

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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BOSTON, MASSACHUSETTS 02111**

**Linda S. Spears
Commissioner**

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IN THE MATTER OF)
)
 RH) **FAIR HEARING DECISION**
)
 FH # 2019-1276)

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

Procedural History

On August 1, 2019, the Department received another 51A report alleging neglect of R and B (hereinafter “R” and “B” or “the children”) by their biological father, RH as well as the physical abuse of B by RH.¹ A non-emergency response was conducted and upon its conclusion the Department made the decision to support the allegation of neglect of the children by their father, RH. The allegation of physical abuse of B by RH was not supported. 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. The hearing was held on February 4, 2020, at the Department’s New Bedford Area Office. All witnesses were sworn in to testify under oath. The record remained open until February 28, 2020 to allow the Appellant the opportunity to submit additional documentary evidence; which was received, reviewed and entered into evidence. The record closed on February 28, 2020.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira	Administrative Hearing Officer
RH	Appellant
JH	DCF Response Worker

¹ Previous to this 51A report, on July 17, 2019, the Department received a 51A report from a mandated reporter alleging the neglect of Lo and Li by their biological father, MM and mother, CH. Neither MM or CH were a party to this hearing; the 51A report was not accepted into evidence at the Fair Hearing. (Fair Hearing Record)

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 digitally recorded pursuant to Department regulations 110 CMR10.26.

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

For the Department:

- Exhibit A: 51A Intake Report dated 8/1/19
- Exhibit B: Child Abuse/Neglect Non-Emergency Response
- Exhibit C: 51A Intake Report dated 7/17/19²

For the Appellant:

- Exhibit 1: NH DCYF Referral
- Exhibit 2: Temporary Probate Order dated 8/30/11
- Exhibit 3: Written Testimony Regarding Removal
- Exhibit 4: Summary of Child Support from CH
- Exhibit 5: Rebuttal Information
- Exhibit 6: Children's Report Cards
- Exhibit 7: Information from KS
- Exhibit 8: Affidavits 2011
- Exhibit 9: Affidavits 2019/2020
- Exhibit 10: Visitation Order, Dictation and Texts
- Exhibit 11: NH DCYF Record

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

² Exhibit C was submitted by the Department during the Fair Hearing but was not allowed into evidence. Exhibit C referred to allegations of neglect of the child, Li and child Lo by MM and CH, which were not under appeal in this instant matter. Moreover, the Department made a decision of "substantiated concern" regarding these allegations. As they were not supported, there was no grounds for appeal pursuant to 110 CMR 10.36 and DCF Protective Intake Policy #86-015, rev. 2/28/16 (Fair Hearing Record)

Findings of Fact

1. At the time of the filing of the 51A report, B was fifteen (15) years old and R was twelve (12) years old. They resided with the Appellant and visited, their mother, CH (hereinafter "CH") and their other siblings, Lo, age two (2) and Li, age four (4), every other weekend. (Exhibit A, pp. 1, 3; Exhibit B, p. 1)
2. The Appellant is the children's biological father; 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 Appellant had previous involvement with the Department dating back to April 2012 due to allegations of physical abuse of the children. An Initial Assessment (IA) concluded there was no/minimal concern regarding the allegation as there was no evidence to suggest the Appellant had physically abused the children. In May 2013, additional allegations of neglect of the children by the Appellant was filed. The allegation was "screened out" as the reporter was unable to provide specifics and collaterals involved with family had no concerns. (Exhibit A, pp. 7-8)
4. On August 1, 2019, the Department received a 51A report from a mandated reporter alleging the neglect of R and B by the Appellant as well as physical abuse of B by the Appellant, pursuant to M.G.L. c. 119, §51A. According to the mandated reporter, the child disclosed that the Appellant "fat shames" B. B also reported she was slapped and punched by the Appellant. R confirmed B's statements. However, R denied being hit or being verbally abused by the Appellant but did witness this happening to B by the Appellant. Both children disclosed they had also witnessed many verbal altercations between the Appellant and CH. CH filed a restraining order against the Appellant. It was granted as to CH, Li and Lo but not as to B or R. (Exhibit A, p. 3)
5. The report was screened in and assigned for non-emergency response, pursuant to M.G.L. c. 119, § 51B. The Department supported the allegations of neglect of the children by the Appellant. The Department supported because B disclosed being "fat shamed" by the Appellant as well as being slapped and pinched. R disclosed witnessing the Appellant verbally mistreating B and both children disclosed witnessing frequenting verbal altercations between the Appellant and CH. The children also disclosed not wanting to return to the Appellant's care. Therefore, the Department concluded that the Appellant neglected the children, and his actions impacted the children's emotional well-being, stability and growth. (Exhibit B, p. 8)
6. The Department Response Worker, JH (hereinafter "JH") spoke with the mandated reporter who reviewed the report to be accurate as written. The mandated reporter also advised that CH wanted to be in a support group due to the Appellant's emotional abuse but when the group leader felt CH was "too loud" to participate. The reporter expressed concerns regarding CH's mental health due to her self-disclosure of past trauma. (Exhibit

B, p. 2)

7. JH met with CH who reported that the report was misconstrued and that she was not referring to her current husband, MM, when she had disclosed being verbally and emotionally abused but was referring to the Appellant. CH disclosed that she endured "spousal rape" for years by the Appellant as well as emotional abuse. Moreover, she had been overwhelmed with custody issues in regards to the children. (Exhibit B, p. 3)
8. On July 25, 2019, CH contacted the DCF Response Worker and informed him that the Appellant had brought the children out of state and she was going to "serve" him and have the children returned as they were not supposed to be out of state without mutual consent even if the Appellant was the custodial parent. CH filed and obtained a restraining order on behalf of herself and all the children. (Exhibit B, p. 4; Exhibit 2; Testimony of JH)
9. When interviewed, B disclosed that the Appellant "physically, emotionally and mentally abused her." She reported being "fat shamed" which caused her having "eating issues." Moreover, she disclosed that the Appellant had also slapped her face, pinched her leg and slapped her ribs. Reportedly, B would tell him to stop but "he would just laugh." (Exhibit B, p. 4)
10. B further reported that she had wanted to engage in therapy but that the Appellant did not want her to do so, in order to avoid her disclosing the concerns she had with him. B also expressed concern being fearful being at home, especially when the Appellant and his girlfriend argued; which made her want to call the police to intervene. When with the Appellant in NH, she felt isolated because he would turn off the WiFi so she was not able to tell CH where she was. (Exhibit B, pp-4-5)
11. B described incidents whereby the Appellant was emotionally abusive as a form of punishment, including "smashing her electronics", saying disparaging things during car rides and "getting into her face" and yelling. The child did not want to return to the Appellant's home out of fear of further abuse. (Exhibit B, p. 5)
12. JH met with R who denied any physical or emotional abuse by the Appellant. However, he disclosed that he had witnessed the Appellant pinch B's leg and slap her face, but denied seeing any marks or bruises. R denied being afraid of the Appellant. He was unsure if he wanted to return to the Appellant's home. (Exhibit B, p. 5)
13. JH met with the Appellant. The Appellant denied the allegations against him. He reported he had been "nothing but loving to the children" which he indicated was recognized by the Court. The Appellant reported that CH had coached the children and made fabricated statements in order to influence the children in making damaging allegations against him, which also had been recognized by the Court as problematic and concerning. (Exhibit B, p. 5; Exhibit 2; Exhibit 7; Testimony of Appellant)
14. The Appellant testified that CH's reaction to his move to NH stemmed from her desire to

cause problems with his relationship with the children and in an attempt to get custody of the children so that she would no longer have to pay child support. The Appellant testified that CH was one hundred sixty one (161) weeks behind in child support. He testified the move to NH was due to a professional opportunity and for a better life for the children, stating that it was a family decision and agreed upon by the children and his current girlfriend. Moreover, all parties were informed and aware and it was submitted to the Guardian Ad Litem in the custody matter that was pending in Probate Court. (Exhibit B, p. 5; Exhibit 3; Exhibit 4; Exhibit 5; Testimony of Appellant)

15. The Appellant denied ever using inappropriate discipline to redirect the children's behaviors but had always used supportive services, including counseling and enforcement of rules of consequences to address their behaviors. The Appellant provided evidence of this and that it had been known by the Department of Children, Youth and Families (hereinafter "DCYF") in NH. (Exhibit B, p. 5; Exhibit 1; Exhibit 5)
16. The Appellant encouraged B to eat healthy and be active rather than indulge on "junk food." The Appellant denied that he ever "fat shamed" his daughter B. The children did well overall, especially academically when they moved and lived in NH. (Exhibit B, p. 5; Exhibit 3; Exhibit 5; Exhibit 6; Testimony of Appellant)
17. The Appellant provided documentary evidence of CH "manipulating" B into cancelling her therapy appointments and how the Appellant was unaware of this arrangement until contacted by the therapist. The Appellant indicated this was another way of CH trying to control the situation in order to gain custody of the children as she had the habit of "framing" negatively with DCF and DCYF. (Exhibit B, p. 5; Exhibit 10; Testimony of Appellant)
18. Character references submitted by the Appellant from the initial separation/divorce in 2011 and most recent Probate involvement in 2019/2020 described the Appellant as a nurturing and thoughtful parent, placing the children's needs first at all times. The documents also portrayed the Appellant as one who tried to cooperate with CH, who often sabotaged situations and agreements for her own needs, something the court described as "problematic." (Exhibit 8; Exhibit 9; Finding #13)
19. The Department made their decision to support the allegation of neglect of the children based on B's "consistent disclosures" and R corroborating B's disclosures by witnessing the verbal altercations. However, the Department noted that there had been similar allegations that were deemed to be unfounded, which attributed to the Appellant's credibility and denial of the allegations. Nevertheless, based upon the child's statements the allegations of neglect were supported. (Exhibit B, p. 8; Testimony of JH)
20. On August 15, 2019, the Probate Court dismissed CH's restraining orders against the Appellant and returned legal and physical custody of the children to the Appellant with CH having visitation on the weekends/overnight. An Order was issued following the Department's testimony in Court. (Exhibit B, p. 9; Testimony of JH)

21. After review and consideration of all the evidence, I find that the Department did not have reasonable cause to believe that the Appellant's behavior constituted a failure to provide the children with minimally adequate care, emotional stability and growth for the following reasons:

- The children's disclosure of neglect was not supported by sufficient indicia of reliability. (See Edward E. v. Department of Social Services, 42 Mass.App.Ct. 478 (1997);
- The children were not reliable reporters;
- Evidence existed which detracted from children's disclosure of neglect.

22. Therefore, the Department's decision to support the allegations of neglect 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

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 was 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 the Department’s decision to support the allegation that he neglect the children and requested that the decision be reversed. The Appellant argued that the allegation of neglect of the children stemmed from his ex-wife (CH) who had historically tried to undermine the Probate Court’s decision to award him full legal and physical custody in 2011. The Appellant further argued that in this instant matter CH deceived Probate Court and DCF, which led to a “flurry” of false allegations regarding the children, specifically B. Moreover, the Appellant argued the children were coached into making the allegations because the documentary evidence showed that they were content with his care and their move to NH. (Fair Hearing Record) The Appellant provided multiple documentary evidence that showed fabrications and misstatements by CH in order to “paint the Appellant in a negative light.” The documents, including numerous affidavits and character references, indicated the Appellant’s attempts to also utilize professional supportive services through DCYF and a clinician to address B’s behavioral issues. All of which,

it was argued, was clearly documented in DCYF dictation, which also indicated concerns in regards to CH's attempts to undermine the relationship between the children and the Appellant so that she could obtain legal and physical custody of the children. Lastly, the Appellant argued that the Court vacated the restraining orders against him and restored his legal and physical custody of the children and a resumed visitation schedule with CH as originally agreed upon in 2011; as there was no basis to the concerns as alleged in the 51A report under appeal. I find the Appellant'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 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. Arnone 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 children's statements, which appeared to be coached and scripted. (Fair Hearing Record) The Department did not take into consideration the history of a Probate Court legal battle between CH and the Appellant, although it was acknowledged by the Department that the Appellant had been accused of similar allegations in the past and that his denial of the current allegations "lends to the credibility" of the Appellant. (Exhibit B, p. 8) Moreover, the Court established that there had been serious concerns regarding CH's "fabrications and misstatements" in regards to the Appellant's character, which the Court found to be "problematic." (Exhibit 2) The Department acknowledged that "ultimately, the [Department's] decision was based by the child's [B] disclosures that were consistent." (Testimony of JH) However, there was no "indicia of reliability" in B's disclosures in light of the circumstances and substantial evidence provided by the Appellant. In fact, the Department was unable to corroborate any of the children's disclosures through independent collaterals. Therefore, with no corroborating evidence to support the allegations of neglect, and in the absence of any reliable evidence, the Department supported this report. The child's statements alone were not sufficient (Edward E., 42 Mass. App.Ct.478 (1997) and there was no independent evidence presented to corroborate the allegations against the Appellant.

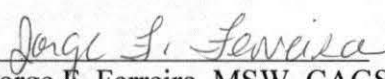
A Hearing Officer's decision must be supported by substantial evidence; there must be substantial evidence supporting the Hearing Officer's conclusion that the Department had reasonable cause to believe the Appellant committed the alleged neglect of the children. (Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006)) I find that the Department did not do so. There was no evidence of current neglect by the Appellant and insufficient evidence to find that that his direct actions or inactions placed the children in danger or posed a substantial risk to their safety or well-being. It was evident that the allegations against Appellant stemmed from a problematic divorce and separation from CH, which unfortunately pitted the children in middle. The Appellant was able to clearly show that CH had made attempts since 2011 to regain legal and physical custody of the children and make false allegations against the Appellant in this endeavor so that she would be seen favorably by Probate Court, DCF and DCYF. This included using the children as instruments towards this goal, which the Department acknowledged happened in the past.

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

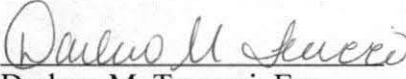
was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the Appellant.

Conclusion and Order

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

 ^(dia)
Jorge F. Ferreira, MSW, CAGS
Administrative Hearing Officer

Date: 7/1/2020


Darlene M. Tonucci, Esq.
Fair Hearing Supervisor

Date: _____

Linda S. Spears
Commissioner