

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111**

**Linda Spears
Commissioner**

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IN THE MATTER OF

NS #2017 1357

FAIR HEARING DECISION

Appellant, NS ("Appellant"), appeals 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 September 2017, the Department received a report which alleged L was a Substance Exposed Newborn (SEN), after the reporter learned that NS, L's mother, was prescribed Subutex for substance abuse treatment. The Department screened-in the report with an allegation of neglect and conducted a response. On October 12, 2017, the Department made the decision to support an allegation of neglect/Substance Exposed Newborn. The Department notified the Appellant of its decision and her right to appeal.

Appellant made a timely request for a Fair Hearing under 110 CMR 10.06(8). A hearing was held at the DCF Robert Van Wart Area Office. In attendance were Maura Bradford, Administrative Hearing Officer; CW, DCF Response Worker; NS, Appellant; CS, Appellant's Mother; L, Appellant's Son.¹

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 or bias in this case.

The Fair Hearing was digitally recorded and transferred to one (1) Compact Disc. The witnesses were sworn in to testify under oath and sequestered until called to testify.

¹ L was present at the hearing, observed by the Hearing Officer and Response Worker and outwardly appeared well.

The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply; only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 CMR 10.21

The following evidence was entered into the record:

For the Department:

- Exhibit A: 51A Report of September [REDACTED], 2017
Exhibit B: 51B Report completed on October 12, 2017 by CW

For the Appellant(s):

- Exhibit 1: Request for Hearing

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

Findings of Fact

1. The Appellant is L's mother. L's father is JL. At the time of the report in question, L was [REDACTED] days old. (Exhibit A)
2. L was born at 39 weeks, two (2) days gestation via Cesarean Section. (Exhibit A)
3. The Appellant was L's caregiver under Department policy and regulations. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00
4. The Appellant was not involved with the Department. JL has two (2) children from a previous relationship who visit with the Appellant and JL at their home. JL does not have a history of involvement with the Department. (Exhibit A; Exhibit

B, pp. 3, 4; Testimony of CW)

5. On September 8, 2017, the Department received a report which alleged neglect of L on the basis that he was a Substance Exposed Newborn (SEN). The reporter noted that L had a negative drug screen at birth and hospital personnel had no concerns for L or regarding the Appellant's care of L. The Department screened in the report with an allegation of SEN/neglect and conducted a response. (Exhibits A and B; Testimony of CW)
6. Under Department Protective Intake Policy, a Substance Exposed Newborn (SEN) is "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." (DCF Protective Intake Policy #86-015, rev. 2/28/16)
7. The Appellant was in substance abuse treatment for opioid disorder four (4) years prior to L's birth and was prescribed a low dose of Subutex.² The Appellant was fully and consistently compliant with her treatment and had no history of relapse or positive screens for any other substances. Due to the Appellant's compliance, she received take-home medication (i.e., did not have to go to the program to take medication). The Appellant had no other history of substance abuse. (Exhibit B, p. 9; Testimony of CW and Appellant)
8. The Appellant received coordinated prenatal care, which included adjustments in her dosage of Subutex during her pregnancy and a temporary increase in the frequency of her visits to the substance abuse program in the final trimester of pregnancy. Following L's birth, he was screened for substances and was not positive for any substances, including Subutex. L was monitored for signs of withdrawal³; none were observed. The Appellant breast-fed L, bonded "nicely" with L and was observed to be "very nurturing". There were no concerns for the Appellant's care of L, nor were there concerns for L's health and well-being while L was in the hospital. (Exhibit B, p. 9; Testimony of CW and Appellant)
9. The Response Worker visited the home and observed all necessary supplies and furnishings for L. The Appellant and JL identified positive family supports. Consistent with the Response Worker's observations, CS testified to the Appellant's parenting strengths. (Exhibit B, p. 5; Testimony of CW and CS)
10. On October 10, 2017, the Department supported an allegation of neglect of L by the Appellant. The basis for the Department's decision was that L was a

² The Appellant testified that her dosage was increased due to the pregnancy, from ¼ mg (.25) to ½ mg (.50). (Exhibit B, p. 9)

³ L remained in the hospital as a precautionary measure given his exposure to Appellant's prescribed medication and due to his exposure to the anesthesia given to the Appellant. (Exhibit B, pp. 2, 3)

Substance Exposed Newborn (SEN). The Department closed the case following the response because there were no protective concerns for L. (Exhibit B, p. 12; Testimony of CW; DCF Protective Intake Policy #86-015, rev. 2/28/16)

11. In determining whether the Department had reasonable cause to support a finding of neglect, the Hearing Officer must apply the facts, as they occurred, to the Department's regulatory definition of neglect. (110 CMR 2.00 and 4.32; also see DCF Protective Intake Policy #86-015, rev. 2/28/16)
12. After a review of all the evidence and for the following reasons, I find the Department did not have reasonable cause to support an allegation of neglect of L by the Appellant:
 - a) Although the Department determined L was a Substance Exposed Newborn (SEN), the Department did not have evidence that the Appellant failed to provide minimally adequate care for L or had neglected L under Department regulations (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16), and;
 - b) Where the Department determined that there were no protective concerns for L beside his prenatal exposure to a prescribed, and properly administered and monitored medication, the Department did not have evidence that the Appellant's actions placed L in danger or posed a substantial risk of harm to L's safety or well-being (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16);
 - c) The Department's decision was not made in accordance with the Department's regulations, policy and/or applicable standards. (M.G.L. c. 119 §51B(g); 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)
13. In reaching the instant decision, the Hearing Officer gave due weight to the clinical decision made by the Department. 110 CMR 4.32; 110 CMR 10.29(2)

Applicable Standards

To "support" a report of abuse or neglect, the Department must have reasonable cause to believe that an incident of abuse or neglect by a caregiver occurred 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 2.00 and 4.32; 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." Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or

caregiver; 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

"Neglect means 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition"; 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. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

Danger is "A condition in which a caregiver's actions or behaviors 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. 2/28/16

Risk is "The potential for future harm to a child." 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

As the biological mother of L, the Appellant was his caretaker under Department regulations. 110 CMR 2.00

The Department determined that because L was a Substance Exposed Newborn (SEN), the Appellant neglected L. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant argued that the Department's decision was not reasonable or supported by

evidence.

In the instant case, the Department received a report which alleged neglect on the basis that L was a Substance Exposed Newborn (SEN). Consistent with the Department's Protective Intake Policy, the Department determined that L was a SEN and screened-in the report for a response. DCF Protective Intake Policy #86-015, rev. 2/28/16

This Hearing Officer considered that it is a well-known fact that opioid abuse in Massachusetts and across the country has reached epidemic proportions such that it is recognized as a public health emergency. The Department is tasked with protecting children who are affected by this broad reaching epidemic. This Hearing Officer is obliged to consider the totality of evidence, and whether there was enough evidence to permit a reasonable mind to accept the Department's decision that the Appellant neglected L. 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.

This Hearing Officer gave due deference to the Department's clinical expertise; however, notes that the Department cannot substitute its clinical expertise alone for substantial evidence to support its decisions. 110 CMR 10.29(2); DCF Protective Intake Policy #86-015, rev. 2/28/16; see *Daniels v. Board of Registration in Medicine*, 418 Mass. 380, 389, 636 N.E.2d 258 (1994)

During the response, the Department obtained evidence to suggest that aside from L's prenatal exposure to a prescribed, properly administered and monitored medication, there were no protective concerns for L; and, to the contrary that the Appellant was an attentive, nurturing parent. Thus, evidence obtained by the Department tended to disprove that the Appellant failed to provide minimally adequate care for L or had neglected L under Department regulations and protective intake policy. 110 CMR 2.00 and 4.32; see DCF Protective Intake Policy #86-015, rev. 2/28/16

With respect to the totality of the evidence and for the reasons described in the Above Findings of Fact, this Hearing Officer has determined the Department's decision was not based on reasonable cause or supported by substantial evidence. Additionally, considering the Appellant was compliant with treatment for opioid disorder, had not suffered a relapse during her years of treatment and had not tested positive for any other illicit substances, that there was no evidence that the Appellant's actions or inactions placed L in danger or posed a substantial risk to L'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

Appellant has shown by a preponderance of the evidence that the Department's decision to support an allegation of neglect on behalf of L was not in conformity with Department regulations or made with a reasonable basis; therefore, the Department's decision is REVERSED.

Maura Bradford
Maura E. Bradford
Administrative Hearing Officer *Be*

May 14, 2018
Date

Barbara Curley
Barbara Curley, Supervisor
Fair Hearing Unit

Date

Linda S. Spears
Commissioner