

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
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BOSTON, MASSACHUSETTS 02111

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Commissioner

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IN THE MATTER OF

EM and JM #2017 1339

FAIR HEARING DECISION

Appellants, EM (“Grandfather”) and JM (“Grandmother”; collectively, “Appellants”), appeal the Department of Children and Families (hereinafter “DCF” or “the Department”) decision to support allegations of neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On September 5, 2017, the Department received a report which alleged neglect of D, B and L by their mother, ErM, who is the Appellants’ daughter/step-daughter, after D disclosed ErM was drinking heavily and he had to take care of B and L. The Department screened-in the report and conducted a response.

On September 25, 2017, the Department received a report via the DCF Child at Risk Hotline which alleged neglect of D by his uncle, EM III, after EM III was arrested for assaulting D after an incident at the Appellants’ home.

On September 27, 2017, a third report was filed which alleged neglect of D by the Appellants. The basis of the reporter’s concern was that because the Appellants failed to obtain a restraining order against EM III following the incident with D, they failed to protect D. The report was incorporated into the ongoing response. On September 29, 2017, the Department made the decision to support allegations of neglect of D and his half-siblings B and L by the Appellants. The Department provided the Appellants with written notification of the decision and their right to appeal.

Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. A hearing was held at DCF Springfield Area Office on December 26, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; EB, DCF Supervisor; EM Jr., Appellant.

JM was unable to attend the hearing; EM Jr. represented their collective interests.¹ Prior to the completion of the hearing, the record was left open until January 26, 2018 for additional submissions by the Appellants, including a written response if desired.

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

The Fair Hearing was digitally recorded and transferred to one (1) Compact Disc. The witnesses were sworn in to testify under oath.

The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply; only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 CMR 10.21

The following evidence was entered into the record:

For the Department:

- Exhibit A: 51A Report of September 5, 2017
- Exhibit B: 51A Report of September 25, 2017
- Exhibit C: 51A Report of September 27, 2017
- Exhibit D: 51B Report completed on September 29, 2017 by JM

For the Appellant(s):

- Exhibit 1: Written Response of JM

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) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the

¹ Grandfather informed the Hearing Officer that on December 20, 2017, ErM was involved in an auto accident which resulted in ErM and B being hospitalized for injuries sustained in the accident. Grandmother was prevented from coming to the hearing on December 21, 2017 because she was at the hospital attending to B. (Testimony of Grandfather)

Findings of Fact

1. The Appellants are the maternal grandfather ("Grandfather") and step-grandmother ("Grandmother") of D, B and L. The children's mother is ErM. At the time of the report in question, D was twelve (12) years old, B was four (4) years old and L was three (3) years old. (Exhibit B, p. 1)
2. The Appellants had custody of D for his first eight (8) years. At the time of the report in question, D spent most of his time with the Appellants. Prior to the report in question, the Appellants had custody of D. The Appellants babysat for B and L and another grandchild, E. E regularly stayed with the Appellants. Grandfather's son EM III is E's father. (Exhibit D, pp. 3, 8; Testimony of EB and Appellant)
3. The Appellants were caregivers for D, B and L under Department policy and regulations. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00)
4. The Appellants were not involved with the Department. At the time of the reports in question, ErM was involved with the Department's Springfield Area Office, where she and the children received case management services. EM III and E were involved with the Department's Robert Van Wart Area Office in a separate clinical case. (Exhibit D, p. 7)
5. On September 5, 2017, the Department received a report which alleged neglect of D, B and L by their mother, ErM, after D disclosed ErM was drinking heavily and he had to care for B and L. The Department screened-in the report (Exhibit A) and conducted a response (Exhibit D; Testimony of EB)
6. During the response, the Department met with ErM and D, B and L. D identified the Appellants as caregivers and his preference to stay with the Appellants. None of the children identified any concerns regarding the Appellants; the Appellants' home was viewed by the Department to have ample room and provisions for the children. (Exhibit D, pp. 3, 4; Testimony of EB)
7. The Department's response continued with respect to ErM and the children. ErM did not identify and concerns for her parents' care of D, B or L. (Exhibit D)
8. On September 25, 2017, D, B and L and E were at the Appellants' home. EM III was visiting the home. It was undisputed that unexpectedly and without any provocation EM III attacked D and the Appellants immediately intervened to move D out of harm's way, to eject EM III from their home with the assistance of

the police and following the incident to seek a protective order on D's behalf.² (Exhibit D, pp. 6, 7; Exhibit 1; Testimony of Grandfather and EB)

