

**THE COMMONWEALTH OF MASSACHUSETTS
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

LQ #2017-0419

FAIR HEARING DECISION

LQ appeals the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support allegations of physical abuse, sexual abuse and neglect pursuant to G.L. c. 119, §§51A and B.

Procedural History

On January 31, 2017, the Department received a 51A report alleging sexual abuse and neglect of A by her father (LQ); physical abuse and neglect of A by her mother (MG) and physical abuse of V by her mother (MG) and mother's boyfriend (LQ). The Department screened-in the report for a response. On March 1, 2017, the Department made the decision that the allegations of sexual abuse and neglect of A by LQ, physical abuse and neglect of A by MG and physical abuse of V by LQ and MG were supported. The Department notified LQ and MG of its decision and their right to appeal.

On April 6, 2017, LQ (through his attorney) made a timely request for a Fair Hearing to appeal the Department's decision and for a Spanish interpreter to be present at the hearing.

On April 14, 2017, the Department sent notice to LQ that his hearing was scheduled for June 22, 2017, at 10:00am in the DCF South Central Area Office.

On April 24, 2017, LQ's attorney sent a second request for a Spanish interpreter to be present at the June 22, 2017, hearing.

A hearing was held on June 22, 2017, at the DCF South Central Area Office. LQ's attorney appeared. LQ was not in attendance. The Department supervisor was present and testified at the hearing.

The Department submitted the 51A and B reports which were entered into evidence at the hearing. (Exhibits A and B).

The hearing was digitally recorded and transferred to compact disc. LQ was provided with a copy of the recording per his request following the hearing.

At the outset of the hearing, LQ's attorney requested that LQ's hearing be consolidated with MG's fair hearing.¹ In support of that request, LQ's attorney stated that she assumed that the matters were already consolidated so that the request for subpoenas and the request for a continuance made in MG's case applied to LQ's case as well.

LQ and MG made separate requests for fair hearings. They were represented by different attorneys appointed by the court in the related Care and Protection proceeding. Their appeals were given different appeal numbers. The hearings were scheduled for different hearing times. There is no reasonable basis for assuming that LQ and MG's appeals were consolidated or that the requests made by MG's attorney applied to LQ's case. LQ failed to make a subpoena request in a timely manner (See 110 CMR 10.13(2)(b)) or show good and sufficient cause for a continuance of LQ's fair hearing and, therefore, LQ's request was denied.

The hearing record was held open until July 26, 2017, to allow the parties to submit additional documentary evidence and/or request a second hearing date and subpoena witnesses.

The Department submitted a trauma evaluation related to the case. The trauma evaluation contained a notice of confidentiality. The parties were asked to submit legal arguments regarding the admissibility of the evaluation absent a waiver of confidentiality and/or privilege or permission from the court.

LQ submitted a memorandum arguing that the trauma evaluation is inadmissible without a waiver of privilege or court order. The Department did not submit an argument addressing the issue. For reasons stated in LQ's memorandum, I find that the evaluation is inadmissible and it is, therefore, excluded from the hearing record.

¹ MG had also requested a fair hearing to appeal the Department's decision. MG's fair hearing had been scheduled for later that same day, but it was continued at her attorney's request due to the unavailability of witnesses under subpoena. Therefore, LQ's request to consolidate is also a request for a continuance under the circumstances.

The Hearing Officer attests to having no prior involvement, personal interest or bias in this matter.

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. 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, 110 CMR 10.05

Findings of Fact

1. MG (hereinafter "mother") is the mother of V (d.o.b. [REDACTED], age 11 at the time in question) and A (d.o.b. [REDACTED], age 5 at the time in question). (Exhibit A, p. 1).
2. LQ (hereinafter "father") is mother's boyfriend and the father of A.² (Exhibit A, pp. 1-2, 3).
3. In September 2011, approximately 6 months after A was born, mother sent V to live in [REDACTED] while A remained with mother and father. V returned from [REDACTED] in February 2013. Between February and sometime in May 2013, mother, father and both children lived together in the same household. (Testimony of the Department supervisor).
4. The Department has had on-going involvement with the family since May 2013. There have been numerous 51A reports filed since that time. Several of those reports were supported. Allegations included neglect, physical abuse, sexual

