THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
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Commissioner

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IN THE MATTER OF	
J.D.	**HEARING DECISION**
FH #2017-0272	

The Appellant, Mr. D, appealed the decision of the Department of Children and Families [hereinafter "the Department" or "DCF"], to support for neglect of M and R, pursuant to M.G.L., c.119, §§51A & 51B.

On January 20, 2017, the Department received a 51A Report from a reporter alleging physical abuse of twelve year-old M by his father, the Appellant, because a few weeks prior during parenting time with the Appellant, the Appellant duct taped the child's mouth closed for swearing. The 51A Report was screened in and assigned to DCF response social worker, M.P., for a non-emergency 51B response. On January 23, 2017, at 10: 25 a.m., the Department received a 51A Report from a reporter alleging physical abuse and neglect of ten year-old R by the Appellant, her father. It was alleged that the Appellant slapped his daughter, R, in the face. It was also alleged that, about two weeks prior, the child told school personnel she was sick and, when picked up by a parent and brought home, she was punished for claiming this. The child was made to clean the bathroom, her bedroom door was removed, all her Harry Potter books were removed, and she was given a Bible because she was a sinner. On January 23, 2017, at 4:05 p.m., the Department received a third 51A Report containing allegations of physical abuse of the children by the Appellant, in connection with the duct taping and slapping incidents, and the filing of a restraining order against the Appellant by the children's mother. The second and third 51A Reports were made part of the on-going response. On February 7, 2017, following the 51B response, the Department unsupported the allegations of physical abuse of the children by the Appellant, supported the allegations of neglect of the children by the Appellant for duct taping M's mouth, which R witnessed, and for the use of inappropriate parenting techniques; the Department made a decision for the family's case to remain open for a comprehensive assessment, and, approved these decisions on February 9, 2017.

The Department notified the Appellant of the decision and his right of appeal by letter dated February 13, 2017. The Appellant filed a timely request for Fair Hearing ["Hearing"] on March

6, 2017, pursuant to 110 CMR 10.06 & 10.08. The Appellant's request for Hearing was granted and held on May 9, 2017 at the Department's South Central Area Office in Whitinsville, MA. Present were the DCF Supervisor, S.G.; the DCF 51B Response Social Worker, M.P.; the Appellant; and, the Appellant's Witness/Wife, D.D. The response social worker, Appellant, and his witness were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to compact disk [CD].

Admitted into evidence for the Department was the DCF 51A Report of January 20, 2017 [Exhibit A-1], the DCF 51A Report of January 23, 2017, 10:25 a.m. [Exhibit A-2], the DCF 51A Report of January 23, 2017, 4:05 p.m. [Exhibit A-3], and, the corresponding 51B Response Supported/Approved on February 7, 2017/February 9, 2017 [Exhibit B]. The Appellant made no submissions. The record was closed on May 9, 2017.

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.

Pursuant to110 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) 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 Appellant and his ex-wife, J.R., are the parents of a twelve year-old autistic son named M and a ten year-old daughter named R. [Exhibit A-1; Exhibit A-2; Exhibit B]

2. The Appellant and the children's mother have each remarried. The children were spending one week at a time with each parent at the relevant time. Because mother has no other children, R was able to receive more attention at mother's home, than at the Appellant's

home. This was because the Appellant's wife, D.D., has three minor children of her own, who also live in the Appellant's home. Because of the increased family size, the Appellant has had to spread his time among all family members, not just his own children. [Exhibit A-2; Exhibit B]

3. After the Appellant's divorce, it was just his own children. They did not have rules, chores, and there were no limits on what they ate. Since his remarriage, more rules and structure were instituted, which R did not like. They also tried to make more healthy choices for the family, as in a better diet. They are a Christian family and used their faith to guide them. The Appellant reported that only recently had he disagreed with mother and the school about the children's care. He and mother have been unable to co-parent since his remarriage. This was all new and a struggle. [Exhibit B]

4. Previously, for example, the family wanted M involved in a lot of social activities and as a result, he began drama. His teachers saw a great [positive] change in the child's behavior from socializing with a wider range of students. Socialization is important given his diagnosis of autism. This school year, the Appellant wanted to pull M out of drama so he could read more. The school believed that this change came from the Appellant's wife. As a result, M now states that he needs to read because he needs to go to college. There was an IEP meeting involving the Appellant and his wife, and four people disagreed with the Appellant about pulling M out of drama. [Exhibit B, p.5; Testimony of Response Social Worker]

