

The Fair Hearing was recorded pursuant to DCF regulations. 110 CMR 10.26

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

For the Department:

- Exhibit A: 51A Intake Report, dated July 17, 2018
- Exhibit B: Child Abuse/Neglect Non-Emergency Response

For the Appellant:

- Exhibit 1: Junior operator license – driver-parent/guardian contract
- Exhibit 2: Motion for temporary orders to modify custody and visitation
- Exhibit 3: Divorce docket sheet
- Exhibit 4: Temporary Order on Complaint for Modification
- Exhibit 5: Complaint for Modification
- Exhibit 6: Department of Children of Families Voluntary Intake Policy
- Exhibit 7: 51A Intake Report, dated November 8, 2018
- Exhibit 8: Child Abuse/Neglect Non-Emergency Response dated December 3, 2018
- Exhibit 9: Clinical case dictation

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. The child of this Fair Hearing was R. At the time of the 51A report, R was sixteen (16) years old (Exhibit A, p.1) and was living with his mother, while having a visitation schedule with his father every other weekend and one additional night every week. (Exhibit B, p.4, 12; Testimony Appellant)
2. MB is the child's biological father; therefore, he is deemed a caregiver pursuant to regulations and policy. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16).

3. On July 17, 2018, the Department received a 51A report, pursuant to M.G. L. c. 119, §51A, alleging neglect of R by his father, MB. On July 16, 2018 the mother informed the reporter that she had learned that the Appellant was drinking to intoxication in R's presence. R told his mother that one day his father made him drive home with his learner's permit. The reporter also stated that R's brother, S, was at that time hospitalized after he had been sectioned by his pediatrician due to the fact that he had threatened to kill his brother. (Exhibit A, p.3)
4. The report was screened in and assigned for a non-emergency response for neglect by MB, pursuant to M.G.L. c. 119, §51B. (Exhibit A, p.4)
5. R stated that once or twice a month his father was drinking 12 beers in 3-4 hours with his friends. (Exhibit B, p.13)
6. Regarding the allegations, R stated that his father was intoxicated by the time they left from the cookout where he drank at least 12 beers and "hard stuff", to the point where he was slurring his words. (Exhibit B, p.13)
7. According to R, his father let him drive home and fell asleep in the car while R was driving. In the vehicle there were also R's brother, S, and his father's girlfriend, HN. (Exhibit B, p.13; Exhibit 9, p.5)
8. R stated that he did not feel safe with his brother S in the house who was trying to "act out" so he could live with the Appellant. R also reported that, after the 51A report was filed, his brother threatened him, calling him a "snitch". (Exhibit B, p.13)
9. R's mother stated that the Appellant had a drinking problem for a long time. (Exhibit B, p.12)
10. On July 10, 2018 R's brother, S, was psychiatrically hospitalized for sexual molestation of a cousin, threatening to kill his mother and sibling and setting his room on fire. (Exhibit B, p.4)
11. On July 17, 2018 a Temporary Order was signed by the judge, stating that the father's parenting time with both children was suspended and it will be at the mother's sole discretion. (Exhibit 4)
12. On July 25, 2018, following mother's refusal to take S back home from the hospital, the Department took custody of the child. (Exhibit B, p.12; Exhibit 9, p.3)
13. The Appellant stated that he drank more in the previous month due to the life stressors, his father's death and his son, S, being hospitalized; however, he did not consider that he had a drinking problem. He mentioned that he went to AA meetings only to follow the Department's recommendation and to be able to resume visits with his children. (Exhibit B, p.8; Appellant's Testimony)
14. At the beginning of the week before the 51A report was filed, R received his learner's permit

and he had asked his father to let him drive as much as possible. (Testimony of Appellant)

15. The Appellant acknowledged the fact that during a cookout, where he was accompanied by his girlfriend and his children, he drank beer and a few shots of alcohol. Although the arrangement was that his girlfriend drive the car after cookout, the Appellant agreed to let R drive the car home (about three miles), as he knew that the child was very enthusiastic about it. The Appellant disagreed with the fact that he made his son drive home. (Exhibit B, p.8; Testimony of Appellant)
16. The Appellant's girlfriend, HN, stated that the Appellant never had a drinking problem and after the cookout R asked her if he could drive the car home, although the arrangement was that HN would drive back. (Testimony of HN)
17. At the conclusion of its non-emergency response, on August 6, 2018, the Department supported the allegation of neglect due to the impact on R's emotional stability and growth based on the following:
 - a. Appellant's drinking in front of R;
 - b. Appellant drinking to intoxication during a cookout, letting R drive and falling asleep in the car while Ryan was driving;
 - c. R's mother's statement that MB had been drinking for a long time;
 - d. R being uncomfortable with his father's drinking and upset about the incident. (Exhibit B, p.13-14; Testimony of KH)
18. At the time when the 51A report was filed, the Appellant and R's mother were in an active legal battle for divorce and the custody of their children. Although in front of the Department's investigator R's mother mentioned the Appellant's old drinking problem, the court documents showed that R's mother did not inform the court about this issue. (Exhibit 2; Exhibit 4; Exhibit 5) Therefore, this hearing officer will not give credit to R's mother regarding her statement about the Appellant's old drinking problem.
19. After review and consideration of all of the evidence, I find that the Department did not have sufficient evidence to have reasonable cause to believe that R was neglected by the Appellant and that the actions or inactions by the Appellant did not place the child in danger or pose substantial risk to the child's safety or well-being. Therefore, the Department's decision to support the allegation of neglect of the child by the Appellant was not made in conformity with its policies and procedures. (110 CMR 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)

Applicable Standards

"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 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

"[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

"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)

"Substantial Risk of Injury" is defined as: "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." DCF Protective Intake Policy #86-015, rev. 2/28/16

"Neglect" is the 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

A finding of support requires that there be: 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 or human trafficking. (DCF Protective Intake Policy #86-015, rev. 2/28/2016)

"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. 2/28/16

“Risk” is defined as the potential for future harm to a child. DCF Protective Intake Policy, (rev. 2/28/2016)

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 the Appellant was a caregiver for the child. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

At the time when the 51A report was filed, the Appellant and R’s mother were in an active legal battle for divorce and the custody of their children. Although R’s mother mentioned the Appellant’s old drinking problem to the Department’s investigator, she did not inform the court about this issue. The Appellant and his girlfriend stated that MB did not have a drinking problem and went to AA meetings only to follow the Department’s recommendation and to be able to resume visits with his children.

Regarding the fact that R drove the vehicle with his learner’s permit while the Appellant was intoxicated and asleep, the evidence shows that the Appellant’s girlfriend, who was an adult, was also in the vehicle as a passenger. There is no evidence that the Appellant’s girlfriend was intoxicated while R was driving the vehicle, therefore the legal provision regarding the presence of an adult with a JOL driver has been met.

There is no evidence that the Appellant made R drive the car home. As stated by the Appellant and his girlfriend, although the initial arrangement was that HN would drive back home, R was given permission to drive the vehicle only because he had enthusiastically expressed his wish to do so, given that he had just obtained his learner’s permit.

This hearing officer finds that, based on the evidence presented, the Department had insufficient evidence to have reasonable cause to believe that the child was neglected by the Appellant or that there was an immediate risk to the child's safety or well-being.

Conclusion and Order

The Department's decision to support the allegation of neglect of R by MB was not made in conformity with Department regulations and/or policies; therefore, the Department's decision is **REVERSED**.

Frances I. Wheat/smc

Frances I. Wheat
Administrative Hearing Officer

8/31/20
Date

Sophia Cho/smc

Sophia Cho, LICSW
Fair Hearing Supervisor

Date

Linda S. Spears
Commissioner