² LQ is referred to as "father" throughout this decision for clarity, however, he is not V's father. The Department's records refer to him as mother's boyfriend as well as step-father in relation to V.

abuse, human trafficking and sexual exploitation. The supported allegations included neglect of V by mother and father, physical abuse of V by father, physical abuse and sexual abuse of V by "unknown," sexual abuse of V by father, sexual abuse of V by male family friends, neglect of A by mother and father and sexual exploitation of V by father. (Exhibit A, pp. 5-11; Exhibit B, pp. 1-2).

5. Following the Department's May 2013, investigation, the children were removed from mother and father's care and placed in the Department's custody. V has remained in the Department's custody since then. A was returned to mother's custody in May 2014. A was removed from mother's care and placed in the Department's custody again after a 51A report alleging sexual abuse and exploitation of V by father was supported in August 2016. The Department placed A in foster care at that time. (Testimony of the Department supervisor; Exhibit B, pp. 1, 5).
6. A participated in a trauma evaluation at [REDACTED] Clinic in December 2016, and January 2017. She met with the evaluator 4 times. During the course of the evaluation, A grabbed a toy television and shouted, "Oh no!! So yucky movies... grownups without clothes on doing bad things. Bad things.... touching privates with their hands and mouths." She talked about remembering mother hitting her and V and the two of them hiding in the closet. She identified mother and father toy figures and had the figures kiss and the father figure put his face on the mother figure's privates. When asked what behaviors she would not allow in her "good" house, she said, "Keep out... no hitting and no grabbing. No more yucky movies. Little children don't need to hide and no more yelling and no, no, no touching privates and no, no drinking and no Mommy and Daddy hitting each other. No touching front privates and no touching bottom either. The children have to hide because not safe.. lots of hitting and lots of touching privates. My [father] touched my privates with his hands. He did it a lot and I can't remember if he put his mouth there" and she pointed to her privates. She said she did not tell her mother because she was scared and father threatened to hurt her. She also talked about her parents fighting a lot. (Exhibit B, pp. 3, 4).
7. On January 31, 2017, the Department received a 51A report alleging physical abuse and neglect of A by mother, sexual abuse and neglect of A by father and physical abuse of V by mother and father based upon A's statements and actions during the trauma evaluation. The Department screened-in the report for a non-emergency response. (Exhibit A).
8. The Department response worker and A's adoption social worker interviewed A with her foster mother present. She made some vague references to bad people in the home and watching adult movies and a bad movie. She did not provide any details. She talked about hiding with V because father was going to hit V, but she denied seeing father hit V or being hit herself. She said she would worry about being hurt if she were alone with mother and father, but she did not say why. She denied anyone touched her private parts. (Exhibit B, pp. 4-5).

