EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN & FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111

LINDA S. SPEARS,
COMMISSIONER

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

IN THE MATTER OF

S. B.

FH # 2017 1365

HEARING DECISION

Procedural Information

The Appellant in this Fair Hearing is Ms. SB ("the Appellant"). The Appellant appeals the Department of Children and Families' ("the Department" or "DCF") decision to support a report of neglect pursuant to Mass. Gen. L., c. 119, sec. 51A. Notice of the Department's decision was sent to the Appellant on October 6, 2017, and the Appellant filed a timely appeal with the Fair Hearing Office on November 1, 2017.

The Fair Hearing was held on January 9, 2018, at the DCF Robert Van Wart Area Office. The following persons appeared at the Fair Hearing:

Linda A. Horvath, Esquire	Administrative Hearing Officer
SB	Appellant
JM, Esquire	Counsel for Appellant
BH	Social Worker, CPCS/CAFL
MS	DCF Response Worker

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 recorded pursuant to DCF regulation. 110 CMR 10.26.

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

For the Department:

Exhibit 1: 9/30/17 51A Report
Exhibit 2: 10/6/17 51B Report

For the Appellant:

Exhibit A: 10/5/17 KM, M.D.
Exhibit B: Reference Letter, AH
Exhibit C: 10/5/17 Reference Letter, PR
Exhibit D: Reference Letter, KT

Statement of the Issue

The issue presented in this Fair 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 investigation, 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, 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, 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 child(ren) being a victim of sexual exploitation of human trafficking." Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 10.05.

Findings of Fact

1. The subject child of this Fair Hearing is the male child "B" ("the child"), who was [redacted] old at the time of the 51A filing referenced below. (Exhibit 1, p.1.)

2. The Appellant is the child's mother. (Exhibit 1, pp.1and 2.) She is a stay-at-home mother. (Testimony of Appellant.)

3. The child's father is Mr. ST ("the father"). The Appellant and father were together as a couple and living together at the time of the 51A filing. (Exhibit 1, pp.1—3.) The father works as a roofer. (Exhibit 2, p.7.)

4. On Saturday, September 30, 2017, the Department received a report pursuant to M.G.L. c. 119, s. 51A alleging neglect of the child by the father[1] after the father gave

[1] The father is not an Appellant in this hearing. The father had a separate fair hearing (FH #20171372) also conducted by the undersigned hearing officer.

the child a bath in the kitchen sink, put the child on the kitchen counter and the child fell from the counter sustaining injuries. (Exhibit 1, p.3.)

5. The Department screened-in the 51A report as an emergency response. (Exhibit 1, p.5.)

6. The Appellant and father have a DCF history unrelated to the issues in this matter. (Exhibit 2, pp.1—2.)

7. The Appellant and the father were interviewed separately by the Police/DCF on September 30th. (Exhibit 2, p.3.)

8. The father got up at 4:30AM when the child woke up for a feeding.[2] The baby had a dirty diaper; because the child had such a bad diaper rash, the couple would give the child a quick bath as they could not use baby wipes. The father gave the child a quick bath in the kitchen sink. He had forgotten to get a towel from the cabinet below the sink; he usually took one out before the bath. He took the wet child out of the sink and placed him on the counter to the left of the sink on his back. The father then knelt down to grab a towel from the cabinet. The child fell from the kitchen counter, hit the open kitchen cabinet, and fell onto the tile floor right next to him. The father yelled to the Appellant to come down. (Exhibit 1, p.3; Exhibit 2, p.3, 4 and 5; Testimony of Appellant.)

9. It is uncontested that the Appellant was sleeping at the time of the incident. The Appellant remembered the baby fussing in the early morning hours; he usually got up to eat around 4AM. She heard the father get up for the baby and then she fell back to sleep. The next thing that woke her was the father yelling for her. "The baby was crying. [The father] was distraught and it took him a few moment[s] to verbalize that the baby had fallen." (Exhibit 2, p.4; Testimony of Appellant.)

10. The Appellant corroborated the father's statements that they give the child a bath or a quick rinse because baby wipes make his diaper rash worse. She also corroborated they keep towels for the child under the sink[3] and usually get a towel out first before the bath in order to lay him down on it. They do not use physical punishment. The Appellant believed the father's account of events completely as "he is a loving, patient father who would never harm his children."[4] (Exhibit 2, p.4; Exhibit A.)

11. The couple observed the child and looked for signs of concussion. They noticed swelling and that one eye was not opening. The Appellant rinsed the child again in the sink in order to keep him awake. The Appellant telephoned the child's pediatrician's office[5] and they were instructed to bring the child to the emergency

---

[2] The father gets up for feedings on the weekends to let the Appellant get more sleep; the Appellant gets up for the child during the week. (Exhibit 2, p.3.)
[3] The DCF RW viewed the towel supply in the cabinet under the sink. (Exhibit 2, p.5.)
[4] The couple also has a three-year-old daughter. (Exhibit 1, p.1.)
[5] Corroborated by the pediatrician's office. (Exhibit 2, p.13.)

room. The Appellant brought the child to the hospital at approximately 5AM, while the father found care for their 3-year-old child and met them at the hospital thereafter. The Appellant and father were fully cooperative with the Police and the DCF Response Workers ("RW") at the hospital. (Exhibit 1, p.3; Exhibit 2, pp.3 and 4.)

