

**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)
)
 NK) **FAIR HEARING DECISION**
)
 FH # 2019-1059)
)

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

Procedural History

On March 2, 2019, the Department received a 51A report alleging the neglect of the children by the Appellant. The Department conducted a non-emergency response and, upon its conclusion the Department made the decision to support the allegations of neglect of the children 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 initially scheduled for September 26, 2019, and rescheduled to December 5, 2019, and upon request of Appellant's Counsel was continued and held on January 9, 2020, at the DCF Lawrence Area Office. All witnesses were sworn in to testify under oath. The record remained open until January 31, 2020, to allow the Appellant to submit additional evidence; which was received and reviewed. The record closed on January 31, 2020.

The following persons appeared at the Fair Hearing:

Lisa Henshall	Fair Hearing Officer
NK	Appellant (Mother)
PB	Appellant’s Counsel
ET	DCF Response Worker (RW)

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 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 Intake Report

Exhibit B: Child Abuse/Neglect Non-Emergency Response

For the Appellant:

Exhibit 1: Human Rights Article dated January 1, 2019

Exhibit 2: Child's Paperback Book

Exhibit 3: Photographs

Exhibit 4: Affidavit of BBS (maternal grandfather)

Exhibit 5: Affidavit of SD (maternal grandmother)

Exhibit 6: Urgent Care Visit dated May 22, 2018

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 Appellant is the mother of the children, M and I, twin girls, who were ten (10) years old at the time of the response. (Exhibits A & B, p. 1)
2. The Appellant, as the mother of the children, was a caregiver pursuant to DCF regulation 110 CMR 2.00 and DCF Protective Policy #86-015, rev. 2/28/16. (Fair Hearing Record)
3. The family had no prior history with the Department. (Exhibit A, p. 4; Exhibit B, p. 1)
4. The family resided in the United States on a Visa. The Appellant was from Kuwait and the father, DJ (hereinafter "DJ"), was from India. The Appellant worked for a corporation and DJ

was teaching and more involved with the daily care of the children due to his hours. (Exhibit B, pp. 2, 4; Testimony of the RW; Testimony of the Appellant)

5. On March 2, 2019, the Department received a report pursuant to M.G. L. c. 119, §51A, alleging the neglect of the children by the Appellant. The reporter alleged that the father, DJ, walked into the police department "to report a domestic violence report against mother." DJ alleged "a history of domestic violence and mental abuse perpetrated by the mother." DJ reported the Appellant had hit him with her hand and a book. DJ reported he would obtain a restraining order and the Appellant was arrested. The Appellant was charged with domestic assault and battery on an intimate partner. The children were present for the altercation. The report was screened in for a non-emergency response. (Exhibit A, pp. 3 & 5; Exhibit B, p. 2; Testimony of RW)
6. The RW interviewed the children at their school, unannounced. I was the more out spoken of the two. The RW described the children as being "more timid." I felt "DCF is there because their mom and dad are fighting." At the time of the incident, the children were in the home, upstairs, when they heard the Appellant yelling at their father, DJ. Subsequently, the children went to a birthday party and when DJ picked them up he told them he had gone to the police. At the time of the report, the children and DJ were residing outside of the home with a "host family." The Appellant was residing in the home. (Exhibit B, pp. 2, 4; Testimony of the RW)
7. When interviewed, the children stated they "do not want their mom to stay with them" as she yells and was mad at them frequently. The Appellant's yelling "scares them." (Exhibit B, p. 2) When the children were interviewed a second time by the RW they denied being fearful of the Appellant, but did not want her to return home as they did not like how she treated "their dad." (Exhibit B, p.7) There was no evidence that the children were asked why they were no longer fearful of their mother, the Appellant.
8. DJ would go into the children's room and would tell them the Appellant should not be yelling at him and he was sorry. (Exhibit B; Testimony of the RW)
9. The children "heard" the Appellant hit their father, DJ, but never saw her hit him. (Exhibit B, pp. 2-3; Testimony of the RW)
10. There was no evidence that DJ sustained a physical injury as a result of the alleged incident. (Testimony of the RW)
11. There was no evidence that the children witnessed the Appellant hit DJ. The RW did not get clarification in regards to what they heard with respect to the hitting. (Exhibit B; Testimony of the RW)
12. DJ was involved with the school and would pick the children up from school and take them to therapy. The children had been in therapy for six (6) months and missed recess and lunch to attend. DJ did not want the Appellant to know that the children were in therapy because he "fears she will be very upset." The Appellant was unaware that the children were in therapy until DCF met with her during the response. (Exhibit B, pp. 2, 4, 8-9, 10; Testimony of the RW)

13. The children were "good students." (Exhibit B, p. 2; Testimony of the RW)
14. The children were up-to-date medically and there were no concerns noted. According to the pediatric practice, the children were new to the practice and were brought in by DJ in 2018. (Exhibit B, p. 7)
15. There were no other protective concerns regarding the children. (Fair Hearing Record)
16. When interviewed, DJ reported the children were "scolded for touching mom by accident." The children would be sent to their room or to the wall to think about what they did wrong. The Appellant would have DJ and the children "write down the sequences of what they need to do." DJ would have to help get her up and dressed in the morning, apply moisturizer to her body after she bathed, put tooth paste on her tooth brush for her and "wait for her to finish with a glass of water and a probiotic." If DJ missed something the Appellant would ask him to repeat the "sequence over and over." In the past, DJ missed work as the Appellant "was angry he had forgotten a step." When the two argued and the Appellant asked him to leave the home and he refused she becomes angry. The Appellant has thrown things at him. The children "hear this but do not see it." DJ "has never hit mom." When she was bad he tried to restrain her stating, "it is ugly and she spits at me." The Appellant had "PMS issues [and] these reported incidents happen within the first few weeks of her getting her period." (Exhibit B, p. 5; Testimony of RW)
17. DJ was scared of the Appellant and reported he was a victim of domestic violence. DJ began divorce proceeding during the DCF response. DJ did not secure a restraining order as he was trying to be nice and was worried about her immigration status. DJ had told the Appellant she needed to vacate the house and if she did not comply he was going to file a restraining order. DJ alleged he was fearful of the Appellant and concerned she would allege that he raped her if he filed. (Exhibit B, pp. 4, 7; Testimony of the RW)
18. The RW encouraged DJ to obtain a restraining order. The RW told DJ "if he waits to get a restraining order then he's really not scared of the Appellant" and the the courts would think he was not really in fear. DJ did not secure a restraining order. (Exhibit B, p. 4; Testimony of the RW)
19. DJ initiated the therapy for the children "as he was aware that the behaviors in the house (were) not appropriate for the children." The RW spoke to the therapist, KC (hereinafter "KC") who was also DJ's therapist. The children had not witnessed the physical abuse of the father however they had heard it. The concerns which had been brought to KC's attention were the Appellant and her "mental health issues." There were concerns that the children had to eat at certain time as the Appellant "insists on eating first in quiet" and that the children cannot be loud when the Appellant was relaxing. KC spoke of DJ having to get the Appellant dressed and undressed. The children reported that the Appellant had whispered in their ears, "do not say good night to your dad he is an evil man." KC "was going to file and then all this happened." There was no evidence that KC had ever spoke to the Appellant. (Exhibit B, pp. 8-9, 10; Testimony of the RW)
20. During the response, DJ and the children returned to the home and the Appellant moved out. Later, the Appellant returned to the home and the two (the Appellant and DJ) were in

different rooms. (Testimony of the RW; Exhibit B, pp. 10)

21. The Appellant was interviewed with her Attorney PB present. The Appellant reported the children did not need a lot for discipline as they “are really good.” As discipline, the Appellant put the children in time out according to criteria in the America Academy of Pediatrics. The Appellant denied mental health issues. The Appellant did not wish to speak to about her relationship with DJ as they were going through a divorce. The Appellant felt that the children were safe with DJ. The Appellant said they would argue with one another and could be insensitive to their father. The Appellant was not interviewed about the incident as she was arrested. Commonwealth v. Howard, 446 Mass. 563 (2006) (Testimony of the RW; Exhibit B, pp. 9-10)
22. It was undisputed that the Appellant and DJ had an argument at the time of the reported incident. This was where the Appellant’s version differs from DJ’s account. The Appellant testified she was upset with DJ because he left milk on the stove which overflowed. The Appellant had read an online article online about getting organized and had been working with him around getting more organized. When the argument was starting to get heated the Appellant sent the girls upstairs. The Appellant alleged that DJ became upset and said she was not being an obedient wife and that her parents had spoiled her. The argument became physical when DJ restrained her and “assaulted her on her buttocks with his knee.” The Appellant fell onto the floor face down and recalled DJ hitting her. The Appellant grabbed a paperback book and hit DJ with it and it was enough to startle him” at which point the Appellant ran to the bedroom. The Appellant sustained marks and bruises as a result. (Exhibit 2 & 3; Exhibit 6; Testimony of the Appellant)
23. The Appellant and DJ had an arranged marriage. It was not “frowned upon” for a husband to hit or rape his wife in India where DJ was from. (Exhibit 1; Testimony of the Appellant)
24. At the hearing, evidence was presented that the Appellant was a victim of domestic violence by DJ since 2009. In addition, to the Appellant’s testimony the Appellant’s parents wrote affidavits about the physical abuse that they witnessed in the home; DJ assaulting the Appellant. They also questioned DJ’s credibility. There was also evidence that the Appellant and DJ would fight and “their tempers would flare.” During the response, DJ presented evidence that he was victim of domestic violence by the Appellant. It remains unclear what was going on except that the two, the Appellant and DJ, were involved in a divorce. (Exhibits 4 & 5; Testimony of the Appellant; Exhibit B)
25. When the Appellant met with the DCF RW she did not want to say anything bad about DJ and had not spoken to DCF about any of it because she was concerned that DCF was going to take her children away. In addition, the Appellant had criminal charges pending and her criminal attorney advised her of her participation with DCF. (Exhibit B; Testimony of the Appellant)
26. DJ had alleged the Appellant was diagnosed with depression and prescribed medication. There was no evidence that the Appellant was diagnosed with any mental health issues or was prescribed medication. (Testimony of the RW; Exhibit B)

27. At the time of the hearing, the Appellant was engaged in counseling and had a domestic violence advocate. (Testimony of the Appellant)
28. At the end of its response, the Department, pursuant to M.G.L. c. 119, §51B, supported the aforementioned report for neglect of the children by the Appellant for the following reasons:
- DJ reported that the Appellant had gotten angry with him and hit him on the back and the back of his head with a book and her hand;
 - DJ went to the police to file a report and disclosed a history of domestic violence including physical abuse;
 - The Appellant was arrested for domestic assault and battery on an intimate partner;
 - The children were interviewed at school, unannounced;
 - The children described the Appellant as being “mad frequently.” The Appellant started the fights with DJ and they got scared when the Appellant was angry with them and DJ;
 - The children heard the Appellant hit DJ;
 - The Appellant moved back into the home during the response and “whispered negative things to the girls”;
 - The situation in the home when the Appellant was present was not a safe/positive environment as the Appellant had been abusive to DJ while the children were home and present;
 - “Children who are witness serious conflict takes a toll on children. Fighting parents affect children’s mental health in several ways.” The Appellant used the “cold treatment” with I and “behaviors such as this creates emotional damage”;¹
 - “The parents do not communicate effectively regarding the children. DJ has the girls in therapy without the mother’s (Appellant) knowledge...”;
 - The family was again residing in the same home and the children “are witness to the arguing and conflict.”
 - The case remained open to “find out what actually going on”;
 - The Department concluded this constituted neglect as the Appellant failed to provide the children with emotional stability due to the violence in the home and her actions placed the children at substantial risk to their well-being as defined by its regulations 110 CMR 2.00 and DCF Protective Intake Policy #86-015, rev. 2/28/16 (Exhibit B, pp. 12-13; Testimony of the RW)
29. The Department did not support for domestic violence as the DCF RW “did not have 100 percent accuracy” in regards to the DV and the children had not disclosed anything. (Testimony of the RW)
30. Based on the totality of the evidence, I find that the Department did not have reasonable cause to believe that the children were neglected by the Appellant per the Department's definition:
- DJ and the Appellant did have an argument at the time of the reported incident. What happened during the argument remains unclear as the both allege domestic violence by the other;

¹ The “cold treatment” was when the Appellant wouldn’t speak to the children if she was mad at them. (Testimony of the RW)

- DJ went to the police alleging domestic violence by the Appellant and a physical assault. The Appellant was arrested;
- The children were upstairs and heard the argument and “heard” the Appellant hit DJ;
- When asked how they know DJ was being hit, “they hear their mom yell at dad and ‘be mean to her’”;
- At the time of the response, the DJ and the Appellant had secured Counsel and were in the process of divorcing. The children initially reported being scared of the Appellant but at a subsequent interview with the RW denied being fearful;
- Unbeknownst to the Appellant, the children were engaged in counseling with DJ’s therapist;
- The children were doing well in school and there were no other protective concerns;
- At the hearing, there was evidence that the Appellant was a victim of domestic violence. It remains unclear what was going on in the home and while it was concerning that the two were arguing there was insufficient evidence to conclude that the children were neglected. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16)

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

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

Analysis

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

The Appellant, as argued by Counsel, contested the Department’s decision to support the allegation of neglect of the children and maintained that there was no evidence that the Appellant neglected the children. Counsel argued that the DCF RW “lacked a present memory of the investigation,” which was necessary to determine that the Appellant had neglected the children. It was argued that the Department failed to establish the location of the children during the reported incident and had relied on DJ’s report to the police about what had occurred and the Appellant’s arrest, despite DJ having “no visible bruises or wounds” in the area where he had reported to have been hit. Further, the RW had not established what time the incident had occurred. At the hearing, it was the Appellant’s testimony that the children were upstairs at the time of the incident as she had instructed when the argument ensued. The RW testified that the children were scared when they heard their parents fighting. In fact, the RW testified that the children never saw their mother hit their father; the father would go to their bedrooms after a fight and tell the children he was sorry that “their mother was yelling at him.” Further, the RW interviewed the children at school where they were described as “good students and discipline problems.” The school reported that DJ had been taking the children out of school to attend

therapy without the Appellant's knowledge and Counsel argued that the therapist's opinion was suspect as she had no legal authority to provide services to the children without the Appellant's consent or speaking to her to gain her perspective. There was testimony provided that contradicted what DJ reported. For instance, there was no evidence that the Appellant had mental health issues which was contrary to what DJ reported to the Department and the therapist. Moreover, there was evidence presented that the Appellant was the victim of domestic violence by DJ. Finally, it was argued that the Department failed to establish that the Appellant neglected her children and the decision "must be reversed." The argument was persuasive.

The Department argued that their decision to support the allegations of neglect of the children by the Appellant should stand. The Appellant was arrested for Assault and Battery on an intimate partner after DJ made a report with the police. While DJ spoke of being in a domestic violence relationship with the Appellant the Department was unsure as this was not corroborated by the children. The Department's decision to support the allegation was due to the children's report that the Appellant fights with DJ and is "mad frequently." While the children never saw the Appellant hit DJ they reported hearing her hit him. The children reported being scared when the Appellant was angry at them or their dad. The Department argued that witnessing serious conflict takes a toll on children and parents fighting impacts children's mental health in several ways. The Appellant would give I the silent treatment which creates "emotional damage." The Appellant did report that DJ was the aggressor and that he was the one who verbally abused the Appellant and the children. The Department determined that the Appellant failed to provide the children with emotional stability and that her actions of throwing things in the home placed them at substantial risk to their well-being.

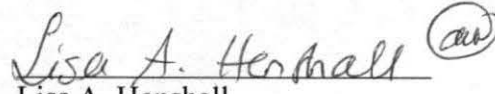
While it was reasonable for the Department to have concerns about what was going on within the home there was insufficient evidence to support the Department's assertion that the children were neglected. It was undisputed that the Appellant and DJ argued and that at the time of the response they were in the process of getting divorced. The Appellant and DJ had an arranged marriage and their respective cultures appeared to have played a part in what was going on depending on who you believed. DJ reported he was the victim of abuse while the Appellant argued that she was. It remains unclear but what was clear was the DJ was the primary caregiver to the children due to the Appellant's work. DJ had the children seeing a therapist without the Appellant's knowledge, and while the therapist had concerns her concerns were based on what DJ and the children had reportedly told her. The children were not asked about her concern that the Appellant would whisper negative things in the children's ear. The day of the incident, the Appellant and DJ were arguing and the children were upstairs. The children reported "hearing" the Appellant hit DJ but there were no further details to determine how they knew it was the Appellant hitting DJ. The children initially reported being scared when they argued but later said they were not fearful of the Appellant. The children were doing well in school and there were no protective concerns. The children preferred to reside with their father, DJ. There was no evidence that the children were being exposed to the domestic violence but they were exposed to the arguing in the home. There was no evidence to determine how the children were impacted of that the Appellant failed to provide them with their basic needs.

Upon review of the evidence presented, in its totality, there was insufficient evidence that the Appellant's actions constituted neglect, as defined by the Department's regulations, and that the

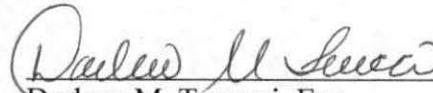
Appellant's actions or inactions placed the children in danger or posed a substantial risk to the children's safety or well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 4.32 (2)

Conclusion and Order

The Department's decision to support the 51A report of neglect on behalf of the children, M and I, by the Appellant is **REVERSED**.


Lisa A. Henshall
Administrative Hearing Officer

6/17/2020
Date


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

Date

Linda S. Spears
Commissioner