

**EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET 6TH FLOOR
BOSTON, MASSACHUSETTS 02111**

**Linda S. Spears
Commissioner**

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IN THE MATTER OF: NY

Fair Hearing # 2017-0409

FAIR HEARING DECISION

The Appellant in this Fair Hearing is Mr. NY (hereinafter NY or Appellant). The Appellant appeals the Department of Children and Families' (hereinafter "the Department" or "DCF") decision, to support an allegation of neglect by the Appellant of the reported child, hereinafter K, the report filed and investigated pursuant to MGL., c.119, sec. 51A and B.

Procedural Information

On March 6, 2017, the Department received a non-mandated 51A report regarding the subject child. The report was received by the Department's Worcester West Area Office, where it was assigned for a non-emergency response. The Department completed its response on March 27, 2016. An allegation of neglect of the reported child by the Appellant was supported. The Appellant was informed of the decision and of his right to appeal the Department's determination. The Appellant filed a timely request for a Fair Hearing under 110 C.M.R. 10.06.

The Fair Hearing was held on May 11, 2017 at the Worcester West Area Office. The witnesses were sworn in to testify under oath. The Fair Hearing was digitally recorded. The record remained open to allow for the submission of further documentary evidence from the Appellant. The evidence was received and the record closed on May 25, 2017.

In accordance with 110 C.M.R. 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 following persons appeared at the Fair Hearing:

Anna L. Joseph
NY
JF

Hearing Officer
Appellant
Department Supervisor

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

For the Department:

Exhibit 1: 51A dated March 6, 2017

Exhibit 2: 51B dated March 27, 2017.

For the Appellant:

Exhibit A: Judgment of Modification dated October 1, 2013

Exhibit B: [REDACTED] Police Department Incident Report dated March 3, 2017

Exhibit C: Letter from [REDACTED], [REDACTED] dated May 24, 2017

Issue To Be Decided

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 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, 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; 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 reported child of this response, K , was age eight (8) at the time of the subject report. (Exhibit 2, p.1)
2. K is the only child in common between the Appellant and K's mother, RG. (Testimony of Appellant)
3. The Appellant and RG separated in 2011 due to adultery and abandonment by RG. (Testimony of Appellant)
4. The communication regarding custody issues between the Appellant and RG was relatively cordial after their separation. There was a marked deterioration in this communication when the Appellant re-married. (Testimony of Appellant, Fair Hearing Record)
5. RG created a number of obstacles to the Appellant's consistent visitation since the 2013 Probate Court custody agreement. (Exhibit A, Testimony of Appellant, Exhibit C)

6. The Appellant and RG have substantially differing parenting styles and priorities, which resulted in significant obstacles toward successful co-parenting. (Testimony of Appellant, see analysis)

7. Among the issues on which the Appellant and RG differ is that of discipline. It is the physical discipline of K which prompted the subject report, as K disclosed ongoing corporal punishment at the home of RG and her new partner. (Testimony of Appellant, Exhibit 1)

8. The Appellant and RG are members of a Christian, ██████████ community, wherein the advice and counsel of Elders and Pastors carries profound weight. (Testimony of Appellant, Fair Hearing Record, Exhibit C)

9. In deference to his profound commitment to his faith and cultural community, the Appellant has been reluctant to involve the probate court in this matter. (Testimony of Appellant, Fair Hearing Record)

10. The Appellant has made multiple attempts over the past several years to engage RG in pastoral work in order to further a positive shared parenting plan for K. RG has rebuffed these attempts. (Testimony of Appellant)

11. The Appellant's version of these events is both credible and supported by the evidence. K is in the joint legal custody of the Appellant and RG. The contemporaneous police report contradicted the Department's conclusions that K was taken from his mother's care without her consent. (Exhibit 2, Testimony of Department Response Worker, Exhibit A, Exhibit B)

12. The Department retained the Appellant and his family for comprehensive assessment (Exhibit 2, Testimony of Department)

13. Since the reported events, the Appellant has had no contact from the Department, therefore no credible assessment of his capabilities has been completed, nor services offered. (Testimony of Appellant, Fair Hearing Record)

14. The Department had insufficient evidence to support a decision. While K reported his displeasure when his parents argued, this alone did not constitute neglect, as defined by the Department. (See analysis, 110 CMR 2.00 and 4.32 DCF Protective Intake Policy #86-015, rev. 2/28/16)

Applicable Standards

“Neglect” is defined as 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. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

A support finding of abuse or neglect requires that there be reasonable cause to believe that a child(ren) was abused and/or neglected; *and* that 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. 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. 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 s. 51A.” Id. at 63. 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.

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

The Department supported an allegation of neglect of the subject child by his father, the Appellant. The Department's decision was predicated on the conclusion that the Appellant was equally culpable in a shared custody dispute which culminated in an alleged act of custodial interference.

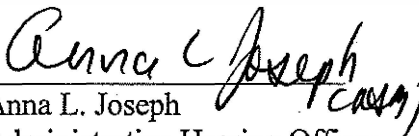
The evident discord and volatile communication between the Appellant and his former spouse doubtless has placed undue strain on this child. However, the Department failed to demonstrate that the Appellant's actions in this instance constituted less than minimally adequate care, as the definition requires. Further there is no evidence that K was placed in danger or that the Appellant's actions/inactions posed a substantial risk to the child's safety or well-being. Additionally, and contrary to the Department's determination, the Appellant has engaged in multiple acts of protection on K's behalf.

K was upset by the arguments, and it would be difficult to over-state the toxic nature of the communication between the Appellant and his former spouse. This did not, however, constitute neglect as defined by the Department.

With respect to the totality of the evidence, including the basic undisputed facts, the Department's decision was not made in accordance with Department policies and/or regulations. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); Wilson v. Department of Social Servs., 65 Mass.App.Ct. 739, 744-745 (2006)

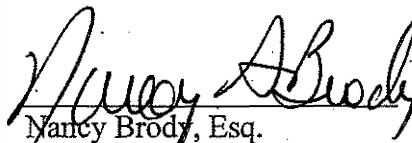
Conclusion and Order

The Appellant has shown by a preponderance of the evidence, that the Department's decision to support the allegation of neglect was not in conformity with Department policies and/or regulations, and therefore the Department's decision to support the allegation of neglect of K by the Appellant, NY, is REVERSED.



Anna L. Joseph
Administrative Hearing Officer

Date: 4-3-18



Nancy Brody, Esq.
Supervisor, Fair Hearing Unit

Date:

Linda S. Spears
Commissioner