

THE COMMONWEALTH OF MASSACHUSETTS
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

Voice: (617) 748-2000
FAX: (617) 261-7428

IN THE MATTER OF:)

)

 D.O-F. & A.G-B.)

FAIR HEARING DECISION

)

 FH # 2017-0692)

The Appellants in this Fair Hearing are the mother and father, hereinafter referred to as Appellant DF & Appellant AB. The Appellants appealed the Department of Children and Families' (DCF) decision to support the allegation of neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

The Department received a 51A report, which alleged the neglect, due to concerns the child was a substance exposed newborn, by the Appellant DF. The Department conducted a response and, on March 29, 2017, the Department made the decision to support the allegation of neglect of the child by the Appellant DF, as well as Appellant AB. The Department notified the Appellants of its decision and their right to appeal.

The Appellant DF made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was held at the DCF Lynn Area Office in Massachusetts on August 24, 2017. At that time it was determined that Appellant AB was unaware of the Department's decision to support the allegation of neglect of the child by him. (Fair Hearing Record) The record was left open to allow Appellant AB time to determine if he would like to appeal, which he did. A second hearing date was held on September 21, 2017. All witnesses were sworn in to testify under oath. The record closed at the conclusion of the September 21, 2017, Hearing.

The following persons appeared at the Fair Hearing on August 24, 2017:

Ms. Lisa Henshall	Fair Hearing Officer
Ms. D.O-F. (DF)	Appellant (mother)
Ms. M.G.	Response Worker

The following persons appeared at the Fair Hearing on September 21, 2017:

Ms. Lisa Henshall	Fair Hearing Officer
Mr. A.G-B. (AB)	Appellant (father) via cell phone
Ms. M.G.	Response Worker (RW)
Ms. S.G.	Response Supervisor (RS)

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

The Fair Hearing was recorded pursuant to DCF regulations. 110 CMR 10.26

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

For the Department:

Exhibit A 51A dated 3/29/17

Exhibit B Child Abuse/Neglect Non-Emergency Response dated 5/22/17

Appellant:

Exhibit 1 Hospital discharge summary dated June 28, 2017

Exhibit 2 Letter from the Appellant D requesting a Fair Hearing

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

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. 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 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 Appellants (DF & AG) are the child's mother and father, respectively. The child, a newborn at the time of the report, was [redacted] day old. (Exhibits A & B)
2. The Appellants, as the child's parents, were caregivers for the child as defined by Department regulation. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.
3. On March 29, 2017, the Department received a 51A report pursuant to M.G. L. c. 119, §51A, alleging the neglect of the child, due to concerns the child was a substance exposed newborn, by the Appellant DF. The report alleged that the Appellant tested positive for marijuana at the time of the child's birth. The mother admitted to smoking marijuana daily to self-medicate.

The report was screened in and assigned for a response. (Exhibit A, pp. 2, 6-8; Testimony of the Response Worker)

4. The infant's urine did not test positive for marijuana at birth. The child's urine screen was negative for any substances. The child's meconium was never tested. (Testimony of the Response Worker; Exhibit B, p. 6; Testimony of Appellants AF and AB)
5. The infant was a medically fragile baby born prematurely, at 27 weeks, due to issues with mother's cervical insufficiency. The child weighed 2 pounds and 11 ounces at birth. It was expected that the newborn would remain in the hospital for 2 months. (Exhibit B, pp. 4 & 6; Testimony of the Appellant AB)
6. It was undisputed that the Appellant DF tested positive for marijuana at the time of the child's birth. (Fair Hearing Record)
7. Appellant DF, who had been homeless, had secured emergency housing on the day she went into labor. (Exhibit B, p. 4)
8. Appellant DF had received prenatal care. (Exhibit B, p. 3)
9. As the child was born prematurely the mother had not yet purchased things for the baby. The mother did have a crib and bouncy set that was donated to her by the shelter. (Exhibit B, p. 5)
10. The Appellant DF was diagnosed with Bipolar Disorder and Post Traumatic Stress Disorder (PTSD). The Appellant has a significant trauma history and numerous psychiatric hospitalizations. (Exhibit B, pp. 3 & 5; Testimony of Appellant DF)
11. The Appellants had been involved in a violent assault while Appellant DF was pregnant with the child. Appellant DF had been engaged in violent behaviors in the past. (Exhibit B, p. 6; Testimony of the Supervisor)
12. The hospital had no concerns about mother's (Appellant DF) care of the child. Appellant DF was described as "attentive, appropriate and asking correct questions." The hospital had no concerns about the Appellants' presentation but noted that they would smell of marijuana. (Exhibit B, pp. 3, 4 5-6, & 10-11)
13. In 2014, the Appellant DF was prescribed medical marijuana and had a medical marijuana card to treat her mental health issues but she was unable to produce any evidence of this. Appellant DF was unable to locate the prescribing Psychiatrist. The mother no longer had a medical marijuana card as she could no longer afford it and it was now "legal." (Testimony of the Appellant DF; Exhibit 2; Exhibit B)
14. Appellant DF continued to smoke marijuana while breast feeding the child despite medical staff informing her of the risks. Appellant DF was also aware that marijuana could be passed through breast milk so she would plan when she would smoke marijuana and pump a few hours later. (Exhibit B, p. 6; Testimony of the Appellant DF) There was no evidence presented to determine what these risks were or what the specific concerns were.

