She maintained it was eczema at her Hearing of June 6, 2017, but said if Ale told her she would believe her. [Testimony of the Appellant]
7. Ale also informed the response social worker, T.N., when interviewed at school on March 20, 2017, that her mother and J.P. fought with their hands and always did this, and showed the worker a closed fist. This last happened when she was six and she is still six. [Exhibit B, p.3; Testimony of Response Social Worker]
8. Mother and J.P. have a DCF history of domestic violence, and J.P. of drug involvement:
 - a) On May 8, 2015, the Department received two 51A Reports that were screened in for a non emergency response. Following the response and in consultation with a supervisor, the reports were supported for neglect of Ale and Ala by their mother and J.P. Mother and the paternal aunt, L.P., engaged in a verbal argument, which escalated into physical violence. J.P. intervened when the argument became physical

³ The decision to support physical abuse of Ale by JP is not addressed in this hearing.

and reportedly “accidentally” punched or elbowed mother in the nose causing it to bleed. The fight occurred at the residence of J.P.’s mother’s home where mother and J.P were staying with the two children. The fight occurred in the room J.P. and mother stayed in. The police responded to the home and observed the room to be cluttered and with broken glass strewn about due to a window having been broken during the argument. The children were in a separate apartment with the brother of J.P., but Ale could hear the argument and wanted to go and see what was happening. Mother took the children and left the home. The Department supported on July 31, 2015 and opened the case. [Exhibit A-1; Exhibit A-2; Exhibit B, p.1]

- b) DCF On-Going Social Worker, B.K., was assigned to the family’s case in August 2015, following a domestic incident between mother and J.P. in June/July. [Testimony of the On-Going Social Worker]
 - c) On November 13, 2015, the police filed a 51A Report with the Department alleging neglect of then five year-old Ale and eight month-old Ala by J.P., who was in the home. The 51A Report was screened in and supported for the domestic violence incident. [Exhibit A-1; Exhibit A-2]
 - d) There was a domestic violence incident in December 2015, which was recanted. [Testimony of the On-Going Social Worker]
 - e) On February 26, 2016, the Department supported an allegation of neglect, documenting a history of domestic violence and that J.P was recently arrested during a drug raid. [Exhibit B, p.1; Testimony of the On-Going Social Worker]
 - f) J.P. self reported on March 20, 2017 that he used heroin in July and was on probation. He had been using three, \$10 bags daily, intranasal for about a year. He went to jail. [Exhibit B, p.5]
9. The Appellant is D.R.’s mother and the maternal grandmother of the children. She lived in elderly housing with her husband, who cared for Ala, when the Appellant worked. [Testimony of the Appellant; Exhibit B, pp.8-9]
10. The on-going social worker knew that the Appellant was helping with child care of Ala, because mother told her. [Testimony of the On-Going Social Worker]
11. The Appellant received permanent guardianship of Ala on December 13, 2016. [Exhibit B, p.8]
12. According to mother, J.P. was typically the caretaker of Ala when she was working, but lately the Appellant had been taking Ala. [Exhibit B, p.4]
13. According to the Appellant, Mother found a job and began working in 2016. Since day care for Ala did not work out well, the Appellant’s assistance allowed mother to work,

and Ale was in school which also allowed mother to work. The Appellant denied assuming custody because of concerns about mother's parenting [Exhibit B, p. 8]