9. The Department response worker met with father and his attorney. On the advice of his attorney, father declined to answer numerous questions. More specifically, he declined to answer questions regarding whether there was ever a time when he and mother did not have enough food or deprived the children of food, whether he and mother ever have loud or abusive arguments, if he and mother have ever struck each other, if he ever had a substance abuse problem or the need for substance abuse treatment, if he had any concerns about anyone with mental health issues in the home, if he spanked the children, if there were any activities in the home that frightened the children, if he ever viewed pornography (books, magazine, television, videos, movies or other materials), horror or other graphic material in the home, if he was ever naked in front of A, if he ever touched A's vagina with his hand or mouth, if he ever had any sexual contact with A and if the children ever witnessed any physical fighting or violence in the home. (Exhibit B, pp. 10-11).
10. Father did answer some of the response worker's questions. He said that he and mother resolved disagreements by being quiet or leaving the house to avoid the upset. He denied having worries about anyone using drugs or alcohol. He disciplines the children by telling them to behave. He has observed mother to be a good mother. He denied mother using physical discipline. He is not aware of any time mother yelled at the children. He denied seeing the children hiding. He is not sure why the children would make the reported allegations. (Exhibit B, pp. 10-11).
11. The Department response worker met with mother and her attorney. Mother did not answer any questions. Mother's attorney suggested that the Department investigate another potential perpetrator and she noted that V and A have only lived together with the parents when A was an infant and again between February and May 2013. (Exhibit B, pp. 11-12).
12. The Department response worker, Department supervisor, adoption social worker and adoption supervisor participated in a conference call with the mandated reporter. They discussed whether it would be in A's best interest to participate in a forensic interview. The reporter did not recommend she participate in a forensic interview. She described A as very guarded and she believed that she would "freeze" and not elaborate about what happened to her. She reported that A made a disclosure of sexual abuse by father, she was exposed to chronic trauma/toxic stressors, on-going domestic violence and she was threatened by father if she told about the sexual abuse. (Exhibit B, p. 4).
13. The Department response worker spoke with the reporter two additional times during the response. The reporter stated it was her opinion that A disclosed contact with pornography, witnessing domestic violence, not being fed, not feeling safe in her home, being sexually abused by father and having to hide. A was exposed to traumatic events and she was in a state of constant guard against physical harm and being without a protector. The reporter gave her opinion that she found A's current disclosures to her to be truthful. (Exhibit B, pp. 8, 12).

14. The Department response worker did not interview V. (Exhibit B; Testimony of Department supervisor).
15. On March 1, 2017, the Department made the decision that the allegations of physical abuse and neglect of A by mother, sexual abuse and neglect of A by father and physical abuse of A and V by mother and father were supported based upon what A reported during a trauma evaluation as well as the family's history with the Department. (Exhibit B, pp. 13-14; Testimony of the Department supervisor).
16. Considering all of the evidence including reasonable inferences drawn therefrom, I find that there is reasonable cause to believe that father exposed A to pornography and sexual activity and engaged in sexual contact with her and that father exposed her to traumatic events including domestic violence, excessive discipline and threats of harm causing her to be fearful and negatively impacting her emotional well-being. Further, the Appellant's actions posed a substantial risk to A's safety and well being. (Fair Hearing Record)

Analysis

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 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. 2/28/16.

"'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 C.M.R. §4.32(2)

"[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.

To prevail, an Appellant must show by a preponderance of the evidence that the Department's decision or procedural action was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the Appellant. If there is no applicable policy, regulation or procedure, the Appellant must show by a preponderance of the evidence that the Department acted without a reasonable basis or in an unreasonable manner, which resulted in substantial prejudice to the Appellant. 110 CMR 10.23

"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.

"Abuse" is defined as the non-accidental commission of any act by a caregiver which causes or creates a substantial risk of physical or emotional injury or sexual abuse to a child or the victimization of a child through sexual exploitation or human trafficking, regardless if the person responsible is a caregiver. 110 CMR 2.00(1), DCF Protective Intake Policy #86-015 Rev. 2/28/16.

As A's father, he is her caretaker under Department regulations. As a household member and mother's live-in partner, father was a caregiver for V under Department regulations during the time she lived with him and he was entrusted with a degree of responsibility for her well-being. 110 CMR 2.00

The Department determined that father sexually abused and neglected A and physically abused V.

With regard to the allegations of physical abuse of V by father, the only evidence to support those findings are A's statements to the trauma evaluator. She said mother "hits so much." She indicated that she and V would hide in the closet. She also said, "They were nicer to me, but I got hit too. V got hit more." She also said that the children have to hide because it's not safe and she indicated it was not safe in part because of "lots of hitting...". When asked what behaviors she would not allow in her "good" house, she answered, "Keep out... no hitting and no grabbing." As noted in the above findings, V was not even interviewed during the response and A denied seeing V get hit or being hit herself during her interview with the response worker.

