

having no direct or indirect interest, personal involvement, or bias in this case.

The Fair Hearing was recorded on one (1) compact disk in accordance with 110 CMR 10.26.

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

For the Department:

- Exhibit A: 51A Report, dated 8/23/17
- Exhibit B: 51B Report, completed 9/14/17
- Exhibit C: Case Dictation

Appellant

- Exhibit 1: Letter of HM, stepparent of V
- Exhibit 2: Letter of MS
- Exhibit 3: Letter of KM, [REDACTED] Youth Football League
- Exhibit 4: Verizon phone record of JS
- Exhibit 5: Affidavit of NS

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. At the time of the filing of the subject 51A report, A was twelve (12) years old. A resided in [REDACTED], MA with the Appellant, her maternal grandfather/Legal Guardian, JS, as well as her half-brother, I. A's maternal uncle, CS (hereinafter "CS") and his

girlfriend, MS (hereinafter "MS") and their child resided in the bottom level of the split family home. (Fair Hearing Record)

2. The Appellant was the Legal Guardian of the subject child; therefore he was deemed a caregiver pursuant to Departmental regulation 110 CMR 2.00 and DCF Protective Intake Policy #86-015, rev. 2/28/16.
3. For her entire life, A resided in the home of her maternal grandparents, JS and FS; and was in their Guardianship for several years due to her mother's, NS, substance abuse issues and her father's, NL (hereinafter "NL") unavailability. (Fair Hearing Record)
4. On July 31, 2017, A's maternal grandmother, FS, passed away unexpectedly from an asthma attack, while working in her garden. JS took three (3) weeks off from work, August 1, 2017 through August 21, 2017, to grieve the loss of his wife and to be with his grandchildren. (Testimony of JS)
5. JS testified that upon the death of FS, NL went to court and attempted to become A's caregiver. NL had believed FS was the sole Guardian for A. Further, after a report made by NL, he tried to take A from JS's home, a scene ensued whereby A threatened to kill herself if she had to go with NL, and grabbed razor blades. 911 was called. A was brought to crisis for an evaluation. NL then petitioned the Court for emergency custody of A; which was not granted to him, and the matter was taken under advisement. (Testimony of JS)
6. JS testified that a day after FS passed away, he was notified by the Department about information the Department received that JS and FS were seen leaving a liquor store and driving around with A, looking for drugs and that FS passed away from an overdose. This information was investigated and unsupported. (Testimony of JS)
7. On August 31, 2017, A's custody situation was scheduled for hearing at Probate Court. (Exhibit A)
8. On August 23, 2017, the Department of Children and Families received a report pursuant to M.G.L. c. 119, §51A from a reporter alleging the neglect of A by JS, and her mother, NS. According to the reporter, NS had called NL and said A was with her at the home of DP, her younger child's father. The reporter did not know if NS was involved in substance abuse treatment at the time but noted DP was believed to be a drug dealer. JS was contacted and he advised that NS had been to his home to pick up clothing she left there. JS denied NS was alone with A and reported that MS was present during this time. This report was screened in for a response. (Exhibit A)
9. On August 21, 2017, JS went back to work. JS asked MS, who lived with his son, CS, in the lower level of the home, to watch A that day but she could not. JS made arrangements for A to spend the day at her friend's home. JS dropped A off at the home of HM and picked her up later on the same day, August 21, 2017². (Exhibit 1)

² HM's contact information was provided to the Department to verify A's whereabouts from a neutral party; however the

10. On August 22, 2017, A was at JS' home for the day with MS. NS contacted JS at work and asked for permission to go to the home and retrieve some clothing. After conferring with MS; JS allowed NS to go to the home. NS reported she traveled by bus, spent from one (1) to two (2) hours at JS' home, and left by bus. NS was not alone with A. (Exhibit B; Exhibit 2; Exhibit 5)
11. NS borrowed A's cell phone when she was at JS' home. A allowed her mother to borrow her phone because NS told her she was job seeking. The plan was made for NS to return the phone to A the following night during A's cheerleading practice. (Exhibit 5) JS was not aware that NS borrowed A's phone, nor of the plan for its return to A. (Testimony of JS)
12. NL was interviewed by the Department. He reported NS had called him on August 22, 2017, asking for his social security number so she could apply for benefits for A. NL asked where A was and NS reported she was with her, in an elevator. NL believed NS and A to be at DP's home. NL reported A told him she stayed at DP's home with NS. (Exhibit B, p.2) I do not find NL to be credible as phone records provided indicated there were no outgoing calls on A's cellphone to NS on August 22, 2017, and MS reported she was with A on August 22, 2017, during the day.
13. JS testified there were no outgoing phone calls to NL using A's phone on August 21, 2017, or on August 22, 2017. (Exhibit 4)
14. On August 22nd, 23rd, and 24th, 2017, A attended cheerleading practice from 5:30 p.m. until 7:30 p.m. JS transported A to and from practice each night. (Exhibit 3)
15. Family members, as well as, A, MS and DP denied NS was alone with A. They denied that NS brought A over to DP's apartment, or that A ever slept over at DP's apartment with NS. (Fair Hearing Record)
16. On September 14, 2017, pursuant to M.G.L. c. 119, §51B, the Department supported the allegation of neglect of A by the Appellant and NS. The Department supported the allegations of neglect because the Appellant allowed NS to be unsupervised with A despite her history of substance use. The Department found reasonable cause to believe that the actions of JS impacted the child and posed a danger or substantial risk to the child's safety and well-being. (Exhibit B)
17. In July, 2017, the Appellant experienced the sudden loss of his spouse; NL's attempts to take A from him; as well as, three (3) DCF investigations; all of which were anxiety provoking and stressful to him. (Testimony of JS) JS was aware of who was supervising A; however acknowledged he was not always aware of the date and could have confused dates when asked by DCF³. (Testimony of JS) I credit the Appellant's testimony.

