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

Voice: (617) 748-2000
FAX: (617) 261-7428

IN THE MATTER OF	)	
	)	
JR & KR	)	**FAIR HEARING DECISION**
	)	
FH # 2017-1134	)	
	)	

The Appellants in this Fair Hearing were JR and KR (hereinafter "JR" or "KR" or "Appellants"). The Appellants 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 July 10, 2017, the Department of Children and Families received a 51A report alleging neglect (substance exposed newborn) of Jo by his mother, KR. A non-emergency response was conducted and on or about August 7, 2017, the Department made the decision to support the allegation of neglect (SEN – Substance Exposed Newborn) of the subject child by his mother, KR. The Department notified the Appellants of its decision and their right to appeal.

The Appellants made a timely request for a Fair Hearing under 110 CMR 10.06. The Hearing was held on December 7, 2017, at the Department's South Central Area Office in Whitinsville, MA. All witnesses were sworn in to testify under oath. The record closed at the conclusion of the hearing.

The following persons appeared at the Fair Hearing:

Jorge F. Ferreira	Fair Hearing Officer
KR	Appellant
JR	Appellant
WC	DCF Response Worker
EK	DCF Supervisor

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 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 Report, dated 07/10/2017
Exhibit B: 51B Report, completed 08/07/2017

For the Appellant:
Exhibit 1: Letter from Appellant KR's Physician
Exhibit 2: Medical Update from Subject Child's Physician

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 51A report, Jo was one (1) day old. Following his birth, he remained hospitalized for approximately three (3) to five (5) days in order to be monitored for withdrawals. The family resided in [redacted], MA. (Exhibit A, pp. 1-2; Testimony of the DCF Response Worker)

2. The Appellants are the parents of the subject child; therefore they are deemed "caregivers" pursuant to Departmental regulation and policy. 110 CMR 2.00;

3. Both Appellants had prior history with the Department as child consumers from 1999-2006. KR experienced DCF foster care and JR was removed from his parent's care and had a guardianship finalized due to parental unavailability. (Exhibit A, p.7; Exhibit B, p. 1)

4. On July 10, 2017, the Department of Children and Families received a report from a mandated reporter alleging neglect (SEN) of the subject child by her mother, KR, pursuant to M.G.L. c.119, § 51A. The reporter alleged that KR had a history of opiate/pill dependence since she was in the 7th grade for pain management and later for recreational purposes. The reporter further alleged that KR was buying methadone illicitly off the street. KR was prescribed Subutex[1] by her attending physician while pregnant and decided to wean herself off on or about July 5, 2017, her last dosage. Reportedly, KR was told by her physician to wean of while the baby was still in utero, which was believed to be dangerous and contrary to what she was told. The reporter further alleged that KR was showing signs of withdrawal and the infant was being monitored for withdrawal as he had displayed some respiratory issues; which might have been due to the delivery. The reporter further stated that upon admission both KR and the infant were negative for all substances and they did not have any meconium results. (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 KR was supported on March 1, 2017. The allegation of neglect – (SEN) was supported because KR allegedly used methadone while pregnant that was not prescribed or monitored by a medical professional until March, 2017. Allegedly, KR failed to inform her physician of her use of methadone until January, 2017, and reported she used it for back pain not due to an opiate addiction. The Department expressed concern that KR weaned off Subutex by herself without medical consent; as this may have caused the fetus to go into withdrawals, fetal distress or a miscarriage, according to the Department. The Department also reported that medical notes showed this was discussed with KR prior to giving birth. The Department concluded they had reasonable cause to believe that the child was neglected as KR tested positive for a non-prescribed benzodiazepine in March, 2017, and had an alleged untreated substance abuse history. (Exhibit B, pp. 12-14)

6. The mandated reporter reiterated to the DCF Response Worker there were a few concerns regarding KR, specifically that she had been illicitly using methadone at the beginning of her pregnancy and that while she told her physician and was then prescribed Subutex, she later came off Subutex on her own because she wanted to

[1] According to www.webmed.com, Subutex (**Buprenorphine**) is used to treat dependence/addiction to opioids (narcotics).**Buprenorphine** belongs to a class of **drugs** called mixed opioid agonist-antagonists. It helps prevent withdrawal symptoms caused by stopping other opioids.

breastfeed when the baby was born. According to the reporter, KR acknowledged that she had used methadone for back pain and told the hospital she had abused opiates in the past. Reportedly, she was prescribed 400mg of Gabapentin for pain once they were aware she had weaned herself off Subutex. The mandated reporter added that KR had a history of assault on JR back in April, 2016, and was arrested, as well as, hospitalized at the time. (Exhibit B, p. 3)

7. The mandated reported further alleged that in March, 2017, KR was positive for methadone and benzodiazepines, although she had no prescription. The reporter confirmed there was no meconium testing as both KR and the child tested negative for all substances upon admission. However, the reporter expressed concern that KR had a history of detox admissions but no long-term recovery treatment. (Exhibit B, p. 3)

8. When interviewed, KR disclosed she struggled with opiate addiction in the past and acknowledged she was prescribed opiates in the 7th grade following surgery. She had ongoing back pain due to car accidents over years. All her medication were prescribed. KR confirmed she took Gabapentin for pain and used cocaine and marijuana in the past but never long-term. She added she never was in a detox facility and/or formal drug treatment facility. (Exhibit B, p. 4)

9. JR reported that KR used to associate with people that had access to methadone for illicit purposes. (Testimony of JR) KR added she was honest with her physician about her methadone use and why she used it in the early stages of her pregnancy. KR reported her physician prescribed her Subutex in order for her to come off methadone. Eventually KR weaned herself off Subutex with her physician's help before the subject child was born. (Exhibit B, p. 4; Exhibit 1; Testimony of Appellant KR)

10. On July 13, 2017, the Department drafted a safety plan due to the Department's concern over KR's history of substance abuse and lack of formal treatment. The safety plan required KR engage in a substance abuse evaluation and abide by recommendations, complete toxicology screens when required and assure that Jo was cared for by a sober person at all times. (Exhibit B, p. 5)

11. JR did not agree with the safety plan that KR should complete a drug treatment program as the medication she was on was prescribed by her physician and she was weaned off Subutex with her physician's knowledge and assistance. (Exhibit B, p. 8; Exhibit 1; Testimony of Appellant JR)

12. The Department obtained KR's medical records dating back to December 2013. These records indicated that KR reported back pain following a motor vehicle accident and was prescribed medication. In March, 2015, she presented for medical clearance to enter a detox program due to substance abuse. Reportedly, KR abused Klonopin, Percocet, cocaine, heroin, benzodiazepines and opiates. It was also noted KR had a past detox at [redacted] Hospital. (Exhibit B, p. 10)

13. The medical notes further indicated the police brought KR to the hospital following a domestic violence incident where both Appellants were arrested April 24, 2016. KR was brought to the hospital to obtain medications. The notes also indicated KR initially denied to her physician that was using other substances during a December, 2016, pre-natal appointment but later acknowledged in January, 2017, of her illicit methadone use. The physician documented that KR was counseled to stop the methadone use due to the dangers it could pose on the unborn child and began a Subutex regimen in March, 2017, as advised by her physician. (Exhibit B, p. 10)

14. On June 5, 2017, during a pre-natal appointment, KR expressed her intent to wean herself off Subutex prior to the delivery of Jo. KR was concerned over the possibility of neo-natal withdrawal. (Exhibit B, p. 11)

15. On March 2, 2017, KR tested positive for methadone. On March 8, 2017, for methadone, benzodiazepines and buprenorphine (Subutex). KR did not have a prescription for the benzodiazepines. However, her toxicology screens were negative during the remainder of her pregnancy and into the delivery day of July 9, 2017, with the exception of Subutex which was prescribed. (Exhibit B, p. 11)

16. The Department expressed concerns that there was a disconnect between the hospital and KR's attending physician (OB/GYN) citing that the hospital typically monitored babies who were exposed to opiates or medications for five (5) days. KR's physician allowed the infant to be discharged only after three (3) days when JR became angry and wanted Jo to be discharged despite Jo having minor withdrawal symptoms. (Exhibit B, p. 12)

17. The infant did not show any signs of withdrawal and the team of physicians at the hospital felt everything was "okay". (Testimony of Appellant JR)

18. Past treatment focused on pain management not substance abuse. KR's abuse of substances when in high school is not a reflection of what she was now and was not relevant. (Testimony of JR)

19. KR's physician reported there were no signs of any illicit drug use during KR's pregnancy. She cared for KR during her whole pregnancy, prescribed her Subutex, and helped her wean her off Subutex prior to Jo's delivery. KR's physician attested that all the toxicology results during labor and following the delivery were negative for Jo and KR. She added that the child had no signs of withdrawal and continued to grow well; there were no medical concerns. Jo was up to date with medical visits and immunizations. (Exhibit 1; Exhibit 2)

20. I find that there was insufficient evidence that the Appellant placed the subject child in danger or posed substantial risk to his safety through her actions. KR's actions during the early stages of her pregnancy were not shown to nor did they have an impact on Jo. DCF Protective Intake Policy #86-015, rev. 2/28/16; See, Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006)

21. 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 §51A Id. at 63. This same reasonable cause standard of proof applies to decisions to support allegations under §51B. Id. at 64; M.G.L. c. 119, §51B

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

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

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. 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. 110 CMR 2.00; Protective Intake Policy #86-015, rev. 02/28/2016

The Appellants contested the Department's decision to support the allegation that KR neglected her infant son, Jo. The Appellants argued all the medications during KR's pregnancy were prescribed to KR and her physician was well aware of her struggle with pain and past opiate use. KR acknowledged illicit methadone use very early on in her pregnancy as well as past illicit substance abuse. However, this was not a factor during

her pregnancy as attested to by her physician and negative toxicology screens, including no indication of illicit substance abuse at Jo's delivery. The Appellants also argued that the allegations were made by a reporter with a jaded perception of KR due to their past professional relationship and that KR's substance abuse while she was in high school was irrelevant to this instant matter as it had no impact on the subject child, Jo. Subsequently, the Appellants argued that the Department utilized history that was no longer relevant to reach a decision to support the allegation of neglect (SEN), which resulted in substantial prejudice to KR. I find the Appellants' 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 did not reflect the Department did so in the subject matter. The Department did not provide sufficient evidence that Jo was impacted by the KR's behavior; use of methadone or even detected traces of benzodiapazine while Jo was in utero or that it had placed the child in medical danger or risk of injury. The Department also did not show evidence that KR's decision to wean of Subutex was done without medical monitoring. While the hospital voiced concern of possible dangers, KR informed her physician who helped her in a collaborative manner to wean off Subutex a few days before the delivery date so there would be no neo-natal withdrawal. (Fair Hearing Record) Neither child nor KR tested positive for an illicit, prescribed substances upon admission and Jo's delivery. Additionally, meconium was never tested and the Jo showed no significant signs of withdrawal. In fact, he was allowed to be discharged two (2) days prior to the standard five (5) day protocol for infants exposed to opiates while in utero. The Department primarily based their decision on the fact that Jo was born having been exposed to methadone while in utero; however was unable to provide corroborating evidence that Jo was placed in danger by KR's behavior. Subsequently, 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. Wilson v. Dep't of Soc. Servs., 65 Mass. App. Ct. 739, 745-746 (2006). The Department did not provide substantial evidence to have reasonable cause to support their decision in this instant matter. On the contrary, the Appellants were able to show through a preponderance of evidence that KR was able to meet her infant's needs and manage her pain while under her physician's 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. (110 CMR 2.00, 10.06 (8) (c)) 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 Appellants. Therefore, the Department did not have reasonable cause and the decision was not made with a reasonable basis.

Conclusion and Order

The Department's decision to support the allegations of the **neglect** (SEN) of Jo by the Appellants, KR and JR, was not made in conformity with Department regulations and with a reasonable basis and therefore, the Department's decision is **REVERSED**.

Jorge F. Ferreira,
Administrative Hearing Officer

4/20/18
Date

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

Date

Linda S. Spears
Commissioner