

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

For the Department:

- Exhibit A: 51A Report, dated 9/21/17
- Exhibit B: 51B Report, completed 10/11/17
- Exhibit C: 51A Report and 51B emergency investigation, completed 9/20/17

Appellant

- Exhibit 1: Annual Report of Guardian of Minor
- Exhibit 2: Educational information relative to C
- Exhibit 3: Medical information relative to C
- Exhibit 4: C's Google calendar from 8/15- 4/18

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 Facts

1. At the time of the filing of the subject 51A report, C was eight (8) years old. He resided in ██████████, MA with his paternal grandmother, CL (hereinafter "CL" or "PGM") and her husband. Prior to the 51A report being filed, C resided in the same residence with the Appellant, PS, C's mother, KB, (hereinafter "KB" or "mother"), C's father, MS, (hereinafter "MS" or "father") elsewhere in ██████████, MA. (Exhibit A)
2. Since March, 2015, the Appellant had been the co-guardian of C with CL; therefore the Appellant was a caregiver pursuant to Departmental regulation and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16
3. Prior to the 51A report, eight (8) other reports of concerns of abuse/neglect had been

filed on behalf of C with DCF; issues being parental substance abuse within C's family. (Exhibit A)

4. In March, 2015 the Appellant and his ex-wife, CL, petitioned the Probate Court for co-guardianship of C, which was permanently granted through C's eighteenth (18) birthday. C remained living in the Appellant's home along with his parents, MS and KB. (Fair Hearing Record)

5. In June, 2015 an Initial Assessment supported concern for C by the Appellant and C's parents, KB and MS. The Department found KB and MS were selling, sharing, or abusing their prescription medications; providers had concerns of medication misuse, and concerns had arisen over appropriate supervision of C in the Appellant's home. (Exhibit B, p.2)

6. On September 19, 2017, the Department received a 51A report which was screened as an emergency response, alleging the neglect of C by his parent. MS was found by the Appellant unresponsive in the home and 911 was called. MS refused medical attention; however while emergency staff were present, KB was nodding off and was subsequently transported via ambulance to the hospital. KB was given Narcan; she admitted to using opiates. A baggie with a white powdery substance was found near KB and MS. C arrived home from school while the emergency staff were at the home. The Appellant had contacted CL and arranged for her to come get C and take him to her home. The allegations of the neglect of C by his parents, KB and MS, were supported. (Exhibit C)

7. On September 21, 2017, the Department of Children and Families received a report pursuant to M.G.L. c. 119, §51A from a non-mandated reporter alleging the neglect of C by his paternal grandfather, PS. According to the reporter, C's father, MS, had a history of psychiatric hospitalizations, PTSD, anxiety and health issues. The reporter alleged there was often yelling and screaming at the Appellant's home which C was exposed to; that C's mother, KB, relapsed on opiates, and MS had presented in the recent past as nodding off, with myotic pupils, and appeared to be under the influence. The reporter was concerned about the supervision of C, as his parents were actively using substances and that the Appellant had plans to go away for four (4) days and to leave C with KB and MS albeit with "questionable behavior". (Exhibit A)

8. The 51A report was assigned for investigation, pursuant to M.G.L. c. 119, § 51B.

9. C believed the ambulance was at his home due to MS' heart condition and his working too hard. He believed KB took too much medication for her "pooping problem". C denied any concerns at the Appellant's home, denied any worries there, and verbalized his desire to return to Appellant's home saying, "There is no place like home". (Exhibit B, pp. 5, 6)

10. C was up to date medically. He received a determination award at school. C was meeting all expectations at school and was working hard in his core subjects. (Exhibit 2; Exhibit 3)

11. On October 11, 2017, pursuant to M.G.L. c. 119, §51B, the Department supported the allegation of neglect of C by the Appellant. The allegation of neglect was supported because the Appellant demonstrated poor judgement in that he planned to leave C with KB and MS while asking CL to visit for four (4) days while he went away to attend a Red Sox away game, in addition to, driving MS to CL's home and wanting to bring C with them to ██████████ hospital for MS to be evaluated. The Department determined these actions of the Appellant constituted a lack of emotional stability for C. (Exhibit B, pp. 13, 14)

12. C had seen ambulances at his home many times before the subject incident on September 19, 2017. MS had a heart condition, ARVD, and suffered from PTSD due to his implanted defibrillator having failed several times in the past. (Exhibit B)

13. The Appellant contacted CL on Monday, September 18, 2017, to inform her of his impending trip out of town from Wednesday through Saturday. KB overdosed in the home on Tuesday, September 19, 2017; the day before the Appellant was planning on leaving. The Appellant did not go on the planned trip. (Testimony of PS)

14. It was undisputed that the Appellant arrived at CL's home on September 20, 2017, with MS to pick C up. The Appellant was taking MS to the hospital to be evaluated. A verbal altercation ensued between the Appellant and CL's husband. C was inside the home and not exposed to the altercation. (Fair Hearing Record)

15. On March 6, 2017, an Annual Report of Guardian of Minor was filed with the Probate Court updating the court on C's year. The court was informed by CL that C was receiving extra help in school for learning disabilities and dyslexia, that he attended a Title I reading program, and that he was happy in school, helpful to his peers, and working hard. The court was advised C was having daily contact with his parents, KB and MS. (Exhibit 1)

16. The Appellant testified he would not allow KB or MS to reside in his home any longer. KB and MS moved out of his home immediately following the subject incident. (Testimony of PS)

17. Based upon the totality of the evidence in this case, I find the Department did not have reasonable cause to support the allegation of neglect of C by the Appellant.

a. The Department had evidence that C was thriving educationally and medically in the home of the Appellant.

b. C was unaware of KB's use of opiates in the home on the day of the subject incident. He was not present, as he arrived home from school to the ambulance, believing MS was having issues relative to his heart condition.

c. C had no knowledge of substance use in the home.

d. The Appellant took steps to protect C from the events of September 19, 2017, by calling 911 and calling CL to come get C from the home.

e. The Appellant did not fail to provide C with minimally adequate care,

emotional stability and growth and his actions did not place C in danger nor did they pose substantial risk to C's safety or well-being. 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) 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 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

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

"Danger" is 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. 2/28/16

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Policy #86-015, rev. 2/28/16

A Fair Hearing shall address (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;. . . In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 CMR 10.05

"Caregiver" means (1) a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or (2) 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. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

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, via counsel, contested the Department's decision to support an allegation that he neglected his grandson, C, whom he had co-guardianship of. The Department found the Appellant demonstrated poor judgement in that he planned to leave C with his parents with CL visiting for four (4) days while he attended a Red Sox away game, and that he drove MS to CL's home wanting to bring C with them to [REDACTED]'s hospital for MS to be evaluated. The Department determined these actions constituted a lack of emotional stability for C. The Appellant argued he took those actions necessary to provide C with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, and other essential care. The Appellant maintained the Department's concerns were risk factors which could have in the future lead to neglect not that his actions in the present time rose to the level of neglect as defined by

the Department's Protective Intake Policy. The Appellant's argument was persuasive.

C had two (2) highly involved and motivated grandparents in his life; that ensured his daily physical needs were provided for, but also provided emotional stability to him. The record reflected and the Appellant testified he had provided care and met the needs of C and will continue to do so. Although the Appellant cannot change the situations of C's parents, MC and KB, he did change their living situation as they are no longer living with him in his home since the time of the incident. In order to support a finding of neglect, the Department must demonstrate that neglect *occurred* (emphasis added). The Department's collection of facts, knowledge and observations did not support that neglect occurred. 110 CMR 4.32 When presented with an emergency regarding KB and MS, the Appellant's actions did not place C in danger or pose substantial risk to C's safety or well-being.

The Department's assertion of "risk of neglect" does not comport with Department regulations where "risk" is a component of abuse but not neglect. The Department must demonstrate that neglect has occurred (110 CMR 2.00 and 4.32) and they have not in the subject matter. While it was reasonable for the Department to be concerned about the emotional impact on C, it was not reasonable to believe that the Appellant neglected C. The Appellant had shown by a preponderance of the evidence that the Department failed to comply with its regulations and policy when it made a finding to support the allegation of neglect.

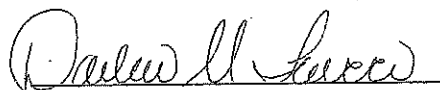
Conclusion

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



Laureen Decas
Administrative Hearing Officer

Date: 5/21/18



Darlene M Tonucci, Esq.
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spear
Commissioner