9. On September 25, 2017 the Department received a report which alleged physical abuse of D by EM III, his maternal uncle. The report was filed following an incident at the Appellants' home during which EM III tackled and strangled B. The Department screened-in the report (Exhibit B), which was incorporated into the response. (Exhibit D; Testimony of EB)
10. The Department spoke with the Appellants and D regarding the new report. Grandmother noted that EM III "seems to have it out for D" and was "always threatening D"; however, Grandfather credibly testified that EM III had not acted that way in front of them before or witnessed EM III treat D badly, although D had told them about incidents outside their house.³ (Exhibit D, pp. 3, 6, 7; Testimony of EB and Appellant)
11. The Appellants' statements to the Department were reliable and consistent with testimony at the hearing. I find the Appellants credible. (Exhibit D, pp. 6, 7; Exhibit 1; Testimony of EB)
12. On September 27, 2017 a third report was filed with the Department which alleged neglect of D, B and L by the Appellants. The basis for the report was concern that the Appellants failed to obtain a restraining order against EM III on behalf of D and because they failed to do so, had failed to protect D. The report was filed to add the Appellants as caretakers for D, B and L, after the Department determined that EM III was not a caretaker for the children. (Exhibit C; Testimony of EB; see DCF Protective Intake Policy #86-015, rev. 2/28/16)
13. On September 29, 2017, the Department supported allegations of neglect of D by the Appellants. A thorough review of the evidence revealed that the Department supported allegations of neglect of D and his siblings B and L. In reaching the instant decision, I reviewed the Department's decision inclusive of B and L. (Exhibit D, pp. 8-10; Testimony of EB)
14. The Department determined the Appellants were the caregivers of D and failed to obtain a restraining order⁴ on D's behalf and were aware that EM III had verbally abused D in the past. The Department determined that the Appellants "emotionally maltreated" D; and their inaction (failure to obtain the restraining

² I inferred from Grandfather's testimony that it was likely that following EM III's arrest a condition of his bail was to have no contact with D. During the hearing, Grandfather queried the Department Supervisor regarding whether he should return to court for another order and testified that EM III had no contact with D since the reported incident and he had made it clear to EM III he was not allowed at the Appellants' home.

³ Before the incident, D told the Response Worker that for discipline, his mother (ErM) would call EM III to "smack him around" and that his uncle's friends also "smack him around". (Exhibit D, p. 3)

⁴ EB testified that the Department can only recommend, not require, caregivers to obtain a restraining order.

order) placed D in danger and posed a substantial risk to D's safety and well-being. (Exhibit D; Testimony of EB; 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

15. The Department's assertion that the Appellants emotionally maltreated D was misplaced and erroneous, where:
 - a) A report was filed on behalf of D, B and L which alleged neglect by the Appellants;
 - b) Under Department regulations emotional maltreatment is a component of abuse. To support a report for emotional maltreatment, the Department must have reasonable cause to believe that a child incurred serious emotional injury at the hands of a caretaker (M.G.L c. 119, §51B; 110 CMR 2.00 and 4.32(2); Arnone v. Commissioner of the Department of Social Services, 43 Mass. App. Ct. 33, 680 N.E.2d 945); and
 - c) "Serious emotional injury" is "an impairment to or disorder of intellectual or psychological capacity of a child as evidenced by observable and substantial reduction in the child's ability to function within normal range of performance and behavior." 110 CMR 2.00
16. "Neglect means 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..." (110 CMR 2.00)
17. After a review of all the evidence and for the following reasons, I find the Department did not have reasonable cause to support allegations of neglect of D, B and L by the Appellants:
 - a) The Department did not demonstrate that the Appellants failed to provide minimally adequate care for D, B and L, including minimally adequate emotional stability and growth or otherwise neglected the children under Department regulations (110 CMR 2.00, 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16), and;
 - b) To the extent that the Appellants did not a restraining order on D's behalf, the Department did not demonstrate that the Appellants' inactions placed D, B or L in danger or posed a substantial risk of harm to the children's safety or well-being. (DCF Protective Intake Policy #86-015, rev. 2/28/16)
18. In reaching the instant decision, the Hearing Officer gave due weight to the clinical decision made by the Department. 110 CMR 4.32; 110 CMR 10.29(2)

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 caregiver 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. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Reasonable cause to believe’ means a collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected.” Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caregiver; 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

“Neglect means 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition”; 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

“Abuse” means the non-accidental commission of any act by a caregiver upon a child under age 18, which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the law of the Commonwealth or any sexual contact between a caregiver and a child under the care of that individual, or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

Danger is “A condition in which a caregiver’s actions or behaviors 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 “The potential for future harm to a child.” 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) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

Analysis

The Appellants were caregivers for D, B and L under Department policy and regulations. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00)

The Department determined the Appellants neglected D, B and L. The Department determined the Appellants "emotionally maltreated" D; and their inaction (failure to obtain a restraining order on D's behalf) placed D in danger and posed a substantial risk to D's safety and well-being. (Exhibit D; Testimony of EB; 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

The Appellants illustratively argued that they provided adequate care and safety for D, B and L.

At the hearing, the Department expressed concern the Appellants permitted EM III to visit the home despite knowing that EM III had "verbally abused" D before; and, following the reported incident, the Department was concerned the Appellants failed to obtain a restraining order on D's behalf. The Department suggested the Appellants' inactions were so egregious as to constitute emotional maltreatment; an argument this Hearing Officer found erroneous and without merit.

It was undisputed that the Appellants provided excellent care for D, B and L except for the reported incident, such that D expressed his desire to live with the Appellants. The evidence suggests that when unexpectedly and without provocation, EM III unexpectedly attacked D, the Appellants immediately and appropriately intervened to protect D; the Appellants ejected EM III from their home, called the police and made it clear to EM III he was not to return, which is in sharp contrast to D's documented claim that for discipline his mother, ErM, invited EM III to "smack [D] around".

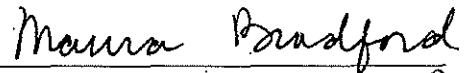
Grandfather credibly testified and Grandmother's statement corroborated that he took steps to obtain a restraining order against EM III and the evidence suggests Grandfather was prepared to extend the order and returned to court to do so. Even if the Appellants had not obtained a restraining order, the Department acknowledged the Department cannot require a caregiver to obtain a restraining order and thus that the Appellant's individual actions or failure to act was not wanting where the Department's regulations and policies were concerned. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

The question before this Hearing Officer was whether the Department had evidence to support that the children were neglected and whether the actions or inactions by the Appellants placed D and his siblings in danger or posed substantial risk to the children's safety or well-being. 110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16

This Hearing Officer is obliged to consider the totality of evidence, and whether there was enough evidence to permit a reasonable mind to accept the Department's decision that the Appellants neglected the children. After careful consideration of the evidence, including testimony at the Fair Hearing, this Hearing Officer has determined the Department's decision was not reasonable or made in accordance with Department regulations. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); also see Wilson v. Department of Social Services, 65 Mass. App.Ct. 739, 843 N.E.2d 691. Additionally, there was no evidence that the Appellant's actions or inactions placed D and his siblings in danger or posed a substantial risk to D and his sibling's safety or well-being, as required to support an allegation of neglect. DCF Protective Intake Policy #86-015, rev. 2/28/16

Conclusion and Order

Appellant has shown by a preponderance of the evidence that the Department's decision to support allegations of neglect on behalf of D, B and L was not in conformity with Department regulations or made with a reasonable basis; therefore, the Department's decision is REVERSED.



Maura E. Bradford
Administrative Hearing Officer



June 4, 2018
Date



Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner