

**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 Spears  
Commissioner

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IN THE MATTER OF )

MS )  
FH #2017-1241 )

**FAIR HEARING DECISION**

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

**Procedural History**

On August 18, 2017, the Department received a 51A report alleging neglect of C (hereinafter "C" or "the child" by the Appellant; during its screening process, the Department added the allegation of sexual abuse. The Department conducted a response and, on September 14, 2017, the Department made the decision to support the allegation of sexual abuse and neglect by the Appellant. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on December 14, 2017 at the DCF Coastal Area Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the Hearing to afford the Appellant the opportunity to submit additional information. The Appellant submitted supplementary photographic documentation, which was reviewed, entered into evidence and

considered in the decision making of the instant case.<sup>1</sup> The record closed on December 28, 2017.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
TO	Appellant's Attorney
MS	Appellant
JM	Department Supervisor (hereinafter "JM")

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: DCF Intake Report/51A Report, dated 8/18/2017
- Exhibit B: DCF Child Abuse/Neglect Non-Emergency Response, completed 9/14/2017

For the Appellant:

- Exhibit 1-3: Photos of the Appellant's garage and axe, undated
- Exhibit 4: Photo of Appellant's front porch light
- Exhibit 5: Photo of Appellant's front porch, undated
- Exhibit 6: Photo of Appellant's front door
- Exhibit 7: Photo of AW taken by Appellant, undated
- Exhibit 8: Photo of AW and ██████████ Police, undated

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

<sup>1</sup> The Appellant did not submit a time line of events as requested by the Hearing Officer. Citing to 110 CMR 10:20: Hearing Officer's Duties and Powers: The Hearing Officer ...shall have the following specific duties:

(4) receive, rule on, exclude, or limit evidence (which shall include the right to request that any party produce additional evidence such as witnesses, documents, etc. but shall not include the right to require any party to do so); . . . .

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. 2/28/2016

### **Findings of Fact**

1. The child of this Fair Hearing was C; the time of the 51A report, C was five (5) years old. (Exhibit A, p.1; Exhibit B, p.1)
2. The Appellant is the child's father; therefore, he was deemed a caregiver pursuant to Departmental regulation 110 CMR 2.00 and DCF Protective Intake Policy #86-016, rev. 2/28/2016.
3. The child's mother is AW (hereinafter "AW"). The Appellant knew AW since childhood; in December 2010, the Appellant and AW entered into a "dating," "casual sexual relationship." According to the Appellant, AW was known in the town of ██████████ MA for being violent. As an example, the Appellant reported that AW would "lipstick cars" and would slash tires if men that she spent the night with did not call her back. (Testimony Appellant)
4. In August 2011, AW moved into the Appellant's residence; at that time she was pregnant with C; AW reportedly moved out four (4) weeks later. According to the Appellant, a couple of weeks prior to C's birth, AW broke his nose and his cell phone. (Testimony Appellant)
5. In September 2011, the Department supported allegations of neglect of C by the Appellant following the Appellant's arrest for Domestic Assault and Battery, as he was deemed the "dominant aggressor." During this altercation, the Appellant spit in AW's face while she held one (1) month old C. The Appellant and AW acknowledged their "unhealthy" relationship and were no longer together as a couple. Both however were noted to be "closed bonded to C and meeting his needs." (Exhibit A, p.5; Exhibit B, p.1) According to the Appellant, at that time, AW threatened to take the Appellant "for everything that he had", including the child. (Testimony Appellant)
6. In November/December 2011, the Appellant and AW reconciled for three (3) months. (Testimony Appellant)

7. During 2011, when the Appellant and AW were not getting along, the Appellant would spend time out in his garage. After a fight, the Appellant found an ax "buried" into his work-table. (Testimony Appellant; Exhibits 1-3)

8. On May 7, 2012, the Department re-opened a case with the Appellant and AW due to ongoing issues of domestic violence. The Department noted that the [REDACTED] Police responded to domestic situations involving the Appellant and AW in September 2011, January 2012 and on May 5, 2012. (Exhibit A, p.6) AW reported that the Appellant was verbally and physically assaultive towards her. On May 5, 2012, AW obtained an emergency 209A Restraining Order which was vacated by the Court on May 7, 2012. The Appellant denied that he physically harmed AW; according to the Appellant, AW was the primary aggressor and she filed false allegations against him. (Exhibit A, p.6; Exhibit B, p.1) AW claimed the Appellant was a daily marijuana user. The Court ordered urine screens for the Appellant and AW. According to the Appellant, the Court awarded him custody of C. Since that time, AW has reportedly been "vindictive." The Appellant subsequently returned C to AW's care as C was breast-feeding. (Testimony Appellant)

9. On May 14, 2012, the Probate Court awarded the Appellant and AW joint legal and physical custody. Visitation/parenting time exchanges occurred at the [REDACTED] Police. (Exhibit A, p.6)

10. On November 1, 2014, the Department became re-involved with the family. The Appellant and AW engaged in a verbal altercation. Thereafter AW presented at the police station reporting that the Appellant texted her suicidal statements. Police and EMTs conducted a well-being check and determined that AW "fabricated" her story. Later that day, AW again presented at the police station, reporting that the Appellant had assaulted her and stolen her phone in the child's presence. AW initiated the process in order to obtain a restraining order when she "abruptly changed her mind." The Appellant and AW were subsequently summoned to Court: AW for Breaking and Entering and the Appellant for Larceny (phone). AW continued in counseling and the Appellant attended AA twice weekly. According to the [REDACTED] Police, "there had been upwards of 20 DV calls to the home and several TROs." The police described C as "crying and distressed" during their encounters. (Exhibit A, pp.6-7; Exhibit B, p.2)

11. According to the Appellant, during the Department's aforementioned 51A investigation, the assigned social worker documented that AW "play{ed} games with visitation." (Testimony Appellant)

12. According to the Appellant, in August 2016, he took a picture of AW waving at him after leaving his porch "taunting" him. The Appellant did so due to a 2014 verbal agreement that AW would not exit her vehicle when picking up/dropping off C (Testimony Appellant; Exhibit 7)

13. In October 2016, AW reportedly broke the pumpkin on the Appellant's porch. (Exhibit 5; Testimony Appellant)

14. On January 30, 2017, the Department received a 51A report due to a domestic altercation, which occurred in the child's presence when AW arrived to pick up the child from the

Appellant's residence. According to AW, she was banging on the door; according to the Appellant, he heard and saw AW kicking the door. AW also broke his outside light. The Appellant's roommate confirmed this. C was present and upset when the police arrived. The Department screened out the 51A report. (Exhibit A, p.7; Exhibit B, p.3; Testimony Appellant; Exhibit 4; Exhibit 6)

15. On May 26, 2017, the [REDACTED] Police responded to AW's request for a well child check as the Appellant was reportedly "harassing her by text and possibly drinking." According to the Appellant, the police, EMTs and the fire department responded and determined there were no concerns with the Appellant's care of the child or his sobriety. (Exhibit B, p.2; Testimony Appellant)

16. On July 17, 2017, AW filed a motion in Probate Court for a reduction in the Appellant's weekend visitation and for exchanges to occur at the [REDACTED] Police station. AW reportedly requested the reduction in visitation due to her concerns for the Appellant's drinking and seeing alcohol containers when at the house. (Exhibit B, p.4)

17. On August 14, 2017, AW contacted the [REDACTED] Police when the Appellant reportedly did not respond to her as she was picking up the child. The police noted the Appellant's delayed response to their efforts to speak with them. The Appellant did open the door and took pictures of the police and AW, asking them to say "cheese" and telling the child to say "hi" to them. The Appellant then walked the child to the driveway and said goodbye to him. He then yelled at AW that she "tramatiz{ed}" C by contacting the police. (Exhibit B, p.2; Exhibit 8)

18. At the time of the subject 51A report, the Appellant had weekend visitation three (3) times per month. (Exhibit A, p.2)

19. At the time of the subject 51A report, the Appellant did not have his license to drive due to three (3) prior DUI convictions. (Exhibit A, p.2; Exhibit B, p.4)

20. On August 18, 2017, the Department received a report from a non-mandated reporter pursuant to M.G. L. c. 119, §51A, alleging neglect of C by the Appellant. According to C, the Appellant and his girlfriend watched "Ridiculousness" an "inappropriate television show on MTV for children." C reported that they no longer watched this show. According to the reporter, a couple of months prior, C talked about his penis and said that the Appellant taught him to "do this thing that he is stretching the skin of his penis over his penis". C reported several times that, "Daddy told me that he smacks you in the forehead with his penis." On August 16, 2017, C and AW were laying on the couch. C put his hands underneath the back of AW's pants, onto her buttocks. When told this was inappropriate and asked where he learned this, C reportedly stated that, "Daddy teaches me. Daddy sticks his finger in my butthole." C reported that the Appellant stopped when asked to. When asked what happened next, C replied, "I went and shot him with my nerf gun." (Exhibit A, p.2) Beer cans and Mikes Hard Lemonade bottles were observed on the back deck when the police last responded to the Appellant's residence. When asked if anything scared C, C replied that the other night, "Dad fell asleep on the floor. I woke up and did not know where he was and it was dark. I went out and found him on the floor asleep. I woke him up. He stood up and he fell down." C reported that the Appellant was drinking lemon beer.

C also reportedly stated that during his last visit he "got his dad to bed." According to the reporter, the Appellant has a drinking problem. Based on the aforementioned concerns, the Department added the allegation of sexual abuse. (Exhibit A, Testimony JM)

21. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to LS (hereinafter ("LS")), Social Worker from the DCF Coastal Area Office. (Testimony JM; Exhibit B)

22. On August 19, 2017, AW filed a 209A Restraining Order against the Appellant following a disagreement that it was the Appellant's visitation weekend. Both contacted the police who determined that it was the Appellant's weekend. (Exhibit B, p.4)

23. The Appellant and AW reported that in the several months preceding the subject 51A report, C frequently spoke about his penis. (Exhibit B, p.5; Testimony Appellant) According to AW, it appeared that he was trying to make jokes about it and did "silly dances but the movement are provocative." (Exhibit B, p.5) The Appellant did not observe anything to be unusual. (Testimony Appellant)

24. According to AW, when she and the Appellant were together, he would say, "I'd like to whack your forehead with my dick, you're so stupid." She was surprised when C told her that "Daddy said he smacks you in the forehead with his Pee Pee...whack whack whack." According to AW, the Appellant had been "sexual and vulgar in his language. (Exhibit C, p.5)

25. C informed LS that the Appellant wanted him to do "Goat" and described that this was when the penis was pushed back "really far;" C demonstrated for LS. Reportedly, the Appellant did this in front of C "lots of places." C stated that the Appellant took off his shirt and "just puts his pants down." C denied that he engaged in this behavior and made "an expression of distaste." C stated that the Appellant said, "It feels good but it did not look that way to me so I didn't do it." When asked why it was called Goat", C replied that it just was. C then mentioned "Batwing" which reportedly was similar to "Goat." C stated that he "sometimes" saw the Appellant do this.. The Appellant was reportedly not angry when C said that he did not want to do this. C also spoke of "fruit-basket is when you gather your...the things under your pee...balls." Initially C said that the Appellant only did "fruit basket" to himself. Following additionally questioning, including whether C and the Appellant did "fruit basket" together and at the same time, C replied "yeah...sometimes." LS noted that C appeared genuine" in his responses throughout the interview and "seemed to be comfortable talking about all the these things and was undisturbed by my questions and did not seem to be guarding his responses." LS subsequently documented that C "denied all my questions regarding the ways he may have been touched inappropriately or sexually by anyone including his father." (Exhibit B, pp.6-7)

26. AW did not take the child for a physical examination due to the reported allegation that the Appellant put his finger inside C's "butt hole" despite LS' suggestion that she consider this. According to the Appellant, C never complained of pain or irritation in that area. AW worried that C had "been through enough and about making it worse." (Exhibit B, p.4; Testimony JM) C did not state this to LS. (Exhibit B, pp.6-7)

27. C reported that when he visited with the Appellant they slept in the same bed and they slept naked. When asked if he was afraid or uncomfortable in the same bed with the Appellant, C replied that he was on two (2) occasions when he woke up to go to the bathroom and "he is not there." He reported that he twice found the Appellant asleep on the floor in another room in the house and it took him "like two minutes and then he got up but fell down again so I had to make him get up again and go to bed." When asked why the Appellant was sleeping on the floor, C replied, "he was probably passed out from Budweiser." C reported that he knew that the Appellant drank Budweiser and Hard Lemonade. He knew the names because "it's on the can and bottle." C reported that the Appellant drank each time he visited, mostly at night, so C did not know the amount that the Appellant drank. He knew because. The Appellant drank because "...there is always tons of cans and hard lemonade bottles." He reported that "sometimes" the Appellant would stumble or walk funny and talk "kinda slow and weird" when drinking alcohol. (Exhibit B, p.6)

28. C spoke of "positive interactions" at the Appellant's home. He reported feeling safe at the Appellant's home but did not like the Appellant drinking. C stated that he would like the Appellant to stop drinking and "not to say mom is stupid or yell at her so much." (Exhibit B, p.7)

29. Due to scheduling issues/DCF emergencies, LS did not meet with the Appellant during the course of the 51A response. On August 24, 2017, LS had a telephone conversation with the Appellant. LS informed the Appellant that she recommended to AW that his parenting time with the child be suspended. LS documented that the Appellant became "very loud and sounded shocked." (Exhibit B, p.8)

30. AW informed the Department that approximately six (6) months prior, she noticed that C and the Appellant repeatedly the word "Goat" to one another and laughed at the exchanges. When asked, C explained that this meant tucking one's "penis behind you inner thighs so it looks like you don't have one and then bending over and showing your butts to each other." The Appellant did inform AW that C saw this in the movie "Waiting." AW explored this and reported that "Waiting" was a sexually graphic comedy for adults."(Exhibit B, p.5)

31. The Appellant informed LS that "Goat, "batwing" and "fruit basket" were things that C viewed on You Tube excerpts from a movie "Waiting". When LS informed the Appellant that C witnessed him engaging in these and other behaviors, in addition to, observing the Appellant drinking and "passed out" on the floor, MS continued "to be very loud and sounded frantic." The Appellant repeatedly denied that the child's statements were true. When informed that a referral had been made to the District Attorney's office, "as the disclosure could be consistent with a crime" the Appellant "remained upset as {LS} ended the call." (Exhibit B, p.8)

32. When AW asked C what he watched when at the Appellant's house, C spoke of a show called "ridiculousness." AW researched this and learned that this was an "adult variety show where internet viral videos are shown and commented on". According to AW, C did not appear to be distressed by this. (Exhibit B, p.5) AW felt "this was a case of {the Appellant} exposing {C} to adult sexual content and thinking that the behavior is funny without regarding for how inappropriate and wrong it was to involved C in it." [Sic] (Exhibit B, p.5)

33. At the end of its response, the Department supported the aforementioned report for sexual abuse and neglect of C by the Appellant. The Department based this determination on the following:

- C's disclosure to AW and LS "that during visits with his father he has been exposed to his father performing self gratifying sexual acts and that he has also attempted to engage {C} in performing these acts."
- C's disclosure that "he and his father sleep naked in the same bed and that he has been present when his father masturbated beside him in bed as well as that his father has taught him how to perform the act."
- C's disclosure to AW that the Appellant put his finger in his buttocks. C became "agitated and silly" when questioned regarding this specific act or other situations involving physical contact with the Appellant.
- C's report that the Appellant told him not to tell AW about the "sexual behaviors."
- C's disclosures being "detailed and genuine."
- C's disclosure that the Appellant drank during his visits. On two (2) occasions C found the Appellant "intoxicated and unresponsive lying on the living room floor."
- Since January 2017, the police responded on three (3) occasions due to "conflict between the parents and mother's concern regarding C's safety and well-being during visits."
- On August 14, 2017, the Appellant did not produce C at the end of his visit and when police responded he initially ignored the police officer attempts to him respond and then "behaved in a bizarre manner taking photos of officers and asking them to say cheese." The Appellant also yelled at AW.
- C's report that the Appellant frequently yelled at AW and recalled an incident in 2011 when the Appellant hit and spit at his mother which resulted in the Appellant's arrest for Assault and Battery.
- AW's observation of alcohol containers in the Appellant's trash on August 14, 2017 and on other occasions.
- The Appellant's loss of his driver's license following three (3) DUI charges. (Exhibit B, p10; Testimony JM)

34. The Appellant reported that he and C played games such a Legos, nerf gun, had forts (in different rooms of the house" camped in front of the fireplace in the winter or watched television on tents as an activity when C visited. The Appellant questioned whether this was what C referenced when speaking with LS about him being on the floor. The Appellant acknowledged that he did drink alcohol; however denied that he did so when the child visited or that he drank to "excess." The empty cans/bottles were reportedly returned for a refund on a monthly basis, thereby accounting for the empties viewed at his home. (Testimony Appellant)

35. According to the Appellant, the issue with C talking about "Goat" began with their referring to Tom Brady as the "Greatest of all time." According to the Appellant, C was proficient at using his electronic devices. C said Goat into his voice recognition, which brought up the movie/comedy, "Waiting" in which "Goat" depicted a male pushing his genitals in between his legs. Additionally, C saw "Batwing" wherein the penis is stretched out in the same movie clip. According to the Appellant, that was as far as the movie clip went. According to the Appellant, C spoke of this a year prior to the subject 51A report. AW informed the Appellant about this and



laughed about it. According to the Appellant, AW never mentioned this as an issue in Court prior to the 51A report. (Testimony Appellant)

36. The Record was absent documentation that LS researched "Goat", the movie "Waiting" or the show "Ridiculousness." Absent refuting evidence, I credit the Appellant's explanations regarding the term "Goat", the movie and the MTV show. (Fair Hearing record)

37. According to the Appellant, the timing of the reported allegations was due to his refusal to sign for a passport for C to leave the country. Initially, the Appellant planned to do so; however, in January 2017, AW took C away for six (6) weeks without the Appellant being able to see him. (Testimony Appellant)

38. The Department supported neglect of C by the Appellant in September of 2011 due to the Appellant spitting in AW's face while holding one (1) month old C. (See: Finding #5). Absent a second such incident, not reported to the Department, I find that it unlikely for C to be able to "recall" such an event independently. A reasonable inference was that AW informed C of this.

39. The aforementioned "recall" by C coupled with a documented pattern of AW providing false information to the police (See Findings #10 and #15) in addition to the Appellant's contention regarding AW's destructive actions (See Findings #3, #7, #13, #14) diminished AW's credibility in the instant case.

