

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

LINDA S. SPEARS  
Commissioner

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( IN THE MATTER OF )  
( LM )  
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( FH # 2017-0501 )  
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**FAIR HEARING DECISION**

**Procedural History**

The Appellant in this Fair Hearing was LM (hereinafter "LM" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support an allegation of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On March 6, 2017, the Department received a 51A report from a mandated reporter alleging neglect of A (hereinafter "A" or "the child") by LM; the allegation was subsequently supported. The Department informed the Appellant of its decision and of her right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06

The Fair Hearing was held on June 28, 2017, at the Department of Children and Families' Park Street Area Office. The record was held open in order for the Appellant to provide additional evidence until July 7, 2017. The record closed on July 7, 2017. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
LM	Appellant
KH	DCF Supervisor

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 recorded on a digital voice recorder, pursuant to 110 CMR 10.26.

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

For the Department:

Exhibit A: 51A Report

Exhibit B: 51B Response

For the Appellant:

Exhibit 1: Hair Follicle Test Results, dated June 30, 2017; DPH Medical Marijuana ID Card

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

**Statement of the Issue**

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 whether 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 Appellant is the biological mother of A. At the time of the 51A report, A was seven (7) years old. The Appellant shared custody of A with the biological father, SF (hereinafter "SF"). Appellant was deemed a caregiver pursuant to Departmental Regulations and Policies. See below. (Exhibit A p.1-2; Exhibit B p.1; Testimony of KH; Testimony of Appellant)
2. The Appellant drove A from [REDACTED] to school in [REDACTED] on Wednesday, Thursday and Friday. This was part of the shared custody arrangement between the Appellant and SF. The Appellant's parenting time was from Wednesday until Sunday at 5:30 pm. (Exhibit B, p.3; Testimony of Appellant)

3. On Thursday March 2, 2017, the Appellant drove A to school. The school staff observed the Appellant to be disheveled and disoriented; the Appellant's "speech was not clear". (Exhibit A p.2)
4. On Friday, March 3, 2017, the school contacted SF about their concerns of the Appellant's presentation. SF contacted the Appellant and did not allow her to pick up A for the weekend due to the school's concerns. (Exhibit B, p. 2)
5. On Monday, March 6, 2017, the Department received a report, pursuant to M.G.L. c. 119 § 51A alleging the neglect of A by the Appellant. According to the reporter, staff members reported that when the Appellant dropped A off, she appeared disoriented. The Appellant appeared to be searching for her words and her speech was not clear. On Thursday, March 2, 2017, the Appellant was observed in the main office and appeared disheveled in her appearance. The reporter stated the Appellant had a history of substance abuse as reported by SF and members of the community. There was an ongoing custody battle between the Appellant and SF. The Appellant had at least weekend visits with the child. The reporter was unclear as to how much child caring the Appellant provided. The child was noted as a well-adjusted student. The Department initiated a non-emergency response. (Exhibit A, p. 2)
6. The Appellant reported and testified that on March 2<sup>nd</sup>, her boyfriend's, NS (hereinafter "NS") car broke down and she was late getting A to school. The Appellant reported she "doesn't always look her best" in the mornings, particularly after driving A from ██████████ to ██████████ (Exhibit B p.4; Testimony of Appellant)
7. The Appellant was willing to provide the Department and the Probate Court with a drug test in order to address their concerns that she had been under the influence of substances on March 2, 2017. The Appellant testified the Department requested a hair follicle test; however it took some time to get medical coverage for the test. (Exhibit B p.2; Testimony of Appellant)
8. On March 20, 2017, the Appellant allowed the Department response worker to view a urine test result from February 13, 2017 that was only positive for marijuana. On March 13, 2017, the Appellant's primary care physician drug tested her; as of March 20, 2017 she did not have the results. (Exhibit B; p.4)
9. The Appellant had a history of substance abuse and a previously supported allegation of neglect of A while she was using substances. (Exhibit A p.4; Exhibit B p.4; Testimony of Appellant)
10. The Appellant denied being under the influence on March 2, 2017. The Appellant was prescribed Zoloft, Clonidine, and Spironolactone. Additionally, the Appellant had a medical marijuana card that the response worker viewed. (Exhibit B, p.4)

11. Following the Fair Hearing, the Appellant submitted the results of a hair follicle test taken April 4, 2017. The test was positive for cannabis and negative for the other cited substances, ie amphetamines, cocaine, opiates and phencyclidine. (Exhibit 1)
12. In light of the totality of the evidence in the case, I find that the Department did not have sufficient evidence that the Appellant failed to provide minimally adequate for A. It was reasonable for the Department to be concerned about the Appellant's past behavior, however; there was no evidence that the Appellant placed the child in danger or that her actions or inactions posed a substantial risk to the child's safety or well-being, and therefore, the Department's decision to support the allegation of neglect was not made in conformity with its policies and regulations.<sup>1</sup> DCF Protective Intake Policy #86-015 Rev. 2/28/16.

#### Applicable Standards

A "support" finding of abuse or neglect means that 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) placed 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 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)

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §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 §51B. Id. at 64; M.G.L. c. 119, §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 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

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<sup>1</sup> Such evidence, that the child was in danger or the Appellant's actions posed a substantial risk to the child's safety or well-being would be necessary for the Department to support the allegations, as opposed to the Department making a finding of "concern" which would also require that the child was neglected, but that there is a lower level of risk to the child, i.e. the actions or inactions by the Appellant create the potential for abuse or neglect, but there is no immediate danger to the child's safety or well-being. (See DCF Protective Intake Policy #86-015, Rev. 2/28/16, p. 28, 29)

inadequate economic resources or be due solely to the existence of a handicapping condition. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

A "caregiver" means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child's health or welfare; and (e) 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 age 18. 110 CMR 2.00; 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, or (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, or (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

"Substantial Risk of Injury" is defined as: A situation arising either through intentional act or omission which, if left unchanged, might result in physical or emotional injury to a child or which might result in sexual abuse to a child. DCF Protective Intake Policy #86-015, rev. 2/28/16

"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. 2/28/2016

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Policy #86-015, rev. 2/28/2016

"Substantial evidence" is defined as such evidence as a reasonable mind might accept as adequate to support a conclusion. DCF Protective Intake Policy #86-015, rev. 2/28/16

### Analysis

It was undisputed that the Appellant was a "caregiver" pursuant to Departmental regulation and policy. 110 CMR 2.00; Protective Intake Policy No. 86-015, rev. 02/28/2016

The Appellant disputed the Department's decision to support the allegation that she neglected A under her care and supervision. The Appellant argued she was never impaired while caring for A and that her drug screens confirmed that she did not relapse. The Appellant acknowledged that she struggled with substance abuse in the past; however, it was not a present issue. The Appellant was late because her boyfriend's car broke down, and appeared disheveled as she "does not always look her best" in the morning. The Appellant argued that the Department made a decision to support the allegation based on assumptions and a lack of facts. That by doing so, 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

This Hearing Officer finds the Appellant's arguments to be persuasive. In making a decision to support a report of abuse or neglect, the Department must consider the entire record, including whatever in the record fairly detracts from the weight of the evidence supporting its conclusion. Arnone v. Commissioner of the Department of Social Services, 43 Mass. App. Ct. 33, 34 (1997); the record did not reflect that the Department did so in the subject matter. The Department failed to provide evidence that A was unsafe or at risk of injury. The Appellant appeared disheveled and disoriented on a Thursday, however, SF was not informed until Friday and the Department was not notified until Monday. The Department did not contact the reporter in order to gain further information about the Appellant and the concerns of their staff. Additionally, the Appellant further acknowledged seeking out help to address her past issues; she provided evidence that she had not used amphetamines, cocaine opiates, or phencyclidine. This was verified with documentary evidence provided by the Appellant. (Fair Hearing Record)

A Hearing Officer's decision must be supported by substantial evidence; there must be substantial evidence supporting the Hearing Officer's conclusion that the Department had reasonable cause to believe the Appellant committed the alleged neglect. Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006) In this case, there was no evidence of current neglect and insufficient evidence to find that that the Appellant's actions placed the child in danger or posed a substantial risk to her safety or well-being. Furthermore, in this instant matter the Department did not link the Appellant's use of substance abuse to her current ability to provide the child with minimally adequate care. Adoption of Katharine, 42 Mass. App. Ct. 25, 34 (1997)

In determining whether the Department had reasonable cause to support a finding of neglect by Appellant, the Hearing Officer must apply the facts, as they occurred, to the definition of neglect as defined by Departmental regulation; new information presented at the Hearing, if not available during the investigation, can be considered as well. 110 CMR 2.00; 10.06 After careful review of all the evidence presented, including new

information offered by the Appellant at the Fair Hearing, the evidence in this case, in its totality, was insufficient to support neglect by the Appellant.

**Conclusion and Order**

The Department's decision to support an allegation of neglect of A by the Appellant is hereby **REVERSED**.

Nicholas Holahan <sup>(d.h.)</sup>  
Nicholas Holahan  
Administrative Hearing Officer

4/19/18  
Date

Darlene M. Tonucci  
Darlene Tonucci  
Fair Hearing Supervisor

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Date

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Linda S. Spears  
Commissioner