

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2018-268

NOVEMBER TERM, 2018

In re L.D., Juvenile  
(C.B., Mother\*)

} APPEALED FROM:  
}  
} Superior Court, Caledonia Unit,  
} Family Division  
}  
} DOCKET NO. 6-1-18 Cajv

Trial Judge: Howard A. Kalfus, Acting  
Superior Judge, Specially Assigned

In the above-entitled cause, the Clerk will enter:

Mother appeals the decision of the family division finding her seven-year-old daughter L.D. to be a child in need of care or supervision (CHINS) based on educational neglect. We affirm.

The Department for Children and Families (DCF) filed a petition on January 25, 2018 alleging that L.D. was CHINS based on allegations of unexplained bruising on her back and excessive absences from school. Following a hearing that took place the same day, the court entered a temporary care order placing L.D. in DCF custody. On February 14, after another hearing, the court granted mother's motion for a conditional custody order returning L.D. to mother's care subject to protective supervision by DCF.

The merits hearing was held over three days in April and May 2018. The State did not pursue the allegation of physical abuse because a pediatrician had examined L.D. after the petition was filed and concluded that the bruising was likely due to sledding. Instead, it focused on allegations of educational and dental neglect.

One of L.D.'s teachers testified that due to L.D.'s behaviors, at the beginning of the 2017-2018 school year she was placed in the "flex room," an alternative classroom for students who struggle behaviorally and emotionally and do not have an individualized education plan (IEP). Mother objected to this placement, apparently because she believed that L.D. should be in the regular classroom with an IEP, and took L.D. out of school for a week. She eventually returned L.D. to school even though the flex-room placement continued. The State asked the teacher if L.D.'s attendance had been an issue during the previous school year when L.D. was in kindergarten. Mother's attorney objected that the CHINS petition was only based on L.D.'s attendance during the current year. The court sustained the objection based on lack of notice. Later in the hearing, however, mother admitted that L.D.'s attendance had been an issue the previous year and that the school had recorded thirty to forty absences. Mother's attorney did not object to this testimony.

The State introduced attendance records for the 2017-2018 school year, which showed that by the time the CHINS petition was filed in January 2018, L.D. had been absent nineteen days and tardy twenty-three days. On several of the days when she was tardy, she arrived at school hours late. Her teachers testified that L.D. was embarrassed and anxious when she arrived late, and had experienced gaps in her academic progress due to the absences and tardiness.

At the conclusion of the hearing, the court ruled that L.D. was CHINS. It made the following oral findings in support of its decision:

I'm find[ing] that L.D. was in need of care and supervision based only on what I would consider to be truancy issues or educational neglect.

....

... L.D. accrued a number of absences and tardies, particularly the first half of this current school year, but also last year. That did interfere with her ability to learn as much as she could and to get the benefits of interacting with her classmates that she needed. I don't—this is not based upon the week in September that L.D. missed.

Again, here, [mother] has been very much engaged with L.D.'s education, making sure that—advocating for the IEP, but here there was—her efforts did fall too short for me to be able to excuse it. The number—again, the number of absences and tardies that could've been avoided, it just took too much of a toll.

So for all these reasons, I do find that L.D. was in need of care and supervision at the time the petition was filed.

The court did not find physical abuse or medical or dental neglect.

A disposition hearing was held in July 2018. The State represented that L.D.'s attendance at school and medical and dental appointments had improved since the petition was filed. Based on DCF's recommendation, the court issued an order returning custody to mother and closed the case. Mother appealed the court's CHINS determination. See 33 V.S.A. § 5315(g) (providing that CHINS adjudication is not final appealable order; party seeking to challenge it must appeal from resulting disposition order).

“The issue before the family court at the merits stage of a CHINS proceeding is a determination of whether, at the time of the filing of the petition, the juvenile is a child in need of care and supervision.” *In re D.T.*, 170 Vt. 148, 156 (1999). A child is CHINS when he or she “is without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being.” 33 V.S.A. § 5102(3)(B). The State has the burden of establishing by a preponderance of the evidence that the child is in need of care or supervision. 33 V.S.A. § 5315(a). We will uphold the family court's factual findings unless clearly erroneous and will affirm its conclusions of law if supported by those findings. *In re J.C.*, 2016 VT 9, ¶ 6, 201 Vt. 192.

The record supports the court's conclusion that L.D. was CHINS at the time the petition was filed in January 2018. At that point, L.D. had been absent or tardy on forty-two days—almost one-quarter of the 2017-18 school year. This was consistent with the pattern established the

previous year, when she was absent thirty to forty days. Although mother argues that L.D.’s attendance issues were “resolved” by the time of the petition, the record does not support this assertion. It is true that some of L.D.’s absences during the fall of 2017 were excused and the school recorded only one absence, also excused, during the month preceding the petition. Mother’s parent advocate also testified that L.D. was making “phenomenal progress” under her IEP. However, L.D. continued to accumulate tardies right up to the date of the petition. On some of those days she was hours late to school, and therefore effectively absent for much of the day. The family court found that L.D.’s pattern of absences and late arrivals limited her ability to learn and interact with her peers. This finding was supported by the testimony of L.D.’s teachers, and in turn supported the court’s conclusion that her educational needs were not being met as of January 2018.

Mother argues that it was error for the court to rely on evidence from the prior school year because it had sustained her objection to such evidence based on lack of notice. However, mother herself testified about L.D.’s absences during kindergarten and thereby waived her objection to this evidence. The evidence was relevant to the court’s assessment. See *In re L.M.*, 2014 VT 17, ¶ 20, 195 Vt. 637 (“[T]he circumstances leading up to the filing of the CHINS petition are relevant in the court’s assessment.”).

Mother also argues that it was unfair to find L.D. to be CHINS based on truancy where the petition did not allege truancy. We see no error. Although the court mentioned truancy in its oral findings, the CHINS merits order states that it was based on educational neglect, not truancy. As discussed above, the record supports the court’s conclusion that L.D. was CHINS due to educational neglect.

Affirmed.

BY THE COURT:

---

Paul L. Reiber, Chief Justice

---

Marilyn S. Skoglund, Associate Justice

---

Harold E. Eaton, Jr., Associate Justice