5. The Appellant acknowledged wanting to pull M out of drama class, because there were other areas of the child's IEP that needed to be addressed, notably vision therapy, physical therapy, and reading. So, at the beginning of the school year, the Appellant went in to school and expressed the need for a reading program for M, because he was significantly behind. Per the Appellant, the school was not pleased with him, when he told them their services were inadequate, and told them he was going to hire an advocate. They did not make any friends during the first half of the school year. The Appellant understood that M enjoyed drama, but there were other areas that needed to be addressed. The Appellant and his wife had bought some books and worked with M on his reading while at home. With the help of an advocate that the Appellant hired, M's IEP was changed and now he is in a reading program. [Testimony of the Appellant]. They have also allowed M to continue with his drama. [Testimony of the Appellant's Wife]

6. This school year [9/2016-1/2017], there was three behavioral instances on the bus involving M and all of them occurred when he was coming from the Appellant's home. School personnel reported that M presents as more put together when he comes from Mother's house. M has also discussed at school having chores at the Appellant's home, which he never had before. [Exhibit B, p.5]

7. The Appellant had no doubt that M's behavioral issues are attributable to the changes he experienced in the Appellant's household. [Testimony of the Appellant]

8. According to mother, the children have been expressing concerns about the Appellant's house, since the summer. M has said that the Appellant is mean to him. The child had been returning to mother's home with unexplained bruises, which R said were from the Appellant throwing him on the couch. Mother believed that the Appellant was doing this in fun, but may be accidentally hurting the children. [Exhibit B, p.8]

9. According to mother, the Appellant's wife has many different views. R is not allowed to wear leggings and was told she needs to be more modest. She has been told she needs to be a better eater. R has also told her that the Appellant's wife has been taking down all the photographs of the Appellant and the children, and only leaving those that are of the entire family. [Exhibit B, p.8]

10. The Appellant has allowed his wife to do a lot of the parenting, which created turmoil between the two houses. In addition, the children's mother was listening to R about the changes in the Appellant's home, instead of communicating directly with the Appellant. [Exhibit B]

11. The response social worker interviewed the children separately on January 23, 2017 at their school. [Exhibit B, pp.3-5]

    (a) R expressed worry about going back to the Appellant's home. She did not feel safe with the Appellant because of punishment. She reported that the Appellant smacks both of them in the head, and has sat on both of them. He laughs when he is doing that. The Appellant also duct taped M's mouth shut because he was swearing. This happened one time. In the past, the Appellant would have simply told M not to do it or would have taken his X-box away. R was worried about her safety and that of M. She reported that yesterday [January 22, 2017], the Appellant smacked her in the head because she did not say, "Yes, I will eat breakfast father." The child claimed that this resulted in a bruise on her right eye, which the response social worker did not see. The child stated that the Appellant does not usually speak to her that way, but does give her a hard time.

    (b) R reported seeing a change in the Appellant's attitude and the way he disciplined, since he remarried. She described the Appellant's wife as mean. The child stated that recently she was sick and threw up, but was made to go to school. She told the Appellant that it was school policy that she could not go to school for twenty four hours, and then broke out in a rash around her mouth. When she arrived at school, she went to see the nurse and the nurse sent her home. The Appellant's wife picked her up and told R and the nurse that they were being disrespectful. When she returned home, R was made to clean the bathroom; the Appellant removed her bedroom door because she slammed it earlier that morning and removed all her Harry Potter books, and handed her a Bible. R also complained that the Appellant's wife encouraged healthy eating and made her eat salmon, which made her throw up.

    (c) M reported that he did not feel safe at the Appellant's home, because the Appellant duct taped his mouth, one time, for a few seconds, for saying bad words, and then took it off. He felt angry about it and it hurt a little, but did not leave marks. The Appellant almost

took his bedroom door off, for kicking it. When asked if he was ever scared, he said he is not. When he does not follow the rules, the Appellant's wife will get mad at him and send him to his room or take his X-box away. M reported having chores and liked doing them, because he earned money, which he could use to buy something he liked. He cleans his own dishes.

12. Mother, upon learning that the Appellant smacked R in the face and sat on her, and duct taped M's mouth shut for swearing, went to court on Monday, January 23, 2017 and filed a restraining order against the Appellant on behalf of the children. The children are on the order. The order was extended to May 1 [2017]. [Exhibit A-3, p.3; Exhibit B, pp.7-8 & 11]

13. The Appellant denied hitting S and denied that incident happened. [Exhibit B, p.6]

14. The Department unsupported the allegations of physical abuse because R later recanted to the Appellant and her mother, and lied because she wanted to live with Mother. Nor did the response social worker see an injury on the child's eye during the interview of January 23, 2017. The response social worker did not believe that the Appellant hit his daughter, R. [Testimony of the Response Social Worker; Exhibit B, pp.4, 7-8 & 12]

15. The Appellant acknowledged taking R's door off because she was slamming it. He also acknowledged having sat on R, but in a playful way, not a harmful way, and she had never expressed fear about this to him. [Exhibit B, p.6]

16. The Appellant acknowledged that R threw up, but because she ate too much the night before at a church group meeting. Because he believed that R simply did not want to go to school, he sent her anyway. When she was dismissed and came home anyway, she wanted to do other things, like play X-box and watch movies. She was not acting sick. He had made it very clear that, if she came home, she would have to be in her room and rest. [Exhibit B, p.6]

17. The Appellant acknowledged duct taping M. M was saying filthy words in front of the younger girls, and smiling and laughing about it. They told him not to say these words and then duct taped him. This was new behavior they were trying to snuff out. The Appellant acknowledged that he could have handled things differently and now understands the gravity of duct taping. It was "a grievous mistake". It was a stupid thing to do and it did not work. [Testimony of the Appellant] He has agreed to never place duct tape over M's mouth again. [Exhibit B, p.6]

18. The Appellant acknowledged that R was distressed and there were many things they could have done differently. They were not adequately prepared for what it meant to have a blended family, but now they are. [Testimony of the Appellant]

19. The Appellant and his wife acknowledged that co-parenting between the households was an issue. [Testimony of Appellant; Testimony of Wife]

20. The response social worker did not find a lot of the concerns conveyed during the response to rise to the level of neglect. R might not like it that the Appellant takes her bedroom door off;

however, he did this because she was slamming it. R might not like that she had to do chores, or follow new family rules, but the Appellant has the right to implement them. R might not like that she had to eat salmon, if this was what the family was having, but as long as she was not allergic to it, the Department had no concerns. Although R may have needed to clean the bathroom when she came home from school sick, it was because when she got home, she did not present as sick. There have been a lot of changes happening in the Appellant's home and both parents needed to work on integrating the adult parties and everybody needed to learn to co-parent and work together as a family. [Exhibit B, p.8]

21. On May 9, 2017, the Department supported for neglect of the children because the Appellant duct taped M's mouth closed for swearing on one occasion and R witnessed this, and both children expressed safety concerns regarding this matter with R wanting to protect her brother. [Exhibit B; Testimony of the Response Social Worker]

22. The primary concern of the Department was around the parenting choices. The methods used to discipline the children impacted the children. There had been changes in the Appellant's household and it had gotten to the point that the children were expressing concerns to their mother during the summer and did not feels safe returning to the Appellant's home. In addition, the Appellant was pulling M out of his drama class, which had been known to have provided a positive change in this autistic child's behavior. M was also exhibiting behavioral issues on the bus coming from the Appellant's home. The Appellant and mother's inability to co-parent the children affected the children and created a lot of turmoil for the family. [Exhibit B; Testimony of the Response Social Worker]

23. The Appellant was unable to see his children for three months. Now he is picking the children up and meeting them at the police station. He is not allowed to take the children back to his home or to church. [Testimony of the Appellant]

24. There are on-going probate court proceedings with a trial forthcoming. [Testimony of Appellant's Wife]

25. The Hearing Officer finds the level of evidence presented at Hearing insufficient for the Department to support for neglect of the children. See *Analysis*.