15. Appellant DF was managing her Bipolar Disorder by smoking marijuana. There was no evidence that the mother's marijuana use impacted her functioning. (Exhibit B; Testimony of the Appellant DF; Exhibit 1)
16. Appellant AB smoked marijuana daily and did not reside with Appellant DF. (Exhibit B, p. 8; Testimony of Appellant DF)
17. Appellant AB disputed that he needed treatment for marijuana as he was not addicted to any substance. Appellant AB argued that marijuana was now legal and he was not addicted to anything, legal or illegal. (Testimony of Appellant AB)
18. Appellant AB was homeless at the time the baby was born and living in a vehicle. There was no evidence that the child was going to be discharged to the father (AB). The plan was for the child to reside with his mother in the shelter when the child was ready to be discharged from the Neo-natal intensive care unit (NICU). (Testimony of the Response Worker; Testimony of the Supervisor; Testimony of Appellant AB)
19. Appellant AB visited the child in the hospital less frequently than Appellant DF. Appellant AB was working to provide for his child while Appellant AB cared for, and visited the baby. (Testimony of Appellant AB; Exhibit 1; Exhibit B, pp. 4, 5 & 11)
20. Once the baby became healthier the Appellant DF stopped breast feeding him to limit his exposure to marijuana, and began using formula. (Testimony of the Appellant DF)
21. The Appellant DF did not smoke marijuana in the presence of the child and would wash her face and hands, use sanitizer, before handling the baby (Testimony of the Appellant DF)
22. At the end of its response, the Department supported the aforementioned report for neglect of the child by the Appellants. The Department determined that there was reasonable cause to Appellant's actions constituted neglect; and the actions and inactions by the mother placed the child in danger and posed a substantial risk to his safety and well-being;
 - The mother tested positive for marijuana at the time the child was born;
 - The mother smokes marijuana daily and was breast feeding the child;
 - Mother has significant mental health issues and has not been in treatment or on medications since 2014;
 - Mother had been using marijuana she purchased on the street to self-medicate;
 - Mother had unstable housing and got placed in a shelter in April 2017 and had no basic necessities for the child;
 - Father was smoking marijuana up to six times a day, was homeless and an open consumer in another DCF case with his older children;
 - Father did not have a stable home environment, was not assisting to meet the child's needs and was not in treatment to address concerns of substance use;
 - The case remained open for an assessment. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16. (Exhibit B, p. 14; Testimony of the Response Worker; Testimony of the Supervisor)
23. Based on the above findings, I find that the Department did have reasonable cause to believe

that child was neglected by his mother per the Department's definition. However, there was insufficient evidence that the Appellant's actions or inactions placed the child in danger and posed a substantial risk to the child's safety and well-being.¹ 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

24. Based on the above findings, I find that the Department did not have reasonable cause to believe that the child was neglected by his father per the Department's definition. There was no evidence that the father (Appellant AG) failed to provide his child with minimally adequate care or that his actions placed the child in danger or posed a substantial risk to the child's safety or well-being. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

Applicable Standards

In order to "support" a report of abuse or neglect, the Department must have reasonable cause to believe that an incident of abuse or neglect by a caretaker occurred 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. 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)

"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, §51B

A "caregiver" 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, "caregiver" includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The "caregiver" 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 himself/herself a child (i.e. baby-sitter). 110 CMR 2.00

¹ [1] 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.)

"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. Protective Intake Policy #86-015 Rev. 2/28/16

A "Substance Exposed Newborn" (SEN) is defined as a newborn who was exposed to alcohol or other drugs in utero ingested by the mother, whether or not this exposure is detected at birth through a drug screen or withdrawal symptoms. A SEN may also be experiencing Neonatal Abstinence Syndrome (NAS), which are symptoms and signs exhibited by a newborn during withdrawal. NAS is a subset of SEN. Fetal Alcohol Syndrome (FAS) as diagnosed by a qualified licensed medical professional is also a subset of SEN. 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, (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

Analysis

The Appellants contested the Department's decision to support the allegation of neglect on behalf of their son. It was undisputed that the both Appellants smoked marijuana. Appellant DF used marijuana to treat her mental health needs. Appellant DF did not dispute that she continued to smoke marijuana and breast feed while the child was in the NICU, but would not smoke marijuana before pumping and stopped breast feeding all together when the child was healthier.

Appellant AB argued that while he was not visiting the child at the hospital as often as mother he was providing for his child, financially. Appellant A also argued that he was not addicted to marijuana, which was legal, and therefore did not require substance abuse treatment. The plan was for the mother, who had secured housing to have the child reside with her, once the child was to be discharged. Appellant AB was homeless and Appellant DF had secured housing in a shelter the day she went into premature labor. Appellant AB also argued that the child had not tested positive for any substances at birth therefore the child was not neglected.

The Department argued that the Appellants failed to provide the child with minimally adequate care and that their actions placed the child in danger and posed a substantial risk to the child's safety and well-being. While there was evidence that Appellant DF failed to provide the child

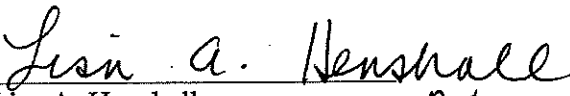
with minimally adequate care, there was no evidence that her actions or inactions placed the child in danger or posed a substantial risk to the child's safety or well-being.

With respect to Appellant AB there was no evidence presented to determine that he neglected his son. Appellant AB visited with the child in the NICU, although far less often than the mother. Appellant A had smoked marijuana daily and there was no evidence to determine how the marijuana use impacted his parental functioning or resulted in him failing to provide minimally adequate care for the child.

Upon review of the evidence presented, in its totality, this Hearing Officer determined that there was insufficient evidence for the Department to support the allegations of neglect, as defined by the Department's regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 4.32 (2) (See Findings)

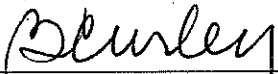
Conclusion and Order

The Department's decision to support the 51A report of neglect on behalf of the child (N) by the Appellants AF and AB is **REVERSED**.



Lisa A. Henshall *BC*
Administrative Hearing Officer

May 8, 2018
Date



Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner