THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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IN THE MATTER OF)
)
) **FAIR HEARING DECISION**
AS & PS)
FH #2017-1387)
)

The Appellants in this Fair Hearing are AS and PS (hereinafter "AS" or "PS" or collectively "Appellants"). The Appellants appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegation of neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On [redacted], 2017, the Department received a 51A report alleging neglect of M (hereinafter "M" or "the child") by AS. On October 2, 2017, the Department received a second 51A report which alleged neglect of M by the Appellants. The Department conducted a response and, on October 26, 2017, the Department made the decision to support the allegation of neglect by the Appellants. 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 originally scheduled for January 3, 3018, was rescheduled by the DCF Fair Hearing Unit. The Hearing rescheduled for January 17, 2018, was rescheduled due to weather. The Hearing was held on January 24, 2018, at the DCF Taunton Area Office. All witnesses were sworn in to testify under oath. The record remained open to afford the Appellant and the Department to submit additional information and to afforded the Appellants the opportunity to respond to previously requested documents. The Department submitted documentary information, which was reviewed, entered into evidence and considered in the decision making of the instant case. The record closed on March 2, 2018.

The following persons appeared at the Fair Hearing:

Carmen Temme	Fair Hearing Officer
AS	Appellant
PS	Appellant
KC	Department Response Social Worker
KR	Department 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 DCF regulations. 110 CMR 10.26

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

For the Department:

Exhibit A:	DCF Intake Report/51A Report, dated [redacted]/2017
Exhibit B:	DCF Intake report/51A Report, dated10/2/2017
Exhibit C:	DCF Child Abuse/Neglect Emergency/Non-Emergency Response, completed 10/26/2017[1]
Exhibit D:	[redacted] Medical record for M
Exhibit E:	E-mail correspondence from AS to Dr. JF, requesting a second opinion, dated 10/1/2017

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 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;

[1] The majority of the names and or roles of the contacted collaterals were redacted by the Department. KC and KR provided the names of the contacted collaterals during their testimony. (Exhibit C; Testimony KC; Testimony KR)

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. 2/28/2016

Findings of Fact

1. The child of this Fair Hearing was M; at the time of the [redacted], 2017, 51A report, M was one (1) day old.

2. The Appellants are the child's parents ; therefore, they are deemed caregivers pursuant to Departmental regulation 110 CMR 2.00 and DCF Protective Intake Policy #86-016, rev. 2/28/2016.

3. The Appellants also had three (3) older children; T (hereinafter "T"), R (hereinafter "R") and W (hereinafter "W"). At the time of the 51A response, W was five (5) years old, T and R were six (6) year old twins. (Exhibit A, p.1; Exhibit B, 1; Exhibit C, p.1)

4. The Department's initial involvement with the family began on July 20, 2011, following concerns of domestic violence, which was a re-occurring issue throughout the ensuing years. KR noted that the 2011 incident was extremely violent. The Department made note that at times, the Appellants were uncooperative; on one (1) occasion they could not be located, believed to be out of state. In February 2013, the Department noted that AS was moving out of a "domestic violence family shelter". Noted in time concern was AS's substance use. Additionally, AS voiced concerns regarding PS's mental health, substance use and domestic violence. In January 2014, the Department's involvement centered around AS's drinking and the condition of the residence; at that time, AS "disclosed an opiate addiction." During the ensuing DCF Assessment completed in March 2014, AS reported that she was afraid of PS, and fled the state. PS was arrested for a violation of a restraining order. At that time, the Department noted that AS "worked cooperatively" with the Department. AS had an active restraining order while PS was in jail. The Department closed its case in April 2014, based on AS's report that she filed for divorce and would not permit PS around the children; the Department believed that the children were safe. (Exhibit A, pp.5-10; Exhibit B, pp.4-7; Exhibit C, pp.1-3; Testimony KC; Testimony KR) AS maintained that her understanding for why the Department closed the case was that she was a good parent and the children were well cared for. AS denied being told that it was "a requirement" that she divorce PS and not permit future contact. (Testimony AS)

5. Since 2012, AS received 4 mg of Suboxone medication. (Exhibit E) Since April 2017, the Appellant saw Dr. B. (hereinafter "Dr. B") who prescribed her Suboxone due to a prior addiction to Percocet medication. AS denied heroin use as later alleged. (Exhibit C, p.4; Testimony KC) According to Dr. B's office, the Appellant was last seen on September 7, 2017; there "were no issues with her screens." (Exhibit C, p.8)

6. On [redacted], 2017, the Department received a report from a mandated reporter pursuant to M.G. L. c. 119, §51A, alleging neglect of M by AS. AS was reportedly prescribed Suboxone that M was exposed to. AS's prenatal records were positive for Suboxone alone. The Appellant saw Dr. G (hereinafter "Dr. G") in [redacted] until April 2017; thereafter, she

was followed by [redacted] OB/GYN. The reporter did not know the reason for the change in doctors. AS was reportedly uncooperative with hospital staff and would not provide "much information." The reporter described the Appellant as quite hostile and not happy." As the Appellants refused to "speak or make eye contact", the information was gleaned from other records. M was admitted to the NICU/special care nursery due to respiratory issues. At the time of the filing, M was "doing better and breathing on his own." "Due to mother's hostility and refusing to answer questions at the hospital" the reporter was concerned about "what is going on." (Exhibit A, p.3; Exhibit D Testimony KR)

7. AS was unaware that the hospital was required to contact the Department due to her use of prescribed Suboxone; this was upsetting news at the time of M's birth. (Testimony AS)

8. Following his birth, the hospital placed M in the NICU due to respiratory issues with an IV cardio pulmonary monitor. (Exhibit C, p.3) According to AS, M was placed in the NICU due to residual fluid in his lungs, unrelated to any medication that AS was on. AS contended that M's initial weight loss was due to being placed on the CPAP machine and being unable to eat. (Testimony AS)

9. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to KC, Social Worker from the DCF Taunton Area Office. (Exhibit B; Testimony KC; Testimony KR)

10. On Thursday September [redacted], 2017, KS learned that M remained hospitalized and was doing well. M had transferred from the NICU to parent's room earlier that day. (Exhibit C, p.3) According to AS, M transferred to the pediatric unit where he was to remain for the "mandatory five day watch due to the Suboxone exposure. (Testimony AS)

11. On September [redacted], 2017, AS informed KC that she had been taking Suboxone since 2012-2013 for opiate abuse. AS denied using any other substances. (Exhibit C, p.3) KC subsequently learned that AS had provided urine screens on April 7, April 21, June 21, July 19, August 30, September 9 and September 21, 2017. All screens were positive for Suboxone only. AS subsequently explained that she was unhappy with her original OB/GYN; transferred at seventeen (17) weeks of pregnancy to Dr. B (hereinafter "Dr. B") and wanted to deliver at a hospital that had a NICU. AS saw Dr. B weekly. (Exhibit C, p.3; Testimony KC)

12. Dr. B also followed PS who prescribed him Buprenorphine for chronic pain. PS also saw Dr. B weekly. Additionally, PS was prescribed Adderall for a diagnosis of ADD. (Exhibit C, p.4; Testimony KC) PS informed Dr. B's office that he missed appointments in June 2017 as he was in jail. (Exhibit C. p.8)

13. On Friday September [redacted], 2017, during KC's home visit, the Appellants denied they were being difficult with the hospital staff. AS recalled being "short" with the hospital social worker as she was annoyed that the social worker wanted to talk when she was trying to use the bathroom. The Appellants denied refusing treatment as previously reported. AS felt that hospital staff was not being clear on hospital policy regarding rooming with M after he received oxygen and was on CPAP machine. (Exhibit C, p.4)

14. During KC's September [redacted], 2017, home visit, the Appellants were asked about domestic violence due to the prior documented concerns. The Appellant's denied in time domestic violence. (Exhibit C, p.4) The Appellants agreed to cooperate with the Department and scheduled an appointment for October 2, 2017, for KC to meet with the older children and M who was scheduled to be discharged on that date. There were no noted concerns for the home environment. (Exhibit C, p.4; Testimony KC; Testimony AS) KC communicated the aforementioned information to the social worker, JN (hereinafter "JN"), who indicated that M was set to be discharged. JN noted that M recently had scored a six (6) and this would be further reviewed by his medical team. (Exhibit C, p.4)

15. According to AS, M had additional medical issues following his birth with included having a blood incompatibility and testing Coomb's positive. This resulted in M's jaundice, in addition to, an abnormal kidney scan. (Testimony AS) This was not reflected in the 51B report. (Exhibit C; Testimony AS)

16. AS recalled that Dr. S (hereinafter "Dr. S"), who followed M during the weekend of September [redacted] to October [redacted], 2017, was primarily concerned with M's weight. AS denied that Dr. S offered them a feeding tube or morphine for M. AS testified she referred to hospital medical records which reportedly stated that the hospital no longer would be "scoring" M for withdrawal symptoms and this had officially ended as M was no longer within the five (5) day threshold. AS's understood that the focus shifted onto why M was not gaining weight and not on withdrawal symptoms. (Testimony AS)

17. On Sunday October [redacted], 2017, the Appellant sent E-mail correspondence to Dr. JF (hereinafter "Dr. JF") requesting a second opinion regarding M's "care plan;" possible discharge home and concern with "the latest events which have occurred on the pediatrics floor." (Exhibit E)

18. According to AS, on Monday October [redacted], 2017, at approximately 8:30 am, the Appellant met with Dr. Bn (hereinafter "Dr. Bn") whom they had not met with before. They "were eager" to ascertain why M continued to lose weight. Dr. Bn wanted to put in a feeding tube to address the weight loss, which the Appellants reportedly agreed to, as they wanted to bring M home. Dr. Bn then stated she wanted to administer opiates; Dr. Bn reportedly provided minimal information. The Appellants expressed that their understanding was that M was no longer being scored. The conversation "unfortunately" became "heated" and "out of control." The Appellants left the room, went downstairs and were enroute back to their room with a hospital advocate to return to continue the conversation. AS received a call on her cell phone from Dr. Bn asking "point blank" if they were refusing morphine and a feeding tube. According to AS, she gave permission for the feeding tube; however, asked to wait for an hour to make sure that the morphine was necessary. According to AS, she stated that if morphine was necessary, they would agree to it; but mentioned that she would like to transfer M to Children's Hospital due to the proposed treatment and "having lost faith" in the hospital's ability to treat M. (Testimony Appellant)

19. On Monday October [redacted], 2017, at 8:50 am, the hospital social worker, SH (hereinafter "SH") informed KC that M was actively withdrawing from Suboxone and had a 15% weight reduction; he was at risk for a seizure. The Appellants were reportedly refusing treatment. The Appellants had been informed of the need to treat M with morphine to "capture the

symptoms of withdrawal." M could then be slowly weaned off the medication. The doctor "is so concerned for {M's} health that she is going to explore treating {M} without parent's consent." (Exhibit C, p.5)

20. Upon the Appellant's return to the hospital room with the advocate, AS spoke with KC who had called her. (Testimony Appellant) KC spoke with AS on October [redacted], 2017 at 8:57 am. (Exhibit C, p.5) AS reported that she and PS were not refusing medical treatment. AS reported, that she was waiting to hear back regarding a second opinion from [redacted] Hospital and a possible transfer there. (Exhibit C, p.5; Testimony AS) According to AS, she asked KC "for a little more time" as the situation was rapidly unfolding, occurring within a 30-40 minute timeframe.(Testimony AS) The Appellants continued to speak with Dr. Bn with the advocate present. (Testimony AS)

21. On October 2, 2017 at 9:01 am, the Department received a second 51A report alleging neglect of M by AS and PS. The mandated reporter noted that M had low birth weight and recently began to exhibit signs of withdrawal. The Appellants reportedly refused care. "Specifically, they are refusing a feeding tube placement which is of concern, as the child has lost weight since birth. Furthermore, the parents are refusing neonatal morphine to treat the child's withdrawal symptoms." The reporter indicated they explained the risk of not moving forward with treatment to the parents at length and in different ways but they "continued to not consent to treatment." The Appellants requested that M be transferred to [redacted] Hospital. Reporter indicated she informed the parents that even if a transfer did occur it would take 24-48 hours and M was in need of treatment regardless of any transfer. Reporter indicated M would receive the same level of care if transferred to [redacted] Hospital and many of the physicians at [redacted] Hospital were affiliated with [redacted] Hospital. (Exhibit B, p.2; Testimony KR)

22. The mandated reporter also noted, "The child's birth weight was 3.34kg and it has decreased to 2.878 kg. The child reached the 4-5 day window to display withdrawal symptoms on Friday and has scored as high as 10, and has been scoring 9 and 8 consistently.[2] Reporter added the parents thought the child would be discharged on Sunday but were unable to do so. Currently the hospital has security posted and feels that the parents are a flight risk." The reporter was not aware of a history of domestic violence. The mandated reporter noted worry that the "parents have been very resistant since coming to the hospital regarding treatment for M. Reporter is worried that the parents are a flight risk and that father is escalating and belligerent. Reporter is concerned that the parents would just leave with the baby when he is in need of treatment." (Exhibit B, p.2; Testimony KR)

23. KC was subsequently informed from the doctors, that the Appellants did not arrange transfers. KC was informed it was due to M's "unstable condition as well as insurance would not permit the transfer." KC was informed that the day prior an NG tube was recommended, that the Appellants refused. AS continued to bottle feed M and the NG tube would supplement the calories. (Exhibit C, p.5)

[2] A high score/number is indicative of increased symptoms. (Testimony KR)

24. AS became emotional as she spoke of what she perceived as the difference the level of care provided at [redacted] Hospital and that provided at [redacted] Hospital despite what was told to her. Additionally, the Appellants believed it was "their right" to request a second opinion and/or a transfer. (Testimony AS)

25. On October 2, 2017, at approximately 10:45am, the Department assumed emergency custody of M after the filing of the second 51A report due to the risk that M would be placed at if he did not receive the necessary medical attention. (Exhibit C, pp.5-6, p.17; Testimony KC) According to AS, KC informed her that the Department assumed custody of M as they continued to speak with Dr. Bn; however AS thought at that time the conversation was going well. The Appellant became emotional as she spoke of being asked to leave the hospital. (Testimony AS)

26. In coming to the decision to assume emergency custody of M, the Department relied on the information provided by the mandated reporter of the October 2, 2017, 51A report and a subsequent conversation with hospital staff at 9:20am reiterating the reported concerns. The staff indicated a 45-minute conversation with the Appellant earlier regarding treatment and the reasons for treatment. AS reported speaking with other professionals who reported weight loss after birth was normal and she did not want M to be on an opiate medication. The staff reported that up until September [redacted], 2017, AS continued to breast feed, resulting in M receiving "trace amounts" of Suboxone "which is why he started to withdraw when {AS} stopped breast feeding." KC was informed that M "presented as having facial scratches, he appears jaundice and is starting to look wasted from his weight loss." (Exhibit C, pp.5-6) AS maintained that there were other presenting medical issues. (Testimony AS; See, Finding #15)

27. On October 2, 2017 at 11:14am, the NG tube was inserted and M received his first dose of morphine. (Exhibit C, pp.7-8) According to AS, per hospital policy, morphine should be administered in the NICU. Within "moments" of administering the morphine, M's breathing reportedly slowed to a "ridiculous level" and M was rushed to the NICU where the morphine was discontinued. According to AS, this was clearly documented in the hospital records.[3] (Testimony AS)

28. On October 2, 2017, KC interviewed R, T and W at their school; all three (3) children were noted to have "significant speech delays." R and T reported that PS would grab their arms or wrist and lead them into their rom for discipline. R denied that PS hit him, "he just screams at us and when he does he cries for his mother." T reported that he "hears" the Appellants argue and it scares him. When they argue, "he will stay close to his brothers and hide under a blanket". T was not sure when was the last time this happened but was before the baby was in AS's belly. T reported that PS was "mean and yells at them to get down here." T reported he felt sad when this happens. T denied any other concerns. All three children denied seeing the Appellant become physical with one another. (Exhibit C, p.7; Testimony KC) The Department did not assume emergency custody of R, T and W. (Testimony KC; Testimony

[3] At the Fair Hearing, AS stated her intent to provide copies of the hospital records for consideration by this Hearing Officer. (Testimony AS) The Appellants did not submit supplemental documentation for consideration.

AS) The Department did not support neglect of R, T and W as it related to domestic violence. (Exhibit C)

29. On October 5, 2017, the Department received refuting/conflicting information regarding the reported allegations contained in the October 2, 2017 51A report and the subsequent conversation with the hospital staff. (See, Findings #21, #22, #26) On October 5, 2017, KC received a telephone call from Dr. S who followed M over the weekend of September 30 to October 1, 2017. On September 30, 2017, a strict plan with timed feeding was initiated. On October 1, 2017, M was switched to a higher calorie formula as his weight was down. "The hope" had been M could discharge on October 2, 2017, provided his scores decreased and his weight was up. Dr. S reported that she was "comfortable managing without morphine over the weekend" and she had informed the Appellants that "should he continue to lose weight and score high then morphine and ng tube would be needed." Dr. S informed the Appellants that discharge would not happened on October 2, 2017, as she was not comfortable with M's weight loss. Dr. S stated, "At no point over the weekend did parents refuse treatment." (Exhibit C, p.10; Testimony KC)

30. KC questioned the veracity of the information contained in the October 2, 2017, 51A report, as this information had been reported to the Court. According to Dr. S, she was unclear as to why the Court was told that morphine would have commenced and the NG tube inserted over the weekend if the Appellants had agreed, as this information was "not true." (Exhibit C, p.10; Testimony KC)

31. On October 6, 2017 the Department and AS presented in Court for the 72-hour hearing; PS was not present. The Court continued the 72-hour Hearing to October 20, 2017. [4] (Exhibit C, p.10; Testimony KC)

32. On October 16, 2017, M discharged from the hospital; M entered DCF foster placement. (Exhibit C, p. 12) M was discharged with cholecalciferol and no specific discharge instructions. (Exhibit D)

33. On October 20, 2017, KC was present in Court for the rescheduled 72 hour Hearing on the Care and Protection Petition. KC met with PS "in lock up with his attorney" present. PS reported he had "engaged in a batterers class and that he completed a 12 week program in Norwood." (Exhibit C, p.14) PS reported that he "was incarcerated due to a probation violation." Counsel advised that PS need not inform the Department why he was incarcerated. (Exhibit C, p.14) The record reflected that PS's criminal records had been requested by the Department; however, the 51B report was absent clarification of PS's recent criminal charges. (Exhibit C) According to PS, he was arrested for Possession of Class B which was prescribed to him. (Testimony PS)

34. On October 20, 2017, the Juvenile Court granted AS conditional custody of M with "strict" orders; including not permitting PS to return to the family home or be the sole caregiver.

[4] AS contended that the Department did not inform the Court of the information provided by Dr. S, which directly refuted the allegations in the second 51A report; instead the Department "hid" this discrepancy in order to support their "rush" in decision making to remove M on an emergency basis. (Testimony AS) This was not an issue for resolution in this Fair Hearing.

(Exhibit C, p.14; Testimony KC)

35. At the end of its response, the Department supported the aforementioned report for neglect of M by the Appellants, noting that M was a Substance Exposed Newborn who subsequently experienced Neonatal withdrawal from the Appellant's prescribed Suboxone. The Department based its determination to support neglect on the following:
    - The family's "lengthy" history with the Department to include "significant domestic violence" wherein AS obtained restraining orders; entered a domestic violence shelter and stated intent to divorce PS.
    - AS's inability to explain what changed within their relationship, continuing "to deflect the questions" posed by KC, stating that the prior case had closed.
    - AS's failure to be "truthful with providers that have been involved with her treatment," specifically, AS's denial during her first intake for her pregnancy with M that she was prescribed Suboxone. Only after a positive urine screen did she confirm this. Thereafter, AS changed OB/GYN providers.
    - During M's hospitalization, AS contacted the older children's pediatrician regarding her concerns regarding the treatment that M was receiving. AS did not inform the pediatrician that M was withdrawing from Suboxone. Concern noted that this "would affect the course of treatment being recommended."
    - While denying "protective concerns" the older children's schools noted that AS would become "confrontational and difficult to work with" when confronted with issues regarding T, M and R. This same concern was noted by the hospital." This appears to be a pattern for A[redacted] and it is unclear where this stems from. If this is a personality trait, symptoms of mental health issues, or A[redacted] feeling the need to be guarded in an attempt to conceal information. This impacts A[redacted]'s ability to be able to engage with community providers."
    - PS's in time arrest and incarceration for possession of a Class B substance. His tentative release date was scheduled for October 27, 2017.

    (Exhibit C, p.17, Testimony KC)

36. The concerns regarding the previously documented issues of domestic violence, resistance from the family and failure to be forthcoming entered into the Department's in time decision to support neglect. (Testimony KR) AS admitted that the 2011 altercation was "completely inappropriate", wherein "items were thrown and there was yelling and screaming." AS disputed the Department's contention that they were uncooperative; AS maintained that barring their move to [redacted], the Department was always able to complete their investigation and assessment. (Testimony AS) Prior investigations resulted in five (5) unsupported 51A reports. (Exhibit A, pp.5-9; Exhibit B, pp.4-6; Testimony AS)

37. According to PS, in 2013 he successfully completed a twenty-one (21) week batterer's intervention program (Testimony PS)

38. AS denied in time issues of domestic violence. (Testimony AS) According to the Appellants they attend counseling sessions together "as needed" with AS's therapist from Dr. B's office. (Testimony Appellants) AS stated that the information documented in the 51B report that she was "discharged" from treatment was inaccurate. (Testimony AS)

39. At the time of the 51A reports, PS remained on probation, stemming from a 2012 possession of Class B charge. On October 2, 2017, PS was pulled over in a company van as he was driving erratically; PS reportedly had a prescription in the vehicle. As he was on probation, he was held without bail. At the time of the Fair Hearing, PS's terms of probation included random drug testing and no further arrests. PS completed an intensive outpatient program with continued involvement in an early recovery program and GPS monitoring. (Testimony PS; Testimony AS)

40. At the time of the Fair Hearing, PS had returned home and M remained at home with the Appellants. (Testimony AS)

41. AS spoke of the emotional toll that the Department's decision had on the family. Additionally, the decision to support neglect could result in a substantial prejudice against the Appellants, as they are involved in their older children's school activities. (Testimony AS)

42. Based on the evidence at the time of the 51A Response, I find that the Department had "reasonable cause to believe" that the Appellants' actions resulted in a failure to provide "minimally adequate "medical care" as delineated in its regulations. 110 CMR 2.00; 4.32

43. However, there was no evidence that the Appellants placed M in danger or posed substantial risk to his safety through their actions. DCF Protective Intake Policy #86-015 Rev. 2/28/16 Therefore, the Department's decision to support the allegation of neglect 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

Caregiver is defined as:
(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 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)
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. 2/28/2016

"[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

"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 "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 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

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Policy, rev. 2/28/2016

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) 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. 2/28/2016

Analysis

It was undisputed that the Appellants are caregivers for M pursuant to Department regulations and policy. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016

The Appellants contested the Department's decision to support the allegations of neglect of M following his birth. The undisputed fact of the instant case was that AS was prescribed Suboxone throughout her pregnancy with M. All urine screens throughout the AS's pregnancy were negative barring the prescribed Suboxone. The record however did not reflect whether M tested positive for Suboxone at birth. The record was absent information to reflect that M was born premature. M's birth weight was 7.3 pounds. M was admitted into the NICU following delivery due to respiratory issues resulting from residual fluid in his lungs; M was placed on a CPAP monitor, which AS contended restricted his ability to feed. The record was absent evidence to reflect that the respiratory issues were due to the Appellant's prescribed Suboxone. The 51A report focused on the Appellants being uncooperative and failing to provide to provide detailed information. The reporter noted that AS was "quite hostile and not happy, but staff is unclear what her problem is." Due to this, the mandated reporter was "concerned about what is going on."

On September 28, 2017, M transferred from the NICU to the Appellants' room. Following a home visit with the Appellant, the Department informed the hospital social worker that M could be discharged as the home had been assessed and a home visit had been scheduled for Monday October 2, 2017, to include M. This scheduled discharge date would require review as M's withdrawal scoring had increased.

From this point forward, the medical information relayed to the Department was inconsistent and contradictory. No concerns were reported nor was a 51A report filed during the ensuing weekend when Dr. S was the attending physician. It was not until the morning of Monday October 2, 2017, that the situation within the hospital escalated, resulting in the second 51A report. This report indicated that on October 2, 2017, the Appellants refused a feeding tube to address M's weight loss and neonatal morphine to address his withdrawal symptoms. The Appellants had reportedly refused these treatments over the weekend. As a result of this information, the Department assumed emergency custody of M. On October 5, 2017, the Department learned from Dr. S that at no point over the weekend had the Appellants refused treatment to include insertion of the NG tube or receiving neonatal morphine. Dr. S stated that information should not have been communicated to the Court.

It was clear from the initial 51A report that the communication between the Appellants and hospital staff was strained and marred by distrust, setting the stage for a poor working relationship, which adversely affected the continuity of M's medical care. It appeared that certain

hospital staff formulated negative opinions of the Appellants due to their hesitancy to fully disclose information and questioning proposed medical interventions, culminating in the Appellant's request for a transfer to [redacted] Hospital. While hospital staff maintained that M would receive the same care as the hospitals were affiliated, the Appellants felt it was within their right to request a second opinion regarding M's condition as they had "lost faith" with the medical providers at [redacted] Hospital. This was deemed reasonable and within their rights as parents. Additionally, the Appellants were not dismissive of the need for medical intervention/continued hospitalization despite their "hope" to have M home by October 2, 2017. The Appellants however bear a measure of responsibility in the matter. Their method of interaction and ability to reasonably communicate their parental opinions, concerns and needs created an environment wherein M's medical care became disjointed.

This same style of parental communication when addressing prior concerns of domestic violence, raised the Department's concerns in this area due to previously documented incidents and statements made by AS. PS's completion of a batterers intervention program coupled with the Appellants intermittently meeting with AS's counselor would have been helpful information for the Department in assessing safety and risk. PS's in time arrest for Possession of Class B raised additional concern for the Department. Noteworthy however was the Department's decision not to support neglect on the Appellant's three (3) older children based on the aforementioned concerns. At the time of the 51A reports, there were no reported concerns of domestic discord/violence or PS being under the influence in M's presence during his hospitalization. These issues however raised additional red flags for the Department.

Considering the entirety of the record in this case, the evidence was sufficient to determine that the Appellants' actions during M's hospitalization resulted in a failure to provide "minimally adequate…medical care…" for M. 110 CMR 2.00,4.32 While it was reasonable for the Department to be concerned about the impact of Appellants' method of communication and interaction with hospital staff, the evidence was insufficient to determine that the Appellants placed M in immediate danger or posed substantial risk to his safety.[5] M remained hospitalized and the evidence supported that the Appellants did not refuse treatment during the preceding weekend. The events of October 2, 2017, quickly unfolded and were largely based on misinformation provided by hospital staff. The Appellants have shown by a preponderance of the evidence that the Department failed to comply with its regulations and policy when it made a finding to support the allegations of neglect. DCF Protective Intake Policy #86-015, rev, 2/28/2016

[5] Such evidence, that the child was in danger or the Appellant's actions posed a substantial risk to the child's safety or well-being would be necessary for the Department to support the allegations, as opposed to the Department making a finding of "concern" which would also require that the child was neglected, but that there is a lower level of risk to the child, i.e. the actions or inactions by the Appellant create the potential for abuse or neglect, but there is no immediate danger to the child's safety or well-being. (See DCF Protective Intake Policy #86-015, Rev. 2/28/16, p. 28, 29)

Conclusion and Order

The Department's decision to support the 51A report of neglect on behalf of M by the Appellants is **REVERSED.**

Carmen Temme
Fair Hearing Officer

9/7/18
Date

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

Date

Linda Spears
Commissioner