

ATTACHMENT A

CASE EXAMPLES AND DISCUSSION OF A FAIR PREPONDERANCE OF THE EVIDENCE STANDARD FOR CHILD PROTECTIVE SERVICES INVESTIGATION DETERMINATIONS

Example 1

A nurse at a hospital called the New York Statewide Central Register of Child Abuse and Maltreatment (SCR) to report a mother gave birth to a baby and both the mother and baby tested positive for cocaine. The SCR classified the allegations as Parent Drug Alcohol Misuse (PDRG). The child protective services caseworker (CPS CW) went to the hospital and confirmed the test results. The CPS CW also confirmed that the infant was born three weeks before her due date, appeared to be jaundiced, struggled to feed and would have to spend some time in the neonatal intensive care unit prior to discharge from the hospital. The CPS CW, hospital staff, the mother, and her family created a plan of safe care for the infant's discharge. Pursuant to the plan, the mother would engage in outpatient substance abuse treatment and both the mother's boyfriend (who is not the father of the baby) and the maternal grandmother would be available to assist in caring for the infant. The biological father would also have regularly scheduled visits. All members of the family agreed to the plan. The mother began outpatient substance abuse treatment as soon as she was discharged and prior to the baby being released from the hospital.

Forty-five days later, CPS received two additional reports regarding the family that were accepted by the SCR. The source of the second report was the baby's father and the source of the third report was an emergency medical technician (EMT). The baby's father reported to the SCR that when he arrived to pick up the baby for visitation, he found the mother had overdosed in the garage, the mother was unresponsive, and the baby was unattended on the garage floor crying. The father reported he immediately called 911 for help. The EMT who called the SCR reported the mother overdosed on cocaine mixed with fentanyl and had to be revived. The EMT did not describe the baby's condition, but stated the baby was present. The SCR classified both reports as Parent Drug Alcohol Misuse (PDRG).

CPS CW followed up with several interviews. During his interview with the CPS CW, the father reiterated the allegations he made to the SCR. The mother's boyfriend had a different account stating he was upstairs taking care of the infant so the mother could visit a friend down the street. He did not know the mother was in the garage until the ambulance arrived. During an interview with the EMT, the EMT informed the CPS CW the baby was present at the scene but was being cared for by the mother's boyfriend. The EMT never observed the child unattended. The mother informed the CPS CW that she left the baby with her boyfriend while she planned to visit a friend down the street, but before leaving the house she stopped in the garage to get high and that was when the overdose occurred. The mother agreed to enter an inpatient substance abuse treatment facility, and in accordance with the plan of safe care, made arrangements for her boyfriend and mother to care for the baby and for the baby to continue regular with visitation for the father.

The CPS CW is inclined to indicate all three reports against the mother for PDRG.

Can the reports be indicated under the fair preponderance of evidence standard?

No.

Discussion

To indicate the mother of a newborn with a positive toxicology, CPS must determine that the child's physical, mental, or emotional condition was impaired or was in imminent danger of impairment due to the mother's failure to exercise a minimum degree of care. Evidence that a newborn tested positive for a drug in its bloodstream or urine is in and of itself insufficient to indicate the report. As described in the *Child Protective Services Manual*, other conditions that a newborn has, which may or may not be attributable to in utero exposure to drugs, is also insufficient in and of itself to support a determination that the child was maltreated. After receiving a report in which PDRG is alleged, CPS must determine whether drug or alcohol misuse has occurred or is occurring and if so, whether the child's physical, mental, or emotional condition was impaired or is at imminent danger of becoming impaired as a result.

In this example, the question of whether the mother's overdose occurred in the presence of the infant such as to leave the infant unattended and impaired or in imminent danger of becoming impaired was not established by a fair preponderance of the evidence. The mother's overdose is a significant event; however, the boyfriend reported he was safely caring for the infant during the entire event, and the EMT provided corroboration. Therefore, the report cannot be indicated against the mother for PDRG.

Note that if the initial report called in by the hospital was accepted by the SCR prior to January 1, 2022 and the two subsequent reports were called in on or after January 1, 2022, the reports in this example could not be consolidated.

Example 2

A school guidance counselor contacted the SCR and made allegations against the mother of Callie (age 15). The source stated that Callie is a lesbian and has made that known to her friends and teachers for over a year. Last night, Callie told her mother she is a lesbian, and her mother punched her in the face and pushed her. Callie took pictures with her phone of her face and sent it to her friends, but the mother subsequently took her cell phone and told Callie she can no longer associate with these people. Before her phone was taken, Callie called the guidance counselor and told her that her mother would not let her go to school and that her mother told her that she (Callie) should kill herself. Mother called the school at noon and said she would be withdrawing Callie from school as she believes the school is at fault for supporting her child's sexual orientation.

The SCR classified the allegations made against the mother as Emotional Neglect (EMOT) and Excessive Corporal Punishment (EXCP).

When the CPS CW went to the home, the mother openly acknowledged that she is not in support of her daughter being a lesbian; however, she denied punching Callie in the face and pushing her. The mother admitted to suggesting to Callie that she should consider suicide if she was not going to change her sexual orientation. Mother stated homosexuality is against her belief system and that she will be enrolling Callie in a private school, which will "fix everything," if she does not

kill herself. CPS CW observed Callie and did not notice any marks on her face, although she did note that her face looked slightly swollen. When the CPS CW asked Callie about her mother's response to her disclosure, Callie looked down and said, "she was really mad, and told me to kill myself." The CPS CW inquired further if her mother became physical violent with her and Callie nodded yes but would not answer verbally. The CPS CW asked Callie if she felt suicidal, Callie nodded yes, started to cry, and left the room. CPS CW made a referral for Callie to receive mental health services. The CPS CW interviewed the source of the report who identified the friends Callie reported as the recipients of the photos. The CPS CW reached out to Callie's friends, one of whom was willing to talk about what happened. This friend shared screen shots of the text messages from Callie about the incident and a selfie Callie had sent right afterwards. In the text messages, Callie conveyed that her mother punched her in the face, pushed her, and made homophobic comments. In the photo, Callie's right cheek was red and swollen. A week later, the CPS CW followed up with Callie by phone. Callie reported her mom had calmed down, but her mother was still not accepting that she is a lesbian, which makes her very upset. Callie also reports that her mother refuses to transport her to receive the mental health services that she was referred to. Callie confirmed that she is now attending the new school but still feels strongly about her sexual orientation and is still considering her mother's suggestion to kill herself. CPS CW spoke with the mother who confirmed that she would not be transporting Callie to her mental health services referral as she felt that they are no longer needed now that Callie has changed schools.

The CPS CW is inclined to indicate the report against the mother for EXCP and EMOT because:

- a) there is photographic evidence of an injury to Callie's face consistent with her being punched by her mother (EXCP); and
- b) upon being informed her daughter reported to a school official that she was suicidal, the mother openly admitted to encouraging suicide and refused transportation to follow through on the referral for mental health services (EMOT).

Can the report be indicated under the fair preponderance of evidence standard?

Yes.

Discussion

In this case, Callie took and disseminated a photograph of her injured face contemporaneously to being punched by her mother. This photograph and Callie's disclosure of what occurred to the CPS CW and her friend outweigh the mother's denial, and this evidence meets the fair preponderance standard to substantiate the allegation of EXCP.

The allegation of EMOT can also be substantiated against the mother under a fair preponderance of the evidence standard based on the mother's comments encouraging her daughter to commit suicide and disregard for her daughter's suicidal ideations. Specifically, in this example, the mother refused to transport her daughter to her referred mental health services and openly admitted to encouraging her daughter to commit suicide. This conduct amounts to a failure to exercise a minimum degree of care in relation to her child's physical, mental and emotional condition. The mother's admissions and her conduct meet the fair preponderance standard for the CPS CW to substantiate the allegation of EMOT as Callie remaining suicidal establishes that

her mental and emotional condition had been impaired as a result of the mother's failure to exercise a minimum degree of care.

Example 3

A person called the SCR to report his neighbor is regularly selling and using drugs with her two young children present and that strangers are coming and going at all hours of the night and some of them may have guns. The SCR accepted the report and classified the allegations as Inadequate Guardianship (INGD) and Parent Drug Alcohol Misuse (PDRG).

When interviewed by the CPS CW, the source of the report complained of loud music, fights in the home, the smell of marijuana smoke, and hearing the children cry all the time. The source could not provide any detailed information to the CPS CW as to why he believes his neighbor is selling or using drugs in the presence of her children. The source did state his neighbor is "up to no good" and if the CPS CW only saw "the type of people" coming in and out of the apartment, the CPS CW would have all the evidence she needed that drug use and sales were occurring in the home.

When the CPS CW knocked on the mother's door, the mother answered and was very upset to learn a CPS report had been called in against her. The mother adamantly denied the CPS CW access to her home but did agree to talk in the hallway. The mother denied there was any drug sales or fights occurring in the apartment. She did report she has two cousins who occasionally stay with her after working a late shift at a nearby business but insisted no one has ever entered her home with a gun in their possession. The mother said she periodically smokes a little marijuana on the fire escape after the children are asleep but questioned why this was an issue since marijuana is legal and she is always capable of caring for her children.

The mother allowed the CPS CW to see her two children in the doorway but would not permit a private interview to be conducted. Both children are under the age of 5 and remained silently clinging to their mother's legs while the CPS CW tried to ask them questions. The children did not have any visible injuries and were appropriately dressed. The mother repeatedly expressed her frustration and distrust of CPS and said she was outraged CPS had come to her home. The CPS CW was agitated due to the way the mother spoke to her and that she was not allowed into the apartment nor allowed to speak with the children without the mother present.

The CPS CW is inclined to indicate the report against the mother for INGD and PDRG.

Can the report be indicated under the fair preponderance of evidence standard?

No.

Discussion

The information provided by the source may reflect he has an implicit or explicit bias against the subject. Additionally, the source was unable to provide any evidence to support the maltreatment allegations he made against the mother.

Adult recreational use of marijuana became legal in New York State on March 31, 2021 (see Chapter 92 of the Laws of 2021 – commonly referred to as "the Cannabis Law"). A report of alleged child maltreatment cannot be indicated solely because the subject of the report

purchases, possesses or consumes marijuana, unless CPS has a fair preponderance of evidence that such behavior by the subject of the report resulted in impairment or imminent danger of impairment to a child's mental, physical, or emotional condition in accordance with the legal definition of child maltreatment. Although the mother acknowledged she occasionally uses marijuana, there was no evidence that such use impacted her ability to provide the minimum degree of care to her children. Moreover, the evidence gathered by the CPS CW did not establish that the physical, mental or emotional condition of either child in the home was impaired or was placed in imminent danger of impairment as a result of the mother's conduct. Furthermore, refusing to allow the CPS CW entry into her home, in and of itself is insufficient evidence to substantiate an allegation of INGD or PDRG against the mother. Therefore, the allegations of PDRG and INGD against the mother in this example cannot be substantiated.

If a CPS CW is denied access to a home or to a child, they should consult with a CPS supervisor and discuss the appropriate course of action. A situation may arise when a CPS CW is unable to locate a child or is denied access to the home or child and the CPS CW has a reasonable cause to believe the child's life or health may be in danger. When this situation occurs, the CPS CW must advise the parent or PLR with whom the child is residing that if denied sufficient access without further notice, CPS may seek an order from family court to compel the parent or PLR to produce the child and/or to permit access to the home (see Social Services Law sections 424(6-a), 424(6-b)).

Example 4

A hospital staff member called the SCR alleging a 3-year-old child was treated in the emergency room after eating an entire package of cannabis gummies the parents kept in the home. The child is believed to have consumed nine cannabis gummies, each containing 10 mg of tetrahydrocannabinol (THC). Upon arrival to the hospital, the child was delirious and vomiting violently. Hospital personnel had to pump the child's stomach and admitted the child overnight for monitoring and to treat acute dehydration. The SCR accepted the report against the mother and father and classified the allegation as Poisoning / Noxious Substance (POIS).

The CPS CW arrived at the hospital and confirmed the allegations with the source and both parents. The parents reported they purchased THC-infused gummies, which were contained in a sealed package. The parents reported the clear package of gummies was left on the living room coffee table, but they did not think this was unsafe to do as the packaging seemed secure. The package appeared to be difficult to open, and they did not think their 3-year-old could access the gummies. The parents were interviewed separately, and the mother reported she was in the kitchen preparing lunch and the father was upstairs when the child managed to open the package and consume the gummies. The father confirmed during his interview the mother's version of events. Both parents assured CPS they only used the gummies after the children had gone to bed and that they will no longer keep THC-infused gummies in the house. The CPS CW had no other safety concerns for the family and did not think the case warranted the filing of an Article 10 proceeding in family court.

The CPS CW is inclined to indicate both parents for POIS.

Can the report be indicated under the fair preponderance of evidence standard?

Yes.

Discussion

The change in the standard of evidence does not mean CPS should only indicate reports that lead to the filing of an abuse or neglect petition pursuant to Article 10 of the Family Court Act.

Adult recreational cannabis use has been legal in New York State since March 31, 2021. However, the Cannabis Law provides that adults shall take reasonable steps designed to ensure that persons under the age of 21 cannot access cannabis (see Penal Law section 222.15(4) and (5)). The parents in this case did not take reasonable steps to ensure their young child could not access the THC-infused gummies, such as storing them in a location that was inaccessible to the child. THC-infused gummies are particularly attractive to children and should have been safely secured.

Both parents failed to exercise a minimum degree of care by failing to secure the THC-infused gummies. The direct result of that failure was the child ingesting a large amount of THC which caused actual physical harm. Therefore, the CPS CW has collected sufficient information to establish that a fair preponderance of the evidence supports the substantiation of the allegations of POIS against both parents and indication of the report in this example.

Example 5

A school official contacted the SCR on February 15 to report that since December 1, Robert (age 13) has not logged in for class via Zoom for 25 total days but has attended on in-school days. Roberts is now failing social studies and math and is disengaged. School officials have contacted the parents several times to report his online absences. Robert's parents have responded to a few of these contacts and stated they are having difficulty with online learning. The SCR accepted the report against both parents and classified the allegations as Educational Neglect (EDNG).

When interviewed by the CPS CW, the parents reported that the first Chromebook the school gave to Robert in September did not work and it took the school almost a month to provide another one. The parents cannot afford to purchase a computer for Robert. The mother stated she works outside of the home and is not present during the day. The father explained that he is salesman, and his employer has allowed him to work from home on the days when Robert has online school. However, the father stated that he is constantly on the phone making sales calls and cannot always assist Robert. The child does have an individualized education program (IEP) plan and parents report that the child has not missed a single day of in-school instruction or any of his speech therapy sessions, which are provided in school.

The CPS CW interviewed Robert who said he does not like online learning, and it is very hard for him. He said he enjoys attending school in person. Robert reported no problems at home, and he appeared clean and well-adjusted at interviews. No safety issues were discovered.

School officials confirm Robert has attended all his in-school days and speech therapy sessions in accordance with his IEP. A teacher reported Robert is currently failing two classes due to his online absences and he continues to struggle even with a working Chromebook.

The CPS CW is inclined to substantiate the allegations of EDNG against both parents.

Can the report be indicated under the fair preponderance of evidence standard?

No.

Discussion

The definition of child maltreatment in relation to failure to provide appropriate education requires that the child is impaired or is in imminent danger of becoming impaired as a result of the failure of the subject to exercise a minimum degree of care in providing education to the child notwithstanding the efforts of the school district or local educational agency and CPS to ameliorate such alleged failure.

When school began in September, Robert was given a nonfunctional Chromebook that the school did not replace for a month. Furthermore, although the school reported to the parents that Robert was not attending his online school days, no evidence was provided to demonstrate that school officials made efforts to resolve the problem.

Robert's parents did ensure that he attended every in-person school day and all of his speech therapy sessions in accordance with his IEP. The mother could not assist Robert with his school work during the day because she works outside of the home. The father is home with Robert on his online days; however, the father must also attend to his own work duties during that time to maintain employment.

In this example, there is not a fair preponderance of the evidence to substantiate the allegations of EDNG against Robert's parents.