14. There is inconsistency in the record concerning the type and frequency of visits Ala had with her mother during the Appellant's guardianship of the child. On March 20, 2017, the Appellant told response social worker that Ala would visit mother sometimes Friday to Saturday, but not always. [Exhibit B, p.6] However, on March 23, 2017, the Appellant told response social worker, W.W., that since she was awarded custody, mother would come to her home every weekend with Ale to visit Ala and would use face time with them every night. This past Friday [March 17, 2016] was the first time Ala went to mother's home and stayed overnight. Mother returned her to the Appellant on Saturday [March 18, 2017]. [Ibid, p. 8] At Hearing, the Appellant maintained that the Saturday, [on March 18, 2017 when the belt incident happened], was the first time she allowed Ala to go to mother's home. She found out about the incident which resulted in the 51A on the same day the incident happened. [Testimony of the Appellant]
15. On March 23, 2017, the Department supported an allegation of neglect of Ala by the Appellant because she failed to provide minimally adequate supervision, when she allowed Ala to visit mother's home unsupervised, despite knowing there were concerns about past domestic violence between mother and J.P., the latter of whom was back living in the home and was helping mother to care for the children. J.P. has a lengthy history of criminal involvement including incarceration for domestic violence and drug involvement. More recently, an incident occurred at mother's home on March 18, 2017 whereupon J.P. punished Ale by hitting her with a belt and leaving injury, because her sister, Ala, fell off the bed. [Exhibit B; Testimony of the Response Social Worker]
16. The Hearing Officer reverses the Department's finding of neglect of Ala by the Appellant for the following reasons:
 - a) On March 23, 2017, the Appellant showed the response social worker, W.W, the Decree and Order of Appointment of Guardian, which he added as a photo to the DCF records. The Appellant told him that the paperwork on the guardianship did not say that Ala could not go with or visit her mother and testified at Hearing that the judge never said Mother could not have contact with her children. [Exhibit B, p.8; Testimony of the Appellant] This Decree was not submitted as evidence by the parties at the Appellant's Hearing of June 6, 2017 nor is there anything in the record to contradict the Appellant's statement. [Administrative Record]
 - b) On March 23, 2017, the Appellant reported that it was her understanding that mother and Ale were living alone. She and her husband were not aware that mother and J.P. were together or in a relationship. The Appellant reported first learning of J.P.'s past criminal history, when she filed for custody of Ala. He was in jail at that time and they had to publish in the newspaper. The Appellant became aware that J.P. was out of jail, but believed he was staying with his own mother [Exhibit B, pp.8-9]. This last statement could be likely, since Mother and J.P. were dishonest with the response

social worker, T.N., when they denied J.P. lived in the home and provided other full and partial addresses for him. [Ibid, p.5]

- c) The DCF on-going social worker, assigned in August 2015 and currently active with the family, was not aware that J.P. was residing with mother. JP was not supposed live with her, but he was allowed to be in the home in a caretaking role per a 2015/early 2016 safety plan. [Testimony of the On-Going Social Worker] The Appellant testified at Hearing that she was not aware that J.P. was taking care of the children per the safety plan. [Testimony of the Appellant] There was no evidence elsewhere to dispute Appellant's testimony. [Administrative Hearing Record]
- d) The Appellant reported to response social worker, W.W. on March 23, 2017, that she was not aware of any violence between mother and J.P. [Exhibit B, p.8] She also testified at Hearing that she was not aware that mother's DCF case was open. [Testimony of the Appellant] Given the long-standing DCF history on mother and J.P. and the Appellant's contact with mother, the Hearing Officer finds it hard to believe that the Appellant did not know of mother's involvement with the Department and the reasons why. Despite this, testimony from the Department at the Appellant's Hearing of June 6, 2017, did not support this inference. (a) The response social worker, T.N., testified at Hearing that she spoke with the on-going team, and determined that Appellant knew of the violence between mother and J.P. from the on-going case; however, this is not documented in Exhibit B and the response social worker did not query the Appellant about this when she met her on March 20, 2017. [Testimony of the Response Social Worker] (b) The on-going social worker, B.K., first met the Appellant on March 20, 2017, during the 51B response. She testified to this fact as did the Appellant. [Testimony of the On-Going Social Worker; Testimony of the Appellant] On this date, the on-going social worker did not ask the Appellant, if she was aware of any domestic violence between mother and J.P. [Testimony of the On-Going Social Worker]
- e) The Appellant testified at Hearing that mother told her J.P. had been arrested and that she learned J.P. was in jail, when she went to court with mother [and filed for custody of Ala]. [Testimony of the Appellant; Exhibit B, pp.8-9; Testimony of the Response Social Worker] Even if the Appellant knew about the reasons for J.P.'s incarceration at that time, whether for domestic violence and/or drug involvement, there was no evidence that the Appellant knew J.P. was living in mother's home and/or that J.P. was allowed by DCF to have a caretaking role for the children; See Findings #16 (b) (c).
- f) On March 20, 2017, the Department filed a care and protection petition on behalf of the children, due to concerns about past domestic violence and physical abuse, and placed the children in foster care. [Exhibit B, pp.5-6] At the 72 hour hearing held on March 24, 2017, Ala was returned to the Appellant's care and the Department's case remained open. [Testimony of the On-Going Social Worker]

Applicable Standards and Analysis

A party contesting the Department's decision, to support a 51A Report for neglect, may obtain a Hearing to review the decision made by the Area Office. [110 CMR 10.06] The Appellant requested a Hearing, which was granted and held on June 6, 2017.

