

**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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LINDA S. SPEARS
Commissioner

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IN THE MATTER OF

CL

#2018-0882

Fair Hearing Decision

The Appellant in this Fair Hearing is CL ("CL" or "Appellant"). The Appellant is appealing the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support an allegation of sexual abuse and add his name to the Department's Registry of Alleged Perpetrators pursuant to M.G.L. c. 119, §§51A and B and M.G.L. c. 119, §51B (4).

Procedural History

On April 11, 2018, the Department received a 51A report with concern for the past sexual abuse of J by the Appellant, CL, and multiple family members. The Department screened-in the report with allegations of neglect and where it regarded the Appellant, an allegation of sexual abuse. The report was screened in for a Non-Emergency Response and upon the completion of the Department's response period, the Department supported the allegation. The Appellant was informed of the Department's decision and made a timely request for a Fair Hearing under 110 CMR 10.06

The Fair Hearing was held on November 20, 2018, at the Department of Children and Families' Area Office located in Chelsea, MA. All witnesses were sworn in to testify. The record closed at the conclusion of the hearing.

The following persons appeared at the Fair Hearing:

Carmen Colón
CL
LCA
SQ

Fair Hearing Officer
Appellant
Spanish Interpreter
DCF Response Social Worker

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 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 Intake Report of March 11, 2018

Exhibit B: 51B Child Abuse/ Neglect Non-Emergency Response of June 5, 2018

For the Appellant:

No documentary evidence was submitted by the Appellant

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. 110 CMR 10.05; DCF Protective Intake Policy #86-015, rev. 2/28/16

Findings of Fact

1. J and M are the subject children of this Fair Hearing. At the time of the subject 51A report, J and M were fifteen (15) years old. The children are identical twins. (Exhibits A, B)
2. The twin's biological mother, MS, lived with the Appellant, CL, who is the father of their eleven (11) year old daughter, E. The girls also have an adult brother, WT, who emigrated to the US in 2016. (Exhibit B, p. 3)
3. The children's parents left El Salvador when J and M were very young and emigrated to the United States to obtain work. In their absence, the children were left in the care of their maternal grandparents. While in their care, J and M were reportedly sexually abused by multiple family members. The alleged abuse started when the girls were 7 to 8 years old and reportedly lasted three years. WT was identified by the children as a one of the perpetrators of abuse. (Exhibit A, pp. 3-4; Exhibit B, p.6-7)

4. By eleven (11) years old and still living in El Salvador, both J and M were involved in exploitative sexual relationships with older men. By the age of twelve (12) the girls were drinking, using marijuana and cocaine. J had moved in with an adult male and M, remained at their grandparents' home for another year before leaving. At some point, both girls returned to their grandparent's home, but did not remain owing to harassment of the grandparents by individuals, including gang members, who had exploited the children. (Exhibit B, p. 3,4,8- Fair Hearing Record)
5. The evidence suggested that while in El Salvador, J and M were sexually exploited and gang involved. Out of concern for their safety, their father, RF, who resided in Massachusetts, paid a "coyote" to assist in the illegal entry of J and M to the United States. The girls entered the US in 2016. The plan for J and M was for them to reside with their mother, MS. (Exhibit B, pp.3,6)
6. Upon entry to the US, J and M were detained and held at an Immigration and Customs Enforcement (ICE) detention center. M was released in June 2016 to her father, RF, as their mother MS was no longer willing to take responsibility of the girls due to their known and reported aggressive and sexualized behavior and gang activity. M was reunified with RF and did well for several months, until J was released seven (7) months later. RF was the children's legal custodian between their arrival in the US and their removal by the Department in 2017. (Exhibit B, pp. 3-7)
7. In October 2017, the Department substantiated concerns for neglect and physical abuse of J and M by their father RF. Soon after the Department assumed custody of J and M and placed the girls in foster care. In October 2017, no disclosure of sexual abuse was made by either girl, concern was focused upon physical abuse. (Exhibit A, pp. 7-9)
8. The Appellant had no previous history with the Department. (Exhibit A)
9. While they resided with RF, the girls had limited contact with MS and CL and fewer than six (6) visits with her. The evidence suggested the children's last visit, or attempt to visit, with their mother at her home was in or around December 2016, but that MS did not visit with them on that occasion. There was evidence to suggest the girls were angry with their mother for her perceived abandonment and were jealous of E. (Exhibit A, p. 8; Exhibit B, p. 3)
10. Although deemed a caregiver for J and M under Department regulations and policy, the evidence suggested that that CL did not have a substantive caregiving role for the children during their visits to the home (Exhibit A, p. 8; Exhibit B; 110 CMR 2.00 and DCF Protective Intake Policy #86-015, rev. 2/28/16)
11. In April 2018, after six (6) months in out-of-home placement, both J and M disclosed a history of sexual abuse by multiple family members and unrelated adults while residing in El Salvador and in the US. Included in the list of perpetrators was the Appellant; their father, RL; their uncle, LU; and their brother, WT. Relative to the Appellant, J disclosed that the Appellant had "grabbed her breast" when she was thirteen (13) years old. (Exhibit A, p. 4; Exhibit B, p. 4-6)
12. A mandated reporter contacted the Department with concern for the children's disclosure of past abuse. The report was screened-in with allegations of sexual abuse and neglect of the children. Notable was the Department's acknowledgement that girls had not been in MS and the Appellant's

home since “sometime in 2016/17” (Exhibit A, p. 9). In accordance with Department regulations and policy, a District Attorney referral was made (Exhibit A). The Department conducted a response. (Exhibit B)

13. The Appellant was interviewed by the Department’s Response Social Worker (“RSW”) at his home on April 18, 2018. MS was present and interviewed as well. Both MS and the Appellant conveyed that due to their risky and violent behavior, J and M did not remain in their home or continue to visit. J and M were said to only have been in their home four (4) to six (6) times of which the Appellant did not care for the girls on his own as MS would always be present. (Exhibit B, pp.3, 5; Appellant Testimony)
14. The Appellant denied any kind of abuse or inappropriate behavior. The Appellant asserted he had limited contact with the children and while admitting he had hugged J when greeting her on one occasion, adamantly denied touching her breast or buttocks. MS similarly denied any inappropriate contact between CL and the children. There was evidence which supported the Appellant and MS’s statements regarding limited visits with the children. (Testimony of Appellant; Exhibit B, pp.3-7)
15. J was interviewed at her foster home. J did not mention the Appellant again or provide further details relative to the Appellant to the RSW or foster parent. Consistent with statements made by the Appellant and MS, M disclosed that when the Appellant picked the children up from the airport [upon their arrival in Massachusetts] the Appellant hugged her and J. M stated that J told her the Appellant “grabbed her breast” and both children had told MS about it, but MS had said “it was just a hug.” (Exhibit B, pp. 6-9)
16. During her interview with the RSW, J maintained that “something happened” to her sister E with their brother WT “about three years ago.” Considering that the children had not come to the US in 2016, J’s statement was not reliable. E also denied that anything had happened during a forensic interview. (Exhibit A, pp. 7,8)
17. On May 17, 2018, both M and J participated in a SAIN¹ interview. During the SAIN interview, the focus of the girl’s disclosure was the exploitation and abuse experienced while in the care of their father, RF.² The children discussed their experience with loss and the abuse endured while in El Salvador. The only reference to the Appellant was made by J, who stated that on one (1) sole occasion, the Appellant hugged her and “squeezed” her breast and “butt” as they were entering her mother’s home for a welcome party. M noted the Appellant had been drinking at the time. (Exhibit B, pp.3-4, 11; Testimony of Response Worker)
18. While there was concern and the likelihood of further criminal investigation regarding the children’s disclosures of abuse by other family members, no action was taken by the District Attorney in regard to the Appellant. (Exhibit B, pp.13-14, Fair Hearing Record)

¹ SAIN: Sexual Abuse Investigation Network; a forensic exam conducted by a single specially trained interviewer from the District Attorney’s Office, which is viewed by the Department, Assistant District Attorney, Victim Witness Advocate, and police from the jurisdiction where the alleged incident occurred. The interview is intended to limit the number of times a child is interviewed.

² The DCF RSW did not attend the SAIN and relied on notes provided by the DCF Ongoing Social Worker who attended the interview. (Exhibit B, p. 11)

19. Aside from an interview with the children's foster parent, no additional collateral contacts were made by the Department. The children's foster parent questioned whether the girls were being honest in their disclosure of abuse, but the RSW did not seek to establish the validity of J's disclosure regarding the Appellant. (Fair Hearing Record)
20. I find that the Department did not comply with 110 CMR 4.27(2) by failing to pursue obvious contacts which were likely to yield some information to corroborate or disprove the allegations.
21. On June 5, 2018, the Department supported the allegation of sexual abuse of J by the Appellant, CL. The Department's decision was based solely on J's disclosure, which the Department found was consistent and credible. (Exhibit B, pp. 15-19)
22. The Department added the Appellant's name to the Department's Registry of Alleged Perpetrators. (Exhibit B, p. 18; See Applicable Standards)
23. After review of the totality of the evidence, including testimony at the Fair Hearing, and for the following reasons, I find the Department's decision to support the allegation of sexual abuse of J by the Appellant was not reasonable or supported by substantial evidence:
 - a) The Department did not have sufficient credible evidence to support a finding of sexual abuse of J by the Appellant (110 CMR 2.00) and;
 - b) The Department did not have sufficient evidence that the Appellant's actions placed J in danger or posed a substantial risk to J's safety or well-being. (DCF Protective Intake Policy #86-015, rev. 2/28/16)
24. I find the Department's decision to add the Appellant's name to the Department's Registry of Alleged Perpetrators was not made in accordance with Department regulations and applicable statutes where there was not sufficient evidence to support the allegation of sexual abuse. (110 CMR 4.37)

Applicable Standards

In order for the Department to "Support" an allegation of neglect, the Department must find that there is reasonable cause to believe that the child(dren) was abused and/or neglected ; and that 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 Police #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. 110 CMR 4.32(2)

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §51A" Care and Protection of Robert, 408 Mass. 52, 63-64 (1990) Id. at 63. This same reasonable cause standard of proof applies to decisions to support allegations under § 51B. Id. at 64; M.G.L. c. 119, § 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

"Abuse" means the non-accidental commission of any act by a caretaker 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

110 CMR 4.37: Listing of Alleged Perpetrators

The name of the alleged perpetrator shall be added to the Registry of Alleged Perpetrators if:

- (a) the allegation of child abuse or neglect has been supported and referred to the District Attorney pursuant to M.G.L. c. 119, § 51B(k); and
- (b) there is substantial evidence indicating that the alleged perpetrator was responsible for the abuse or neglect. Pursuant to M.G.L. c. 30A, § 1(6) substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion."

The name of the alleged perpetrator shall remain on the Registry of Alleged Perpetrators for 75 years or until the decision to list the name of the alleged perpetrator is reversed pursuant to 110 CMR 10.00 et seq., or by a court of competent jurisdiction.

"Caregiver" means a child's: (1) a child's parent, stepparent, guardian or any household member entrusted with the responsibility for a child's health or welfare; or, (2) 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 babysitting), a foster home, a group care facility, or any other comparable setting. As such "caretaker" includes (but is not limited to) school teachers, babysitters, 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 babysitter under age 18). DCF Protective Intake Policy #86-015 Rev. 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

Analysis

The Department determined the Appellant sexually abused J, basing its disclosure on J's disclosure that the Appellant had grabbed and/or squeezed her breast during a hug on one occasion in 2016.

The Appellant argued that there is a history of discord within the family and concerns for J and M's volatile behavior and conflict with their mother, MS, and the Appellant. The Appellant adamantly denied any inappropriate behavior toward J. The Appellant's argument was persuasive. The Department did not have sufficient credible evidence to support its decision that the Appellant sexually abused J.

It was undisputed that twin sisters J and M have a history of significant childhood trauma while living with maternal relatives in El Salvador, including sexual abuse and exploitation. When the twins came to the US in 2016, they were detained by immigration authorities and upon release from detention lived with their father and had limited visitation with their mother, MS, and the Appellant.

The children's disclosures and severity of childhood abuse described by them was deeply concerning and warranted a response by the Department. However, J's disclosure regarding the Appellant, which is the focus of this Fair Hearing, warranted careful attention because of her significant history of trauma, alienation by her mother and anger with her mother for her perceived abandonment in El Salvador, which the evidence suggested had extended to the Appellant. It was notable that the only allegation of sexual abuse alleged to occur in the US was the allegation made by J regarding the Appellant and regarding WT's alleged abuse of E, which E denied. J's disclosure was that during a hug on one (1) occasion in 2016, the Appellant grabbed her breast, she told her mother, and her mother did not believe her. Both the children's mother and the Appellant corroborated that the Appellant had hugged both J and M, but denied any inappropriate contact. The Department relied solely upon J's statement in concluding that the Appellant had sexually abused her.

This Hearing Officer considered whether there was substantial evidence in this instance to permit a reasonable mind to accept that the Appellant had sexually abused J. The court has determined that there is "no abstract quantum of evidence that satisfies the "substantial evidence" test in all circumstances" and that which constitutes "substantial evidence" varies with the importance of the decision involved; and, that although "reasonable cause" implies a relatively low threshold of proof, the Department must still demonstrate substantial evidence to support its decision. M.G.L. c. 30A, § 1(6); 110 CMR 10.05; See Covell v. Department of Social Services, 54 Mass.App.Ct.805, 768 N.E.2d 564 (2002)

While there was corroborative evidence that the Appellant had hugged J, he adamantly denied touching J inappropriately. No evidence was presented to refute the Appellant's assertion or to diminish his credibility in this instance. The Appellant had no documented history of sexual abuse or predation to suggest a pattern of behavior by the Appellant or which would lead a reasonable person to conclude that he sexually abused J. The evidence presented was therefore insufficient to support the Department's decision.

Lacking substantial evidence to support its decision that the Appellant sexually abused J, the Department's decision to add the Appellant's name to the Department's Registry of Alleged Perpetrators was not made in accordance with Department regulations or applicable statutes. 110 CMR 4.37

After considering the totality of the evidence and for these reasons and those set forth in the above Findings of Fact, this Hearing Officer finds the Department's decision was not reasonable or supported by substantial evidence and that the Appellant was substantially prejudiced thereby. 110 CMR 10.23

Conclusion and Order

The Department's decision to support an allegation of sexual abuse of J by the Appellant, CL, was not made with a reasonable basis or in conformity with Department regulations and therefore is **REVERSED**.

The Department's decision to list Appellant CL's name on its Registry of Alleged Perpetrators was not made in conformity with Department regulations and is therefore **REVERSED**.

CARMEN COLÓN
Carmen Colón
Fair Hearing Officer

11 JUN 20
Date

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