12. As a result of the fall, the child sustained a subarachnoid hematoma, an intraventricular hematoma, and a subdural hematoma. On September 30th, child abuse specialist, Dr. SB, opined "the child has a significant skull fracture that goes from ear to ear, and has 'branching.'" He could not exclude child abuse but also stated that the family's story was possible. (Exhibit 1, p.3; Exhibit 2, pp.2 and 7.)

13. The hospital social worker met with the father and had "absolutely no concerns." He gave the social worker a consistent account of events as what he told the police and DCF. He was "appropriately very upset with himself." Nursing staff also reported no concerns. (Exhibit 2, p.7.)

14. The child's pediatrician did not have any medical concerns for the child and confirmed the child had diaper rash as described by both parents. (Exhibit 2, p.6; Exhibit A.)

15. A skeletal survey was performed on the child. It showed the skull fracture with no evidence of other fractures. (Exhibit 2, p.6.) Dr. SB opined babies do get skull fractures more easily but found the child's fracture to be outside the range of what he typically sees from a fall from counter height. (Id. at p.9.)

16. An ophthalmologist examination was performed on the child. It showed sub-conjunctive hemorrhage of the right eye, which was consistent with the fall and not a child abuse concern. There was no evidence of retinal hemorrhage. (Exhibit 2, p.6.)

17. A subsequent MRI also showed a "white matter shear injury, which is indicative of a severe traumatic event...caused by an abrupt acceleration and deceleration of the brain." (Exhibit 2, p.7.) Dr. SB opined that the subdural bleeds found on the base of the child's brain (separate from the area of the fracture) were unusual. "They are not exclusively due to abusive head trauma, and do have accidental causes as well." (Id. at p.9.)

18. The child remained stable while in the hospital following the incident and was discharged to the paternal grandparents on October 3, 2017. (Exhibit 2, pp.2, 9, 10.)

19. The Department believed there to be discrepancies in the information the parents gave them with respect to how many alcoholic drinks the father had the night before the incident, who fed the child at midnight, and what time the incident occurred:

    a) The father had two Twisted Teas (he calls them "beers") on his ride home from work beginning at 2:30PM (as a passenger in the vehicle coming from [redacted] to MA). He arrived home from work between 5:30 and 6:00PM and had a third

Twisted Tea when he was showering. He had a fourth Twisted Tea at some time before he went to bed. He denied he was drunk and denied having an issue with alcohol. He denied a history of drug abuse and is randomly tested for his employment. He was physically disciplined as a child and denied he would do this to his children. (Exhibit 2, pp.3; 7—8.)

b) The Appellant corroborated that the father calls Twisted Teas "beers" and that he usually has one or two after work. On the night of the incident, she did not notice the father drinking but she also was not looking for that as drinking is not an issue for him; she denied he is ever drunk while caring for the children. Had she thought the father was unable to care for the child, she would not have allowed him to get up for the feedings that evening.[6] (Exhibit 2, pp.3, 4 and 8; Testimony of Appellant.)

c) The Appellant and the father each informed DCF that the other parent fed the child at his midnight feeding. (Exhibit 2, p.8.) The DCF RW acknowledged that it was possible each parent simply did not remember who fed the child at midnight at the time of the incident. (Testimony of MS.) The mother testified at the hearing that the father fed the child at midnight. (Testimony of Appellant.)

d) The Appellant indicated the child woke up "around 4:30AM" for his feeding. (Id. at p.3.) The mother also indicated she heard the child fussing "around 4:00AM" and the time between getting downstairs when father called her to the time she called the pediatrician was ten minutes. (Id. at p.4.) The pediatrician's records indicate a time of contact with the Appellant as 5:45AM. (Id. at p.13.) The 51A report indicates the mother arrived to the emergency room with the child at "5:00AM or 6:00AM." (Exhibit 1, p.3.)

20. Based upon the above perceived inconsistencies, the Department performed an emergency removal of the child (pursuant to M.G.L. c. 119, s.51B (3)) on October 2, 2017. (Exhibit 2, pp.8 and 9.)

21. On October 6, 2017, the Department supported the aforementioned report for neglect of the subject child by the Appellant[7] based upon neither the mother nor father knowing who fed the child at midnight, and not being aware of the father drinking at home on the night of the incident, even though father had two additional drinks at the home after work. The Department opined, "There are a lot of discrepancies regarding time frames from the time father was drinking, to the time of the accident, time calling the Pediatrician's office and time arriving at the emergency room." (Exhibit 2, pp.14 and 15.)

---

[6] The Appellant has a history of substance abuse but had been sober for three years at the time of the 51A filing. (Exhibit 2, pp.3 and 4.)

[7] The Department supported the father for neglect and physical abuse of the child. (Exhibit 2, pp.14 and 15.)

22. The Department opened the family for services following the support decisions. (Exhibit 2, p.15.)

23. The DCF RW did not believe that any drinking by the father on the night of the incident had anything to do with the child falling. The RW did not have any concerns with the parents' parenting abilities. (Testimony of MS.)

24. At the time of the 72-hour hearing, the specialist, Dr. SB, testified he could not say conclusively that the child was physically abused. The Juvenile Court returned custody of the child to the parents. (Testimony of MS.)

25. At the time of the fair hearing, both parents were in compliance with their service plan tasks. The child was receiving Early Intervention services and was being monitored closely. (Testimony of Ms.)

26. The Appellant's testimony at the Fair Hearing was sincere and forthright. Considering the Appellant's demeanor and content of testimony, which was consistent with her explanation of events of the day in question and the father's explanation of events, and as she reported to the Police and to the DCF RW the Appellant is deemed credible. (See, hearing record.)

27. References (written by close friends and a former neighbor) submitted by the Appellant on her/the father's behalf indicate that physical abuse would be out of character for either parent. (See, Exhibits B, C, D.)

28. Considering the evidence in its entirety, the Department did not have reasonable cause to believe that the Appellant failed to provide minimally adequate care for the child, and there was no substantial evidence that any action on the part of the Appellant placed the child in danger or posed a substantial risk to his safety or well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16. (See, Analysis.)

Applicable Standards

A "Support" finding means: "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) 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 of human trafficking." 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).

"Reasonable cause" implies a relatively low standard of proof which, in the context of 51B, serves a threshold function in determining whether there is a need for further assessment and/or intervention. Care and Protection of Robert, 408 Mass. 52, 63-64 (1990). "[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A. Id. at 63. This same reasonable cause standard of proof applies to decisions to support allegations under s. 51B. Id. at 64; M.G.L. c. 119, s. 51B.

"Neglect" is defined as failure by a caregiver, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; malnutrition; or failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. Protective Intake Policy #86-015, rev. 2/28/16.

"Caregiver"

(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 person entrusted with responsibility for a child's health or welfare, whether in the child's home, 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. Protective Intake Policy No. 86-015 (rev. 02/28/2016)

To prevail at a Fair Hearing, an Appellant must show based upon all evidence presented at the hearing, by a preponderance of the evidence that the Department's decision or procedural action 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. If there is no applicable policy, regulation or procedure, the Appellant must show by a preponderance of the evidence that the Department acted without a reasonable basis or in an unreasonable manner, which resulted in substantial prejudice to the Appellant. If the challenged decision is a supported report of abuse or neglect, the Appellant must show 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

As the child's mother, the Appellant is deemed a "caregiver" pursuant to Protective Intake Policy #86-015.

The Department's reasoning for the support decision of neglect by the Appellant is not supported by substantial evidence and is not reasonable based upon the findings of fact in this matter.

The Department's perceived inconsistencies of the time frame of the early morning hours of the incident are not indicative of neglect by the Appellant. The father recalled feeding the child at 4:30AM, and the Appellant arrived at the hospital between 5AM and 6AM. It is conceivable that the parents' recollection of time might not have been on target due to the traumatic event that occurred. In addition, the pediatrician's record is not clear if the Appellant telephoned them at 5:45 or if that is when the on-call physician spoke with her. Also, the hospital record is not clear as to when the mother arrived with the child to the emergency room—5AM or 6AM. The Appellant had no control over the times listed by the pediatrician's office or the hospital. It is plausible that within the 1-1/2 hour time span (4:30AM—6AM), the father fed the child, bathed the child, the fall occurred, the mother assisted with the child, made a phone call to the pediatrician's office, waited for the on-call physician to call back, and then took the child to the emergency room.

In addition, the Department acknowledged at the hearing that the father's drinking did not play a role in the child falling from the counter. The evidence is clear that the Appellant would have had no reason to believe that the father was intoxicated as drinking is not a problem for him and she saw no indication of such. If she had, she never would have allowed the father to care for the child, and she allowed the father to give the child his midnight feeding. The undersigned hearing officer found the Appellant's testimony to be credible at the hearing.

Although it is uncontested that the Appellant was sleeping during the accident and played no part in bathing the child during the event, noteworthy is that Dr. SB could not say with certainty either during the DCF response or at the time of the 72-hour hearing in Juvenile Court that the child was physically abused. As such, the Court gave custody of the child back to the parents. Of note, the radiologist was not concerned for physical abuse in this matter and all collaterals in contact with both parents, DCF and other, found them to be cooperative and appropriate.

In light of the totality of evidence in this case, as discussed above and in the detailed Findings of Fact, there is a lack of evidence that the Appellant neglected the child, and there is also a lack of evidence that any action by the Appellant placed the child in danger or posed a substantial risk to his safety or well-being.

Conclusion

The Department's decision to support the 51A report of September 30, 2017, for neglect by the Appellant on behalf of the subject child is **REVERSED.**

Linda A. Horvath, Esquire
Administrative Hearing Officer

June 5, 2018
Date

Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner