

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET, 5th Floor
BOSTON, MASSACHUSETTS 02111**

**Linda S. Spears
Commissioner**

Voice: (617) 748-2030
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IN THE MATTER OF)
)
 BA) **FAIR HEARING DECISION**
)
 FH # 2018-1216)

The Appellant in this Fair Hearing was BA (hereinafter “BA” or “Appellant”). The Appellant appealed the Department of Children and Families’ (hereinafter “DCF” or “the Department”) decision to support an allegations of neglect and sexual abuse pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On July 11, 2018, the Department received two (2) 51A reports¹ from separate mandated reporters alleging the sexual abuse and neglect of I, (hereinafter “I” or “child”) by the Appellant, BA. A non-emergency response was conducted and upon its conclusion the Department made the decision to support the allegations of neglect of the child by her father, MM² and sexual abuse and neglect of I by the Appellant. Pursuant to M.G.L. c. 119, §51B (4) the allegations were referred to the District Attorney’s Office (hereinafter “DA”). The Department notified the Appellant of the decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06.³ The hearing was originally scheduled for November 27, 2018; however, the District Attorney’s Office requested a stay in the matter pursuant to 110 CMR 10.10 (5). The matter was continued to August 20, 2019. The matter was further continued due to the unavailability of the Department and subsequently the hearing was held on December 10, 2019, at the New Bedford Area Office. All witnesses were sworn in to testify under oath. The record was closed at the conclusion of the hearing.

¹ On August 2, 2018, a third 51A report was filed regarding allegations of neglect of the child by her father, MM, which was incorporated in the 51B response. This report was not relevant to this Fair Hearing as it did not involve the Appellant; further the allegations do not pertain to the Appellant; therefore, MM will not be discussed in this decision.

² MM was not a party to this instant matter and nor was his allegations under appeal at this Fair Hearing. (Fair Hearing Record)

³ The Appellant also appealed his being identified as an alleged perpetrator on the Registry of Alleged Perpetrators (hereinafter “RAP”); however according to the record the Appellant was not placed on the RAP. Notwithstanding, this decision will address the RAP. (Fair Hearing Record)

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira	Administrative Hearing Officer
BA	Appellant
DS	Appellant's Counsel
SC	DCF Response Worker
ML	DCF Response Supervisor
JC	DCF Supervisor

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this matter, having no direct or indirect interest, personal involvement, or bias in this case.

The Fair Hearing was recorded pursuant to Department regulations 110 CMR10.26.

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

For the Department:⁴

Exhibit A: 51A Intake Report dated 7/11/18@12:44AM
Exhibit B: 51A Intake Report dated 7/11/18@ 2:11PM
Exhibit C: Child Abuse/Neglect Non-Emergency Response
(put a note regarding Ex. D)

For the Appellant:

Exhibit 1: Police Report

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

Issue to be Decided

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

⁴ The Department submitted a 51A report dated 8/2/2018 however, this report specifically was for MM; as such, this 51A report was not allowed into evidence. (Fair Hearing Record)

Findings of Fact

1. At the time of the filing of the 51A reports, I was seventeen (17) years old. She resided with her mother, CM (hereinafter "CM"). (Exhibit A, p. 1; Exhibit B, p. 1)
2. The Appellant was a staff person at a program where the child attended and had supervisory responsibility over the child; therefore he is a "caregiver" pursuant to Departmental regulation. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16)
3. The child's family had been known to the Department since July 2010. The child had been the subject of other 51A reports of neglect and physical abuse by her mother, CM and CM's boyfriends/partners. (Exhibit A, pp. 8-10)
4. On July 11, 2018, the Department received two (2) 51A reports from separate mandated reporters alleging the neglect and sexual abuse of I by the Appellant, pursuant to M.G.L. c. 119, §51A. According to the initial reporters, the child disclosed that she had been sexually perpetrated by the Appellant who was a XXXXX at the XX Program where the child attended. The child described the Appellant as a "pedophile" and that she had been given alcohol by the Appellant. The reporters alleged there had been some type of relationship that occurred between November 2017 and January 2018. The child showed text messages of affection from the Appellant to the child. It was also reported that the relations were further occurring when the Appellant was living in the 3rd floor apartment of CM's tenement house and had daily access to the child. Lastly, the child disclosed that the Appellant purposefully "got her drunk" to have sex with her and that they had been "dating" since she was fourteen (14) years. (Exhibit A, p. 3; Exhibit B, p. 3)
5. It was alleged that in 2015, the child had made similar allegations against another older adult male, known to be a teacher. (Exhibit B, p. 3)
6. For the six (6) months prior to the filing of these 51A reports, the child had not been active in the XX Program. However, at the child's last encampment at the XX Program, she was seen with the Appellant "chatting" and something was "off" as observed by the reporters. CM denied that the Appellant posed a threat to the child and trusted him. The Appellant was "inactivated" by the Director of the XX Program. (Exhibit B, p. 3)
7. The reports were screened in and assigned for non-emergency response, pursuant to M.G.L. c. 119, §51B. The Department supported the allegations of sexual abuse of I by the Appellant. The Department supported because the child participated in a Forensic Interview and disclosed that she had sex with the Appellant on more than one occasion. She acknowledged that she consented a couple of times but often did not. She also disclosed that she had often drunk alcohol with the Appellant and on more than one occasion he got her drunk and they had sex. The Department concluded there was reasonable cause to believe the child was neglected and sexually abused by the Appellant pursuant to the Department policies and regulations. (Exhibit C, p. 12)

