

In January 2020, mother was found unresponsive in her car by police, who believed she had an overdose. DCF subsequently amended the CHINS petition to include a description of this incident. DCF also moved to compel disclosure of the November 2019 urinalysis results.

A merits hearing was held over three days in March and June 2020 and January 2021. On the first day, the court considered DCF's motion to compel disclosure of the urinalysis results. Mother's attorney objected, stating that mother did not have the report and did not concede that she had tested positive for fentanyl as alleged by DCF. The court concluded that the urinalysis test result was a treatment record protected by federal law. It held that it could not order disclosure because there was no evidence that disclosure was necessary to protect against an existing threat to life or serious bodily injury. The court noted that K.S. was in the care of her grandparents and thus did not appear to be subject to an existing threat. The court further rejected the State's argument that the fentanyl test was necessary to prove CHINS, and thus to prevent K.S. from being exposed to an existing threat, because the significance of the test was questionable when mother's substance abuse assessment had not identified a disorder or led to any treatment recommendations.

In June 2021, the court issued an order denying the CHINS petition. The court found that in 2008, mother had undergone surgery to remove several tumors from her neck. She lost all her teeth, part of her jawbone, and much of the hearing in her left ear. Due to extended radiation therapy, mother experienced nonepileptic seizures. She had been prescribed various medications over the years including oxycodone. At the time of the petition, mother was prescribed a seizure medication, an anxiety medication, and a sleep medication. Because she had difficulty swallowing pills, she crushed her medication and mixed it with food or a drink.

The court found that despite her health issues, mother provided adequate food, shelter, and clean clothes for K.S., and there were no issues with power outages or lack of heating. In October 2019, mother had lost her job and her employer-based health insurance. She applied for public assistance. In November 2019, she received an eviction notice. She was able to pay off the back rent with her boyfriend's help and no eviction occurred.

Mother's boyfriend, with whom she had been in a relationship for approximately five years, lived in his own apartment but regularly stayed over at mother's. The court found that he and mother argued but that domestic violence was not an issue. The court found the boyfriend to be credible in his testimony that he had never seen mother abuse her prescribed medication or use nonprescription drugs, including marijuana.

The court found that mother and paternal grandmother had a strained relationship. On special occasions, mother had allowed K.S. to spend additional time with her paternal relatives beyond the contact schedule set forth in the court order. Mother also allowed paternal grandmother to bring K.S. to medical appointments, sometimes with her permission and knowledge and sometimes without. The court found that mother had not completely abdicated responsibility for K.S.'s health care, however. Mother attended K.S.'s oral surgery in 2019 and brought K.S. to many counseling sessions. In the summer and fall of 2019, at grandmother's request, mother allowed K.S. to spend increasing amounts of time with grandmother. When school resumed, grandmother noticed that mother seemed unusually tired.

K.S. testified that when she was in the fourth or fifth grade, mother had snorted some type of drug on a few occasions and that the drug was stored in the bathroom in a plastic baggie. The court found this testimony credible. The court further found that in January 2020, mother

was found unresponsive in her vehicle by police. She exhibited symptoms of an overdose. The officers administered Narcan, which revived her. The officers did not observe any drugs or paraphernalia in the vehicle. Mother was taken to the hospital and given some tests, but these were not admitted into evidence. Mother was not cited with any criminal or motor vehicle violations. The court conceded the possibility that mother had an epileptic seizure, but found it likely, based on the officers' observations and experience with overdose victims, that mother had had an opioid overdose.

In early February 2020, mother participated in a substance abuse assessment and took another urine test. The results of the urinalysis were not offered into evidence, and the clinician who performed the assessment did not testify. However, the assessment concluded that mother did not meet the criteria for a substance abuse disorder and did not make any recommendations for substance abuse treatment.

Based on these findings, the court concluded that the State had failed to demonstrate that K.S. was CHINS. It found that mother's incidental substance use years before was not probative of K.S.'s current circumstances. It found that the absence of any treatment recommendations resulting from the February 2020 substance abuse assessment strongly suggested that the incident in January 2020 was not part of a sustained relapse, and this conclusion was supported by mother's boyfriend's credible testimony that he had never seen her use illegal drugs. The court found that the other allegations in the petition were not proven. It therefore dismissed the petition. K.S. appealed.*

A child is CHINS if 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). "[T]he focus of a CHINS proceeding is the welfare of the child." In re B.R., 2014 VT 37, ¶ 13, 196 Vt. 304 (quotation omitted). The State must prove by a preponderance of the evidence that the allegations in a CHINS petition have been established. Id. If the allegations are not established, the court must dismiss the petition and vacate any existing orders. 33 V.S.A. § 5315(f). "On review, we will uphold the trial court's findings unless they are clearly erroneous, and the court's legal conclusions will stand when supported by the findings." In re M.M., 2015 VT 122, ¶ 12, 200 Vt. 540.

