

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

Linda S. Spears
Commissioner

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IN THE MATTER OF)
)
 ED) FAIR HEARING DECISION
)
 FH # 2017-0293)
)

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

Procedural History

On February 7, 2017, the Department of Children and Families received a 51A report alleging neglect (substance exposed newborn) of N by her mother, ED. A non-emergency response was conducted and on or about March 1, 2017, the Department made the decision to support the allegation of neglect (SEN) of the subject child by her mother, ED. The Department notified ED (ED or "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 May 11, 2017 at the Department's South Central Area Office in Whitinsville, MA. All witnesses were sworn in to testify under oath. The record remained open until May 26, 2017 to allow the Appellant additional time to submit documentary evidence.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira Fair Hearing Officer

ED Appellant
SS DCF Response Worker
SG DCF Supervisor

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

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

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

For the Department:

Exhibit A Child Abuse/Neglect Report dated 02/07/2017
Exhibit B Child Abuse/Neglect Emergency Response completed 03/01/2017

For the Appellant:

Exhibit 1 Letter from DCF Ongoing Social Worker
Exhibit 2 Toxicology Screens
Exhibit 3 Letter/Email – Character Reference
Exhibit 4 Copy of Appellant’s Resume
Exhibit 5 Copy of Handwritten 51A
Exhibit 6 Child Care Voucher
Exhibit 7 Pediatrician Progress Notes
Exhibit 8 Hospital/Admission Information
Exhibit 9 Newborn Discharge Instructions
Exhibit 10 Discharge Summary
Exhibit 11 Medication Discharge Summary
Exhibit 12 Bloodwork/Lab. Results

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

On the basis of the evidence, I make the following factual findings:

1. At the time of the filing of the subject 51A report, N was two days old. The infant was born at [REDACTED] and remained there until being discharged to the Appellant who lived in [REDACTED] (Exhibit A, p. 1; Testimony of the DCF Response Worker)
2. The Appellant, ED, is the mother of the subject child; therefore she is deemed a "caregiver" pursuant to Departmental regulation and policy. 110 CMR §2.00; *DCF Protective Intake Policy #86-015, rev. 2/28/16*
3. The family has no previous history with the Department. (Exhibit A, p. 3; Exhibit B, p. 1)
4. On February 7, 2017, the Department of Children and Families received a report from a mandated reporter alleging neglect (SEN) of the subject child by her mother, pursuant to M.G.L. c.119, § 51A. The reporter alleged that that subject child was a substance exposed infant because the Appellant acknowledged using marijuana early in her pregnancy to help with nausea. At birth both the Appellant and infant tested negative in their toxicology screens. The infant was born premature and placed in a special care nursery, where the Appellant was able to bond with her and feed her as well (Exhibit A, p.2)
5. The report was screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, § 51B. The allegation for the neglect (SEN) of the subject child by the Appellant was supported on March 1, 2017. The allegation of neglect – (SEN) was supported because the Appellant acknowledged smoking marijuana early in her pregnancy to treat symptoms of nausea. The infant's meconium was also tested and came back positive for the exposure to marijuana, despite early urine testing having tested negative for the presence of the marijuana. (Exhibit B, p. 8)
6. When interviewed, the Appellant acknowledged that she had used marijuana for nausea, relating that she had worked as an EMT during her pregnancy and would get extremely nauseous with the motion of the ambulance and the patients. (Exhibit B, p. 2; Exhibit 4; Testimony of the DCF Response Worker)
7. The Appellant maintained that prior to returning to [REDACTED], she had worked as a firefighter in [REDACTED] and had always lived a very "straight laced" life. She denied having a substance abuse problem, including marijuana. (Exhibit B, p. 2; Exhibit 4)
8. The Appellant was diagnosed with Cholestasis in early November 2016. Once she was

diagnosed with Cholestasis, she refrained from using marijuana and just endured the nausea. She went into spontaneous labor at 34 weeks and 6 days. (Exhibit B, p. 2; Exhibit 8; Testimony of the Appellant)

9. Due to the subject child's premature birth, she was being kept in a Special Nursery during the response. The assigned nurse reported no concerns for the baby or the mother, Appellant. The Appellant was described as attentive to the infant's needs, including doing all feedings and seeking guidance when necessary. (Exhibit B, pp. 2-3; Exhibit 7)

10. On February 13, 2017, the subject child's meconium tested positive for marijuana. (Exhibit B, p. 3)

11. According to the Appellant's obstetrician's office, the Appellant had been prescribed Reglan, which curbs the effects of nausea, on August 16, 2016. However, the Appellant felt that it was not effective. No drug screens were done during the Appellant's pregnancy as there were substance abuse concerns. (Exhibit B, p. 4; Testimony of the Appellant)

12. The subject child was discharged to the Appellant on February 19, 2017. No protective concerns were reported aside from the Appellant's admission to have used marijuana while pregnant. The Appellant was noted to have family supports and very attentive to the subject child's needs. (Exhibit B, p. 4; Exhibit 5; Exhibit 9; Exhibit 10)

13. Following the infant's discharge, the Appellant temporarily lived with her mother and was later able to acquire a two bed room apartment, which was observed to be adequately furnished for both the Appellant and the infant. (Exhibit B, p. 5; Testimony of the DCF Response Worker)

14. The subject child's grandmother did not have any protective concerns regarding the Appellant nor in her ability to care for the infant, citing that she did have some struggles with the subject child's father who was whereabouts unknown. (Id.)

15. The attending physician for the Appellant during pregnancy reported that the Appellant was compliant with treatment and abided by medical recommendations. No protective concerns were noted. This was also noted in the Appellant's medical records. (Exhibit B, p. 6; Exhibit 7; Exhibit 8; Exhibit 9; Exhibit 10; Exhibit 11)

16. The subject child was noted to be thriving following her discharge and was back to her birthweight, according to her pediatrician's office. No protective concerns were noted. (Exhibit B, p. 7)

17. The Appellant was described as a very attentive parent, with a strong family support network as well as a professional support; consisting of Early Intervention and daycare for the subject child. (Exhibit 1; Exhibit 6)

18. The Appellant has remained drug free and has cooperated with the Department

recommendations. The Department was scheduled to close her case following the case as no services were assessed to be needed in addition to what she was being serviced. (Exhibit 1; Exhibit 2)

19. The Appellant has a strong work ethic and is compassionate. She related that she was able to obtain employment despite the challenges involving this instant matter. (Exhibit 3; Exhibit 13)

20. I find that there is no substantial evidence that the Appellant placed the subject child in danger or posed substantial risk to her safety through her actions. Her use of marijuana during the early stages did not have any impact on the infant nor did any collateral express concern regarding as such. *DCF Protective Intake Policy #86-015 (Rev. 2/28/16)*; See *Wilson v Dep't of Soc. Servs.*

18. Therefore, the Department's decision to support the allegation of neglect (SEN) was not made in conformity with its policies and regulations. 110 CMR §2.00, 110 CMR §4.32, *DCF Protective Intake Policy #86-015 Rev. 2/28/16.*

Applicable Standards

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)

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. *Care and Protection of Robert*, 408 Mass. 52, 63-64 (1990). "[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 51A. *Id.* at 63. 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.

Caregiver

- (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 person entrusted with responsibility for a child's health or welfare, whether in the child's home, 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. *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

Neglect is 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 a failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. (*Id.*)

Substance Exposed Newborn (SEN) A newborn who was exposed to alcohol or other drugs in utero ingested by the mother, whether or not this exposure is detected at birth through a drug screen or withdrawal symptoms. A SEN may also be experiencing Neonatal Abstinence Syndrome (NAS), which are symptoms and signs exhibited by a newborn due to drug withdrawal. NAS is a subset of SEN. Fetal Alcohol Syndrome (FAS) as diagnosed by a qualified licensed medical professional is also a subset of SEN. (*Id.*)

To Support a finding means:

- There is reasonable cause to believe that 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 . . . (*Id.*)

Danger is 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. (*Id.*)

A Substantiated Concern means:

- There is 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 children(ren)'s safety or well-being. (*Id.*)

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; or (e) if the challenged decision is a listing on the alleged perpetrators list, that there is not substantial evidence indicating the person is responsible for the abuse or neglect of a child. 110 CMR §10.23

Analysis

It is undisputed that the Appellant was a "caregiver" pursuant to Departmental regulation. 110 CMR §2.00; *Protective Intake Policy No. 86-015* (rev. 02/28/2016)

The Appellant contested the Department's decision to support the allegation that she neglected her infant daughter, N, because she acknowledged having used marijuana to offset symptoms of nausea during her early stages of her pregnancy. The Appellant argued that she had been prescribed medication by her doctor to treat the nausea, but it did not have a satisfactory effect. The Appellant further argues that the medical providers, through documentary evidence, noted that she was meeting the needs of her infant when she was born and was in the Special Care Nursery. She was noted to be committed to her child's needs as the infant was born premature. The Appellant added that she stopped using marijuana, once she was diagnosed with Cholestasis and had been drug free since then. (Fair Hearing Record) The Appellant was able to show that the infant has since thrived and used both formal and informal supports in her life to care for the subject child, while cooperating with the Department and abiding by her social worker's clinical recommendations. This has resulted in the Department no longer recommending further services following their assessment and with a scheduled closing of her case. I find the Appellant's argument to be persuasive.

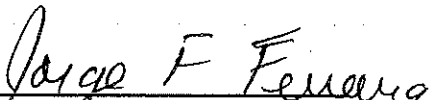
In making a decision to support a report of abuse or neglect, the Department must consider the entire record, including whatever in the record fairly detracts from the weight of the evidence supporting its conclusion. Arnone v. Commissioner of the Department of Social Services, 43 Mass. App. Ct. 33, 34 (1997); the record does not reflect that the Department did so in the subject matter. The Department failed to provide any evidence that N was impacted by the Appellant's behavior; use of marijuana while N was in utero or that it had placed the child in medical danger or risk of injury. The Department failed to provide any evidence to link the child's premature birth to the Appellant's marijuana use. While, the infant did test positive for marijuana in her meconium, this in itself is not neglect. (*See definition*) The Department solely based their decision on the fact that N was born having been exposed to marijuana while in utero and was unable to provide any corroborating evidence that N was placed in any danger by her mother's behavior. There must be substantial evidence supporting the hearing officer's conclusion that the Department had reasonable cause to believe the Appellant neglected the child. Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006). To the contrary, the Appellant was able to show through a preponderance of evidence that she was able to meet her infant's needs, despite her premature birth. She has also cooperated with the Department, abiding by recommendations and utilizing supports to continue to meet her daughter's needs while she thrived in her care.

In determining whether the Department had reasonable cause to support a finding of neglect by Appellant, the Hearing Officer must apply the facts, as they occurred, to the definition of neglect as defined by Departmental regulation; new information presented at the Hearing, if not available during the investigation, can be considered as well. After careful review of all the evidence presented, including new information offered by the

Appellant at the Fair Hearing, the evidence in this case, in its totality, was insufficient to support the Department's decision to support neglect by the Appellant. Therefore, the Department did not have reasonable cause and the decision was not made in accordance with its policies and regulations.

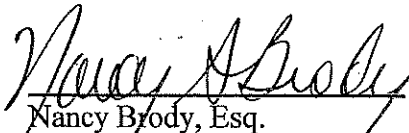
Conclusion and Order

The Department's decision to support the allegations of the **neglect** of N by the Appellant was not made in conformity with Department policies and regulations and therefore, the Department's decision is **REVERSED**.



Jorge F. Ferreira, (1400)
Administrative Hearing Officer

12-11-17
Date



Nancy Brody, Esq.
Fair Hearing Unit Supervisor
Office of the General Counsel

Date

Linda S. Spears
Commissioner