**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 )
)
JM )
)
FH #2019-1032 )

**FAIR HEARING DECISION**

The Appellant in this Fair Hearing was JM (hereinafter "JM" or the "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "the Department" or "DCF") decision to support the allegation of neglect pursuant to M.G.L. c. 119, §§ 51A and B.

## Procedural History

On June 14, 2019, the Department received a 51A report from a mandated reporter alleging neglect of D (hereinafter "D" or "the child") by the Appellant. The Department screened-in the report for a non-emergency response. On July 1, 2019, the Department supported the allegation of neglect of D by the Appellant. The Department notified the Appellant of its decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on November 19, 2019, at the Department of Children and Families' Worcester West Area Office. All witnesses were sworn in to testify under oath.

The record was closed at the end of the Hearing.

The following persons appeared at the Fair Hearing:

| | |
|---|---|
| David Halloran[1] | Administrative Hearing Officer |
| JM | Appellant |
| JP | Witness |
| HD | DCF Response 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 of bias in this case.

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[1] As David Halloran transferred to another position within DCF after the hearing concluded, this matter was assigned to a successor hearing officer pursuant to 110 CMR 10.29(5).

The Fair Hearing was recorded pursuant to DCF regulations 110 CMR 10.26.

The following documentary evidence was entered into the record for this Fair Hearing:
For the Department:
Exhibit A: 51A Report
Exhibit B: Child Abuse/Neglect Non-Emergency Response

For the Appellant:
None.

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

## Findings of Fact

1) The child of this Fair Hearing was D. At the time of the 51A report, D was four (4) days old. (Exhibit A, p.1).

2) The Appellant is the biological mother of D. Therefore, she is deemed a caregiver pursuant to Departmental regulation 110 CMR 2.00 and DCF Protective Intake Policy #86-015, rev. 2/28/16. (Exhibit A, p. 3; Exhibit B, p. 2).

3) On June 14, 2019, the Department received a report, pursuant to M.G.L. c. §51A, from a mandated reporter alleging neglect of D by the Appellant. The reporter alleged that the child was a substance exposed newborn by the Appellant due to the Appellant's marijuana use during pregnancy. The Appellant smoked marijuana at the beginning of her pregnancy, however, the father (hereinafter "JP") bought the Appellant CBD oil so the Appellant could stop using THC. The Appellant tested positive for marijuana on April 9, 2019. The reporter stated that this could have been the residual effect of the Appellant's last February use. The hospital had no concerns for the Appellant and JP's care of D. They were appropriately

bonding. The Appellant is diagnosed with anxiety and depression. The Appellant was prescribed Zoloft for ten (10) years, but stopped when she found out she was pregnant. The Appellant's urine was negative along with D's. The meconium test results were pending. (Exhibit A, p. 3).

4) On June 17, 2019, the report was screened in for a non-emergency response and was assigned to a response worker (hereinafter "RW"). (Exhibit B, p. 2).

5) On July 18, 2019, RW went to the Appellant and JP's home. RW observed the home and it was viewed without any visible safety hazards and plenty of baby supplies for D. D was sleeping in the Appellant and JP's bedroom. The Appellant had a worker through a non-profit agency she met with weekly that helped with community supports. The Appellant had an intake appointment for individual counseling. The Appellant did smoke marijuana to help with her appetite and to help with nausea. JP found out and told the Appellant that CBD oil would be better for her instead of smoking. The Appellant last smoked marijuana the day before but JP was home and sober. The Appellant only used marijuana and denied any other substance use. The Appellant had a problem with alcohol in the past but was sober now. The Appellant continued to attend AA meetings and had a sponsor. The Appellant and JP had been together for two (2) years. JP had anxiety and depression and was prescribed medication. JP would see a therapist once a month. JP would attend AA meetings and had a sponsor. (Exhibit B, p. 3; Testimony of Appellant).

6) On June 25, 2019, RW called Worcester Pediatrics. D was seen for her new patient appointment on June 19, 2019 and there were no concerns noted by the Doctor. (Exhibit B, p. 4).

7) RW made a phone call to the Appellant's therapist, TM (hereinafter "TM"). TM had a new patient intake with the Appellant on June 21, 2019 and would be seeing the Appellant the following week. The Appellant had good interactions with D and appeared to be well bonded with her. (Exhibit B, p. 4).

8) On June 25, 2019, RW received a call from the mandated reporter and D's meconium came back positive for marijuana. (Exhibit B, p. 4; Testimony of Appellant).

9) On June 26, 2019, RW received a call from the Doctor stating that the Appellant came in with D for their scheduled appointment. D was doing well and the Doctor had no concerns for D. The Doctor was aware that the Appellant smoked marijuana during her pregnancy and that D's meconium came back positive. (Exhibit B, p. 4; Testimony of Appellant).

10) On July 10, 2019, RW received a phone call from the Appellant's worker, DH (hereinafter "DH"). DH had known and was working with the Appellant for a year and a half. DH had been meeting with the Appellant regularly. The Appellant would use DH's agency for community resources and was good at reaching out when she needed help. When the Appellant became pregnant, DH was working with her more on a weekly basis. The Appellant and JP appeared to be bonding with D. DH had no parenting concerns. The Appellant disclosed to DH that she used marijuana while pregnant. (Exhibit B, p. 5; Testimony of Appellant).

11) RW received a phone call from JP's therapist, BV (hereinafter "BV"). BV had no concerns for JP. JP was voluntary in his treatment. JP had been medication compliant and was seeing BV about once a month. (Exhibit B, p. 5).

12) On July 1, 2019, the Department's decision had been made to support the allegations of neglect of D by the Appellant based on the following:

   a) The report was alleging that D was a substance exposed newborn;

   b) The Appellant smoked marijuana while she was pregnant to help with nausea and with her appetite. When the Appellant was discharged from the Hospital, she smoked marijuana; and

   c) D was exposed to marijuana while in utero and her meconium came back positive for marijuana. (Exhibit B, p. 6)

13) In light of the totality of the evidence in this case, I find that the Department did not have reasonable cause to believe that the Appellant neglected D. There were sufficient facts collected to conclude that that the Appellant's actions did not place the child in danger or pose a significant risk to her safety or well-being. (110 CMR 2.00; 4.23; DCF Protective Intake Policy #86-015, rev. 2/28/16).

## Applicable Standards

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A." Care and Protection of Robert, 408 Mass. 52, 63 (1990) This same reasonable cause standard of proof applies to decisions to support allegations under s. 51B. Id. at 64; M.G.L. c. 119, s. 51B "Reasonable cause" implies a relatively low standard of proof which, in the context of 51B, serves a threshold function in determining whether there is a need for further assessment and/or intervention. Id. at 64

"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)

"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

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

"Danger" is defined as a condition in which a caregiver's actions or behaviors have resulted in harm to a child or may result in harm to a child in the immediate future. DCF Protective Intake Policy #86-015, rev. 2/28/2016

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Policy z386-015, rev. 2/28/2016

A finding of support requires that there be: 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 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. 2/28/2016

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 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 for D. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.

On June 14, 2019, the Department received a report, pursuant to M.G.L. c. §51A, from a mandated reporter alleging neglect of D by the Appellant. The reporter alleged that D was a substance exposed newborn due to the Appellant's marijuana use during pregnancy. The Appellant smoked marijuana at the beginning of her pregnancy, however, JP bought the Appellant CBD oil so the Appellant could stop using THC. The Appellant tested positive for marijuana on April 9, 2019. The reporter stated that this could have been the residual effect of the Appellant's last February use. The Appellant's and D's urine was negative. The meconium tested positive for marijuana.

On July 1, 2019 the Department's decision had been made to support the allegations of neglect of D by the Appellant. There was sufficient evidence to support the allegation as D was exposed to marijuana while in utero and her meconium came back positive for marijuana. The Appellant admitted to smoking marijuana during her pregnancy and continued to smoke marijuana after being discharged from the hospital with D.

At the Hearing, the Appellant, denied and disputed the allegations. It is undisputed that the Appellant smoked marijuana while pregnant. The Appellant is diagnosed with anxiety and depression. The Appellant was prescribed Zoloft for ten (10) years, but stopped when she found out she was pregnant.

The Appellant started smoking the marijuana to help with nausea, sleeping and eating. The Appellant tried to get prescribed Zofran to help with these symptoms. The Appellant's doctor would not prescribe her the Zofran because it was not good for pregnant women. The Appellant had no appetite and could not get out of bed. The Appellant knew that her actions were not healthy for herself or her baby. The Appellant was looking out for the best interest of her and D. The Appellant tried using other natural remedies before trying the marijuana which included lemon tea, vitamin B6 and roots.

The Appellant graduated from a halfway house. The Appellant attended AA meetings weekly and had a sponsor but recently had to look for a new one. The Appellant worked with a therapist and a social worker.

The hospital had no concerns for the Appellant's care of D. They were bonding appropriately. D's pediatrician noted no concerns from 2 visits. The Appellant's new therapist, TM, reported the Appellant had good interactions with D and appeared well bonded. The Appellant's worker, DH, also reported no concerns and that the Appellant appeared to be bonding well with D.

To support an allegation of substance exposed newborn – neglect, the Department must collect facts which demonstrate that the Appellant, in exposing her child to marijuana, neglected her child, i.e. failed to provide minimally adequate care, pursuant to the definition of neglect. The support decision cannot solely be based upon the fact that the child was substance exposed. The substance exposure must impact the child in such a way that it meets the definition of neglect. The facts in this case does not meet those requirements. It was just the opposite; not one collateral that the Department contacted had concern for the Appellant's care of D.

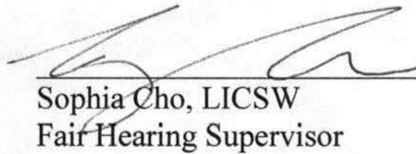
Considering the totality of the evidence, this Hearing Officer has determined the Department's decision that the Appellant neglected J was not based on reasonable cause or supported by

substantial evidence. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); also see Wilson v. Department of Social Services, 65 Mass. App. Ct. 739, 843 N.E.2d 691 (2006). Additionally, there was no evidence that the Appellant's actions or inactions placed D in danger or posed a substantial risk to D's safety or well-being, as required to support an allegation of neglect. DCF Protective Intake Policy #86-015, rev. 2/28/16

**Conclusion and Order**

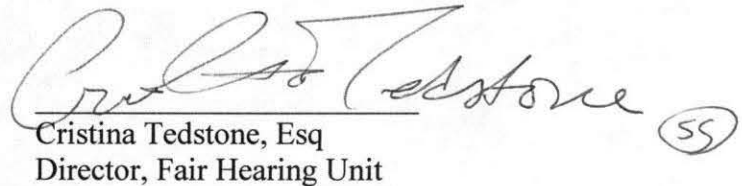
The Department's decision to support allegations of neglect of D by the Appellant was made without a reasonable basis and therefore, the Department's decision is **REVERSED.**

8/21/2020
Date



Sophia Cho, LICSW
Fair Hearing Supervisor

8/21/2020
Date



Cristina Tedstone, Esq
Director, Fair Hearing Unit

Date

Linda S. Spears
Commissioner