Department did not contact HM.

³ The Department alleged JS' first response was that MS was watching A on 8/21/17 and she was not, she watched her on 8/22/17.

18. A denied NS used drugs, saying she only smoked cigarettes. A disclosed NL smoked marijuana⁴ and used alcohol. (Exhibit B)
19. Based upon the totality of the evidence in this case, I find that the Department did not have reasonable cause to believe the Appellant failed to provide minimally adequate care/supervision. There was insufficient evidence to support the allegation of neglect of A by JS or that the Appellant placed A in danger or posed substantial risk to her safety or well-being through his actions.
- a. NL was not a reliable reporter.
 - b. NL's alleged disclosure of neglect was not supported by sufficient indicia of reliability. (See Edward E. v. Department of Social Services, 42 Mass.App.Ct.478 (1997))
 - c. No independent evidence existed to corroborate the claim of neglect.
20. Therefore, the Department's decision to support the allegations of neglect of A by the Appellant was not made in compliance with its regulations and policy. 110 CRM 4.32; 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

⁴ NL admitted to daily marijuana use.

“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; 110 CMR 2.00

“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

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, (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. 2/28/16

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, contested the Department's decision to support an allegation that he neglected A, his granddaughter. He argued the investigative response was not conducted in accordance to Departmental policy, as collateral first hand witnesses were not consulted; due weight was not provided to direct information provided by he and A; and improper weight was given to the statement of the reporter.

The Department supported the allegations of neglect of A by the Appellant due to a report that A was with NS alone and unsupervised; that the Appellant allowed this to occur which constituted neglect. However, the Department had no evidence to confirm that NS was actively abusing substances at the time of the report, and did not contact her treatment provider to ascertain if she was in treatment. Statements obtained from A regarding her parents, NL and NS, and their drug use was not considered by the Department. Statements from other family members denying NS was ever left alone with A were not considered. The Department was required by their regulations "to make any collateral contacts necessary to obtain reliable information which would corroborate or disprove the reported incident and the child's condition."⁵ The Department must then utilize the facts provided by collaterals, both positive and negative, to evaluate the allegations before them. *Id.* The record did not reflect this was done in the subject investigation. Rather, the Department admittedly relied primarily upon the statements of a parent actively involved in an upcoming Probate Court custody battle with the Appellant. Independent collateral witnesses were available and known to the Department; however they were not contacted.

As allowed by the Department's regulations, the Appellant presented additional documentation and witness statements at the Fair Hearing. This information was available at the time of the investigation, as well as these witness that the Appellant had hoped would raise questions regarding the disclosures and credibility of NL. The Department did not talk with these collaterals during the investigation. The Appellant presented credible evidence to support his position; evidence that was not considered by the Department during its investigation.

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. Arnove v. Commissioner of the Department of Social Services, 43 Mass. App. Ct., 33, 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 and 10.06

After a review of the evidence presented, including new information offered by the Appellant at the Fair Hearing, the evidence was insufficient to support the Department's decision to support neglect by the Appellant. Therefore, the Department did not have reasonable cause to support and the decision was not made with a reasonable basis.

⁵ 110 CMR 4.27(2)

Conclusion

The Department's decision to support the allegations of **neglect** of A by the Appellant was not made in conformity with Department's regulations and with a reasonable basis and therefore, the Department's decision is **REVERSED**.

Laureen Decas (initials)

Laureen Decas
Administrative Hearing Officer

Date: 4/4/18

Darlene M. Tonucci

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

Date: _____

Linda S. Spears
Commissioner