

**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)
(S.K.)
(FH #2017-0059)
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HEARING DECISION

Procedural History

The Appellant, S.K., appeals the decision of the Department of Children and Families [hereinafter “the Department” or “DCF”], to support for neglect of her son, L, pursuant to M.G.L., c.119, §§51A & 51B.

On November 25, 2016, the Department received a 51A Report alleging neglect of two year-old L by the Appellant, his mother, in connection with a domestic that occurred on November 25, 2016 between the Appellant and the child’s father, J.K. The 51A Report was screened in for a 51B non-emergency response and assigned to response social worker, E.H. On December 16, 2016, following the 51B response, the Department supported for neglect of L by the Appellant due to the child’s exposure to the domestic altercation and opened the family’s case for assessment [now called a Family Assessment Action Plan – FAAP]. The case remains open to date. The Department notified the Appellant of the decision and her right of appeal by letter dated December 16, 2016. The Appellant filed a request for Fair Hearing [“Hearing”] on January 17, 2017, pursuant to 110 CMR 10.06. The Appellant’s request for Hearing was granted and held on March 28, 2017 at the Department’s South Central Area Office in Whitinsville, MA. Present were the DCF Supervisor, S.G.; the DCF Response Social Worker, E.H.; the Appellant’s Attorney, K.S.; the Appellant; and, Appellant’s Three Witnesses/Friends – A.P., B.P.; and R.S. The response social worker, the Appellant, and her witnesses were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to CDs. Admitted into evidence for the Department was the DCF 51A Report of November 25, 2016 [Exhibit A] and the corresponding 51B Response Supported on December 16, 2016 [Exhibit B]. Admitted into evidence for the Appellant was a March 8, 2017 Letter from the Director of Clinical Services of [REDACTED], R.M.; L’s Medical Records [Exhibit 2]¹; Affidavit of S.H. [Exhibit 3]; Affidavit of J.T. [Exhibit 4]; and, Affidavit of K.R. [Exhibit 5]. The Hearing record was closed at adjournment.

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.

¹ The medical record pre-dates the incident of November 25, 2016 and thus has little to no relevance to this appeal.

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 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 thirty three year-old Appellant and her husband, J.K., are the mother and father, respectively, of their two year-old son, L. At the relevant time, the family was living at the home of L.K and M.K., paternal grandparents, and paying rent. [Exhibit A; Exhibit B, pp.6 & 8; Testimony of the Appellant]
2. The family had no prior DCF history. [Exhibit A, pp.3-4]
3. In 2005, the Appellant came to the United States from Africa on a visa in order to work as a nanny for the █████ family, who had two children. [Testimony of the Appellant]
4. The Appellant returned to Africa after the two year visa expired, but came back to the United States on a K1 visa when she got engaged to J.K. [Testimony of the Appellant]
5. On April 16, 2008, the Appellant and father were married. [Testimony of the Appellant]
6. After her marriage, the Appellant worked as a nanny for other families, up until her pregnancy with L. [Testimony of the Appellant]
7. From April 2008 to August 2010, the Appellant was a nanny for the █████ family. The mother of this family conveyed positive remark about the Appellant's care of her two children. [Exhibit 4]

8. On July 17, 2014, L was born. [Exhibit A, p.1; Testimony of the Appellant]
9. On January 20, 2015, the Appellant started a family day care out of the home. [Exhibit B, p.9; Exhibit 3; Testimony of the Appellant] She opened the day care so that she would not have to drag her baby, L, around with her, getting up early to go to her nanny job. [Testimony of the Appellant] The parents who wrote letters and testified on behalf of the Appellant conveyed positive experiences they and their children had with her day care. [Exhibit 3; Exhibit 5; Testimony of A.P.; Testimony of B.P.; Testimony of R.S.]
10. During their marriage, the Appellant threw a cell phone right by father's head while he was holding L, but did not hit L. On another occasion, the Appellant smashed a cell phone into a vanity and the screen smashed and father had to remove L from the room because of broken glass everywhere. [Exhibit B, p.4]
11. The Appellant did not dispute throwing cell phones, but not at father's head. She said she threw it three or four times. On one occasion, while angry, she threw her phone down the driveway. L was in a stroller and the Appellant and paternal grandfather were next to the stroller. Another incident happened in the bathroom and the screen of her cell phone broke. The third time occurred at the day care, after hours. Father was standing between the day care and kitchen at the time. [Exhibit B, pp.9-10]
12. In January, June, and September 2016, the Appellant sent father text messages disparaging their son, L, as described below. [Exhibit B, pp.6-7]
 - a) In a January 18, 2016 text, there was a picture of L, and a woman with L and the child was crying. Under the picture was written, "The whole day so far" under the picture. Father replied to the text saying he could not talk until 11:30 and the Appellant then wrote: Days like today, I could just close the daycare [and put] Logan into a day care center and go back looking after someone else's kids. He has been crying all day and nothing makes him happy. I'm done! Seriously can't take much more before he gets a fucking hiding. You better come home now. Just lost it. [Exhibit B, pp.6-7]
 - b) On January 26, 2016, the Appellant sent a text with a picture of L crying and under the picture she wrote, you need to come home now. I'm not dealing with him today. Do[n]'t know what the fuck he wants, but I've already had it with him. You can take a pack n play and he can sleep at the gym. Otherwise he can spend the day in his crib. You can't not go to work. I'll deal with this, but we need to talk about day care for him. [Exhibit B, p.7]
 - c) On June 16, 2016, the Appellant wrote, You need to come home and look after your shit. He will be in the court yard in the pack n pay waiting for you. Fucking had enough! Father replied, I'm heading home. He could go in the road?!?!? Get him Please. I'm going to have a ducking heart attack. Get him!!! No wonder I'm on heart medication. The Appellant wrote, Well I think I need to go on them if I have to keep looking after this brat. [Exhibit B, p.7]