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 May 9, 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]

The purpose of the response is to determine whether, under MGL, c.119, §51B, there is "reasonable cause to believe" that a child has been abused or neglected. The response includes an investigation of the validity of the allegation(s) received, a determination of current danger and future risk to the child(ren), and an assessment of the capacity of the parent(s)/caregiver(s) to provide for the safety, permanency, and well-being of their child(ren). "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 the credibility of the persons providing relevant information, would lead a reasonable person to conclude that a child has been abused or neglected. [Protective Intake Policy #86-015, 2/28/16]

The 51A report under appeal is supported for neglect. "Neglect means 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition"; 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

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 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]

A substantiated concern finding means there was reasonable cause to believe that the child was neglected and the actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being. Examples include neglect that resulted in a minor injury and the circumstances that led to the injury are not likely to recur, but parental capacities need strengthening to avoid future abuse or neglect of the child; neglect that does not pose an imminent danger or risk to the health and safety of a child; and, educational neglect. Protective Intake Policy #86-015 [2/28/16]

An unsupported finding means there is not reasonable cause to believe that a child(ren) was abused and/or neglected, or that the child(ren's) safety or well-being is being compromised; or the person believed to be responsible for the abuse or neglect was not a caregiver, unless the abuse or neglect involves sexual exploitation or human trafficking where the caregiver distinction is not applied. Protective Intake Policy #86-015 [2/28/16]

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 Appellant in the matter under appeal. See Findings #1 to #25 and the below discussion.

The Appellant is a *caregiver* of his twelve year-old son, M, and his ten year-old daughter, R, consistent with that term as defined at Protective Intake Policy #86-015 [2/28/16] and 110 CMR 2.00.

The burden is on the Appellant to show, by a preponderance of the evidence, that the Department's decision, to support for neglect of M and R by the Appellant, for his failure to provide them with emotional stability and growth, was not in conformity with Department's regulations and policies and did not have a reasonable basis. This case represents one isolated incident where the Appellant duct taped his twelve year-old son's mouth for a few seconds, for saying bad words, and then took it off. Although M was angry and said it hurt a little, it did not leave marks. Although the children did not feel safe returning to the Appellant's home because of this, the Appellant now understands that he could have handled things differently, and that it was a stupid thing to do and did not work. Secondly, there is no credible evidence that the Appellant struck his daughter, R. This is undisputed by the parties at Hearing. Third, the Appellant acknowledges having sat on R, but said this was done in a playful way. The children's mother did not dispute this during her interview with the response social worker. Finally, the Department's paramount concern was around parenting choices. For example, the response social worker spoke of the Appellant wanting to withdraw M from his drama class, which had helped improve the child's behavior. The Appellant's explanation at his Hearing for wanting to do this was understandable, given his concern about M's IEP deficits and the need to remedy them by increasing the child's reading skills. The child's IEP was changed and the child put into a reading program due to the efforts of the Appellant and his school advocate to effect this. M's involvement in his drama class continued. Many of the issues of concern raised in this case

occurred within the context of the children's adjustment to the new rules in the Appellant's home stemming from his remarriage, and to the Appellant and mother's failure to speak to each other to resolve the issues, before they came to the attention of the Department and the Probate Court.

Based on a review of the evidence presented at the Hearing, including testimony from the parties and documents submitted by the Department, the Hearing Officer finds that the Department's decision does not comply with the Department's policy definition for a supported finding. Such evidence, that the children were in danger or the Appellant's actions posed a substantial risk to the children's safety or well-being would be necessary for the Department to support the allegations, as opposed to the Department making a finding of concern, which would also require the potential for abuse or neglect, but there is no immediate danger to the children's safety or well being. See Protective Intake Policy, #86-015, Revised 2/28/16. The Hearing Officer is not convinced that the children were in danger or at risk of substantial injury while in the Appellant's care. The parties are still engaged in Probate Court where matters have and/or will be addressed.

When weighing the Department's evidence against the Appellant's, the Hearing Officer finds that the Appellant met his burden of proof herein. [110 CMR 10.23]

Orders

1. The Department's decision of February 7, 2017, to support the 51A Report for neglect of M and R by the Appellant, his Father, is REVERSED.

Frances I. Wheat, MPA
Administrative Hearing Officer

Date: 6-25-18

Susan Diamantopoulos
Fair Hearing Supervisor

Date: _____

Linda S. Spears
Commissioner