

**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

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(
(IN THE MATTER OF)
(E.C.)
(FH #2019-0970)
(

HEARING DECISION

The Appellant, E.C., appealed the decision of the Department of Children and Families [hereinafter “the Department” or “DCF”], to support for neglect of A [hereinafter “A” or the “reported child”], pursuant to M.G.L., c.119, §§51A & 51B.

Procedural History

On June 11, 2019, the Department received a 51A Report from a reporter alleging physical abuse of A by the Appellant, her father, in connection with the Appellant’s behaviors toward her during a weekend visitation preceding June 11, 2019. The 51A Report was screened in for a non-emergency 51B response assigned to response social worker A.D., who was assisted by out of state DCYF investigator A.M. On July 2, 2019, following the 51B response and clinical case conferencing, the Department unsupported the allegations of physical abuse; added and supported an allegation of neglect of A by the Appellant; and, continued its involvement to conduct a family assessment [FAAP].

The Department notified the Appellant of the decision and his appeal rights by letter dated July 3, 2019. The Appellant filed a timely request for Fair Hearing [“Hearing”] on July 19, 2019, pursuant to 110 CMR 10.06 & 10.08. The Appellant’s request for Hearing was granted and held on October 29, 2019 at the Department’s South Central Area Office in Whitinsville, MA. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a CD. The Hearing record was closed on October 29, 2019, at adjournment.

The following persons appeared at the Hearing:¹

J.R.	DCF Response Supervisor
A.D.	DCF Response Social Worker
K.F.	Attorney for Appellant
E.C.	Appellant [Father]

¹ The DCF Response Social Worker was sworn in and testified. The Appellant was advised by his counsel not to testify.
[Administrative Hearing Record]

The following documentary evidence was entered into the record:

For the Department:

- Exhibit A: DCF 51A Report of June 11, 2019.
Exhibit B: DCF 51B Response Supported on July 2, 2019.

For the Appellant:

- Exhibit 1: Defendant's Objection to Plaintiff's Motion for Temporary Orders, May 21, 2019.
Exhibit 2: Probate and Family Court Memorandum and Temporary Orders for the Parties, June 2019.
Exhibit 3: Defendant's Proposed Agreement to the Probate and Family Court, September 16, 2019.²
Exhibit 4: Joint Stipulation of Parties, Signed by the Parties, September 16, 2019.
Exhibit 5: Temporary Scheduling Order on Complaint for Modification filed March 1, 2019 to include Scheduling of a Pre-Trial Conference for December 18, 2019 and Supplemental Order for Cases Scheduled for Pre-Trial Conference, September 19, 2019.
Exhibit 6: Parties' Joint Motion to Suspend Hearing of September 19, 2019 Allowed by Probate and Family Court on September 19, 2019, filed on September 20, 2019.
Exhibit 7: Plaintiff's Motion to Request an in Camera Review of DCF Documents, August 14, 2019 with Certificate of Service and Notice of November 14, 2019 Hearing on Motion to Defendant.
Exhibit 8: Plaintiff's Motion to Appoint Guardian Ad Litem & Request for Postponement of Pre-Trial Conference Scheduled for September 24, 2019 Agreed by Parties and Filed August 14, 2019 with Certificate of Service and Notice of Hearing on Motion for November 14, 2019 Hearing to Defendant.

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 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.

Issues 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

² This document was not reviewed by the plaintiff, i.e. mother. [Administrative Hearing Record]

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. [110 CMR 10.05]

For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issues are whether there was reasonable cause to believe that a child had been abused or neglected [110 CMR 10.05] and whether the actions or inactions by the parent or caregiver placed the child in danger or posed substantial risk to the child's safety or well-being or the person was responsible for the child being a victim of sexual exploitation or human trafficking. [DCF Protective Intake Policy #86-015 Revised 2/28/16]

Findings of Fact

1. C.D. [hereinafter "mother"] is the mother of three daughters - six-year-old A, who is the reported child in this case; three-year-old A; and, fifteen year-old K from a relationship other than with the Appellant. At the relevant time, the children lived in Massachusetts with their mother, mother's boyfriend R.R., and the boyfriend's eighteen year-old daughter, M. [Exhibit A; Exhibit B, pp. 1, 8; Exhibit 2]
2. The Appellant is the father of six-year-old A; three-year-old A; and, fourteen-year-old Z from a relationship other than mother. The Appellant left the aforementioned marital home in October 2017. At the relevant time, he was divorced from mother; lived out of state with Z; and, had weekly court-ordered visitation with his other two children, from Friday after school to Saturday at 5:00 p.m. [Exhibit A; Exhibit B, pp.1, 3, 5, 8-10; Exhibit 1]
3. The Appellant is a *caregiver* of A, pursuant to the definition of that term within the Department's Protective Intake Policy.
4. The Appellant and mother have been engaged in probate court matters prior to the 51A Report of June 11, 2019, during the subsequent 51B response that resulted in a support for neglect of A by the Appellant on July 2, 2019, and afterward. The Appellant submitted numerous documents reflecting this as summarized below. [Exhibits 1-8]
 - (a) On October 23, 2018, the Appellant and mother [the parties] executed a stipulation for shared legal custody, primary physical custody to mother, and a parenting schedule for the Appellant. The stipulation was lengthy and focused almost exclusively on the parenting schedule.
 - (b) On March 1, 2019, mother filed a complaint for modification and motion seeking legal custody for sole authority over medications to be administered to the [reported child]. Both parties with their respective attorneys appeared in probate court on May 23, 2019 for a hearing to address disputes over medication for the [child]; mother arranging medical appointments for the children on the Appellant's work days so he could not attend; the Appellant wanting to seek second or third opinions as to the reported child's

diagnosis of Attention Deficit Disorder [ADHD] and if yes, whether the child required medication; and, about the Appellant's use and cost of out of network doctors.

- (c) The Appellant, in his objection to mother's motion for temporary orders, went far beyond the above by including: a change in cost structure for medical testing and reimbursement for prior costs, a change in the parenting schedule, a restraint on the Appellant dismissing the children early from school, transportation to extracurricular activities [already in the Judgment], and, the parties providing current addresses.
 - (d) On June 18, 2019, the Judge declined to change legal and physical custody, or the parenting plan, and ruled that either party seeking a second or third opinion or using doctors out of network shall be solely responsible for the uninsured costs. A pre-trial conference was scheduled for September 25, 2019.
 - (e) The aforementioned Judge noted in his memorandum that "Reasonable parents with open minds ordinarily are able to resolve such issues without lawyers and courts".
 - (f) On August 14, 2019, mother motioned the court for an in camera review of DCF documents for an update on the change of circumstances affecting the parties to include the opening of the family's DCF case; for an appointment of a Guardian Ad Litem to investigate and report to the Court all issues pertaining to the care and custody of the reported child and all costs to be born equally; consolidation of both matters; and, postponement of the pre-trial conference of September 24, 2019. The Appellant agreed to the postponement due to DCF involvement and to provide the GAL with an opportunity to complete his/her investigation and make recommendations to the Court.
 - (g) On September 16, 2019, the parties entered into and signed the following joint stipulation: (a) The Appellant will consent to Dr. Y's treatment recommendations including a non-stimulant medication and any therapy. (b) The parties will begin use of "our family wizard" co-parenting app and update it each week, if needed earlier. (c) The parties will select a family provider within the next two weeks and have an appointment scheduled by September 30, 2019. (d) The parties agree to collaborate with school providers and take necessary steps, including consent, should accommodations, a 504 plan, and/or an IEP be recommended. (e) The parties agree that the hearing scheduled for 9/19/19 be suspended until further order of the court.
 - (h) A pretrial conference was scheduled for December 18, 2019 on mother's complaint for modification, filed March 1, 2019. The parties shall comply with their joint stipulation of September 16, 2019 as made part of this temporary scheduling order.
5. On June 11, 2019, just prior to the Judge's ruling in Finding #4 (d), the reported child told a mandated reporter that over the weekend, when visiting the Appellant, he hurt her. He scratched her on the knee, which left a small mark on her left knee; hit her on the right knee with a shoe, which left a faint bruise; and, picked her up and hit her head on the ceiling, which caused her head to bleed. The Appellant gave her an ice pack. There was no injury seen on the reported child's head at this time and the reporter was unable to determine if the

injuries to her knees were caused by the Appellant. The reporter indicated that there had been domestic violence between the Appellant and mother and the Appellant had struggled with substance abuse. The child was not afraid of the Appellant, but angry about what happened and had mixed emotions about visiting the Appellant. This information resulted in the filing of a 51A Report of the same date by the reporter, who alleged physical abuse of the reported child by the Appellant, her father. The allegations were screened in for a 51B response, which included home visits to and interviews with all members of both households, contact with the police for any records pertaining to the Appellant, mother, and mother's boyfriend, a phone interview with mother's therapist, and a medical status update on the three children living with mother. [Exhibit A; Exhibit B; Testimony of the Response Social Worker]

6. On July 2, 2019, following the 51B response and clinical case conferencing, the Department unsupported the allegations of physical abuse, but added and supported an allegation of neglect because the Appellant, according to mother's therapist, had not followed through with any professional recommendation; services had been terminated due to the Appellant's inability to work with providers and mother to co-parent their children; and, the therapist's statement that this has been difficult for mother to provide the children with help. As a result of this behavior, the Department found that the Appellant failed to provide the children with minimally adequate emotional stability and growth. [Exhibit A; Exhibit B; Testimony of Response Social Worker]
7. The Hearing Officer reverses the finding of neglect for the following reasons:
8. There has been no police involvement with this family [Exhibit B, pp. 9, 13] and no prior DCF adult involvement. [Exhibit B, p.1]
9. At the relevant time, the reported child was participating in therapy, reasons unknown and with whom unknown. [Exhibit B, p.2] There is no evidence this therapist was contacted during the 51B response. [Exhibit B]
10. At the relevant time, the reported child had a pediatrician named Dr. D. [Exhibit B, p.2]
11. The reported child was diagnosed with ADHD [Attention Deficit Hyperactivity Disorder] by Dr. D. on May 10, 2019. [Exhibit B, pp. 2, 12] This diagnosis was made by the child's pediatrician and just prior to the probate court hearing involving the parties as seen in Finding #4 (b).
12. The Hearing Officer finds insufficient evidence at this point in time to reliably prove that the Appellant's contrary position as to the reported child's diagnosis and use of medication does not have value, given the polar positions of the parties and the lack of evidence at hand.
13. During her interview of June 19, 2019, mother reported having depression, not being on medication. She was in weekly therapy. [Exhibit B, pp.2-3]

14. The response social worker spoke with mother's therapist on June 28, 2019. The therapist stated that mother's therapy began on 2/15/19. They focus on what mother could do from a parenting perspective to work with the reported child, because of the road blocks and parenting struggles she said she faced with the Appellant. Mother was trying to get help for the reported child, but the Appellant would not allow for extra help, wanted no medications, and would not work or follow through with professionals. [Exhibit B, pp.10-11]
15. The Hearing Officer finds that the Department's support for neglect is primarily based on the statements made by mother's therapist.
16. Interviews with mother on June 19, 2020 and with the Appellant on June 25, 2019 by different investigative social workers reflect their angst toward each other.
 - (a) Mother reported that that the Appellant was verbally abusive when she was with him and sometimes he would be threatening and it would get physical; yet, fifteen year-old K reported never seeing the Appellant hit mother or become physical with her. K did say that the Appellant punched holes in the walls and was always yelling. Mother also said that the Appellant hit the reported child, when she was less than one year old, and left a mark. Mother stated that she also saw the Appellant use a belt and hit Z, who is from another relationship, because Z had been on line with older men and engaging in promiscuous behaviors. [Exhibit B, p.3]; however, Z, who was interviewed on June 27, 2019, was not questioned about this. [Ibid, p.9] Mother also reported that the Appellant abused drugs and alcohol. [Exhibit B, p.3]; however, there is no other information on record to corroborate this. [Administrative Hearing Record] The Hearing Officer finds that the Appellant left the marital home in 2017 and that the statements of mother and K about the Appellant's behavior when the family was intact, may not reflect the more current situation, if true.
 - (b) The Appellant, when interviewed, said that Mother's boyfriend, R, moved right into the marital home when he left and feels he has been physical with his two children: six-year-old A and three-year-old A [Exhibit B, pp. 8-9] yet, all children living with mother reported feeling safe in mother's home [Ibid, pp.4-5] The Appellant also stated that he strongly feels that mother and her boyfriend tell the children bad things about him and that makes them angry with him. [Exhibit B, pp.8-9]
17. The parties had an on-going probate case active during the filing of the 51A report of June 11, 2019 and the subsequent decision of July 2, 2019, to support for neglect of the reported child by the Appellant, her father. [Exhibits 1-8; Testimony of the Response Social Worker] which
18. The Department did not seek out probate court documents during the 51B response. [Testimony of Response Social Worker] The Appellant supplied the documents through his attorney at his Hearing of October 29, 2019. [Administrative Hearing Record]

19. The Appellant's Hearing was conducted on October 29, 2019, before the GAL recommendations were made and the court made a final ruling on mother's motion to modify, which she filed on March 1, 2019. [Administrative Hearing Record]
20. Based on the record as a whole, the Hearing Officer finds the evidence insufficient to meet the Department's policy definition of a support for neglect of six-year-old A by the Appellant, her father. Such evidence, that the reported child was in danger or the Appellant's actions posed a substantial risk to the reported child's safety or well-being would be necessary to support the allegations, as opposed to the Department making a finding of concern, which also requires that the reported child was neglected, but there was no evidence of immediate danger to the reported child's safety or well-being. [DCF Protective Intake Policy #86-015, Revised 2/28/16]
21. The Hearing Officer finds that the Department, in supporting for neglect of A by the Appellant, did not have reasonable cause to believe that the Appellant failed to provide the child with minimally adequate emotional stability and growth and was therefore neglectful.

Applicable Standards

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 51A report under appeal 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, Revised 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, Revised 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]

Caregiver is defined as:

- (1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
- (2) 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 an 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 the age of 18. [Protective Intake Policy: #86-015, Revised 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

Pursuant to 110 CMR 10.06, 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. The Appellant requested a Hearing, which was granted and held on October 29, 2019.

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 #21 and the following discussion.

On July 2, 2019, the Department made a decision to support for neglect of six year-old A by the Appellant, her father, because he failed, by his behaviors of not having the reported child engage in services or take medication for her diagnosis of ADHD, to provide the reported child with minimally adequate emotional stability and growth. The Hearing Officer finds the information insufficient to support this finding. The child was in therapy at the relevant time, however, little is know about the reasons for it, who provided the therapy, and when it began. The child was diagnosed with ADHD in May 2019 by her pediatrician; yet, there is no information concerning his methodology in reaching this diagnosis or if he had the expertise to make such a diagnosis, particularly given the Appellant's opposition regarding this matter.

At the relevant time, the Department relied heavily on information supplied by mother and her therapist in making the finding of neglect.

At the present time, based on information supplied at Hearing by the Appellant, the reported child is in treatment with Dr. Y and taking a non-stimulant medication per a stipulation signed by the parties in September 2019, as part of their probate case. The Hearing Officer finds that the parties' arbitrary positions regarding the reported child's diagnosis and the use of medication better left to the probate court, the proceedings of which have been on-going throughout DCF involvement, to include motions, hearings, pre-trial conferences, and a stipulation by the parties. The probate court, given the extent of its involvement and motions regarding the appointment of a GAL, has a broader scope of review concerning the matter under review, as well as other matters raised by the parties to that court.

Based on a review of the totality of evidence presented at the Hearing, including testimony from the Department and documents submitted by the parties, and when weighing the Appellant's evidence against the Department's, the Hearing Officer finds that the Department's decision, to support for neglect of A by the Appellant, her father, did not comply with its regulations and policies. Pursuant to 10.23, the Appellant met his burden of proof in this appeal.

Conclusion and Order

The Department's decision of July 2, 2019, to support the 51A Report for neglect of A by the Appellant, her father, was not made in conformity with the Department's regulations and policies and therefore **REVERSED**.

Frances Wheat

Frances I. Wheat
Administrative Hearing Officer

BC

June 24, 2020

Barbara Curley

Barbara Curley, L.I.C.S.W.
Supervisor, Fair hearing Unit

Date _____

Linda S. Spears, Commissioner