

**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)
(LL &ML)
()
(FH # 2017-0510)
()

HEARING DECISION

Procedural History

The Appellants in this Fair Hearing are LL and ML. The Appellant appeals the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support allegations of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On March 31, 2017 the Department received a 51A report from a mandated reporter alleging physical abuse of J ("Child") by LL. During the course of the subsequent 51B response, the Department added an allegation of neglect of J by MM. The allegations were subsequently supported. The Department informed the Appellants of its decision and of their right to appeal the Department's determination. The Appellants made a timely request for a Fair Hearing under 110 C.M.R. 10.06

The Fair Hearing was held on July 5, 2017 at the Department of Children and Families'  Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
LL	Appellant
BT	DCF Supervisor
ML	Appellant
YS	Interpreter (Also a DCF Supervisor)

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 Fair Hearing was recorded on a digital voice recorder, pursuant to 110 CMR 10.26

The Appellants agreed to allow DCF Supervisor YS to translate for them. YS was not directly affiliated with the Appellant's DCF case.

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:

The Appellant did not submit any documentary evidence at the Fair Hearing. The record was left open and the Appellants submitted the following documents:

- Exhibit 1: Letter from Primary Care Provider [REDACTED] dated 4/3/2017
- Exhibit 2: Notice of Fair Hearing
- Exhibit 3: Letter from Family Support worker [REDACTED]
- Exhibit 4: Letter from PCP [REDACTED] dated 6/21/2017
- Exhibit 5: Letter from ongoing DCF social worker to the [REDACTED] Public Schools
- Exhibit 6: Letter from ongoing DCF social worker to [REDACTED] Housing Authority.
- Exhibit 7: Assessment summary of J from [REDACTED] Psychology Department.
- Exhibit 8: [REDACTED] Special Education Annual Review Report
- Exhibit 9: Letter in Spanish dated 4/13/2017
- Exhibit 10: Letter to ML regarding an incident with J
- Exhibit 11: Letter to ML regarding an incident with J
- Exhibit 12: Request for reasonable accommodation form for [REDACTED] Housing.
- Exhibit 13: Certificate of need for reasonable accommodation for [REDACTED] Housing
- Exhibit 14: Neurology Visit Summary dated 1/17/2017
- Exhibit 15: Neurology Visit Summary dated 8/2/2016
- Exhibit 16: Neurology Visit Summary dated 5/18/2015
- Exhibit 17: Neurology Visit Summary dated 2/24/2015
- Exhibit 18: Neurology Visit Summary dated 6/18/2014
- Exhibit 19: Neurology Visit Summary dated 12/18/2013
- Exhibit 20: Neurology Visit Summary dated 5/15/2013

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. 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. ML is the biological mother of J. LL is the step-father of J. At the time of the instant 51A, J was five years old. I find that LL and ML are caregivers for J in accordance with the regulations and policies of the Department of Children and Families. (Exhibit A p.1-2, Exhibit B p.1, Testimony of BT, Testimony of LL, Testimony of ML)
2. J is diagnosed as being on the Autism Spectrum. (Exhibit A p. 3, Exhibit B p.1-2, Appellants' Exhibits 1-20, Testimony of BT, Testimony of ML, Testimony of LL)
3. On March 31, 2017 J arrived at school with two medium size red marks on his right hand. He stated his father "did it". J's hand was observed to be swollen and he was unable to sustain a closed fist. This led to the filing of the instant 51A. (Exhibit A p.3, Exhibit B p.1-2, Testimony of BT, Testimony of LL, Testimony of ML)
4. During the course of the ensuing 51B Response, the Department contacted J's pediatrician, who stated that the mark on J's hand looked like a low-grade burn. Also, during the course of the 51B Response, the Department observed a very hot, uncovered radiator in the J's bedroom. In light of these facts, the Department did not support an allegation of physical abuse against LL. (Exhibit B p.2, Exhibit 6, Testimony of BT, Testimony of ML, Testimony of LL)
5. In April of 2017, the Department's ongoing worker had advocated for the Appellants to have reasonable accommodations through [REDACTED] Housing due to the Appellants' residence having mold, cockroaches, and an exposed radiator valve that has caused burns to children. The letter indicates that the Appellants have made reasonable efforts to safeguard their children from the hot valve, but remain concerned because J is unable to process certain rules in the household regarding climbing on furniture. I find that the Appellants' had attempted to obtain new housing for their family, in part because of the danger the hot, exposed valve posed to their autistic son who was curious. (Exhibit B p. 2-3 Exhibit 5, Exhibit 6, Exhibit 12, Exhibit 13, Testimony of BT, Testimony of ML, Testimony of LL)

6. In supporting the decision of neglect of J by the Appellants, the Department cites previous injuries of J that had led to previous support decisions. (Exhibit A p.5, Exhibit B p.5, Testimony of BT)
7. I find that the Appellants' had a hot, exposed valve in J's room. The Appellants made reasonable efforts to safeguard J from injury from this valve. However due to J's Autism diagnosis, he is prone to not adhering to his parents rules. (Exhibit B p.2, Exhibit 5, Testimony of BT, Testimony of ML, Testimony of LL)
8. The Department did not submit any evidence in regards to how long it would have taken for J to obtain the burn, or if his autistic condition would have impacted his ability to draw attention to his injury. (Exhibit B, Testimony of BT)
9. I find the Department did not have reasonable cause to believe the Appellants' neglected J for the following reasons:
 - a. The Department was aware that there was a hot valve in J's room that the Appellants' had attempted to cover.
 - b. The Appellants had attempted to obtain a new residence, in part to address the concern they had regarding the hot valve.
 - c. The Department did not submit any evidence regarding how long it would have taken for J to obtain the burn.

Applicable Standards

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." 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.

"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." 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

"Caregiver". A caregiver is a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or 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.

"Neglect". Neglect is 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.

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.

Analysis

In this case, the Department has supported its decision based on a lack of minimally adequate supervision. However, the Department has not provided any evidence regarding exactly how the Appellants' supervision lapse caused the injury in question. The exact time and conditions of when and how the injury occurred are not known. It is reasonable to assume that J received the injury in question by touching the valve in his room. However, when this contact happened, and how long it took for any contact to result in injury is not known. The valve is frequently referred to as hot, and the Department had previous knowledge of it having caused other burns. The Appellants made reasonable efforts to protect J from the valve, but it is apparent that due to his autistic condition, he does not always adhere to his parents' rules and suggestions. Further, the contact that resulted in this injury could have occurred at night, while the Appellants' were asleep. In reviewing the totality of the evidence and the Appellants' actions to protect their son

from this injury, there is no reasonable cause to believe they failed to provide minimally adequate supervision.

Conclusion and Order

The Department's decision to support the allegations of neglect of J by the Appellants is hereby REVERSED.

Nicholas Holahan

Nicholas Holahan *BC*
Administrative Hearing Officer

May 30, 2018
Date

Barbara Curley
Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner