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

KH & SC #2017 1381

FAIR HEARING DECISION

Appellants, KH ("KH") and SC ("SC"; collectively "Appellants"), appeal the Department of Children and Families (hereinafter "DCF" or "the Department") decision to support allegations of neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On [redacted], 2017, the Department received a report which alleged neglect of L by KH, her mother. The basis for the report was that KH presumptively tested positive for marijuana following L's birth and the reporter's concern that L was a Substance Exposed Newborn (SEN). The Department screened-in the report and conducted a response. On October 16, 2017, the Department made the decision to support an allegation of neglect of L by KH. The Department provided the Appellant with written notification of the decision and her right to appeal.

Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. A hearing was held at the DCF Worcester West Area Office on January 9, 2018. In attendance were Maura Bradford, Administrative Hearing Officer; JM, DCF Supervisor; CT, DCF Response Worker; KH, Appellant; SC, Appellant.

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.

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 [redacted] 9, 2014
Exhibit B: 51B Report completed on October 16, 2017 by CT

For the Appellant(s):

No Documentary Exhibits were submitted by Appellant

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 Appellants are the parents of L and her older siblings B and C. At the time of the report in question, B was three (3) years old, J was one (1) year old and L was one (1) day old. (Exhibit B)

2. The Appellants were L's caregivers under Department policy and regulations. (DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00)

3. The Appellants were not involved with the Department at the time of the report in question. In 2014, the Appellants were briefly involved with the Department. B was a Substance Exposed Newborn who tested positive for marijuana after he was born. KH admitted smoking marijuana to ease side effects of her pregnancy. The Department closed the case following an assessment.[1] (Exhibit A, p. 5; Exhibit B, p. 2; Testimony of JM and Appellants)

[1] JM testified that the family's history "lends us to take pause if the situation occurred a time prior".

4. The Appellants used marijuana recreationally. KH was unaware of her pregnancy until she was already 2 months pregnant and did not smoke marijuana once she learned she was pregnant. KH was occasionally exposed to SC's second-hand marijuana smoke during her pregnancy. (Exhibit B, p. 2; Testimony of CT and Appellants)

5. Due to a lapse in the family's insurance for factors outside of the Appellants' control, KH did not receive prenatal care until she was 32 weeks pregnant.[2] Despite the delay in prenatal care, there was no adverse effect upon L. (Exhibit B, pp. 4, 7; Testimony of JM, CT and Appellants)

6. On [redacted], 2017, the Department received a report which alleged that one (1) day old L was a Substance Exposed Newborn (SEN). Following L's birth, KH had a "presumptive positive" test result for marijuana.[3] There were no concerns for L or the Appellants following L's birth. KH and L were discharged from the hospital without delay following L's birth. The Department screened-in the report for SEN-neglect and conducted a response. (Exhibit A; Exhibit B; Testimony of JM, CT and Appellants)

7. On [redacted], 2017, L's meconium test was completed and was positive for marijuana. According to the DCF Substance Abuse Specialist, meconium testing "goes back 2-3 months (or so)". The Specialist questioned the veracity of KH's claim that she did not smoke marijuana later into her pregnancy than she had admitted. (Exhibit B, pp. 3, 4; Testimony of CT and JM)

8. During the response, the Department visited the Appellants' home; there were no concerns for the family's home. The children's maternal and paternal grandparents were involved with the family and identified as supports. (Exhibit B, p. 2; Testimony of CT)

9. On October 15, 2017, the Department supported an allegation of neglect of L by KH. The basis for the Department's decision was KH's presumptive positive test for marijuana following L's birth and L's exposure to marijuana in utero. (Exhibit B, pp. 7, 8; Testimony of JM and CT)

10. Substance exposure in utero does not alone constitute neglect, as defined by the Department's policies and regulations. The Department routinely screens-in and conducts a response for reports of Substance Exposed Newborn (SEN) and during a response involving SEN, regardless of the substance used, the Department considers several factors including frequency of substance use (e.g., use versus abuse of a substance) sobriety of caretakers and the effects of a caregiver's

[2] The Appellants testified that CT's company pulled out of Massachusetts. KH testified that they earned too much money to qualify for MassHealth (i.e., Medicaid) and struggled to find insurers who included their doctors.

[3] CT testified that KH's urine was positive for Marijuana.

substance use upon a child's care. (110 CMR 2.00 and 4.32; Testimony of JM)

11. Following the response, the Department conducted an assessment with the family. The Department did not determine any further protective concerns and anticipated closing the case upon completion of the assessment. (Testimony of JM)

12. After a review of all the evidence and for the following reasons, I find the Department did not have sufficient evidence to support an allegation of neglect of L by the Appellant:

    a) Following R's birth, there were no concerns for the Appellant's care of L, nor were there concerns for L's health and well-being. The Department did not have evidence that at the time of, or following, L's birth, KH or the Appellants collectively failed to provide minimally adequate care for L or neglected L under Department regulations and policy (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16);
    b) During the Assessment the Department determined there was no further protective concern and the case was closed. The Department did not have evidence that the Appellant's actions following L's birth placed L in danger or posed a substantial risk of harm to L's safety or well-being. (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

In order 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" 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. 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 parents of L, the Appellants were her caregivers under Department policy and regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Department determined KH neglected L. The basis for the Department's decision was KH's positive test for marijuana following L's birth and L's exposure to marijuana in utero. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

It was undisputed that KH used marijuana early in her pregnancy. Although KH tested presumptively positive following L's birth, L's urine was not positive; however, L's meconium was tested and was positive for marijuana. Based upon the meconium test results, the Department speculated that KH smoked marijuana later in her pregnancy than admitted. Whether or not KH smoked marijuana later into her pregnancy, there was no evidence to suggest KH's marijuana use resulted in a deleterious effect upon L following her birth. L was born without incident, there were no concerns for her health at birth, nor were there concerns for the Appellants' care. L's pediatrician was aware of the meconium test results and had no concerns for L, whose care following her birth was up

to date and without issue.

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 KH neglected L. With respect to the aforementioned and as enumerated in the above Findings of Fact, this Hearing Officer has determined the Department's decision was not based on reasonable cause or supported by sufficient 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. Additionally, there was no evidence that the KH's actions 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

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

5-10-18
Date

Maura E. Bradford
Administrative Hearing Officer

Nancy S. Brody, Esq.
Supervisor, Fair Hearing Unit

Date

Linda S. Spears
Commissioner