40. The Appellant emotionally spoke of his love and concern for C. The Appellant was visibly distressed when addressing the allegations regarding inserting his finger in the child's anus and masturbating with the child. The Appellant denied that he and C slept naked together; in the winter they reportedly wore pajamas and in the summer they wore boxer shorts. (Testimony Appellant) The Appellant repeatedly denied that he ever sexually abused C nor were criminal charges filed against him. The Appellant maintained that he only pulled C's foreskin back during toilet training. The Appellant referred to this as "a hail Mary" attempt by AW to remove him from C's life.(Testimony Appellant)

41. By virtue of the documentary evidence and the Appellant's testimony, I find a confirmed and repeated pattern of AW either embellishing or fabricating stories regarding the Appellant. (Fair Hearing Record) Additionally, AW's motivation to raise the reported concerns was questionable. I find that the evidence was insufficient to determine that the Appellant sexually abused the child. 110 CMR 2.00; 4.32 However, in light of the Appellant's historical and in time use of alcohol coupled with the question supervision/exposure to adult sexualized content, albeit in the form of movie comedy, I find the Department's decision to support the allegation of neglect was made in conformity with its regulations, policies and with a reasonable basis (110 CMR 2.00, 4.32) and "pose{d} substantial risk to the child's safety or well-being." (DCF Protective Intake Policy #86-015, rev. 2/28/2016)

### 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

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

“Abuse” means (1) 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 (2) the victimization of a child through sexual exploitation or human trafficking, whether or not the person responsible is a caregiver. This definition is not dependent upon location. Abuse can occur while the child is in an out-of-home or in-home setting. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Sexual abuse” is any non-accidental commission of any act by a caregiver upon a child that constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caregiver and a child for whom the caregiver is responsible. DCF Protective Intake Policy #86-015, rev. 2/28/16

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

“[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

“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)

“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 z386-015, rev. 2/28/2016

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. 2/28/2016

### Analysis

It is undisputed that Appellant was a caregiver pursuant to Departmental regulation and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant, through Counsel, disputed the Department’s decision to support the allegations of sexual abuse and neglect of C by the Appellant, citing to AW’s history of providing misleading and/or false information to law enforcement and the Court and her propensity for violence. The documentary and testimonial evidence reflects a tumultuous and volatile relationship between the Appellant and AW, both past and in time. The Department’s has had intermittent involvement with the Appellant, AW and the child since C’s birth. Throughout the years, C has

been present for both verbal and physical altercations between the Appellant and AW. Additionally, C had been subject to repeated police involvement regarding these altercations and or AW's allegations against the Appellant. The documentary evidence supports the Appellant's contention that AW dramatized and/fabricated allegations against the Appellant, thereby diminishing her credibility. Without the benefit of a substantive interview with the Appellant, the Department's conclusion that the Appellant sexually abused the child lacked clarifying and quantifying information/context. The timing/possible motivation for the reported allegations was also an important missing piece of information requiring consideration in the ultimate decision making of the instant case. Issues of credibility and reliability must be carefully considered and the facts and circumstances in such cases must be carefully reviewed. Edward E. v. Department of Social Services, 42 Mass.App.Ct.478, 484 (1997)

This Hearing Officer gave careful consideration to the allegation of sexual abuse. When viewed on its surface, the terminology used by C denoted sexualized behavior indicative of sexual abuse. When placed into the context of an adult movie comedy, clips of which C reportedly viewed on You Tube, while admittedly an inappropriate subject matter for a child to view, it did not denote sexual abuse if the viewing of such was unintentional. "Sexual Abuse" means "Any non-accidental act by a caregiver upon a child that constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caregiver and a child for whom the caregiver is responsible." 110 CMR 2.00 While the child informed the Department that the Appellant engaged in the acts of "Goat" "Fruit basket" and "Batwing," the Department was unaware that these were terms and or/actions as depicted in a movie as reported by the Appellant. Had the Appellant had the opportunity to provide said information, the Department's interview with C could have explored this explanation and its potential influence on the child's statements. The Court has determined that in making a decision that a report is supported, 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). In this matter, the Department made its decision absent input from the Appellant. "... When reviewing a support decision or an Alleged Perpetrator listing, the hearing officer may consider information available during the 51A response investigation and new information subsequently discovered or provided that would either support or detract from the Departments decision." 110 CMR 10.21 (6) The Appellant's information warranted consideration and additional scrutiny. Finally, the child denied that the Appellant touched him inappropriately or sexually and no criminal charges were filed against the Appellant.

