

# The Impact of Changes in DCPD Investigatory Findings

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There has been a dramatic change in the investigatory findings of child protection investigations. For the first time since the late 1990s, there are now findings of child abuse/neglect that are not entitled to be challenged by an independent fact-finding procedure. Attorneys who do not routinely practice in the area of child protection litigation should take notice. This new findings scheme can have a significant impact on the average New Jersey family enduring a Division of Child Placement and Permanency (DCPP) (formerly known as DYFS)<sup>1</sup> investigation or on a parent who makes a serious, but one-time, error in judgment and risk being labeled for the rest of his or her life as a child abuser.

The most commonly relied upon definition of an abused child is:

...[A] child whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian...to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so...or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.<sup>2</sup>

There have been significant decisions in recent years that may have made it more difficult for the division to establish abuse/neglect under Title 9. A one-time incident where a mother used physical discipline against her autistic daughter resulted in the Appellate Division reversing a final agency decision of abuse.<sup>3</sup>

The mother in *K.A.*:

Out of sheer frustration, or through an ill-advised impulse...struck her child five times. These blows, though undoubtedly painful, did not cause the child any permanent harm, did not require medical intervention of any kind, and were not a part of a pattern of abuse.<sup>4</sup>

The Appellate Division concluded that "[u]nder all of these circumstances, labeling *K.A.* a child abuser is factually unwarranted and legally unsustainable."<sup>5</sup>

The division created a new category of child abuse with the 'established' finding in an effort to circumvent unfavorable appellate decisions. 'Established' is a less serious investigatory finding than 'substantiated,' but nonetheless may have a highly negative impact on a person, particularly a parent, who may be faced with a child custody dispute. The parent, or other accused, has no right of administrative appeal to challenge any division finding other than 'substantiated.' However, an 'established' and 'not established' finding is maintained in division records in perpetuity and conveys that the perpetrator did something to harm a child. As explained below, the DCPD records are obtainable in future non-DCPP court proceedings.

In New Jersey, the protection of children from acts of abuse and neglect falls within the authority of the division. The division must investigate all abuse, abandonment, cruelty, and neglect cases pursuant to statutes N.J.S.A. 9:6-8.9, N.J.S.A. 9:6-1 and N.J.S.A. 9:6-8.21.

Reports that are made to the division and information obtained during the course of the investigation are entitled to statutory confidentiality.<sup>6</sup> However, as explained below, confidentiality can be pierced under circumstances defined in the statute. Although the courts recognize that many of the division's investigatory findings are not subject to procedural challenges, the trend

has been to expand the disclosure category. In 2006, the division was required to turn over investigation results for a new profession:

{The Division} shall conduct a check of its child abuse registry for each person seeking registration as a professional guardian...The department shall immediately forward the information obtained as a result of the check to the Office of the Public Guardian for Elderly Adults.<sup>7</sup>

It is important to note that the division is not specifically limited to only disclosing 'substantiated' findings against professional guardians by the above statute. It is foreseeable that at some future point all individuals employed with what might be considered vulnerable populations may be subject to disclosure of any child abuse investigatory findings.

After a referral is received, an investigation must be conducted, generally within 24 hours in most instances, pursuant to the protocol established by the New Jersey Administrative Code, at N.J.A.C. 10:129-1.1. An emergency caseworker is dispatched to conduct an initial investigation if it contains at least one allegation of child abuse or neglect as defined by the statute. An investigator must assess each new and separate report. By way of illustration in the context of a custody dispute: where one parent makes nine referrals of child abuse in nine months, the division will open and initiate nine investigations and issue nine separate findings.

The investigation must be started no later than the end of a workday or within 24 hours after the referral is received. The child protective investigator follows a specific protocol requiring contact with the alleged victim, members of the family, other children in the home, school personnel, medical care providers and other collateral sources.<sup>8</sup>

The investigator is also duty-bound to report suspected cases of abuse or neglect to the appropriate county prosecutor if criminal activity is suspected on the part of the child's parent, caregiver or other person.<sup>9</sup> During the process, the investigator is required to notify each alleged perpetrator of the investigation and the fact that he or she had been named, unless law enforcement officials advise otherwise.

The investigation must be completed and findings made within 60 days of the receipt of the referral. Extensions in increments of 30 days may be sought with authorization by a supervisor. At the end of the investigation, specific findings are made and entered into the DCPP record. Prior to April 1, 2013, findings were limited to two categories: 1) substantiated, or 2) unfounded. Unfounded was defined as meaning there did not exist sufficient evidence to establish a child was abused or neglected, and the child had not been harmed or placed at risk of harm by the caregiver.<sup>10</sup>

Significantly, if an unfounded finding was entered, reports of the investigation would be expunged within three years.<sup>11</sup> However, a substantiated finding remains in the DCPP records and results in inclusion in the central registry.<sup>12</sup>

Originally, neither a substantiated finding nor inclusion in the central registry was entitled to procedural due process and was appealable to the Appellate Division as a final agency decision. However, based upon a due process challenge, an administrative appeal procedure was established.<sup>13</sup>

The *East Park High School* decision recognized that, although the "substantiated" reports are deemed confidential pursuant to N.J.S.A. 9:6-8.10a, they were subject to disclosure to third parties upon written requests for certain statutorily authorized purposes.<sup>14</sup> For example, if necessary to provide evidence in a matrimonial custody dispute, the record could be obtained by a litigant. Based upon the foregoing, the court held that the inclusion in the central registry created a protectable liberty interest under the state constitution warranting due process to protect an individual's reputation.<sup>15</sup> The court ultimately determined that the procedure utilized by the division was constitutionally infirm since the alleged perpetrator was not afforded the right of cross-examination or any opportunity to rebut the referral. As a result, (then) DYFS was required to provide administrative appeals from determinations of substantiation.

As of April 1, 2013, there has been a drastic change to the investigation findings, with DCPP now utilizing four classifications. This change has great significance, since it deprives individuals of the right to challenge three of the four findings, including a finding of child abuse or neglect, by way of administrative appeal.

The newly promulgated provisions of the Administrative Code provide:

(c) For each allegation, the Department representative shall make a finding that an allegation is "substantiated," "established," "not established," or "unfounded."

1. An allegation shall be "substantiated" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21 and either the investigation indicates the existence of any of the circumstances in N.J.A.C. 10:129-7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 10:129-7.5.
2. An allegation shall be "established" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21, but the act or acts committed or omitted do not warrant a finding of "substantiated" as defined in (c)1 above.
3. An allegation shall be "not established" if there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or was placed at risk of harm.
4. An allegation shall be "unfounded" if there is not a preponderance of the evidence indicating that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, and the evidence indicates that a child was not harmed or placed at risk of harm.

### **An Established Finding Doesn't Presently Afford a Right to Administrative Due Process**

The 'established' finding is a new investigatory conclusion. It constitutes a finding of child abuse and neglect yet further acknowledges factors mitigating against a more serious finding of substantiated.<sup>16</sup>

The code goes on to clarify that a finding of either

established or substantiated results in a determination that the child is abused/neglected pursuant to N.J.S.A. 9:6-8.21.<sup>17</sup> The findings of not established and unfounded constitute a determination that a child is not abused or neglected pursuant to the same statute.<sup>18</sup>

The division representative must look to N.J.A.C. 10:129-7.4 to determine whether child abuse or neglect is substantiated. "The existence of any one or more of the following circumstances shall require a finding of substantiated when the investigation indicates:"

1. The death or near death of a child as a result of abuse or neglect;
2. Subjecting a child to sexual activity or exposure to inappropriate sexual activity or materials;
3. The infliction of injury or creation of a condition requiring a child to be hospitalized or to receive significant medical attention;
4. Repeated instances of physical abuse committed by the perpetrator against any child;
5. Failure to take reasonable action to protect a child from sexual abuse or repeated instances of physical abuse under circumstances where the parent or guardian knew or should have known that such abuse was occurring; or
6. Depriving a child of necessary care, which either caused serious harm or created substantial risk of serious harm.<sup>19</sup>

If N.J.A.C. 10:129-7.4 does not apply, DCPP staff must look to N.J.A.C. 10:129-7.5 to determine whether a finding should be substantiated or established.<sup>20</sup>

There are aggravating factors that lean toward substantiation as opposed to established. "The Department representative shall consider the aggravating factors below in determining if abuse or neglect should be substantiated or established."

1. Institutional abuse or neglect;
2. The perpetrator's failure to comply with court orders or clearly established or agreed-upon considerations designed to ensure the children's safety, such as a child safety plan or case plan;
3. The tender age, delayed developmental status, or other vulnerability of the child;

4. Any significant or lasting physical, psychological, or emotional harm on the child;
5. An attempt to inflict any significant or lasting physical, psychological, or emotional harm on the child;
6. Evidence suggesting a repetition or pattern of abuse or neglect, including multiple instances in which abuse or neglect was substantiated or established; and
7. The child's safety requires separation of the child from the perpetrator.<sup>21</sup>

"The Department representative shall consider the mitigating factors below in determining if abuse or neglect should be substantiated or established."

1. Remedial actions taken by the alleged perpetrator before the investigation was concluded;
2. Extraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristically abusive or neglectful manner;
3. The isolated or aberrational nature of the abuse or neglect; and
4. The limited, minor, or negligible physical, psychological, or emotional abuse or neglect on the child.<sup>22</sup>

N.J.A.C. 10:129-7.5 limits the trial court to a general finding of whether the child was abused or neglected, but not substantiated or established. "The Superior Court, Chancery Division, has jurisdiction to adjudicate determinations that a child is an abused or neglected child."<sup>23</sup>

The Administrative Code prevents the court from rendering a decision regarding a specific finding. The "Department shall retain the administrative authority to:"

1. Determine whether an allegation of conduct determined to be abuse by the Superior Court, Chancery Division, is established or substantiated;
2. Determine whether an allegation of conduct determined to not be abuse or neglect by the Superior Court, Chancery Division is not established or unfounded; and

3. Determine the finding for each allegation of abuse or neglect that is not adjudicated by the Superior Court, Chancery Division.<sup>24</sup>

There is no statutory requirement under Title 9 for a trial court to make specific findings regarding aggravating or mitigating circumstances. The court is only required to conduct a fact-finding hearing that is defined as "a hearing to determine whether the child is an abused or neglected child as defined herein."<sup>25</sup>

Even though a trial court may conduct a fact-finding trial pursuant to Title 9, "[a] determination by the Superior Court that abuse or neglect did occur shall not extinguish a perpetrator's right or eligibility to contest a substantiated finding of the allegation by administrative hearing pursuant to N.J.A.C. 10:120A."<sup>26</sup>

Thus, a substantiated perpetrator will have to defend him or herself not only in the superior court at a fact-finding hearing, but then at an Office of Administrative Law (OAL) appeal.

Significantly, it appears that the only findings that are appealable for the purpose of having a fact-finding or trial-type hearing are 'substantiated' findings. There is no right to an OAL hearing (i.e., administrative due process) for a finding of established. However, the only findings that may be expunged are those categorized as unfounded.

If the trial court concludes there was abuse/neglect, a parent would then have to defend him or herself a second time at an OAL hearing regarding whether the finding of abuse/neglect will be substantiated or not. There is no indication that public defenders would be appointed to represent parents, who are essentially conducting two forms of litigation over the same issue. The judicial time and cost to litigants is exorbitant.

The division (referred to as the department in more recently amended sections of the code), "shall provide notice of a finding of substantiated abuse or neglect to each perpetrator pursuant to N.J.A.C. 10:129-7.6(c)."<sup>27</sup>

According to N.J.A.C. 10:120A-4.3: "The Administrative Hearings Unit (AHU) shall transmit a matter that constitutes a contested case...to the Office of Administrative Law, including...[a] request by a perpetrator of child abuse or neglect to appeal a *substantiated* finding of child abuse or neglect." (Emphasis added.)

The AHU is not to transmit the following to the OAL: "Requests to appeal the terms of a court order which specifically addresses the disputed Division action." Arguably, if the court makes findings consistent with N.J.A.C. 10:129-7.3, 7.4 or 7.5, it seems as though the nature of the finding may be considered resolved, though this seems somewhat inconsistent with N.J.A.C. 10:129-7.3, which specifically reserves the division's right to determine the category of the finding. This inconsistency must be addressed and can leave clients in legal limbo.

One obvious question that needs to be addressed with clients facing DCPD litigation or administrative proceedings is whether there is any real benefit to a litigant of having a finding of established versus substantiated. Although higher courts may eventually weigh in on this issue, it does appear that a substantiated finding may have a more significant negative impact on a litigant's life, including preclusion from working as a childcare provider, being licensed to run a daycare center or preschool and possibly expanding a family by way of adoption. The way the division uses established findings remains to be seen and is likely determined by way of additional litigation that explores what, to many practitioners, is a murky area of the law.

In conclusion, under the present administrative and statutory scheme there is no right for an individual against whom child abuse or neglect has been established to due process in the form of a fact-finding hearing. This leaves such individuals the recourse of appealing the final agency decision to the Appellate Division of the superior court. It appears to the authors that whether the investigatory conclusion is a finding of established or substantiated, the negative implication of a finding of child abuse/neglect warrants some administrative due process in the form of an OAL/fact-finding hearing. Another glaring problem, the authors feel, is the prospect of litigating a substantiated finding twice—once before the superior court and a second time at the OAL. ■

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## Endnotes

1. DCPD is interchangeably referred to as division, department and/or DYFS in this article.
2. N.J.S.A. 9:6-8.21 (c)(4)(c). See N.J.S.A. 9:6-8.9 for additional definitions.
3. *DYFS v. K.A.*, 413 N.J. Super. 504, 996 A.2d 1040 (App. Div. 2010).
4. *DYFS v. K.A.*, *supra*, 413 N.J. Super. at 512.
5. *DYFS v. K.A.*, *supra*, 413 N.J. Super. at 513.
6. N.J.S.A. 9:6-8.10(a).
7. N.J.S.A. 9:6-8.10e.
8. N.J.A.C. 10:129-3.2.
9. N.J.A.C. 10:129-5.1.
10. See N.J.A.C. 10:129-7.3(c)(4).
11. N.J.S.A. 9:6-8.40a.
12. N.J.S.A. 9:6-8.11.
13. *IMO Allegations of Sexual Abuse at East Park High School*, 314 N.J. Super. 149, 714 A.2d 339 (App. Div. 1998).
14. N.J.S.A. 9:6-8.10a(b)(1) to 8.10a(b)(8).
15. *Doe v. Poritz*, 142 N.J. 1, (1995).
16. N.J.A.C. 10:129-7.3.
17. N.J.A.C. 10:129-7.3(d).
18. N.J.A.C. 10:129-7.3(d).
19. N.J.A.C. 10:129-7.4(a)1-6 (emphasis added).
20. N.J.A.C. 10:129-7.5.
21. N.J.A.C. 10:129-7.5(a) 1-7.
22. N.J.A.C. 10:129-7.5(b) 1-4.
23. N.J.A.C. 10:129-7.5(g).
24. N.J.A.C. 10:129-7.3(h) 1-3.
25. N.J.S.A. 9:6-8.44.
26. N.J.A.C. 10:129-7.3(i).
27. N.J.A.C. 10:120A-2.3.