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Local Commissioners Memorandum

Transmittal:	13-OCFS-LCM-01
To:	Local District Commissioners
Issuing Division/Office:	Strategic Planning and Policy Development
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Subject:	Investigation and Determination of Sleep-Related Fatality and Injury CPS Reports
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Attachments:	CPS Program Manual - Chapter 11, Section K: Investigation and Determination of Sleep-Related Fatality and Injury CPS Reports
Attachment Available Online:	CPS Program Manual: ocfs.ny.gov/main/cps/cps_manual.asp (Internet) ocfs.state.nyenet/cps/manual (OCFS intranet)

I. Purpose

The purpose of this Local Commissioners Memorandum (LCM) is to provide policy guidance to child protective services staff of social services districts regarding the investigation and determination of Child Protective Services (CPS) reports involving sleep-related fatalities or injuries. Attached to this LCM are guidelines, entitled *Investigation and Determination of Sleep-Related Fatality and Injury CPS Reports*, that

address this subject. These guidelines will be incorporated into the Child Protective Services (CPS) Program Manual.

II. Background

The Office of Children and Family Services (OCFS) has noticed that an increased number of fatalities reported to the Statewide Central Register of Child Abuse and Maltreatment (SCR) have been occurring to children, mainly infants, while they are sleeping. Most involve bed sharing, but a number also involve where the child, usually an infant, is left unattended. OCFS recognizes that investigating and making determinations in such cases presents unique challenges and requires special attention. Non-fatality sleep-related injury reports to the SCR present similar issues; therefore, those cases are also addressed in this policy.

In the course of developing and issuing fatality reports pursuant to section 20 of the Social Services Law (SSL) that involve sleep-related deaths, OCFS has noted that there are variations across the state in how these reports are investigated and in the criteria used in making the determination whether to indicate or unfound the report.

In 2010, OCFS issued Local Commissioners Memorandum 10-OCFS-LCM-15, *Guidance for CPS Investigation of Infant Fatalities and Injuries Involving Unsafe Sleeping Conditions*, which provided guidance on the investigation and determination of sleep-related CPS reports. However, OCFS has heard from the field that there is a need for further guidance regarding these types of reports. The goal of this release is to provide a tool that CPS caseworkers and supervisors may use throughout the investigation and determination processes. The issuance of a standard OCFS policy should also be useful in regard to requests for amendment of indicated reports.

The thorough and complete investigation of sleep-related cases will serve to:

- help determine whether any death or injury in such a case is the result of abuse or maltreatment;
- allow an assessment to be made concerning the safety of any other children in the home; and
- contribute to the growing understanding of the factors that create risk for sleeping children, particularly infants.

OCFS cooperates with the National Center for Child Death Reviews (NCCDR) in its reporting on infant fatalities; CPS caseworkers should familiarize themselves with the NCCDR format. Information about this can be found in OCFS policies 10-OCFS-INF-01, *New York State Participation in the National Center for Child Death Reviews*, and 10-OCFS-INF-08, *Introducing New Fatality Report Format*.

OCFS encourages local districts to share this policy with multidisciplinary investigative teams (MDTs) established in accordance with section 423 of the SSL (see 10-OCFS-LCM-09, *Multidisciplinary Teams and Child Abuse Investigations*). In addition, this

policy should be shared wherever the local district has an approved local or regional child fatality review team (CFRT) established in accordance with section 422-b of the SSL.

This policy focuses on the investigation and determination of sleep-related fatalities and sleep-related injury CPS reports. OCFS will continue to develop and issue materials on issues relating to prevention of such fatalities and injuries.

III. Program Implications

OCFS has developed new guidance for local district staff to use when investigating and making determinations in reports of sleep-related fatalities and injuries. The guidance is included as an attachment to this LCM, and will be added to the Child Protective Services (CPS) Program Manual, where it will be located in Chapter 11, Appendices, as a new Section K, titled *Investigation and Determination of Sleep-Related Fatality and Injury CPS Reports*. CPS caseworkers and supervisors are strongly encouraged to examine this information and to apply the practice and policy reflected in the new section of the CPS Program Manual whenever they are presented with a case involving a sleep related fatality or injury. They are also encouraged to consult, when necessary, this subject.

/s/ Nancy W. Martinez

Issued By:

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K. INVESTIGATION AND DETERMINATION OF SLEEP-RELATED FATALITY AND INJURY CPS REPORTS

This section is intended to provide guidance to Child Protective Services (CPS) caseworkers and supervisors regarding the actions to take in the investigation of CPS reports involving a sleep-related death or injury and the criteria for making the determination whether to indicate or unfound such reports.

1. Investigation

Conducting a complete and thorough investigation is important for all CPS reports, but especially for those involving a fatality or serious injury. In regard to sleep-related cases, OCFS release 10-OCFS-LCM-15, *Guidance for CPS Investigations of Infant Fatalities and Injuries Involving Unsafe Sleeping*, provides guidance on what a complete investigation of such a case should include. The following guidance on investigation is generally derived from that release. This guidance refers to “infants,” but it may also be applicable to older children who have developmental or medical conditions that make them susceptible to death or injury due to sleep-related conditions.

a. Some Recommended Steps for Obtaining Information

When conducting a CPS investigation of a report of an infant who has died while sleeping or incurred a sleep-related injury, the following actions are recommended for gathering information:

- Speak with Emergency Medical Services (EMS), law enforcement, and any other first responders or individuals who were on the scene of the incident, in order to obtain specific information pertaining to the cause and circumstances of the infant’s injury or death.
- Secure information from first responders or law enforcement regarding the conditions in the home, condition of the infant when they arrived, and any statements made to first responders or law enforcement by those present in the home regarding what transpired.
- Where reasonably possible, locate and view the exact place where the infant’s death or injury occurred. Identify where the infant was placed and by whom, and the position (back, stomach, or side) of the infant both when last observed alive and when found dead or unresponsive.
- Observe the physical living environment and, when the circumstances permit, take photographs or video of the scene. This should be done even if the body has been removed. If the first responders or law enforcement personnel have taken photos or video, request copies of those items. This may assist CPS in conducting an efficient investigation and reduce duplication of efforts.
- Establish and document the timeline of events regarding the incident, including, but not limited to, the events of the day prior to the time when the infant was placed to sleep, if and when the infant was thereafter observed by anyone in the

household, and when the infant was discovered to be in distress, through the time when first responders arrived at the home.

- Solicit and record the observations of all persons in the household regarding what they saw and heard with respect to the infant during the timeline established above. Ask relevant household members about these details and, if possible, ask them separately. Document if the family also spoke with law enforcement about the details.
- Consult with the infant's pediatrician and any other service providers. Health and service providers should be asked about the infant's history.
- Obtain the medical examiner's/coroner's report and any reports completed by first responders or law enforcement.

Do not stop collecting evidence or contacting collateral sources because law enforcement or the local district attorney concludes that there was "no foul play" or is not otherwise pursuing criminal charges. Similarly, do not stop or otherwise limit the investigation because the preliminary findings of the medical examiner or coroner do not indicate or suggest the presence of abuse or maltreatment. In all cases, a complete CPS investigation must be conducted and recorded as required by 18 NYCRR 428.5 and 432.2(b)(3), including the ongoing assessment of the safety and well-being of any surviving children in the household.

Be aware that the decision by law enforcement not to arrest the subject or by the district attorney not to prosecute, in and of itself, is not controlling in CPS's decision as to whether there is some credible evidence to substantiate one or more allegations. The district attorney and law enforcement use a standard of evidence that is higher than the one used by CPS.

Also, be aware that officials outside of the child welfare system use terminology that is not consistent with that used by CPS. Medical examiners / coroners use terms whose meanings or implications for them may be different than they are in child protective terminology. Criminal charges are not the same as making assessments of abuse or maltreatment. For example, if an infant dies of "natural causes," or dies because of what the medical examiner / coroner refers to as an "accident," that does not in and of itself mean that there was not maltreatment in the case. It generally means, for the purpose of the medical examiner / coroner, that the case was not a homicide. Become familiar with the terms used by the medical examiner / coroner and how they are defined. These are the types of cases where you should not only be consulting with your supervisor but also with your agency attorney.

Depending on the case, CPS should consider consulting with medical and/or other appropriate professionals for the purpose of assessing the evidence collected during the investigation to assist CPS in making its determination. This could include deciding to consult with medical experts other than your local medical examiner/coroner.

In those communities in which there is a multidisciplinary team (MDT) or a Child Fatality Review Team (CFRT), local districts should follow the local protocols for working with those teams (see 10-OCFS-LCM-09, *Multiple Disciplinary Teams and Child Abuse Investigations*).

b. Important Information to Obtain

CPS workers should obtain as much information as possible about any and all circumstances that might be relevant to ascertaining the possible cause(s) of an infant's sleep-related death or injury, and to assessing possible future risk to any other children in the home. Information should be gathered that will allow CPS investigators to determine the events and circumstances on the day of the incident—prior to, during, and after the death or injury – and to assess them along with any other relevant facts about the family or infant.

What follows is a brief listing of the information that CPS caseworkers should attempt to obtain when investigating reports of an infant's death or injury that may be related to unsafe sleep conditions. This list does not necessarily contain every factor that should be considered, as the relevant factors may vary from one report to another. The following information may be obtained by completing the actions noted in the previous section, and by observation, interviews, review of previous reports, or other means.

- Determine all aspects of the sleeping conditions at the time of the infant's death or injury including, but not limited to:
 - where the infant was sleeping (in a crib, bed, on a couch, or elsewhere), including an assessment of the firmness of the surface;
 - what, if any, other objects were on the sleeping surface, including pillows, blankets, stuffed animals, or any other objects, and their location in relation to the infant when the infant was placed to sleep, while sleeping, and when found;
 - the position of the infant when placed to sleep, while sleeping, and when found. A reenactment using a doll may be helpful in determining this information. Specifically,
 - was the infant placed to sleep face up, face down, or on its side;
 - where on the sleep surface was the infant placed to sleep;
 - where on the sleep surface was the infant found in distress;
 - was the infant found face up, face down or on its side;
 - was the infant between objects, such as, cushions when found in distress;
 - was the infant's head covered with anything when found;
 - temperature of the room and the amount of clothing worn by the infant;

- the condition of the room in which the incident occurred;
 - the presence and location of other persons or animals in relation to the infant while sleeping;
 - any other aspects of the environment in which the infant slept.
- If a shared sleeping situation has been identified, be sure to:
 - determine all of the above information regarding the sleep surface and sleeping conditions, paying special attention to the positional relationship of the infant with any other occupant of the sleeping surface;
 - Identify the number, identity, and size of occupants, including pets, of the bed, couch or other sleeping surface.
 - Inquire into the infant's usual sleeping arrangements, including the infant's usual sleeping location and normal sleeping schedule, and whether the sleeping arrangements at the time of the incident varied from the infant's normal routine.
 - Determine if the infant had any medical condition, either pre-existing condition or one that existed on the day of the incident (for example, mild cold, infection, sleep apnea, use of a respiration monitor), that could enhance risk to an infant in a sleep situation and, if so, whether the caretakers were aware of that risk.

2. **Making the Determination**

A determination is made by applying the facts, as developed as part of a complete CPS investigation, against each of the elements of the definition of abuse or maltreatment.

Abuse - A finding of intent or gross negligence would, as a practical matter, be required in unsafe sleeping cases to satisfy the definition of abuse. Accordingly, it would be extremely rare to have an abuse case in regard to bed sharing.

Maltreatment - In light of that, this release focuses on maltreatment.

In making a determination in a fatality or sleep-related injury report, CPS caseworkers must determine whether the facts of the case, as developed by CPS during its investigation and using the "some credible evidence" standard, satisfy each of the elements of the definitions of abuse [as defined in section 412(1) of the Social Services Law / section 1012(e) of the Family Court Act] or maltreatment [as defined in section 412(2) of the Social Services Law / section 1012(f) of the Family Court Act].

Each of the respective elements of abuse or maltreatment must be supported by some credible evidence.

For the purpose of the definition of maltreatment, the elements are:

- A) The infant's physical, mental or emotional health or condition was impaired or placed in imminent danger of impairment; **and**
- B) The subject of the report failed to exercise a minimum degree of care in providing proper supervision or guardianship to the infant; **and**
- C) The subject's failure to exercise a minimum degree of care caused the impairment or imminent danger of impairment.

Whether a sleep-related fatality or sleep-related injury report, there must be some credible evidence satisfying each of the elements of the definition of maltreatment (failure to exercise a minimum degree of care, impairment or imminent danger of impairment, and causation) for a report to be indicated for maltreatment.

Whether there is a sleep-related fatality or sleep-related injury, the basis for the determination must be timely and completely recorded in the record.

- a. **Bed Sharing** - This refers to a case involving an infant who dies or is injured and who is sharing a sleeping surface with another person (adult or child).

For the purpose of this guidance, bed sharing refers to an infant and one or more persons sleeping together on any surface, not necessarily a bed.

Bed sharing by a parent or other person legally responsible with an infant, without an aggravating factor or proof of intentionally harming the infant, is not abuse or maltreatment, irrespective of whether the infant is harmed or not.

(i) Failure to exercise a minimum degree of care

The first step in making a determination in a case in which there is a sleep-related death or injury is to determine whether there was a failure to exercise a minimum degree of care. Where a parent or other person legally responsible bed shares with an infant and an aggravating factor is present, the parent or other person legally responsible has failed to exercise a minimum degree of care.

Bed sharing aggravating factors include, but are not limited to:

- 1) The parent or other person legally responsible was under the influence of alcohol or legal or illegal drugs to the extent that such person's judgment or physical ability was impaired, including the ability to arouse.
- 2) The infant had a medical condition known to the parent or other person legally responsible and the parent or other person legally responsible had

been made specifically aware or should reasonably been aware that, because of the medical condition, bed sharing increased danger to the infant.

- 3) The parent or other person legally responsible was significantly sleep deprived to the extent that such person's judgment or physical ability was significantly impaired.
- 4) The physical condition of the sleeping area was unsafe or the contents of the sleeping area created an unsafe condition.
- 5) The size of the sleeping surface in relation to the occupants (persons, pets and/or objects) created an unsafe condition.
- 6) The temperature of the room or the sleeping area, including the infant's clothing and bed coverings used, in which the infant was cared for was so extreme as to make it unsafe.
- 7) Another condition that a reasonable person would understand to place an infant at risk of harm.

If there is not an aggravating factor, then there is no maltreatment, irrespective to whether the child was harmed or not.

If there is an aggravating factor present, then there must be a determination whether there was impairment or imminent danger of impairment.

The existence of some credible evidence of an aggravating factor, in and of itself, is not sufficient to indicate a report.

The receipt or the failure to receive safe sleep counseling does not impact the determination whether the parent or other person legally responsible exercised a minimum degree of care in regard to the fatality.

(ii) Impairment or Imminent Danger of Impairment

For sleep-related fatality cases, the issue of impairment is addressed by the death of the child. For sleep-related injury cases, there must be some credible evidence that the infant's physical health or condition has been impaired or placed in imminent danger of impairment.

(iii) Causation

Whether the report is for a sleep-related fatality or sleep-related injury, the issue of causation must also be addressed and resolved.

The test here is whether the subject's failure to exercise a minimum degree of care caused the impairment or the imminent danger of impairment.

Sleep Related Fatality Cases

For fatality cases, the issue then is whether there is some credible evidence that the death of the infant was caused by the parent's/other person's legally responsible failure to exercise a minimum degree of care.

The means of proving causation includes direct contact and inquiry of the medical examiner or coroner as to whether the death of the infant was caused by the actions of the parent or other person legally responsible.

In all cases, CPS should address the issue of causation with the applicable medical examiner or coroner.

If the medical examiner or coroner affirmatively states that there is no such causation, the report must be unfounded, **unless** there is credible evidence to the contrary that was **not** considered by the medical examiner or the coroner when the medical examiner or coroner made his or her findings regarding the death of the infant. In such a case, CPS may apply such additional evidence to its determination of causation relating to the DOA/Fatality allegation.

If the medical examiner or the coroner states that there is causation between the actions or inactions of the parent or other person legally responsible and the death of the infant, then causation has been satisfied.

If the medical examiner or the coroner does not or cannot give an opinion on causation, then CPS should do the following.

CPS makes the causation determination based on the facts before it. CPS should consult with other medical professionals, such as the infant's pediatrician, the hospital that treated the infant, or the county health department. CPS should consult with law enforcement and EMS personnel who observed the scene. CPS should assess statements from witnesses who are otherwise familiar with the incident or conditions in the home. The CPS worker should not make a determination in such instances without such consultation.

If the conclusion reached by CPS is that there is not some credible evidence that the parent or other person legally responsible caused the death of the infant, the allegation of DOA/Fatality must be unsubstantiated, as must any other allegation that uses the death of the infant as the basis for such determination. Note there may be cases where there is not some credible evidence of causation of the death of the infant but the facts of the case otherwise support a finding of imminent danger to the infant.

Sleep-Related Injury Cases

For sleep-related injury cases, the issue is whether there is some credible evidence that the impairment or the imminent danger of impairment was caused by the parent's/other person's legally responsible failure to exercise a minimum degree of care.

CPS makes the causation determination based on the facts before it. CPS should consult with medical professionals, such as the infant's pediatrician or the hospital that treated the infant, if medical treatment was received, or the county health department. CPS should consult with law enforcement and EMS personnel who observed the scene. CPS should assess statements from witnesses who are otherwise familiar with the incident or conditions in the home.

If the conclusion reached by CPS is that there is not some credible evidence that the parent or other person legally responsible caused the impairment or created an imminent danger of impairment, the sleep-related injury allegation must be unsubstantiated.

- b. Unattended Sleeping Infant** - This refers to a case involving an infant who dies or is injured and who is not sharing a sleeping surface with another person (adult or child).

(i) Failure to exercise a minimum degree of care

Where a parent or other person legally responsible leaves the infant unattended and an aggravating factor is present, the parent or other person legally responsible has failed to exercise a minimum degree of care.

Unattended sleeping infant aggravating factors include, but are not limited to:

- 1) The infant was left unattended for an unreasonable amount of time under the circumstances.
- 2) The physical condition of the sleeping area was unsafe.
- 3) The contents of the sleeping area created an unsafe condition.
- 4) The size of the sleeping surface in relation to the occupants (person, pets and/or objects) created an unsafe condition.
- 5) The temperature of the room or the sleeping area, including the infant's clothing and bed coverings used, in which the infant was cared for was so extreme as to make it unsafe.

- 6) The parent or other person legally responsible was under the influence of alcohol or legal or illegal drugs to the extent that such person's judgment or physical ability was impaired to the point that such person was unable to adequately supervise the infant.
- 7) Another condition that a reasonable person would understand to place an infant at risk of harm.

If there is not an aggravating factor, then there is no maltreatment, irrespective of whether the infant is harmed or not.

(ii) Impairment or Imminent Danger of Impairment; and
(iii) Causation

If there is an aggravating factor present, then there must be a determination whether there was impairment or imminent danger of impairment. As with a fatality report, the issue of causation must also be addressed.

The existence of some credible evidence of an aggravating factor, in and of itself, is not sufficient to indicate a report.

The receipt or the failure to receive safe-sleep counseling does not impact the determination whether the parent or other person legally responsible exercised a minimum degree of care in regard to the fatality.

In those cases in which there is no bed sharing, the criteria for Impairment or Imminent Danger of Impairment and Causation are the same as in cases in which there is bed sharing.

Whether there is a sleep-related fatality or sleep-related injury, the basis for the determination must be timely and completely recorded in the record.