Considering all the evidence and the circumstances, the Department did not have reasonable cause to believe and the decision to support the allegation of sexual abuse was not in conformity with its policies and/or regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016

The second issue for resolution in the instant case was whether the Appellant's actions constituted neglect per Department regulations and policies. While determining that the Appellant did not sexually abuse C, his questionable supervision wherein C was able to view graphic adult behavior, albeit under the guise of comedy, was cause for concern. This coupled with the Appellant's continued use of alcohol raised concern for the level of appropriate

supervision and care that C received when spending time with the Appellant. By the Appellant's own admission he continued to drink alcohol, despite three (3) DUI convictions and prior engagement with AA. The Appellant however contended that he did not drink alcohol when caring for C. The child clearly identified the alcohol beverages that the Appellant drank and reported that he saw the Appellant do so each time he visited. C did not know the amount that the Appellant drank as he went to bed; he did speak of the "tons of cans and hard lemonade bottles" that he saw. C reported that at times the Appellant would stumble or walk funny and talked "kinda slow and weird." He spoke of one occasion wherein it was difficult to wake the Appellant up at night, and that he had to help the Appellant get up to go to bed. C informed the Department that he did not like the Appellant drinking and would like him to stop.

In addition to the aforementioned, the relationship between the Appellant and AW continued to be fraught with turmoil. The child continued exposure to the parental conflict and police responses. The Court has determined that a physical or verbal altercation between caretakers, witnessed by the children, "constitutes a failure to provide the children with minimally adequate stability and growth." John D. v. Department of Social Services, 51 Mass. Ct, 125, 132 (2001) This was such a case. Even with no indication or evidence that the child has been injured, either physically or emotionally by the domestic violence, the State need not wait until a child has actually been injured before it intervenes to protect a child. Custody of a Minor, 377 Mass. 879, 389 N.E. 2<sup>nd</sup> 68, 73 (1979) In the instant case, the police witnessed C crying and distressed during their responses. C informed the Department that he would like the Appellant "not to say mom is stupid or yell at her so much." While making no finding regarding AW's role in the continued discord, the Appellant's actions constitute a failure to provide "...minimally adequate emotional stability and growth..." per Departmental regulation 110 CMR 2.00

"Reasonable cause" implies a relatively low standard of proof which, in the context of 51A, "serves a threshold function" in determining whether there is a need for further assessment and/or intervention. "[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of Section 51A." This same reasonable cause standard of proof applies to decisions to support allegations under 51B. Care and Protection of Robert, 408 Mass. 52, 63 (1990) As set forth in the Findings, and above, the evidence presented was sufficient to support the Department's findings.


Due to the child's exposure to the Appellant's drinking, questionable supervision and conflictual relationship with AW, the evidence was sufficient to determine that the Appellant's "the actions or inactions by the parent...pose substantial risk to the child's safety or well-being" thereby meeting the Department's regulatory standard. DCF Protective Intake Policy #86-015, rev. 2/28/2016)

### **Conclusion and Order**

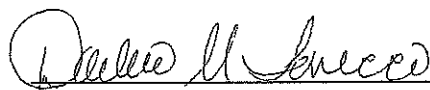
The Department's decision to support the 51A report of sexual abuse of C by the Appellant is **REVERSED**.

The Department's decision to support the 51A report for neglect of C by the Appellant is **AFFIRMED.**

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he may do so by filing a complaint in the Superior Court in Suffolk County, or in the county in which he resides, within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, §14.) In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.

  
Carmen Temme  
Administrative Hearing Officer

5/30/18  
Date

  
Darlene M. Tonucci, Esq.  
Supervisor, Fair Hearing Unit

\_\_\_\_\_  
Date

\_\_\_\_\_  
Linda S. Spears  
Commissioner