COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 15-00164

JOEL & CYNTHIA L.

vs.

DEPARTMENT OF CHILDREN & FAMILIES

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiffs, Joel ("Joel"), and Cynthia ("Cynthia"), L. bring this Motion for Judgment on the Pleadings pursuant to G. L. c. 30A, § 14, to appeal an adverse Fair Hearing Decision by a Department of Children and Families' ("DCF"), Fair Hearing Officer. Zachary L is the plaintiffs' son and the subject of this dispute. The plaintiffs request that the court reverse the hearing officer's decision and order the plaintiffs' names removed from any registry of persons alleged to have abused or neglected children. In support of their motion, the plaintiffs argue that the hearing officer's decision is not supported by substantial evidence, is unwarranted by the facts, is arbitrary and capricious, and an abuse of discretion. For the following reasons, the plaintiffs' motion is **ALLOWED.**

BACKGROUND

The following facts are taken from the administrative record.

Zachary has a dual diagnosis of Autistic Disorder and x-linked Opitz G/BBB Syndrome with a confirmed MID1 mutation. As a result, Zachary is severely autistic, has substantial intellectual impairment, and is non-verbal. Zachary is also diagnosed with Pica, a disorder wherein an individual is compelled to ingest non-eatable items. Zachary was eleven-years-old

when the events at issue began.

Throughout his childhood, Zachary displayed a number of challenging behaviors including, head banging, bolting[1], and pica. In October, 2013, Zachary required hospitalization in a locked psychiatric unit due to his self-injurious behaviors. He was admitted to Hampstead Hospital ("Hampstead"), in New Hampshire. Zachary remained on the inpatient unit at Hampstead for two weeks, and ultimately, was discharged home.

Zachary attended Agawam Public Schools ("the School District"). Due to Zachary's behaviors, the plaintiffs believed that he needed a residential placement to receive the educational assistance he required. The School District disagreed, and denied the plaintiffs' request for a residential placement. The plaintiffs appealed and requested a hearing before the Bureau of Special Education Appeals ("BSEA"). The hearing took place on December 19, and 23, 2013, before a BSEA hearing officer.

In his decision, dated January 16, 2014, the BSEA hearing officer, William Crane, wrote that: "It cannot be disputed that Student's behaviors at home and in the community have become extreme and unsafe… And, importantly, even with this supervision, Student presents as a substantial risk of seriously harming himself or possibly others. Of equal concern is that these behaviors in the home have been escalating, particularly over the past year or so."

The decision goes on to state, that: "Since January 2013, Student's maladaptive behaviors have worsened. The bolting behavior has continued but has become more dangerous as Student has learned how to unlock doors. He has left the house on his own several times, crossing streets, and, once, getting into a 55 gallon drum with water – any of these incidents could have resulted in

[1] Bolting is a term to describe running, without notice, into a roadway.

death. He has also broken windows to exit the house. Parents have tried to secure the house by taking off door knobs, putting in an alarm system and installing plexiglass windows, but they reasonably believe that none of this will prevent all of Student's bolting behavior… And therefore do not assure his safety…. In sum, Parents provided credible and persuasive testimony that Student's behaviors at home and in the community have become extremely dangerous to Student and others, with parents unable to safeguard Student at home…. None of the evidence presented at the hearing indicated that there is any likelihood that parents would be able to safely and effectively address Student's behavioral difficulties at home and in the community and avoid the likelihood of further hospitalizations that disrupt Student's educational services…. It is undisputed that parents are incredibly devoted to Student and there has been no allegations or argument that parents have a 'poor' home." The hearing officer concluded, in part, that: "The only way that Student's behavior needs can be appropriately and safely addressed is through an around-the-clock residential educational placement."

As evident, the BSEA hearing officer agreed with the plaintiffs that Zachary required a residential placement. The BSEA hearing officer further found that the Melmark New England Residential Program ("Melmark"), was an appropriate placement.

Again, in Spring, 2014, Zachary was admitted to Hampstead due to his self-injurious behavior. This time he remained at Hampstead for one month while awaiting his placement at Melmark. On April 8, 2014, Hampstead discharged Zachary to Melmark.

Melmark maintains very specific program requirements. The pertinent requirements include: at least one parent's attendance at an initial thirty-day meeting; an initial home visit to discuss creating a safe home environment for reunification; residents are to return home during

prescheduled closings; and general compliance with program rules including visiting hours.

Melmark provided the plaintiffs with written copies of the program's requirements. The plaintiffs, however, did not attend the thirty-day initial assessment meeting in person. Rather, after repeated attempts to schedule the meeting, the plaintiffs agreed to a date, but at the scheduled time, Cynthia attempted to attend the meeting by telephone. Further, the plaintiffs refused to schedule the initial home visit and informed Melmark that they did not feel that they could keep Zachary safe at home. As a result of the missed meetings and refused visits, Melmark granted Zachary a waiver and allowed him to stay at Melmark for the first prescheduled closing.

The plaintiffs visited him nearly every weekend, although, they rarely did so during visiting hours. On June 26, 2014, Joel physically attended a ninety-day meeting and Cynthia attended by telephone. At the meeting the plaintiffs informed the treatment team that they did not feel that they could keep Zachary safe at home, and therefore, they wanted the option to refuse home visits. Melmark claimed that they could not accommodate this request. The plaintiffs reiterated their stance verbally, and also refused to sign any IEP paperwork that contained reunification language.

On June 18, 2014, a mandatory reporter filed a report with DCF, pursuant to G. L. c. 119, § 51A, alleging that the plaintiffs were neglecting Zachary. DCF investigated the allegation. In the course of the investigation, Melmark staff reported that Zachary's progress at the program was "remarkable" and "unbelievable." After speaking with the plaintiffs and Melmark staff, and reviewing Zachary's educational and medical history, DCF supported the allegation of neglect. DCF's report stated:

> "Parents lack of involvement in Zachary's current educational programming, their refusal to participate in home visits for the purpose of assessing the home for safety and visitation planning, their minimal visitation and failure to follow the parameters of the program's visitation policy, and their resistance to any planning towards an eventual reunification, negatively impacts Zachary's emotional health and well being and limits his ability to make progress."

The plaintiffs appealed the decision to a DCF hearing officer. The hearing officer affirmed DCF's decision concluding: "The Department's decision to support the allegation of neglect of Zachary by JL [and CL] was made with a reasonable basis and therefore, is Affirmed."

On March 13, 2015, The plaintiffs filed this action and requested that the court reverse the hearing officer's final decision, and declaratory relief in the form of an order requiring DCF to expunge its records of all neglect allegations against the plaintiffs.

DISCUSSION

I. Standard of Review

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Mass. R. Civ. P. 12 (c). When considering a motion for judgment on the pleadings the court must accept as true, all the facts plead by the nonmoving party. *Jarosz* v. *Palmer*, 436 Mass. 526, 530 (2002). A motion for judgment on the pleadings is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. See *Wing Memorial Hosp.* v. *Dep't of Pub. Health*, 10 Mass. App. Ct. 593, 596 n.3 (1980).

II. Appeal pursuant to G. L. c. 30A

"[A]ny person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled

to a judicial review thereof . . . ." G. L. c. 30A, § 14. The appealing party has the burden of demonstrating that:

> "[T]he substantial rights of any party may have been prejudiced because the agency decision is (a) In violation of constitutional provisions; or (b) In excess of the statutory authority or jurisdiction of the agency; or (c) Based upon an error of law; or (d) Made upon unlawful procedure; or (e) Unsupported by substantial evidence; or (f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or (g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 14; *Merisme* v. *Board of* Appeals *on Motor Vehicle Liability Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

An agency's decision is entitled to substantial deference. *Southern Worcester County Regional Vocational School Dist.* v. *Labor Relations Com.*, 386 Mass. 414, 420 (1982) "A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Id.*

III. Neglect

The regulatory definition of neglect is:

> "failure *by a caretaker*, whether 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 an out-of-home or in-home setting)." 110 Code Mass. Regs. 2.00 (emphasis in the original).

The plaintiffs argue that the DCF hearing officer's decision was against the substantial weight of the evidence. Substantial evidence is sufficient evidence that a "reasonable mind might accept as adequate to support a conclusion." G. L. 30A, § 1 (6). The court agrees.

The 51A report alleged that the plaintiffs were neglecting Zachary by not complying with Melmark policies, namely, working toward Zachary moving home. DCF supported this report when it found that, clearly, the plaintiffs were resisting any suggestion or course of treatment that lead to reunification, as well as generally failing to follow Melmark policy. Finally, the hearing officer affirmed DCF's decision based on the same findings. The plaintiffs themselves do not dispute that they will not actively work toward reunification, because they believe that they cannot keep Zachary safe. DCF claims that by failing to comply with Melmark policy, a placement where Zachary is flourishing, the plaintiffs risk the possibility that Zachary will be discharged from the program. Therefore, DCF argues, the plaintiffs are failing to take those actions necessary to provide Zachary with emotional stability and growth. See 110 Code Mass. Regs. 2.00.

Initially, the court notes that DCF's claims of harm are speculative. Nothing in the record suggests that Zachary was discharged from Melmark, nearly discharged from Melmark, or that Zachary would not receive a similar placement if Melmark determined that it could not work with the family. Further, the record lacks any evidence that Zachary was negatively impacted in any way by his parents' failure to attend meetings or work toward unification. To the contrary, Melmark staff characterized his progress as impressive.

DCF correctly asserts that no showing of actual harm is necessary to support a finding of neglect. See *B. K.* v. *Dep't of Children & Families*, 79 Mass. App. Ct. 777, 783 (2011) ("A caretaker's actions that fail adequately to protect a child's well being can constitute neglect, even in the absence of actual harm."). Unlike the case at bar, the courts have affirmed a finding of neglect, absent a showing of actual harm, where the child avoided harm despite the caretaker's dangerous and neglectful behavior.

In *B. K.* v. *Dep't of Children & Families*, the child's father repeatedly violated a court order prohibiting him from contacting his daughter. *Id.* at 778. Additionally, the basis of the 51A report filed against the father, was an allegation of sexual abuse. *Id.* at 778-779. The DCF investigation was unable to support the allegation of sexual abuse, however, DCF still found that the father's actions constituted emotional neglect. *Id.* at 779. The fact that DCF did not prove actual harm was immaterial in the face of the father's actions and the seriousness of the claims. *Id.* at 780-782.

The case at bar differs significantly from *B. K.* v. *Dep't of Children & Families*. The plaintiffs did not repeatedly violate a court order that existed for the primary purpose of protecting Zachary from his parents. They repeatedly refused to participate in portions of a treatment plan they believed were not in their son's best interest. Further, a failure to adhere to visiting hours and similar program policies, while certainly frustrating for the program staff, cannot be equated with parental neglect.

DCF also cites *Lindsay* v. *Dep't of Social Servs.* 439 Mass. 789 (2003). The plaintiff in *Lindsay* was a day care provider. *Id.* at 790-791. On two occasions, the plaintiff left the same child, buckled in the back of a car for an extended period of time before remembering to retrieve her. *Id.* at 791-792. Although the child was unharmed, she was found "crying or whimpering while she was alone in the car and emerg[ed] with sweaty clothes." *Id.* at 792. The court noted that the potential injuries from leaving the child in a vehicle unattended are quite severe. *Id.* at 799-800 ("An abandoned child can be abducted or kidnapped. Even if not physically injured, a small child can become truly terrified by such abandonment, a potential all the more likely here

because the same child had been abandoned in a similar manner just one month earlier"). The court affirmed DCF's finding of neglect even though the child was unharmed. *Id.*

Zachary's case stands in contrast, because, unlike the child in *Lindsay*, Zachary is not simply unharmed, but, to the contrary, is flourishing. The record shows that the plaintiffs advocated strenuously to have him placed at Melmark. Zachary is doing very well in the program, and his parents do not feel that at home he would be able to function as well. Additionally, the potential harm to Zachary if his parents fail to comply with Melmark's policies are not comparable to the risks of leaving a small child locked in an unattended vehicle.

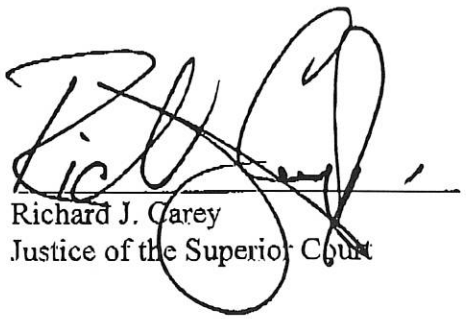
Finally, "[t]he purpose of this statutory scheme is to alert the department to instances where children may have been abused or neglected and, if the department's investigation confirms those reported suspicions, to take steps to protect the child and correct the underlying situation that led to the abuse or neglect." *Lindsay*, 439 Mass. at 795, citing G. L. c. 119, §§ 51A and 51B. The record shows that the Melmark staff was frustrated with the plaintiffs' noncompliance and asked DCF if there were any legal avenues it could pursue to resolve the conflict. DCF is authorized to investigate abuse and neglect to protect children living in the Commonwealth, not to induce parents' compliance with a specific treatment program by supporting claims of neglect. See *id.*

The plaintiffs and Melmark have widely divergent views as to what is necessary for Zachary's emotional stability and growth. These attentive parents, who felt strongly that they could not keep their son safe in their home, made the heart wrenching decision to back up that position with their actions. As a consequence, they should not have become the targets of a coercive attempt to get them back in line by the filing and supporting of a report of neglect.

Accordingly, the hearing officer's final decision to affirm DCF's finding of neglect is not supported by the substantial weight of the evidence. The plaintiffs' motion, therefore, will be allowed.

ORDER

For the forgoing reasons, it is **ORDERED** that Joel and Cynthia L.'s Motion for Judgment on the Pleadings is **ALLOWED.** The Fair Hearing Decision to uphold DCF's decision to support the allegation of neglect is reversed, and it is **ORDERED** that the plaintiffs' names be removed from DCF's Registry.



Richard J. Carey
Justice of the Superior Court

Dated: July 19, 2016