- d) On September 2, 2016, the Appellant sent a picture of L peeing in the yard and under the picture, she wrote, going to pee all over my house like a fucking animal-he can spend the day outside like an animal pissing wherever he likes. [Exhibit B, p.7]
13. The Appellant did not dispute sending these text messages to father. It was wrong for her to send them. They were pretty nasty. They were sent out of frustration because she received no help from father. She had to write them like this to make father take her seriously and come home. She denied leaving L outside and said the potty training one was a joke. [Exhibit B, p.9; Testimony of the Appellant]
14. Father worked a lot. He was gone ten hours/day, and the Appellant did not have a lot of free time to herself. She was overwhelmed. [Testimony of the Appellant]
15. In September or October [of 2016], the Appellant and another day care provider a child care swap whereby the Appellant sent L to her day care three days a week and she cared for the other child in her day care. This was arranged because of the frustration level with L and so the Appellant could focus on the day care children. [Exhibit 3; Exhibit B, p.9; Testimony of the Appellant] When this swap occurred, things improved. [Testimony of the Appellant]
16. On November 1, 2016, the Appellant asked father for a divorce. [Testimony of the Appellant; Exhibit B, pp.4 & 8]
17. On November 3, 2016, father filed for a divorce. [Exhibit B, p.8]
18. On November 3, 2016, the paternal grandparents notified the Appellant that they were canceling the liability insurance on the home. [Exhibit B, p.8; Testimony of the Appellant]
19. On November 19, 2016, after receiving a letter from the Appellant's prior attorney, the paternal grandparents moved back into their home. Prior to this, they had been staying at the home for short periods, but had not been living there. [Exhibit B, p.8; Testimony of the Appellant]
20. On December 3, 2016, the Appellant's day care was shut down. The paternal grandparents gave the Appellant a letter to this effect. [Exhibit B, p.8; Testimony of the Appellant]
21. During the morning of November 25, 2016, prior to the below incident, the Appellant went to district court to file a motion to have the paternal grandparents removed/evicted from the home so she could run her day care.. She filed a civil restraining order to keep them out of the day care business. This was continued until December 8, 2016 so the paternal grandparents could be served with notice that would prevent them from shutting down her day care. [Exhibit B, pp. 5 & 8; Testimony of the Appellant]

22. On November 25, 2016 at 5:30 p.m., there was a verbal and physical altercation between the Appellant and father wherein the father received injury and which resulted in the Appellant's arrest for assaulting father and father filing a restraining order against the Appellant and receiving custody. [Exhibit B; Testimony of the Response Social Worker]
23. L was present during this domestic. [Exhibit B; Testimony of the Appellant]
24. Per father, he, the Appellant, and L spent time together at an amusement center on November 25th. When they returned to the home [about 5:00 p.m.], the Appellant was going to take L out to dinner at the café. Father said he was going to go and the Appellant agreed, but told him he had to take a separate car. The Appellant put Logan in the car. The Appellant then said she was going to a friend's house with L and father was not welcome. Father told the Appellant he had a right to go where L went. The Appellant started struggling with father and was pointing her fingers in his throat. He broke loose and the Appellant elbowed him in the head. Father tried to get L, who was screaming. The Appellant struggled with him harder. Father was able to break free. The Appellant went to his vehicle and kicked and punched it. When father took L out of the car, the Appellant went to the other side of the vehicle and grabbed L's legs and tried to pull L out of his arms. Father had L. Father called the police and the Appellant went to the police station. [Exhibit B, pp. 2 & 5]
25. The Appellant did not dispute this domestic occurred. The Appellant said that because she was not invited for Thanksgiving dinner, she wanted to take L out for a meal. The Appellant was going to join them, but would follow them in a separate vehicle. The Appellant told father that she was going to R's house and father told her she was not going to do that. The Appellant had L in her vehicle. Father came running at her and used his shoulder and back to push her out of the way. Father then started to unbuckle L from his car seat. L was screaming for her. The Appellant was trying to pull father out of the vehicle. When father turned, the Appellant pushed father's face against the back of the car. Then the Appellant ran around to the other side of the back door and tried to get L out of the car seat. [Testimony of the Appellant] The Appellant had been trying to pull L toward her. [Exhibit B, p.9] Father pushed her again out of the way and he managed to get L out of his car seat. [Testimony of the Appellant] Father told her he was calling the police and she got into her vehicle and went directly to the police station where, while writing her statement, she was placed under arrest. [Exhibit B, p.9]
26. There is no dispute that L cried and/or was screaming during the domestic. [Exhibit B, pp.5 & 9]
27. The Appellant, the police and the EMTs all checked L [REDACTED] out and he did not have any visible injuries nor did he appear to be injured in any way. [Exhibit A, p.4; Exhibit B, p.2]
28. An April 27, 2016 trial was scheduled to address the criminal charge(s) leveled against the Appellant. [Testimony of the Appellant]

29. The probate matter is in process. [[Exhibit A, p.4; Testimony of the Appellant] The Appellant has been seeing L in a public setting two times a week and has facetime with him. [Testimony of the Appellant]
30. Since the restraining order went into effect, the Appellant has been living elsewhere; with R.S. and his wife. [Testimony of R.S.]
31. ██████ took the Appellant's day care license away because she no longer had an address, the restraining order prevented her from entering the home, and she was arrested [Testimony of the Appellant; Exhibit B, p.4] The Appellant reported at Hearing suing the paternal grandparents for the closure of her day care. [Testimony of the Appellant]
32. In March 2017, the Appellant had attended two sessions of ██████ eight to ten week Nurturing Program Series on parenting. [Exhibit 1]

Analysis

A party contesting the Department's decision, to support a 51A Report 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 March 28, 2017.

Regulations, policies, 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 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]**

Our courts have repeatedly recognized that witnessing domestic violence has a profound impact on the development and well being of children and constitutes a "distinctly grievous kind of harm." Custody of Vaughn, 422 Mass. 590,599, 664 N.E. 2nd 434 (1996), cited in John D. v. Department of Social Services, 51Mass.App. 125 ((2001), Adoption of Ramon, 41 Mass. App. Ct. 709, 714 (1996). Even with no indication or evidence that a child has been injured, either physically or emotionally by the domestic violence, the state need not wait until a child has actually been injured before it intervenes to protect a child. Custody of a Minor, 377 Mass. 879, 389 N.E.2d 68, 73 (1979).

The Court has also held that the Department's determination of neglect does not require evidence of actual injury to the child. Lindsay v. Department of Social Services, 439 Mass. 789 (2003).

Caretaker means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with the responsibility for a child's health or welfare, and (e) any other person entrusted with the responsibility for a child's health or welfare whether in the child's home, a relative's home, a school setting, a day care setting (including baby-sitting), a foster home, a group care facility, or any other comparable setting. As such, "caretaker" includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The "caretaker" definition is meant to be construed broadly and inclusively to encompass any person

who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is him/herself a child, i.e., a baby-sitter. [110 CMR 2.00]

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. [110 CMR 10.23]

After review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Department in the matter under appeal. See Findings #1 to #31 and the below discussion.

The Appellant was a *caregiver* of her two year-old son, L, as defined herein and at 110 CMR 2.00.

Based on the record as a whole and giving due weight to the clinical judgment of Department social workers, the Hearing Officer concludes that the Department had "reasonable cause to believe" that the Appellant failed to provide L with minimally adequate supervision, emotional stability and growth and other essential care, such as a safe environment, when she exposed him to the verbal and physical domestic of November 25, 2016 and her subsequent arrest. See Care and Protection of Robert. The Hearing Officer has no reason to doubt the clinical experience and judgment of the Department in the instant matter. The Hearing Officer did not find any information offered by the Appellant to be substantial or compelling to such an extent that the Department acted unreasonably and/or abused its discretion in making its decision in this matter. Based upon a review of the evidence presented at the Hearing, including testimony from the parties and documents submitted, the Hearing Officer finds the Department's decision was made in conformity with its regulations, supported by sound clinical judgment, and that there was a reasonable basis for the decision. The Appellant failed to meet her burden of proof. [110 CMR 10.23] The Appellant provided non-persuasive evidence at her Hearing. She acknowledged the domestic and its impact on L. See Custody of Vaughn, Adoption of Ramon, and Custody of a Minor. In addition, criminal charges are pending, a restraining order in effect, and probate matters in process whereupon she only visits with L in public settings.

Order

1. The Department's decision of December 16, 2016, to support the 51A Report for neglect of L by the Appellant, is AFFIRMED.

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 within thirty (30) days of the receipt of this decision. [See, M.G.L. c. 30A, §14].

Handwritten signature of Frances I. Wheat in cursive, with the letters 'SC' circled at the end.

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

Date: 1/16/2018

Handwritten signature of Sophia Cho in cursive.

Sophia Cho, LICSW
Fair Hearing Supervisor