EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
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LINDA S. SPEARS
COMMISSIONER

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IN THE MATTER OF

M. D.

HEARING DECISION

FH # 2019 1330

Procedural Information

The Appellant in this Fair Hearing was Ms. M.D. (hereinafter "the Appellant"). The Appellant appealed the Department of Children and Families' ("the Department" or "DCF") decision to support allegations of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On August 27, 2019, the Department received a 51A report alleging neglect and physical abuse of M ("M" or "the children"), Z ("Z" or "the children"), and A ("A" or "the children"), by the Appellant. On August 28, 2019, the Department received a second 51A report, also alleging similar allegations of neglect and physical abuse of M, Z, and A. At the conclusion of the 51B response, the Department supported allegations of neglect of the children and the physical abuse of M by the Appellant.[1] The Department informed the Appellant of its decision and of her right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. [2]

The Fair Hearing was held on February 21, 2020, at the Department of Children and Families' Robert Van Wart Area Office. The Appellant was sworn in to testify under oath.[3] The record remained open until March 6, 2020, to allow for the submission of additional documents to be submitted and entered into the record.[4]

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[1] Allegations of physical abuse of Z and A by the Appellant were not supported by the Department. (Exhibit 3, p.7)

[2] The Appellant's written request for a Fair Hearing only included the supported allegations of neglect and physical abuse of M. However, at the onset of the Fair Hearing, when it was explained to the Appellant that she had also been supported for neglect of Z and A, the Appellant requested that the supported allegations of neglect of Z and A be included in her appeal as well as the Fair Hearing decision. The Appellant's request was granted by this Hearing Officer. (Fair Hearing Record)

[3] No one from the Department attended the Fair Hearing to provide testimony. However, the Appellant requested that the Fair Hearing go forward as scheduled. This Hearing Officer provided the Appellant the opportunity to decide at the conclusion of the hearing if she would like an additional hearing date to allow her the opportunity to question the Department; the Appellant subsequently declined an additional date, and the hearing concluded on February 21, 2020. (Fair Hearing Record)

[4] Exhibit "1"

The following persons appeared at the Fair Hearing:

Anastasia King	Administrative Hearing Officer
Ms. M.D.	Appellant

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 regulations 110 CMR 10.26

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

For the Department:
Exhibit 1: 51A Report – dated August 27, 2019
Exhibit 2: 51A Report – dated August 28, 2019
Exhibit 3: 51B Response

For the Appellant:
Exhibit A: Medical Documents

Pursuant to 110 CMR 10.21, 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.

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 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 subject children of this Fair Hearing were M, ("M" or "the children") a male child who was five years old at the time the 51A reports were filed, Z, ("Z" or "the children") a female child who was five years old at the time the 51A reports were

filed, and A, ("A" or "the children") a female child who was four years old at the time the 51A reports were filed. (Exhibit 1, p.1; Testimony of Appellant)

2. On August 27, 2019, the Department received a 51A report alleging neglect and physical abuse of the children by the Appellant. The Department received a second 51A report on August 28, 2019, also alleging neglect and physical abuse of the children by the Appellant. Both 51A reports contained similar concerns made by M of the Appellant sleeping while caring for the children, and M being struck by the Appellant. (Exhibit 1, p.3; Exhibit 2, p.3)

3. The 51A reports were screened in as a Non-Emergency Response and assigned to DCF SIU[5] Response Worker, Mr. M.S., ("Response Worker" or "RW") to complete a 51B response. (Exhibit 3, p.1)

4. At the time of the reported incidences, the Appellant operated a home-based daycare from her residence and the Appellant was the children's daycare provider. (Exhibit 3, p.2; Testimony of Appellant) The Appellant was a "caregiver" as defined by Departmental regulation and policy 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.

5. On September 3, 2019, the RW and Ms. C.D., ("CD") from Early Education and Care ("EEC"), met with the Appellant at her home. (Exhibit 3, p.2) During the Appellant's meeting with the RW and CD, the Appellant reported the following:
   - The Appellant had no assistants and normally had eight licensed children in her daycare. (Exhibit 3, p.2)
   - Normal nap time was from12:00 p.m. until 2:00 p.m. The older children, M and Z would stay awake and remain in the kitchen area with snacks and were allowed to use the small kid's table. There were times that she would show a video and M and Z were allowed to play at the table quietly. The Appellant would also be in the kitchen area and A would sit with them at times as well. (Exhibit 3, p.2)
   - The Appellant initially denied ever napping while caring for the children, stating that she could not nap because the older children would get themselves into trouble. (Exhibit 3, p.2)
   - However, later in the conversation when the Appellant spoke of one occasion that M climbed her pantry shelf during nap time, the Appellant was asked again if she ever napped or dozed off. The Appellant stated that there may have been a few times that she had dozed off at the kitchen table, but she could not afford to keep her eyes closed for long periods of time. (Exhibit 3, p.2)
   - Other than the kitchen and the room the younger children napped in, there was also the living room that had a couch and television; the Appellant denied ever napping on the couch. (Exhibit 3, p.2)
   - There were times when the Appellant would use the bathroom that the children would say she was napping. It was when the Appellant would be in the bathroom that Z and A would gang up and tell on M. (Exhibit 3, p.2)