Even assuming A was recalling actual events when she spoke to the trauma evaluator and that she and V were hit and they would hide because they did not feel safe, there is insufficient evidence to determine whether father's actions caused or created a substantial risk of physical injury to V. There is no evidence in the hearing record that either A or V suffered an injury and A provided no details that would assist in evaluating whether the parents' actions created a substantial risk that an injury might occur or whether the hitting referred to involved a form of spanking that would not constitute physical abuse under Department regulations.³

³ It is also noted that there were prior supported 51A reports of physical abuse of V by the parents. Since V was removed from their care after the May 2013, report and she has never returned to their care, any incidents of physical abuse of V must have happened prior to her removal. Therefore, any incidents of physical abuse of V witnessed by A and disclosed by her to the trauma evaluator have likely already been addressed in prior reports.

Regarding the allegation of sexual abuse of A by father, I find that there is sufficient information in the record to support the Department's conclusion.

During her interview with the response worker, A made no clear disclosure of being exposed to pornography, witnessing sexual activity in person or of father touching her private areas, in fact, she denied that anyone has touched her private parts. She made vague references to movies that she did not want to watch and that scared her, but she did not say specifically what she observed.

Instead, the Department's decision was based upon what the trauma evaluator reported that A disclosed during the evaluation and what she demonstrated with mother and father figures during the sessions as well as the family's history with the Department. Therefore, it must be determined whether the Department was reasonable to rely on the information provided by the trauma evaluator and the family's history and, if so, whether the Department's conclusion that A was sexually abused by father based on that information was reasonable.

The Department is not only authorized to consider its history with a family, but it is required to review the history as part of the investigation/response process. The Department is also required to make any collateral contacts necessary to obtain reliable information which would corroborate or disprove the reported incident and the children's condition. The parent(s) or caretaker(s) of the reported child, the reported child him/herself and the reporter are to be considered the primary sources of information. 110 CMR 4.27

I find that the Department's consideration of the family's history and information provided by the trauma evaluator/reporter was proper under the Department's regulations and reasonable. The Department regularly relies upon the information from providers in various professions related to child welfare and mandated reporters in general and there is no reason to doubt the accuracy of the information provided in this case. There is no evidence in the record to indicate that the trauma evaluator did not accurately report what A said and did during the evaluation. There is no evidence that the trauma evaluator was biased in any way or that she had any interest that would be served by falsifying information. As a professional with expertise in the area of evaluating children to assess whether they have been exposed to traumatic events, I find that it is not only reasonable for the Department to rely on information she provided but I find it would be unreasonable for the Department to disregard that information absent some compelling reason to do so and there is no evidence of such a reason in this case.

Based upon A's statements during the trauma evaluation and given the family's history, particularly in light of father's failure to answer relevant questions during the response interview or testify at the hearing, I find that there is reasonable cause to believe that father exposed A to sexual activity and/or pornography and that he engaged in sexual contact with her and, therefore he sexually abused her under Department regulations.

Regarding the allegation that A was neglected by father, I find sufficient information in the record to support the Department's conclusion.

For the reasons stated above, the Department properly and reasonably relied upon what the trauma evaluator reported and the family's history. A's statement indicates that she has been exposed to significant yelling and physical fighting between the parents, excessive discipline causing her to be fearful and feel the need to hide and threats of harm by father if she disclosed the sexual abuse. I find that father failed to provide minimally adequate emotional stability and growth and a safe home environment for A and, therefore, he neglected her under Department regulations. I also find that his actions placed A in danger and posed a substantial risk to her safety and well-being.

Conclusion and Order

The Department's decision to support allegations of physical abuse of V by father was made without a reasonable basis and, therefore, the Department's decision is REVERSED.

The Department decision to support allegations of sexual abuse of A by father was made in conformity with Department regulations and with a reasonable basis and, therefore the Department's decision is AFFIRMED.

The Department decision to support allegations of neglect of A by father was made in conformity with Department regulations and with a reasonable basis and, therefore the Department's decision is AFFIRMED.

Anne L. Dale Nialetz
Anne L. Dale Nialetz,
Administrative Hearing Officer

2-2-18
Date

Cristina Tedstone
Cristina Tedstone
Deputy General Counsel

Date

Linda S. Spears, Commissioner