8. When interviewed, CM reported the child was in the custody of MM but that she had been with her since July 4, 2018. MM would not let her see the child for about six (6) months. She reported that the child “comes and goes” as she pleases and does not abide by authority and rules. She doubted that she would participate in a Forensic Interview in regards to the Appellant because nothing came of it last time she engaged in one. (Exhibit C, p. 2)
9. MM reported that the child had attempted suicide “not too long ago” and did not want her to go to CM’s home with the fear that she would try another one while in her care. (Exhibit C, p. 3)
10. When interviewed, the child disclosed that she was willing to undergo a Forensic Interview because she did not want the Appellant “to hurt any more young girls.” (Exhibit C, p. 3)
11. The child’s therapist, BF (hereinafter "BF") confirmed that I was hospitalized in February 2018 and March 2018. BF reported the child had been compliant with her scheduled sessions. The child disclosed she felt responsibility for the struggles between her parents. However, she never disclosed sexual abuse by the Appellant but did disclose sexual abuse by a teacher. BF described CM as a “strong opinioned woman that exaggerates at times and therefore it’s difficult to know what is accurate.” The child was diagnosed with PTSD. (Exhibit C, p. 4)
12. On July 30, 2019, the child underwent a Forensic Interview and disclosed the following in regards to the Appellant:
 - She met the Appellant when she fourteen (14) years of age when she went to the XX Program. They initially just walked and talked in the program but later she considered him to be “like a brother.” They would speak of things that would make her feel uncomfortable;
 - The Appellant was offered an apartment by CM and paid rent as he needed a place to live. He would often watch the child when CM was not home. He would often stare at her and look at her chest and walk into her room without permission;
 - The child reported that she had a boyfriend when she met the Appellant and that he would get jealous. She described getting drunk with the Appellant, engaging in physical altercations and intense verbal altercations. She acknowledged consenting to having sex a “couple of times” because she did what he wanted and was convinced that he loved her. She reported that her mother, CM, did not know anything and was “blind-sided”;
 - The child disclosed the Appellant would often force her to have sex even when she told him to stop. He would purposefully get her drunk in order to have sex with her;
 - The child explained that the Appellant was aware she was minor and even acknowledge to have raped her in their conversations;
 - In their two (2) year relationship, the Appellant began to have another relationship with another minor girl that had started in similar ways as theirs, gaining her trust

- and forming a sibling like relationship;
 - The child's relationship with the Appellant was violent at times and she complained that she suffered bruising from being pushed and having sex, including bruising to her genital area;
 - The child reported during the Forensic Interview that she agreed to be interviewed because she wanted to "put a bad man away." (Exhibit C, pp. 5-8)
13. The DCF Response Worker reached out to the second mandated reporter who reported that the child and the Appellant had been seen together prior to the reports being filed. The child was spoken to and denied that anything was going on and that the Appellant was "like a brother." The reporter also stated that CM had no concerns at the time and trusted Appellant with the child, even writing a letter praising him to the XX Program. (Exhibit C, p. 8; Testimony of SC)
 14. The mandated reporter further stated there had been some issues with the Appellant as a tenant in CM's apartment and that the Appellant had filed a harassment report with the police. A couple of days later, was when the child made disclosures to the mandated reporters. Moreover, according to the mandated reporter this was the fourth time the child made allegations of sexual abuse against someone, at the program (another child and another officer) as well as allegations against a school teacher. (Exhibit C, p. 8; Exhibit 1; Testimony of SC)
 15. When interviewed, the Appellant acknowledged he rented an apartment from CM and did become close with the family. He described the child as immature and often sneaking out of the home. She would often argue with CM. The Appellant also observed the child to be intoxicated one time when she stole two (2) bottles of vodka from CM's cabinet. (Exhibit C, p. 9)
 16. The Appellant reported that he could no longer afford the apartment and decided to move out. He also described the family as "crazy." He moved out on December 1, 2017. According to the Appellant, soon after he began receiving threatening messages from both the child and CM. They were texting him regarding money owed and damage to the apartment. (Exhibit C, p. 10)
 17. The Appellant's friend, SC (hereinafter "SC") reported and confirmed that on April 23, 2018, that the Appellant had received a text message from CM wanting money owed for the apartment. SC also reported a time line of events, starting on May 6, 2018, when the Appellant received a text message from the child to "get on your knees and pray." On July 18, 2018, the child reached out to another adolescent girl regarding her relationship with the Appellant and called the Appellant a "pedophile." On July 2, 2018, the Appellant received another text from CM demanding money. The Appellant was also warned by a colleague at the XX Program to "cover your ass" in regards to the child. That was when the Appellant made the decision to go to the police department and file harassment complaints regarding CM and the child. (Exhibit C, p. 10)
 18. The Appellant denied the allegations. He only recalled the child going to the apartment once when he was not home. Reportedly, she took CM's keys when went into his

apartment when he was not home. He found the door unlocked when he eventually came home. Reportedly, she had continued to harass him at his place of employment when he became inactive at the XX Program. (Exhibit C, p. 10)

19. The Appellant also reported that the child texted him pictures of bruising and scars, stating she did it to herself. Reportedly, she also told him that she did not like the fact he had moved out because everything was fine until he moved out. (Exhibit C, p. 10)
20. The Appellant was present at the Fair Hearing however upon advice of counsel, he did not testify. As such, a negative inference can be drawn. (See, Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976))
21. After review and consideration of all the evidence, I find that the Department did not have reasonable cause to support the allegation of sexual abuse of the child by the Appellant for the following reasons:
 - The child's disclosure of sexual abuse was not supported by sufficient indicia of reliability. (See, Edward E. v. Department of Social Services, 42 Mass.App.Ct. 478 (1997);
 - The child was not a reliable reporter;
 - Evidence existed which detracted from child's disclosure of sexual abuse.
22. Based upon a review of the evidence, the Department did not have reasonable cause to believe that the Appellant neglected the child, and there was no credible evidence that any action by the Appellant placed the child in danger or posed a substantial risk to her safety or well-being. (DCF Protective Intake Policy #86-015, rev. 2/28/16; See, below.)
23. Based upon a review of the evidence in its entirety, the Department did not properly record the Appellant's name on its Registry of Alleged Perpetrators ("RAPL") as all conditions of that listing were not satisfied in this matter. (110 CMR 4.37; DCF Protective Intake Policy #86-015, rev. 2/28/16; See, Analysis)
24. Therefore, the Department's decision to support the allegations of neglect and sexual abuse by the Appellant was not in compliance with its regulations. (110 CMR 4.32, 4.37; DCF Protective Intake Policy #86-015, rev. 2/28/16; See, Analysis)

Applicable Standards

A "support" finding of abuse or neglect means that 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) placed 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. 110 CMR 4.32(2) 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 (1990) 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

A "caregiver" means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with responsibility for a child's health or welfare; and (e) 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

"Neglect" is defined as 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

"Sexual abuse" is any non-accidental commission of any act by a caregiver upon a child that constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caregiver and a child for whom the caregiver is responsible. DCF Protective Intake Policy #86-015, rev. 2/28/16

Department regulations require that "[f]or any investigation and supported report of abuse, the Department shall record the identity of the alleged perpetrator when the report of abuse is referred to the District Attorney and there is substantial evidence indicating that the alleged perpetrator was responsible for the abuse." 110 CMR 4.33 and 4.37

A Fair Hearing shall address (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;. . . In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 CMR 10.05

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, or (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, or (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 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 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

Analysis

It is undisputed that the Appellant was a caregiver pursuant to Departmental regulation and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant disputed, through counsel, the Department's decision to support the allegation that he neglect and sexually abused the child, I, and requested to remove him as an alleged perpetrator of sexual abuse from the Registry of Alleged Perpetrators. The Appellant's counsel argued that the Appellant had been harassed by the child and her mother since he decided to leave their home as a tenant. Moreover, the allegations were prompted and made by false disclosures by the child who was angry at the Appellant for moving out of his apartment in the same tenement home that the child and CM resided. Counsel further argued that Department's investigative response also revealed multiple collaterals that did not corroborate the child's disclosure and even doubted her credibility and/or motivation to disclose. One of the mandated reporters revealed that the child recently made similar allegations regarding a teacher, who had since been reinstated as the child was found not to be credible. (Fair Hearing Record) The child's therapist reported that the child had never disclosed any sexual abuse by the Appellant but her history with the Department revealed that the child had been sexually molested by a same age peer when she was eight (8) years old. In addition, the child had been hospitalized in February 2018 until March 2018 due to suicidal ideation and she suffered from PTSD. (Exhibit B, p. 3; Exhibit C, p. 4) Lastly, counsel argued that the child's disclosures during the Forensic Interview were not consistent as she reported that she consented to have sex with the Appellant and then alleged that she was raped as well as considering him like a brother, having contact with him even after she had made disclosures to mandated reporters. I find that this evidence was not considered by the Department. I find the counsel's argument persuasive and find that the circumstances presented in this case, viewed in light of the surrounding circumstances, did not support a finding of sexual abuse and neglect by the Department.

In making a decision to support a report of abuse or neglect, the Department must consider the entire record, including whatever in the record fairly detracts from the weight of the evidence supporting its conclusion. Arnove v. Commissioner of the Department of Social Services, 43 Mass. App. Ct., 33, 34 (1997); the record did not reflect that the Department did so during this investigation. Rather, the Department relied solely on the child's inconsistent statements, which

were vague and contradictory during the Forensic Interview. (Fair Hearing Record) The Department argued that the child was exploited by the Appellant by having an inappropriate sexual and/or romantic relationship based on her disclosures. The child described drinking with the Appellant, having "consensual" sex and being raped as well as incidents of control and violence. However, the Department failed to take into consideration the child having a significant trauma history prior to meeting the Appellant, due to the struggles she had with her parents. (Exhibit C, p. 4) The child's therapist confirmed that she had been psychiatrically hospitalized and never disclosed during their sessions that she had been sexually abused by the Appellant. Moreover, it was also revealed during the hearing that the child had made similar allegations regarding a teacher and that resulted in being unfounded. (Fair Hearing Record) Collaterals working with the Appellant corroborated that the child reached out to the Appellant via text messages with threats of misconduct soon after he left the apartment. Lastly, the second mandated reporter disclosed that the child was spoken to and denied that anything was going on and that the Appellant was "like a brother." The reporter also stated that CM had no concerns at the time and trusted the Appellant with the child, even writing a letter praising him to the YM Program. Therefore, with no corroborating evidence to support the allegations of sexual abuse and neglect, and in the absence of any reliable evidence, the Department supported this report.

The evidence in this case, in its totality, and as set forth in the Hearing Officer's Findings, was insufficient to support the Department's decision to support allegations of sexual abuse of G by the Appellant. The child's statements alone were not sufficient (Edward E. v. Dept. of Soc. Servs., 42 Mass. App.Ct. 478 (1997) and there was no independent evidence presented to corroborate the allegations against the Appellant. Therefore, a Hearing Officer's decision must be supported by substantial evidence; there must be substantial evidence supporting the Hearing Officer's conclusion that the Department had reasonable cause to believe the Appellant committed the alleged neglect and sexual abuse of the child. Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006) I find that the Department did not to do so. There was no substantial evidence of sexual abuse by the Appellant and insufficient evidence to find that that his direct actions or inactions placed the child in danger or posed a substantial risk to her safety or well-being. It was evident that the allegations against Appellant stemmed from child's anger, trauma and need to maintain a fantasy relationship with the Appellant that never existed as well as anger towards the Appellant leaving the apartment, which further alienated her.

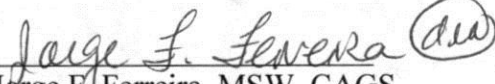
Based on a review of the evidence presented at the Fair Hearing, including testimony from all witnesses and documents submitted by the Department and the Appellant, the Appellant has shown, by a preponderance of the evidence, that the Department's decision or procedural action was not in conformity with the Department's policies and/or regulations; that the Department has not demonstrated there is "reasonable cause to believe" that the Appellant sexually abused or neglected the child which resulted in substantial prejudice to the Appellant.

Given the above Findings and discussion, the Department improperly recorded the Appellant's name on its Registry of Alleged Perpetrators as there is substantial evidence that the alleged perpetrator was not responsible for abuse or neglect in this case. (See, 110 CMR 4.37) Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion". M.G.L. c. 30A, §1(6)

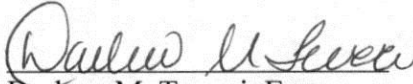
Conclusion and Order

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

The Department's decision to place the Appellant's name on its Registry of Alleged Perpetrators is **REVERSED**.

 (d.u.)
Jorge F. Ferreira, MSW, CAGS
Administrative Hearing Officer

Date: 6/15/2020


Darlene M. Tonuci, Esq.
Supervisor, Fair Hearing Unit

Date: _____

Linda S. Spears
Commissioner