[5] Special Investigations Unit

- The Appellant denied ever striking or poking any of the children in her care. (Exhibit 3, p.2)
- Although the Appellant had taken a day off for a medical appointment, the Appellant denied having any medical conditions or being prescribed any medication that would cause her to doze off or hinder her from being able to care for the children. (Exhibit 2, p.3)
- In the 51B response, the RW noted that the Appellant provided EEC the paperwork regarding her medical appointment and EEC would later provide the paperwork to the Department. (Exhibit 2, p.3)

6. On September 9, 2019, the RW and CD met with M and his mother, Ms. M.F. ("MF") in their home. M reported that the Appellant would poke him, Z, and A if they were being bad. M reported that he had climbed on a shelf in the kitchen when the Appellant was sleeping in the room with the couch in it, and Z was the one that pulled him off. On another occasion, M put soap in his hair and face and the Appellant put him in the shower to rinse the soap off his head. M reported that another time the Appellant was sleeping, M played in the kitchen sink. M also grabbed a red paint brush that they had used earlier in the day. M reported that on more than one occasion the Appellant had poked him on the head, on the back of his head, and hit him on another spot on his head. M never told MF because the Appellant had asked him to not tell his mother. MF reported to the RW she never saw any physical signs of M being struck, but there had been times when M did not want to attend daycare and would become visibly upset. M had not disclosed to MF about being struck or about the Appellant napping sooner as the Appellant had told M not to tell. M reported to MF that he would nap in the kitchen by putting his head on the kid's table and he would sometimes see the Appellant sleep at the big table. (Exhibit 3, p.4)

7. On September 9, 2019, the RW and CD met with A and the child's mother. A reported that M was naughty and put dish washer soap on her hair and had climbed a shelf. A reported that M was placed in a time out for both incidences. On another occasion, A reported that M ate sugar from the bowl on the kitchen counter. Although A did not report any incidences of the children in the daycare being struck by the Appellant, the child did state to the RW that she would see the Appellant sleeping in the living room, and on one occasion, the Appellant did not give them lunch because she was tired and needed to sit down and rest. A reported to the RW that she would have to sleep at the kid's table in the kitchen, demonstrating to the RW what that looked like. A reported that she would sit in a chair and rest her head on the table and sleep. This would occur every day. (Exhibit 3, p.5)

8. On September 24, 2019, the RW met with Z at her school where the child attended kindergarten. Z acknowledged that she had attended the Appellant's daycare, but no longer did as she was now in kindergarten. Z named off the children that attended the daycare, including M and A. When asked by the RW if M ever got in trouble at the Appellant's daycare, Z reported that M got in trouble for climbing up the shelf in the kitchen and for putting soap on his head and face. When asked what the Appellant was doing when M climbed the shelf, Z reported that the Appellant was taking a nap on the couch. Z stated that she was taking a nap too, but M woke her up. On that day, Z

reported she was taking a nap at the kid's table. Z then showed the RW how she would take a nap at the table by putting her head down on her arms as they rested on the table. M and A also napped like that. When the Appellant heard that M had climbed on the shelf, the Appellant hit M's head with her hand. The Appellant's hand was open when she struck M, and M later went to lie down. Z reported that the Appellant had never done that to her or to Z because they did not do bad things. Lastly, Z reported that on another occasion when the Appellant was sleeping, M found scissors on the table and cut his hair. The Appellant yelled at M when he did this. (Exhibit 3, p.6)

9. The Department relied on the children's statements when making its determination. (Exhibit 3 p.8)

10. I find the Department's reliance on the children's statements to be reasonable. M and A were interviewed by the RW in their respective homes and Z, who no longer attended the daycare, was interviewed by the RW at her school. The children were forthcoming with the information they provided to the RW, and though some of what the children reported varied, M, Z, and A all clearly reported that they had witnessed the Appellant sleeping during daycare hours. In addition, no credible or independent evidence presented to suggest that the children fabricated the information they provided or were motivated to make false allegations against the Appellant. (Edward E. v. Dep't of Soc. Servs., 42 Mass. App. Ct. 478, 484-485 (1997)) (Fair Hearing Record)

11. Because the Appellant was renewing her daycare license, she completed a physical examination for EEC on July of 2019. However, the Appellant reported the physical did not include blood testing. (Testimony of Appellant)

12. On August 5, 2019, the Appellant met with a new primary care physician and completed a "new patient physical". The Appellant changed physicians because her prior physician did not accept the Appellant's new medical insurance. In addition, the Appellant's adult daughter had concerns when she noticed that the Appellant's ankles appeared swollen. (Exhibit A; Testimony of Appellant)

13. At the Appellant's physical on August 5, 2019, the physician prescribed the Appellant Microzide and Estradiol and a follow up appointment was made for four weeks. (Exhibit A; Testimony of Appellant)

14. During the four-week time frame between her medical appointments, the Appellant began a carb restricted diet, and when she returned for her follow up medical appointment on September 12, 2019, the Appellant had lost 30 pounds. However, during that period of time, the Appellant reported that she "couldn't see straight" and was experiencing extreme fatigue and pounding headaches. (Testimony of Appellant)

15. In addition to the physical symptoms the Appellant was experiencing, the Appellant was also going through a stressful and emotional period of time due to her father's own serious medical issues. As a result, the Appellant was not eating or sleeping well. (Testimony of Appellant)

16. When the Appellant attended her follow up medical appointment on September 12, 2019, tests were completed, and the Appellant was diagnosed with Type 2 Diabetes Mellitus. (Exhibit A; Testimony of Appellant)

17. The Appellant denied that the incidences reported by the children occurred. The Appellant maintained she never witnessed any of the reported incidences, adding that all the incidences reportedly occurred when she was in the bathroom. The Appellant reported that she would be in the bathroom for eight minutes, and had the incidences happened as described by the children, she would have heard something or observed some evidence after the fact, which she maintained, she did not. The Appellant further maintained that Z and A would make things up about M because Z and A did not like the child. (Testimony of Appellant)

18. The Appellant did not dispute what she reported to the RW, specifically that there had been times while caring for the children that she had dozed off at the table. However, the Appellant maintained the reason that that would happen was because she was under a great deal of stress due to her father's illness, and her diabetes had not yet been diagnosed; therefore, she was not taking care of herself physically or emotionally. (Testimony of Appellant)

19. On October 1, 2019, pursuant to MGL c. 119, § 51B, the Department supported allegations of physical abuse of M and neglect of the children by the Appellant. The Department based its decision on information obtained during the 51B response. (Exhibit 3, p.8)

20. Based upon a review of the evidence presented in its entirety, and after consideration of all the facts and circumstances, I find that the Appellant, on more than one occasion, fell asleep while caring for the children, and therefore, the Appellant did not take those actions necessary to provide M, Z, and A with minimally adequate supervision. I further find that the Appellant's actions placed the children in danger and posed substantial risk to their safety and well-being as required by the Department's intake policy when supporting an allegation of neglect. (110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16)

21. Therefore, I find that the Department's decision to support the allegations of neglect of M, Z, and A, by the Appellant was based on "reasonable cause" and thus, made in compliance with its regulations and policies. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00 & 4.32) (See, "reasonable cause" and "Analysis" below.

22. However, a finding of physical abuse, in part, requires that the Department have reasonable cause to believe that a non-accidental act by a caretaker created a substantial risk of physical injury. (Cobble v. Commissioner of the Department of Social Services, 430 Mass. 385, 392-393,395 (1999)) (See, definition of "abuse" below) Although I find the children to be reliable reporters, with only the evidence presented and in the absence of a physical injury, I find insufficient evidence to support the Department's determination that physical abuse of M, as defined in its regulations, occurred in this case. As a result, the Department did not have reasonable

cause to support the allegation of physical abuse of M by the Appellant, and its decision was not in compliance with its regulations and policies. (110 CMR 4.32) (See, "Analysis" below)

Applicable Standards

A "caregiver" is defined as a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child's health or welfare; or (e) any 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 the age of 18. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 02/28/2016)

"Neglect" is defined as a 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 a 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. 02/28/2016)

"Abuse" means is defined as 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 caretaker and a child under the care of that individual. (110 CMR 2.00)

"Physical injury" is defined as "(a) death; or (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or (c) soft tissue swelling or skin bruising depending on such factors as the child's age, circumstances under which the injury occurred, and the number and location of bruises…" (110 CMR 2.00)

To "support" a finding of abuse or neglect means there is reasonable cause to believe that 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 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. 02/28/2016)

"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 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(2))

To prevail, an Appellant must show by a preponderance of all the evidence presented, that: (a) the Department's or Provider'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, (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 a n 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 their safety and 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)

When reviewing a support decision, the Hearing Officer may consider information available during the investigation and new information subsequently discovered or provided that would either support or detract from the Department's decision. (110 CMR 10.21(6))

Analysis

The Appellant contested the Department's finding of neglect of Z, A, and neglect and physical abuse of M, and in support of this argument, the Appellant submitted documentary evidence and testimony at the Fair Hearing. However, in regards to the Department's determination of neglect of the children by the Appellant, after review of all of the evidence provided, I found no evidence to detract from the Department's finding, and despite her denials that the reported incidences occurred as reported by the children, the Appellant failed to provide sufficient evidence to support her claim.

Though the children reported that the incidences they disclosed to the RW occurred when the Appellant was sleeping, the Appellant maintained that it was when she was in the bathroom that problems arose with the children, and it was when she came out of the bathroom that Z and A would report to her that M had done something bad. The Appellant did not believe the reported incidences occurred as she never witnessed them or observed any evidence that they did. The Appellant maintained in her testimony that neither Z nor A liked M and would make things up about him. However, during their interviews with the RW, none of the children ever mentioned the Appellant being in the

bathroom; all consistently reported that the Appellant was asleep during all the incidences.

The children, who I found to be reliable reporters, were interviewed separately by the RW and all were forthcoming with the information they provided to the RW; though some of what the children reported varied, M, Z, and A all clearly reported that they had witnessed the Appellant sleeping during daycare hours. No credible or independent evidence was presented to suggest that the children fabricated the information they provided or were motivated to make false allegations against the Appellant; nor was any credible or independent evidence presented to suggest that Z or A were motivated to make false allegations against M.

In addition, although the Appellant denied ever striking M as reported, the Appellant did not dispute that there had been instances where she had fallen asleep while caring for the children. However, the Appellant was adamant that the cause of her dozing off was the result of her undiagnosed medical issues and the stress she was under due to her father's illness. No evidence was presented to suggest that the Appellant's actions were intentional. Nevertheless, as defined by the Department's regulations, the Appellant's actions constituted neglect. According to those definitions, the responsibility of providing a child with "minimally adequate supervision" lies with the "caregiver." (See above definitions of "caregiver" and "neglect") When M, Z, and A were at the Appellant's daycare, the Appellant was a "caregiver" and responsible for the children's supervision and care. The incidences that transpired as reported by the children occurred while the Appellant was asleep and therefore, the children were not being supervised; the fact that the children were unharmed, is irrelevant. The court has determined that the Department's determination of neglect does not require evidence of actual injury. (Lindsay v. Department of Social Services, 439 Mass. 789 (2003))

Despite her dispute of the Department's findings of neglect, the Appellant did not present persuasive evidence in this matter to allow for a reversal of the Department's determination. The Appellant failed to provide M, Z, and A, with minimally adequate supervision, and the Appellant's actions placed the children in danger and posed substantial risk to their safety and well-being as required by the Department's intake policy when supporting an allegation of neglect. (110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16) As such, there was sufficient evidence to support a finding of neglect.

Based on the totality of the evidence, for reasons cited above, and in the detailed Findings of Fact, I find the Department's concerns were valid, and rose to the level of "reasonable cause to believe" that neglect of M, Z, and A, did occur in this case, and thus, made in compliance with its regulations. As stated above, "reasonable cause" implies a relatively low standard of proof which, in the context of the 51B response, serves as 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))

However, while I find the children to be reliable reporters, with only the evidence presented and in the absence of a physical injury, I find insufficient evidence to support the Department's determination that physical abuse of M, as defined in its regulations, occurred in this case. Therefore, the Department did not have reasonable cause to support the allegations of physical abuse of M by the Appellant, and the Department's decision was not made with a reasonable basis. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16; also see Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006)

The Appellant has shown by a preponderance of the evidence that the Department acted without reasonable basis or in a reasonable manner, resulting in substantial prejudice to the Appellant when supporting allegations of physical abuse of M.

Conclusion and Order

The Department's decision to support the allegation of **neglect** of **M** by the Appellant was made in accordance with its policies and regulations and therefore**,** is **AFFIRMED.**

The Department's decision to support the allegation of **neglect** of **Z** by the Appellant was made in accordance with its policies and regulations and therefore**,** is **AFFIRMED.**

The Department's decision to support the allegation of **neglect** of **A** by the Appellant was made in accordance with its policies and regulations and therefore**,** is **AFFIRMED.**

The Department's decision to support the allegation of **physical abuse** of **M** by the Appellant was not made in accordance with its policies and regulations and therefore, is **REVERSED.**

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, she may do so by filing a complaint in the Superior Court for the county in which she lives, or within Suffolk County, within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, s. 14.) In the event of an appeal, the Hearing Officer reserves the right to supplement the Findings of Fact.

Anastasia King
Administrative Hearing Officer

June 29, 2020
Date

Barbara Curley, L.I.C.S.W
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spears
Commissioner