On appeal, K.S. argues that the court committed reversible error by denying DCF's motion to compel disclosure of mother's November 2019 urinalysis results. K.S. argues that the court applied the wrong standard under federal law. She further argues that even if the standard was correct, the court improperly concluded that disclosure was not necessary to avoid bodily injury because K.S. was in the care of her grandparents at the time of the hearing. She maintains that the court should have focused on whether she was at risk at the time of the petition.

We agree with K.S. that the court applied the wrong federal standard to DCF's motion to compel. The court's decision was based on § 2.63 of the federal substance abuse confidentiality regulations set forth in Part 2 of Title 42 of the Code of Federal Regulations. The regulations generally prohibit federally funded substance abuse programs from disclosing patient information without the patient's consent. See 42 U.S.C. § 290dd-2; 42 C.F.R. § 2.2. In certain circumstances, courts may order disclosures of patient records for use in court proceedings. See 42 C.F.R. §§ 2.61-2.67. Section 2.63 provides that a court "may authorize disclosure of

* DCF did not participate in the appeal.

confidential communications made by a patient . . . in the course of diagnosis, treatment or referral” only when one of the following situations exists: “[t]he disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect,” the disclosure is necessary in connection with prosecution of a serious crime, or the patient testifies about the content of the communications. 42 C.F.R. § 2.63. The court denied DCF’s motion to compel disclosure of the urinalysis result because it found that none of the above circumstances applied to this case.

As we have explained, § 2.63 applies only to “confidential communications made by [the] patient,” not to patient records in general. See *id.*; *In re B.S.*, 163 Vt. 445, 449 n.2 (1995) (explaining distinction between §§ 2.63 and 2.64). A urinalysis test result is plainly not a communication made by a patient. Thus, the court erred in applying § 2.63 to the sought-after disclosure here; the appropriate standard is that set forth in § 2.64, which governs court-ordered disclosure of patient records in noncriminal proceedings. See 42 C.F.R. § 2.64 (stating that after notice to patient and hearing, court may order disclosure of records if good cause exists).

However, K.S. has failed to demonstrate that the court’s error resulted in prejudice. See *In re M.B.*, 147 Vt. 41, 44 (1986) (“Reversal is required only where the error complained of results in undue prejudice, not where it is harmless.”). DCF presented little evidence that mother was abusing illegal drugs at the time the petition was filed in December 2019. There was grandmother’s testimony that mother seemed unusually tired in the fall of 2019, and K.S.’s testimony indicating that mother had, years before, used some type of illegal drug. After mother’s apparent overdose in January 2020, DCF amended the petition to include a description of those events. Assuming without deciding that the court could compel disclosure of the urine test result without violating other provisions of federal and state law, a positive fentanyl result would have added some weight to DCF’s allegations that mother was using unprescribed drugs. But this relatively weak evidence was countered by ample other evidence supporting the court’s determination that K.S. was not without proper parental care at the time of the CHINS petition, including: the fact that mother’s substance abuse assessment did not result in a diagnosis or treatment recommendations; mother’s boyfriend’s testimony that she did not abuse drugs; and, most importantly, the evidence that K.S. was generally well provided for by mother, who provided her with safe and stable housing, adequate food, clean clothing, and medical and dental care. Under these circumstances, K.S. has failed to demonstrate that the court’s claimed error would have changed the outcome of the proceeding. See *Schmitt v. Lalancette*, 2003 VT 24, ¶ 19, 175 Vt. 284 (“The party who objects to the error must demonstrate that the error resulted in prejudice.”); V.R.C.P. 61 (stating that error by court is not ground for disturbing judgment “unless refusal to take such action appears to the court inconsistent with substantial justice.”).

K.S. contends that it was improper for the court to consider the February 2020 substance abuse assessment in determining whether she was CHINS. We agree that CHINS decisions generally cannot be based on events that occur after the petitions are filed. See *In re M.L.*, 2018 VT 32, ¶ 16 (“[I]n evaluating the State’s CHINS petition, we focus on the circumstances at the time the State filed the petition.”). However, “that does not mean that evidence of events that took place after the CHINS petition cannot be considered in assessing whether, at the time of the CHINS petition, the child was CHINS.” *In re L.S.*, No. 2018-172, 2018 WL 5778988, at *2 (Vt. Oct. 31, 2018). Here, the substance abuse assessment, which took place within days after the amended petition, and approximately a month and a half after the original petition, provided relevant evidence countering DCF’s allegations that K.S. was CHINS in December 2019 and January 2020. It was not unreasonable for the court to infer from the resulting lack of diagnosis

or treatment recommendations, and the relatively weak nature of the other evidence, that mother did not appear to have a serious substance abuse problem at the time of the original petition.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice