

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
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(IN THE MATTER OF)
(V.J.)
(FH #2017-1385)
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HEARING DECISION

Procedural History

The Appellant, V.J., appealed the decision of the Department of Children and Families [hereinafter "the Department" or "DCF"], to support for neglect of Ry and Ri, pursuant to M.G.L., c.119, §§51A & 51B.

On October 20, 2017, the Department received a 51A Report from a reporter alleging sexual abuse of Ry by her stepfather, presumed to be the Appellant's boyfriend, M.S. The 51A Report was screened in for an emergency 51B response and assigned to DCF emergency response social workers, F.O and C.E. On October 27, 2017, the Department received a 51A Report from a reporter alleging physical abuse of Ri by the Appellant's boyfriend. The report was screened in for a non-emergency response and added to the on-going 51B response. On October 23, 2017, the 51B response was turned into an additional five day response and reassigned to response social worker, M. A-D. On October 27, 2017, following the response, the Department approved the following decisions. The Department made a decision to un-support the 51A Report of October 20, 2017 for sexual abuse of Ry by the Appellant's boyfriend. Ry acknowledged feeling uncomfortable around the boyfriend, but did not disclose sexual abuse to the emergency response social workers, and it was unclear if the boyfriend was in fact the stepfather the child earlier referred to as the perpetrator of her sexual abuse. The Department also made a decision to support the 51A Report of October 23, 2017 for physical abuse of the children by the Appellant's boyfriend, because during the emergency response, the children disclosed being hit by the boyfriend and feeling unsafe. Finally, the Department supported for neglect of the children by the Appellant, their mother, because she was present during the children's play fighting with the boyfriend and did not intervene; allowed the boyfriend to have access to the children against DCF directive; and, the Appellant's home was of poor condition, which did not bode well for Ry, who is legally blind. The family's case remained open for a family assessment action plan [FAAP], and their ongoing social worker still visits the family home to date.

The Department notified the Appellant of the decision and her appeal rights by letter dated October 27, 2017. The Appellant filed a timely request for Fair Hearing ["Hearing"] on

November 9, 2017, pursuant to 110 CMR 10.06 & 10.08. The Appellant's request for Hearing was granted and held on December 21, 2017 at the Department's Park Street Area Office in Dorchester, MA. Present was a DCF Supervisor, K.H.¹ and the Appellant; both of whom were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a compact disk [CD].

Admitted into evidence for the Department was the DCF 51A Report of October 20, 2017 [Exhibit A-1], the 51A Report of October 27, 2017 [Exhibit A-2], and the corresponding 51B Response Approved on October 27, 2017. [Exhibit B]. The Appellant made no submissions. The Hearing record was closed on December 21, 2017.

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

Pursuant to 110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney-client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

Standard of Review

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 51B response, the Department's decision or procedural action, in supporting for neglect of the Appellant, 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. [110 CMR 10.05]

For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issues are whether there was reasonable cause to believe that a child had been abused or neglected [110 CMR 10.05] and whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being or the person was responsible for the child being a victim of sexual exploitation or human trafficking. [DCF Protective Intake Policy #86-015 Revised 2/28/16]

Findings of Fact

1. The Appellant is the mother and caregiver of an eleven year-old daughter named Ry; an eight year-old son named Ri; and, an adult daughter. Other than the adult daughter, all other family members lived in the home. [Exhibit A; Exhibit B, pp.1-2 & 7]

¹ Supervisor K.H. covered for all involved DCF staff, who was not present at Hearing.

2. Ry is legally blind, has some cognitive and developmental delays such that her level of functioning is around age five; and is diagnosed with ADHD [Attention Deficit Hyperactivity Disorder]. She is a special needs student. [Exhibit B, pp.2, 4 & 7]
3. The family has no previous DCF history. [Exhibit A-1; Exhibit A-2; Testimony of the Appellant]
4. M.S. was and is the Appellant's boyfriend. [Exhibit A-2; Testimony of the Appellant]
5. The Appellant has known her boyfriend and his family for twenty years, before she hooked up with him on Face book. At the relevant time, the Appellant had been in a relationship with her boyfriend for six or six to nine months. He was spending the night at her home, but not living there. The boyfriend did not have an address so when not with the Appellant, he would stay at his mother's home or with friends. [Exhibit B, p.2 & 6-7 & 9; Testimony of the Appellant]
6. During the 51B response, the Appellant reported that her boyfriend has a history of incarceration she believed for drugs. [Exhibit B, p.2] During the 51B response, the boyfriend separately reported smoking marijuana occasionally, but not at the Appellant's home. He reported having a criminal history, mostly firearms possession, but no open case. He denied having an assault and battery case, though his criminal record indicated otherwise. [Exhibit B, p.10]
7. There is no evidence in the record of the boyfriend actively using drugs in the Appellant's home or when having access to the children or of him being "violent" toward the Appellant or children. [Administrative Hearing Record]
8. The Appellant reported that she first learned that Ry had disclosed inappropriate touching by someone in her home, when [on or about October 20, 2017] the after school bus driver brought Ry home and told her and she, in turn, called the child's after school teacher to discuss the matter. During the 51B response, the Appellant told the emergency response social workers that she could not confirm or deny that Ry was telling the truth. [Exhibit B, p.2] and later told the response social worker, M.A-D., that Ry tends to report things that are not true. [Exhibit B, p.7]
9. During the 51B response, the response social worker contacted teacher, S.J., at the school program and learned that Ry disclosed on October 20th that the Appellant's boyfriend had been coming into her bedroom at night and feeling her private area and putting it on her bum bum. The child said that she told the Appellant about it, and the Appellant did not want to hear it. Ri, who also attends the after school program, was walking by and said, "oh I will tell mommy because you are not supposed to talk about what is going on in the home". [Exhibit B, p.4]
10. Ultimately, following the 51B response, the Department made a decision to un-support the allegations of sexual abuse of Ry by the boyfriend. When interviewed by the emergency response social workers and the detectives from the sexual assault unit, and the response

social worker, Ry did not make any statement or disclosure of sexual abuse and it was unclear who she was referring to when she made the initial disclosure at her after school program that her stepfather abused her. The Department remained concerned, however, and committed to monitoring the family and intervening with any additional disclosures. [Exhibit B, pp. 7 & 12]

11. At the beginning of the Appellant's relationship with her boyfriend, Ry mentioned not liking her boyfriend and told the maternal grandmother that he pinched her, but when the Appellant questioned her, the child denied it ever happened. [Exhibit B, p.2] Ry spends time with the maternal grandmother and has not disclosed any other actions. [Exhibit B, p.4]
12. The emergency response social workers interviewed each child privately on October 20, 2017 at their home. This is a summary of their responses, as it pertains to the Department's approved decision of October 27, 2017, to support for physical abuse of the children by the boyfriend, and any concerns related to the Appellant. [Exhibit B, pp.2-3]
 - (a) The interview with Ry was difficult as she would change the subject often, but did make it clear that she did not feel safe around the boyfriend and her body language changed when his name was mentioned. Ry did report that the boyfriend pinched her ears and hits her arm and he will turn on Sponge Bob, but she does not like it and will ask him to turn it off.
 - (b) During his interview, Ri corroborated that he has seen the boyfriend hit Ry and turn on Sponge Bob, when he knows that Ry does not like it. Ri was aware that Ry does not like the boyfriend. He also said that sometimes they both feel uncomfortable around the boyfriend.
 - (c) During his interview, Ri said that he kind of feels not safe with the boyfriend and explained that the boyfriend hits them a lot. He reported that the boyfriend will play a little game and then get rough. They play fight a lot and it starts off fine and the boyfriend will get a little rough. Also, the boyfriend will punch him in the legs, when he gets mad that he has not tied his shoes. The boyfriend will get mad, because he is always telling him to tie his shoes. The child said he sometimes cries and then goes to hug the Appellant. Ri reported that the Appellant sees this every time and does not say anything. When asked to show how the boyfriend hits him, the child closed his fist and hit his legs multiple times and slapped his arms a few times with an open hand.
13. The Appellant correctly argues that there is no evidence of marks or bruising or bleeding on the children. [Administrative Hearing Record]
14. The Appellant does not dispute there is play fighting, but states that Ri starts it and, if not in his favor, Ri will cry. [Testimony of the Appellant]
15. Following the children's interviews of October 20, 2017, the Appellant agreed there was to be no contact between the boyfriend and the children and he was not to go to the home until the matter was resolved, per the safety plan. [Exhibit B, pp.3, 7 & 10] A week after meeting

with the emergency response social workers, although the boyfriend denied this, the Appellant allowed her boyfriend to take Ri to football practice. He did not come in the house. He met Ri outside. [Exhibit B, p.7 & 10]

16. At Hearing, the Appellant testified that her boyfriend is still around, but does not watch the children and there is no more wrestling going on or anything physical. She reported there is no safety plan in effect to date. [Testimony of the Appellant]
17. The emergency response social workers visited the Appellant's home during the 51B response and observed it to be in disarray. There were clothes all over the house. Although the Appellant denied that emergency response social workers looked in the children's bedroom, documentation indicates otherwise. They saw that the room the children slept in was messy and there were clothing and things all over the bed. The Appellant did not dispute her home was a mess. [Exhibit B, p.2] At Hearing, the Appellant corroborated that this. She said her home was messy that day, because she was doing laundry and that's why there were piles of clothes about. They do have a lot of clothes and she needs to work on organizing. [Testimony of the Appellant]
18. There is no evidence in the record of fire and safety hazards in the home such that the children were put at substantial risk. [Administrative Hearing Record]
19. On October 27, 2017, the Department supported for neglect of the children by the Appellant. The Department found that the Appellant was neglectful because she allowed her boyfriend to physically discipline the children [by hitting them] and failed to intervene in the play fighting when it got too rough. The Department also found the condition of the Appellant's home concerning in that was cluttered and [reportedly] hazardous, which was not advantageous for Ri, who is legally blind. In addition, the Appellant was aware that the children were uncomfortable with the Appellant, but failed to comply with the safety plan and allowed her boyfriend to meet Ri outside the home and take the child to football practice. [Exhibit B, p.12; Testimony of the Supervisor]
20. Pursuant to the Department's Protective Intake Policy, the Hearing Officer finds there was reasonable cause to believe that the children were neglected and the actions or inactions by the Appellant, their caregiver, created a potential for neglect, but there was no immediate danger or substantial risk to the children's safety or well-being.

Analysis

A party contesting the Department's decision, to support for neglect, may obtain a Hearing to review the decision made by the Area Office. [110 CMR 10.06] The Appellant requested a Hearing, which was granted and held on December 21, 2017.

Policies, regulations, and case law applicable to this appeal include, but are not limited to, the following:

After completion of its 51B investigation, the Department shall make a determination as to whether the allegations in the report received are supported or unsupported. To support a report means that the Department has reasonable cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker did occur. To support a report does not mean that the Department has made any findings with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker(s) did inflict abuse or neglect upon the child(ren) in question. Reasonable cause to believe is defined as 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 caretaker, physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals, e.g., professionals, credible family members, and the social worker and supervisor's clinical base of knowledge. [110 CMR 4.32]

"[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

The 51A report under appeal is also supported for neglect. Neglect means failure by a caretaker, 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. This definition is not dependent upon location, i.e., neglect can occur while the child is in out-of-home or in-home setting. [110 CMR 2.00]

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 children 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. One such example is neglect that has led to a serious physical or emotional injury. Protective Intake Policy #86-015 [2/28/16]

Substantial Risk of Injury: A situation arising either through intentional act or omission which, if left unchanged, might result in physical or emotional injury to a child or which might result in sexual abuse to a child. Protective Intake Policy #86-015 [2/28/16]

Danger: 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. Protective Intake Policy #86-015 [2/28/16]

Safety: A condition in which caregiver actions or behavior protect a child from harm. Protective Intake Policy #86-015 [2/28/16]

A substantiated concern finding means there was reasonable cause to believe that the child was neglected and the actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being. Examples include neglect that resulted in a minor injury and the circumstances that led to the injury are not likely to recur, but parental capacities need strengthening to avoid future abuse or neglect of the child; neglect that does not pose an imminent danger or risk to the health and safety of a child; and, educational neglect. Protective Intake Policy #86-015 [2/28/16]

An unsupported finding means there is not reasonable cause to believe that a child(ren) was abused and/or neglected, or that the child(ren)'s safety or well-being is being compromised; or the person believed to be responsible for the abuse or neglect was not a caregiver, unless the abuse or neglect involves sexual exploitation or human trafficking where the caregiver distinction is not applied. Protective Intake Policy #86-015 [2/28/16]

Caregiver is defined as:

- (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 an 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 the age of 18. [Protective Intake Policy, #86-015, Revised 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

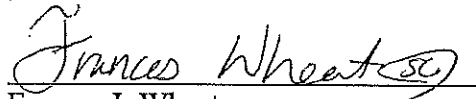
After review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Appellant in the matter under review. See Findings #1-#20 and the below discussion.

Based on the record as a whole, the Hearing Officer finds the evidence insufficient to meet the Department's policy definition of a support for neglect of Ry and Ri by the Appellant, their mother and caregiver. Such evidence, that the children were in danger or the Appellant's actions or inactions posed a substantial risk to the children's safety or well-being would be necessary to support the allegations, as opposed to the Department making a finding of a substantiated concern, which also requires that the children were neglected, but there is no evidence of immediate danger to their safety or well-being. [DCF Protective Intake Policy #86-015, Revised 2/28/16]

The burden is on the Appellant to show, by a preponderance of the evidence that the Department's approved decision of October 27, 2017, to support for neglect of the children by the Appellant, was not in conformity with Department's regulations and policy. Based on a review of the evidence presented at the Hearing, including testimony from the parties and documents submitted, the Hearing Officer found that the Department's decision was not made in conformity with its regulations and policy. The Appellant meet her burden of proof in this case. [110 CMR 10.23]

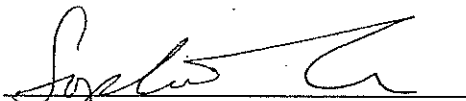
Orders

1. The Department's decision of October 27, 2017, to approve the reported allegations for neglect of Ry and Ri by the Appellant, their mother, is REVERSED.



Frances I. Wheat
Administrative Hearing Officer
Office of the General Counsel

Date: 6/6/2018



Sophia Cho, Supervisor
Fair Hearing Unit
Office of the General Counsel

Date: _____

Linda S. Spears
Commissioner