THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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Commissioner

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IN THE MATTER OF	)	
	)	
YA	)	**FAIR HEARING DECISION**
	)	
FH # 2020-0084	)	
	)	

The Appellant in this Fair Hearing was YA (hereinafter "YA" 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 November 27, 2019, the Department received a 51A report from a mandated reporter alleging the neglect/substance exposed newborn (hereinafter "SEN") of child by the Appellant.[1] A non-emergency response was conducted and upon its conclusion, the Department made the decision to support the allegation of neglect/SEN of the child by the Appellant. The Department notified the Appellant of the decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was scheduled to be heard on April 9, 2020, in the Lawrence Area Office, but as agreed to by the Appellant, was held via WebEx teleconference due to the current pandemic and the Governor's orders issued in conjunction therewith. All witnesses were sworn in to testify under oath. The record was closed upon conclusion of the hearing.

The following persons appeared at the Fair Hearing:

Lisa Henshall	Fair Hearing Officer
YA	Appellant
LG	DCF Response Worker (RW)
JC	DCF Response Supervisor (RS)

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this matter,

[1] At the time of the 51A report, the child's name was listed as "Y"; however, in the 51B response the child's name was indicated as "Pe." The child will be referred to as "Pe" in this decision. (Exhibit A; Exhibit B)

having no direct or indirect interest, personal involvement, or bias in this case.

The Fair Hearing was digitally 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: 51A Intake Report
Exhibit B: 51B Child Abuse/Neglect Non-Emergency Response
Exhibit C: Medical Records

For the Appellant:
None

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 whether 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. Pe was six (6) days old at the time of the filing of the 51A report. Pe was born prematurely and admitted to the Special Care Nursery at the hospital.(Exhibit A, p. 3; Exhibit B, p. 3)

2. The Appellant is the mother of the child; therefore she is a "caregiver" pursuant to Departmental regulation and policy. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16)

3. The Appellant had a history of involvement with the Department dating back to 1994. In

April, 1992, a 51A report was filed, the allegations were unlisted, however, supported and a case was opened. On October 9, 1997, and October 10, 1997, two 51A reports were filed alleging the neglect of the Appellant's daughter, N (hereinafter "N") by the Appellant. The allegations were supported due to N having medical issues and the Appellant not following through with medical appointments for N, or following medical advice. N and the Appellant's second child J (hereinafter "J") were placed in foster care. On October 28, 1999, the Appellant and the father of N and J agreed to an open adoption for their two children, who are now adults. (Exhibit A, p. 6; Exhibit B, p. 1)

4. On November 27, 2019, the Department received a report pursuant to M.G.L. c. 119, §51A, from a non-mandated reporter alleging the neglect of Pe by the Appellant. The reporter alleged that on November 22, 2019, the Appellant arrived to the Labor and Delivery unit of the hospital. The Appellant was in preterm labor at thirty-two (32) weeks and three (3) days. Upon taking a urine and toxicology screen, the Appellant tested positive for amphetamines. The Appellant stated she began having contractions a week prior while she was in the Dominican Republic (hereinafter "DR") and her doctor prescribed her some medication to stop the contractions. The Appellant denied she took drugs and attributed the positive test to her visit to her doctor in the DR. On the plane ride home from the DR, the Appellant's water broke and she went directly from the airport to the Hospital. The Appellant received all of her prenatal care in the DR, except for one visit to a doctor in Massachusetts. The reporter stated the Appellant was already discharged from the Hospital but the child would be admitted to a different hospital within the next few days. (Exhibit A, p. 3; Testimony of RW)

5. The report was screened in and assigned for a non-emergency response, pursuant to M.G.L. c. 119, § 51B. The allegation of neglect of Pe by the Appellant was supported by the Department following the conclusion of the response. The allegation was supported because upon giving birth to the child the Appellant tested positive for amphetamines. The child did not test positive for any illicit substances. However, the Appellant had inconsistent prenatal care and it was unable to be determined if the amphetamines were the cause of the premature delivery. (Exhibit B, p. 17; Testimony of RW; Exhibit C)

6. The Department Response Worker (hereinafter "RW") called the hospital to check in on the child, who was reported to be doing well. Additionally, it was reported that the child's meconium and urine toxicology screen came back negative for any substances. RW was told the Appellant had been discharged on November 24, 2019, but came to visit the child on the 25th, 26th, and 28th of November. There was no visit on the 27th but the Appellant called the hospital to check in. (Exhibit B, p. 2)

7. RW visited the child at the hospital. The RW observed the child to be small but he was moving and had his eyes open. The nurse stated the Appellant visited the child often and was always appropriate with him. The child was receiving tube feedings and a multivitamin, but no other medications. There was no anticipated release date for the child at the time of this visit. (Exhibit B, p. 3; Testimony of RW)

8. The Appellant was living with a friend, Je (hereinafter "Je"), the paternal grandmother and the Appellant's three other sons, Y who was ten (10) years old, C who was seven (7)

years old and Ph who was four (4) years old. RW visited the family at the Appellant's friend's house, she observed the Appellant to be very attentive to the children. The Appellant's husband was deported back to the DR about two years ago, and she and the children spent a lot of time traveling back and forth. (Exhibit B, p. 3; Testimony of RW)

9. The Appellant also had a sixteen (16) year old daughter, E (hereinafter "E") who decided to live with the maternal grandmother because she did not want to go to the DR. The maternal grandmother had temporary custody through Probate Court. The maternal grandmother denied RW access to her home. (Exhibit B, p. 4; Testimony of RW)

10. During the interview, the Appellant adamantly denied she would do anything to harm her children. The Appellant was unable to explain how a positive drug screen came back because she did not use drugs. The Appellant showed RW a bag of medication given to her by the doctor in the DR, which included fosfomicina calcina, acido metenamico, nifedpinia and progestroma. The Appellant also drank herbal tea throughout her pregnancy. (Exhibit B, pp. 3-4)

11. Since the Appellant was planning on staying in the United States with the children, she had enrolled the three boys in school and had made them medical appointments. RW called and confirmed Y and C were enrolled in school, but the Appellant decided to keep Ph home because there was a waiting list for their pre-k. RW confirmed the three boys were also registered with a physician. (Exhibit B, pp. 4, 12 & 14; Exhibit B, p. 12; Testimony of RW)

12. RW spoke with Y and C who both expressed they were happy to be living back in the United States because the DR was "boring". They liked staying at Je's house with her and her children. Both children denied drug or alcohol use by the Appellant and shared excitement about having a new baby brother. (Exhibit B, p. 4)

13. The doctor in Massachusetts confirmed he had met with the Appellant one time and could not comment on any concerns of substance abuse. The Doctor urged the Appellant to give birth at a hospital in the United States because she was considered "high risk" due to having five (5) previous cesarean sections. (Exhibit B, p. 5; Testimony of RW)

14. RW went to E's school to meet with her, since the maternal grandmother would not allow a home visit. E denied the Appellant had a drug or alcohol abuse problem and stated they must have given her something in the DR that caused the positive test. E had a different father than the younger four children, her father lived in Florida. She expressed no concern about the father, PH (hereinafter "PH"), of her four younger siblings, saying he is a good guy. RW was not able to get in touch with PH because his phone was disconnected. (Exhibit B, pp 12-13)

15. The RW contacted the Appellant's doctor in the DR. This doctor had met with the Appellant approximately three (3) times and had no concerns of substance abuse, nor did he give her any narcotics. (Exhibit B, p. 13; Testimony of RW)

16. The Appellant reported she had taken a second drug screen at the hospital but was not

told the results from the hospital. (Exhibit B, p. 13)

17. Throughout the response the child was gaining weight and was began to take some bottles in addition to receiving some tube feedings. The Appellant was still visiting regularly and the nurse had no concerns. (Exhibit B, p. 13)

18. The Appellant always appeared sober and appropriate. (Testimony of RW)

19. E's father, EM (hereinafter "EM"), denied any concerns for drug or alcohol abuse by the Appellant. They were in a relationship for ten (10) years and during that time there were no issues regarding drugs or alcohol. EM had no concerns for the Appellant's ability to care for her children. (Exhibit B, p. 15)

20. RW testified there was no confirmation from the medical professionals that amphetamines could have caused a premature birth; everything was vague. They could not say for sure whether or not this could have caused the premature birth. The RW reiterated that the child's meconium and urine did not test positive for amphetamines. (Testimony of RW; Exhibit C)

21. RW spoke with the Appellant's ongoing social worker who reported no concerns about substance abuse. The Appellant had been cooperative. (Testimony of RW)

22. The Appellant was confused as to how she tested positive drug screen as she did not smoke or drink. The Appellant went to her primary care physician and asked him to test her urine three times, each test came back negative. The Appellant asked RW to speak with her physician to verify the negative screens, but there was no evidence to confirm or deny this.(Testimony of Appellant; Exhibit B)

23. The Appellant testified she was having contractions while she was in the DR. She was fearful of giving birth in the DR, because she did not trust the medical care. The doctor in the DR gave her medicine through an IV, and some yellow pills, to stop her contractions so she could make it back to the United States to give birth. She believed there must have been something in the IV, or pills, that triggered the positive drug screen. (Testimony of Appellant)

24. At the Fair Hearing, the Appellant testified she had seven (7) children and never had she tested positive for drugs. (Testimony of Appellant)

25. The Appellant's testimony at the Fair Hearing was candid and consistent with her statements to the RW. Considering the Appellant's demeanor and basic facts, I find the Appellant's testimony credible. (Fair Hearing Record)

26. After a review of all the evidence and testimonies presented by both parties, I find that the Department did not have reasonable cause to believe that the Appellant failed to provide the child with minimally adequate care. Further, the Appellant's actions did not place the child in danger and/or pose a substantial risk to the child's safety or well-being.

(110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16; See, Analysis below)

27. Therefore, the Department's decision to support the allegation of neglect/SEN of the child by the Appellant was not made in compliance with its regulations 110 CMR 2.00; 4.32 and 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

"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. Fetal Alcohol Syndrome (FAS) as diagnosed by a qualified licensed medical professional is also a subset of SEN. DCF Protective Intake Policy #86-015, rev. 2/28/16

"Danger" is defined as 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. DCF Protective Intake Policy #86-015, rev. 2/28/2016

"Substantial evidence" is defined as such evidence as a reasonable mind might accept as adequate to support a conclusion. 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 is undisputed that the Appellant was a "caregiver" pursuant to Departmental regulation and policy 110 CMR 2.00 and DCF Protective Intake Policy #86-015, rev. 2/28/16.

The Appellant contested the Department's decision to support the allegation of neglect of Pe. The Appellant argued following the birth of the child, she went to her primary care physician and asked him to test her urine for any illicit substances. The Appellant had her physician test her

three times and all tests came back negative. The Appellant asked the Department to contact her physician to obtain these records, but they did not. The Appellant argued the medical care in the Dominican Republic was perfunctory and untrustworthy and she believed she was given something there that triggered the positive drug screen. The Appellant argued she did not drink or do drugs and has given birth seven times and never had any issues like this before.

The Department argued that the support decision should stand. Although the Appellant denied taking any substances, she had tested positive for amphetamines at the child's birth. The child was born prematurely at 32 weeks and was in the NICU following his birth. The Department had concern as the Appellant had "inconsistent prenatal care." In addition, "it remained unclear if the amphetamines caused the premature delivery." Moreover, the Department reasoned that while the child did not test positive for any illicit substances, this still met the threshold for SEN neglect. Nevertheless, it was unknown if the potential substance use could have been what caused the child to be born prematurely. However, at the time of the response, the child was gaining weight but was still receiving some tube feedings and the Appellant regularly visited the child and had been appropriate according to the hospital staff.

In order to support a finding of neglect, the Department must determine that there was reasonable cause to believe that the Appellant neglected the child and placed him in danger or posed substantial risk to his safety or well-being. The burden was on the Appellant to show, by a preponderance of the evidence that the Department's decisions were not in conformity with Department regulations and/or policy and/or with a reasonable basis. The Appellant has presented persuasive evidence in this matter to allow for a reversal of the Department's neglect support decisions against her. There was no evidence of substances in the child's urine or meconium. The child remained at the hospital due to the premature birth. The Appellant visited the hospital and was found to be appropriate with the child by the staff. There were no concerns noted by collaterals. While it was reasonable for the Department to be concerned, the Department did not collect facts sufficient to conclude the Appellant neglected the child. The Appellant tested positive for amphetamines after giving birth to the child prematurely. There was no evidence that amphetamines attributed to the child's premature birth. As indicated in the findings, the Appellant was credible and it remains unclear how or why she tested positive for the amphetamines. There was no evidence of drug use by the Appellant with the exception of this one positive test. Further, the child did not test positive and there was no evidence of withdrawal symptoms that would need to be present to determine that he was a substance exposed newborn.

Based on a review of the evidence presented at the Fair Hearing, including testimony from all witnesses and documents submitted by the Department, the Appellant has met her burden; she 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

The Department's decision to support the allegation of **NEGLECT** of the child, Pe, by the Appellant was not made in conformity with Department regulations and with a reasonable basis

and therefore, the Department's decision is **REVERSED**.

Lisa A. Henshall (aw)
Lisa A. Henshall
Administrative Hearing Officer

Date: 6/29/2020

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

Date: _____

_____
Linda S. Spears
Commissioner