Regulations, policies, and case law applicable to this appeal include, but are not limited to, the following.

After completion of its 51B investigation, the Department shall make a determination as to whether the allegations in the report received are supported or unsupported. 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. To support a report does not mean that the Department has made any findings with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker(s) did inflict abuse or neglect upon the child(ren) in question. Reasonable cause to believe is defined as 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 caretaker, physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals, e.g., professionals, credible family members, and the social worker and supervisor's clinical base of knowledge. [110 CMR 4.32]

The 51A report under appeal is supported for neglect. Neglect means 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 out-of-home or in-home setting. [110 CMR 2.00]

A Support finding means there is 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 children in danger or pose substantial risk 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. One such example is neglect that has led to a serious physical or emotional injury. Protective Intake Policy #86-015 [2/28/16]

A substantiated concern finding means there was reasonable cause to believe that the child was neglected and the actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being. Examples include neglect that resulted in a minor injury and the circumstances that led to the injury are not likely to recur, but parental capacities need strengthening to avoid future abuse or neglect of the

child; neglect that does not pose an imminent danger or risk to the health and safety of a child; and, educational neglect. Protective Intake Policy #86-015 [2/28/16]

An unsupported finding means there is not reasonable cause to believe that a child(ren) was abused and/or neglected, or that the child(ren's) safety or well-being is being compromised; or the person believed to be responsible for the abuse or neglect was not a caregiver, unless the abuse or neglect involves sexual exploitation or human trafficking where the caregiver distinction is not applied. Protective Intake Policy #86-015 [2/28/16]

The 51A report under appeal is supported for neglect. Neglect means 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 out-of-home or in-home setting. [110 CMR 2.00]

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. 110 CMR 2.00 & Protective Intake Policy #86-015 [2/28/16]

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, and (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 baby-sitting), a foster home, a group care facility, or any other comparable setting. As such, "caretaker" includes (but is not limited to) school teachers, baby-sitters, 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 baby-sitter. [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, (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]

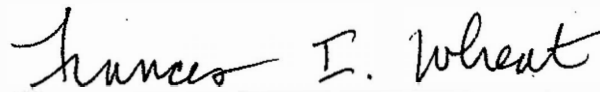
After review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Appellant in the matter under appeal. See Findings #1 to #16 and the discussion below.

The Appellant was a *caretaker* of her two year-old maternal granddaughter, Ala, as defined above and at 110 CMR 2.00.

Based on the record as a whole, the Department did not have “reasonable cause to believe” that the Appellant failed to provide Ala with minimally adequate supervision, when as the child’s maternal grandmother and guardian, she allowed the child to visit her mother and J.P. unsupervised. J.P. has a lengthy criminal record including incarceration for domestic violence involving the children’s mother and drug involvement. He had been released from jail and was living in the home at the relevant time. On March 18, 2017, J.P. punished Ale with a belt because her sister, Ala, fell off the bed. Although the Appellant knew about J.P.’s incarceration when she filed for custody of Ala and received such custody of the child on December 13, 2016, there was no evidence to demonstrate that the Appellant knew J.P. was living in mother’s home following his release from jail or that she knew that the family’s DCF on-going social worker had allowed, per a safety plan established in 2015/early 2016, J.P. to take on a role of caretaker for the children. The evidence further showed that the Appellant first learned of the March 18, 2017 belt incident on the day it happened; there was no convincing evidence to show otherwise. There was no evidence that the Appellant allowed Ala to visit mother’s home, after learning of the belt incident, but before the Department assumed custody of the children on March 20, 2017. The Department’s evidence was insufficient. The Appellant met her burden of proof in this case. [110 CMR 10.23]

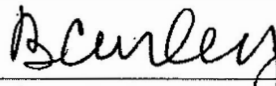
Order

1. The Department’s decision of March 23, 2017, to support the 51A Report for neglect of Ala by the Appellant, is REVERSED.



Frances I. Wheat, MPA BC
Administrative Hearing Officer
Office of the General Counsel

June 11, 2018
Date



Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner