

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
BOSTON, MASSACHUSETTS 02111**

LINDA S. SPEARS
Commissioner

Voice: 617-748-2000
FAX: 617-261-7428

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(IN THE MATTER OF)
(GP)
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(FH # 2017-0130)
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HEARING DECISION

Procedural History

The Appellant in this Fair Hearing is GP. The Appellant appeals the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support an allegation of neglect pursuant to Mass. Gen. L., c. 119, §§ 51A and B.

On December 15, 2016 the Department received a 51A report from a mandated reporter alleging neglect of N ("Child") by GP; the allegation was subsequently supported. The Department informed the Appellant of its decision and of his right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 C.M.R. 10.06

The Fair Hearing was held on March 22, 2017 at the Department of Children and Families' Arlington Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
PA	DCF Supervisor
AD	DCF Response Worker
MR	Witness for Appellant
RP	Appellant's Attorney
GP	Appellant

In accordance with 110 C.M.R. 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 on a digital voice recorder, pursuant to 110 CMR 10.26

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

For the Department:

Exhibit A: 51A Report dated 12/15/2016

Exhibit B: 51B Response dated 1/9/2017

For the Appellant:

The Appellant did not submit any documentary evidence.

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)

Statement of the Issue

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. DCF Protective Intake Policy #86-015 Rev. 2/28/16

Findings of Fact

1. The Appellant was a driver for a transportation company. The Appellant regularly drove children to and from a special education program. (Exhibit A p.1-2, Exhibit B p.1, Testimony of AD, Testimony of Appellant)
2. At the time of the 51A report, N was a three year old child attending a special education program. N has delayed speech. (Exhibit B p.2, Testimony of AD)
3. On 12/13/2016, the Appellant picked up N and two other children in a van. He transported them to their special education program. An aide from the program took two of the children off the van. The Appellant did not physically look through the van to ensure all children had been discharged. N was still in the van when the Appellant drove away from the special education program. I find that GP is a caregiver of N in

accordance with the regulations and policies that govern these proceedings. (Exhibit B p. 1-3, Testimony of AD, Testimony of Appellant)

4. Subsequently, the Appellant drove to attend a training. The training lasted approximately three hours. The Appellant left the van's engine running during the training. During breaks in the training, the Appellant would return to the van. After the training, the Appellant noticed that N was still secured in her car seat in the van. He returned to the special education program and brought N inside. N was examined by the program's nurse and found to be dehydrated. At some point, she had also soiled herself. The Appellant subsequently resigned from the transportation company. (Exhibit A p.2, Testimony of AD, Testimony of Appellant)
5. During the 51B Response, the Appellant informed the Response Worker that the aide had informed him that all the children had been removed from the van. The Appellant repeated this account at the Fair Hearing. (Exhibit A p.2, Exhibit B p.3, Testimony of Appellant)
6. The established policy of the transportation company is for the driver to go through the van after discharging students in order to ensure all of the children have been unloaded. I find that the Appellant failed to adhere to this policy. (Exhibit B p.3, Testimony of AD, Testimony of Appellant)
7. Another established policy of the transportation company is for the driver to physically go through the van upon parking, in order to ensure that no children remain in the van. At the Fair Hearing the Appellant testified that on that day, before entering the training, he opened the van door and looked in the van, but did not see N. The Appellant did not physically move through the entire van. I find that the Appellant failed to adhere to this policy. (Testimony of Appellant)
8. At the Fair Hearing, the Appellant testified that he believed the temperatures during the time N was in the van was somewhere between the mid-forties to lower fifties degrees Fahrenheit. (Testimony of Appellant)
9. At the Fair Hearing, MR testified that she had also previously worked for the transportation company as a monitor. She testified she did not recall any policy in regards to the physically going through a van to ensure the children had been discharged. She testified that the transportation company did not regularly implement their policies and that there was a wide variance in actual practice. She further testified that the company would quickly blame drivers for any problems that might occur. MR testified that during her time with the transportation company, she did not regularly go to this particular special education program. (Testimony of MR)
10. At the Fair Hearing, the Appellant testified while the applicable transportation company policy does state that he should physically go through the van upon discharging students, this was rarely done by any driver. He stated that such a physical check would cause a considerable delay in the van departing and that it was

also difficult for him to move through the interior of the van. (Testimony of Appellant, Testimony of MR)

11. I find that there is reasonable cause to believe that the Appellant neglected N for the following reasons:

- a. GP was a caregiver for N.
- b. GP failed to follow established policy and ensure that N was unloaded from the van he was driving.
- c. N remained in the van without any supervision for three hours.
- d. N was found to be dehydrated and to have soiled herself.

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 or human trafficking. DCF 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." 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.

"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." 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

"Caregiver". A caregiver is a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or 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.

"Neglect". Neglect is 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.

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.

Analysis

In this case, the essential facts are not in dispute. The Appellant was a driver for a transportation company and was responsible for bringing N to her special education program along with two other students. The Appellant failed to ascertain that N had left the vehicle, and he also failed to conduct a physical check of the van as per established policy. Subsequently, N was left without any supervision for three hours, while the Appellant attended a training. The Appellant subsequently realized N was still in the van, and brought her to the special education program where it was determined she was dehydrated and had soiled herself.

Appellant failed to follow the established policy of the transportation company in order to ensure that all students are discharged at the special education program. Yet, even if there was no established policy or practice to ensure the children's discharge, as a caregiver the Appellant must provide minimally adequate care and supervision of a child or face a finding of neglect. By comparison, it would also be neglect if a parent or babysitter left a three year old child unsupervised in a car for three hours.

While MR testified that she was not aware of any policies regarding physically moving through the van to check that children had been discharged, I do not find that this means no such policy existed. Indeed, the Appellant clearly testified that he was aware of such policies, and failed to adhere to them. Further, the difference between MR's job as a

monitor was different from the Appellant's job as a driver. It is possible that MR would not be informed of policies that did not apply to her particular position.

This case is strikingly similar to Lindsay v. Dep't of Soc. Servs., 439 Mass. 789 (2003). In that case there were two incidents in which a daycare provider left a child unsupervised in her station wagon after transporting the reported child and several other children. Similar to this case, an aide would come out and assist the daycare provider in getting the children out of the car. In the first instance, the Department supported an allegation of neglect against the aide, because it determined that the aide had taken over as a caregiver once she began helping the children out of the car. In the second instance, the Department supported an allegation of neglect against the daycare provider, because only the daycare provider had been present when the children were getting out of the car.

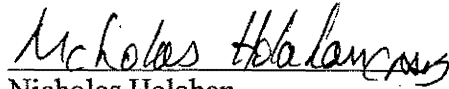
In his argument, the Appellant attempts to compare this case to the first described incident in Lindsay, in which only the aide was found to have neglected the child. However, here this case differs from Lindsay due to the established policy of the transportation company. While the Appellant testified that this policy was not commonly adhered to and was physically inconvenient, it remains the established policy. It is reasonable to assume that this policy was put in place to prevent exactly such incidents as the instant case. By not following the established policy, the Appellant failed to provide minimally adequate supervision.

By failing to follow these policies and realize that N remained in the van, the Appellant's actions and inactions placed N in danger and posed a substantial risk to her safety and well-being. N was left for three hours without any supervision and suffered from dehydration. If the Appellant had chosen not to leave the van's engine running for three hours while parked, it is reasonable to assume that N would have suffered from exposure to the low temperatures of the winter season.

Conclusion and Order

The Department's decision to support the allegation of neglect of N by the Appellant is hereby AFFIRMED.

This is the final administrative decision of the Department. If 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 in Suffolk County, within thirty (30) days of the receipt of this decision. See, M.G.L. c.30A, §14. In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.



Nicholas Holahan
Administrative Hearing Officer

2-28-18

Date



Susan Diamantopoulos
Fair Hearing Supervisor