SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1139-15T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Petitioner-Respondent,

v.

D.M.,

Respondent-Appellant.

Submitted March 22, 2017 – Decided September 22, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the New Jersey Department of Children and Families, Division of Child Protection and Permanency, Docket No. AHU 13-1041.

Theresa Richardson, attorney for appellant.

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Alicia Y. Bergman, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

D.M.[1] appeals from an October 1, 2015 final agency decision of the Department of Children and Families (DCF) issued after a contested hearing before the Office of Administrative Law (OAL). DCF affirmed the substantiation of D.M.'s abuse of her adopted son, D., and ordered that D.M.'s name be placed on the Central Registry of Abuse/Neglect Perpetrators (Central Registry) pursuant to N.J.S.A. 9:6-8.11. In so doing, DCF rejected the Administrative Law Judge's (ALJ) contrary initial decision. Having considered the parties' arguments in light of the record and applicable legal principles, we affirm.

We glean the following facts from the record. In 1998, the Division of Child Protection and Permanency[2] (Division) substantiated allegations of physical abuse stemming from a January 14, 1998 altercation between D.M. and D., who was eleven-years-old at the time. As a result, D.M. was arrested and charged with aggravated assault, N.J.S.A. 2C:12-1(b)(1), and child

[1] We use initials to protect privacy interests. See R. 1:38-3(e); see also R. 5:12-4(b).

[2] Pursuant to L. 2012, c. 16, effective June 29, 2012, the Division of Youth and Family Services became known as the Division of Child Protection and Permanency. Although the Division's earlier actions occurred when the Division was still known as the Division of Youth and Family Services, we refer to the agency under its current name.

endangerment, N.J.S.A. 2C:24-4(a), which charges were later no-billed by the grand jury and subsequently expunged.

Due to defective service of the Division's January 23, 1998 notification of its findings, D.M., who had no prior or subsequent history with the Division, did not learn of the substantiation until fifteen years later, when her employer conducted a Child Abuse Record Information (CARI) check.[3] Thereafter, D.M. requested an administrative hearing to contest the investigative findings. Although her initial request for a hearing was denied as untimely, by letter dated October 21, 2013, the denial was rescinded because of the "service issue" and the matter was referred to the OAL.

On March 19, 2015, the OAL conducted a one-day hearing, during which a then-retired Division caseworker testified on behalf of the Division. D.M. and D. testified on D.M.'s behalf. Documents were also admitted into evidence, including the Division's investigative summary, the police report, D.'s medical examination form, D.'s psychiatric evaluation, D.'s criminal history, D.M.'s education and job performance records, and a letter terminating D.M.'s employment.

At the hearing, the caseworker testified that the Paterson Police Department referred D.'s case to the Division at 8:49 p.m.

[3] Pursuant to N.J.S.A. 9:6-8.10a, child abuse background checks are permissible in limited circumstances.

on January 14, 1998, while D.M. was at the police station and after D. had been transported by ambulance to the hospital. When the caseworker questioned D.M. at the police station, she admitted that she had "slapped" or "backhanded" D. "in the nose" after he returned home from his after-school program one hour late and was dismissive when she questioned him about his whereabouts. Dissatisfied with his explanation, she followed him and "continued to question him" until "he gave her a defiant look." D.M. told the caseworker that, at that point, "[s]he lost control and began hitting him[.]" She "beat him or hit him with a broom on his back and his arms and . . . the broom broke[,]" after which "he ran out of the house." One of the responding officers informed the caseworker that the response team recovered a broom from D.M.'s home that was "broken in three pieces." D.M. admitted to the caseworker that because she worked with children, "she was worried about losing her job" and agreed to have D. placed temporarily with her sister rather than return to her home.

When the caseworker interviewed D. at the hospital, he provided a similar account. He confirmed that D.M. "hit him in the nose with her backhand[,] and it began to bleed." She followed him into his room while continuing the argument and "grabbed him by the face[.]" When "he pushed her hand away[,]" she "hit him with a broom on his right arm, his left arm, [and] his back" and

"he believed that she broke the broom." He then ran from the house to the police station. The caseworker observed injuries on D.'s "back" and "arm[,]" as well as "old injuries" on his legs, which D. attributed to being "hit with an extension cord." D. seemed relieved to learn that he would be placed with his aunt.

D.'s treating physician informed the caseworker that the fresh "injuries on [D.'s] right arm, left arm[,] and back that were swollen and several centimeters in length were consistent with being hit with a straight . . . linear broom type . . . object." D. also had dried blood in his left nostril, but no swelling of the nose. The physician documented D.'s injuries, noting that D. reported that his mother had hit him with a broom handle and punched him in the nose. According to the caseworker, the Division substantiated physical abuse by D.M. based on D.'s statement and D.M.'s admission as well as the police and physician's reports.

D.'s testimony at the hearing differed from his January 14, 1998 account. During the hearing, D. testified that when D.M. confronted him on the stairs about returning home late, he "got . . . frustrated and tried to move past her" but when "she got in front of [him]" and "blocked" him, he "got angry" and "pushed her." According to D., when he pushed her, "she went back and [he] lost it[.]" D. continued,

> I had kicked her but then she tried to get me off her and she hit me, like slapped me on the head on the side of my face. That is when I took off and I ran in the room and I went to grab the broom. When I went to grab the broom she was still behind me. She said something, I don't recall exactly what she said but she said something to me and I turned around and I tried to hit her with the broom but I missed. She grabbed the broom, we tussled for the broom for a little bit and then the broom ended up snapping. It was . . . an old broom in the house. When the broom snapped I realized that I was stuck so I ran out of the house.
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> I ran out of the housing complex and I ran up Summer Street, ...
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> I was looking for somewhere to hide, because I figured I was in trouble. I thought she was going to call the police . . . so I ran in the backyard but as I ran in the backyard I slipped. When I slipped I think it was like a truck or a car back there and I hit the car but when I hit it I just crawled up under there and stayed there for a little bit.

D. explained that he sustained the injuries when he "slipped and hit" the car with "the side of [his] face." He testified that when he came out from under the car, he noticed that his "shirt was ripped" and his "nose was bleeding." To avoid getting into trouble, he went to the police station and told an officer that his mother beat him with a broom and busted his nose. D was removed, but returned to D.M.'s home about six months later without any additional incidents.

In 2013, D. wrote a statement at D.M.'s request recounting what transpired on the night in question. Contrary to his hearing testimony, D.'s written statement did not mention that D.M. slapped him or that he swung the broom at D.M. When confronted with the inconsistency at the hearing, D. explained that in his written statement, he had altered his version of the events in order to mitigate his conduct.

At the time of the hearing, D. was then twenty-eight years old and incarcerated for attempted murder and weapons possession. He testified that he had previously served two juvenile sentences and was currently serving his third adult sentence. He also testified that he started undergoing therapy in 1994 when he was seven or eight-years-old. When questioned, he recalled admitting to a psychiatrist that he heard "voices that [told him] to do bad things."

In her account of what transpired on the night in question, D.M. testified at the hearing that when D. arrived home late, she repeatedly questioned him about his whereabouts, and D. suddenly "lunged into [her]." According to D.M., she backed into a wall, and D. kicked her, at which point she "slapped him." D.M. followed D. into his bedroom while scolding him for putting his hand on her. D.M. testified that "D. had the broom[,] and he started swinging it at [her] like he wanted to hurt [her] with it." D.M.

"grabbed the broom and [they] tussled" with it until "it broke[,] and D. ran." D.M. denied hitting D. with the broom and denied telling the police or the caseworker that she had done so. D.M. also denied seeing any blood or other injuries on D. The next time she saw D. was June 11, 1998, when the Division returned him to her.

D.M. testified that she had worked in child care for twenty-eight years. She has a Bachelor's Degree in Early Childhood Education, a head teacher license, and a director's license, as well as other licenses and certifications. On June 7, 2013, while she was out on disability for breast cancer, her employer, the Michael's Education Center, terminated her employment after a CARI check revealed the 1998 substantiation for child abuse. According to D.M., that was the first time she learned about the substantiation.

D.M. testified that she has two daughters of her own, but she and her husband adopted D. in 1990 when he was three-years-old after the Division removed him from an abusive home. She enrolled D. in the nursery at the school where she was a kindergarten teacher. There were immediate complaints about his behavior that continued with increasing severity as D. grew older. Ultimately, D. was diagnosed with a "psychotic disorder" and prescribed medication. His diagnosis was confirmed in 1999 when D. was deemed

eligible for disability benefits following a Social Security disability hearing. The medical evidence established that he had a severe psychotic disorder, a conduct disorder, and a severe cognitive disability. D. was classified and placed in a succession of different special education programs until he was incarcerated at the age of twelve.

After the hearing, an Administrative Law Judge (ALJ) issued an initial decision on July 14, 2015, reversing the substantiation of D.M.'s physical abuse of D. and ordering that D.M.'s name be removed from the Central Registry. The ALJ made factual findings consistent with the undisputed testimony at the hearing. As to the disputed account of the January 14, 1998 altercation, the ALJ rejected D.'s and D.M.'s hearing testimony. Instead, the ALJ found that D.M. engaged in corporal punishment of D. "which caused injuries and bruising to his nose, arms[,] and back" by "[striking] D. on his nose with the back of her hand, causing his nose to bleed" and "[striking] D. on his back and arms with the broom, which broke." Nonetheless, the ALJ concluded that the Division failed to prove by a preponderance of the evidence that D.M.'s conduct constituted physical abuse as defined in N.J.S.A. 9:6-8.21.

Analogizing the facts of the case to the facts in N.J. Div. of Youth & Family Servs. v. K.A., 413 N.J. Super. 504, 510 (App.

Div. 2010), certif. dismissed as improvidently granted, 208 N.J. 355 (2011), the ALJ explained:

> [D.M.] acknowledged that she had imposed the discipline because she was overwhelmed and under stress, and D., a child diagnosed with a severe psychotic disorder, a conduct disorder, and severe cognitive disability, came home late again from an after-school program, and she was worried. Like K.A., she responded out of frustration with her child's very long history of psychologically and physically disruptive behavior. It is undisputed that D. had been medicated since the age of ten and was receiving ongoing psychological treatment, but his behavior had steadily worsened. D.'s behavior was undisputedly rebellious and disrespectful.
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> Significantly, D.M. immediately regretted the nature of the corrective action she pursued, and the preponderance of the credible evidence established that the incident was isolated and aberrational to the family. There is no evidence whatsoever that D.M. is or was a danger to children in general, indeed she went on to work for many years in child care, rising to the level of director of a child-care center. I am satisfied that the record was devoid of any credible evidence that D.M.'s behavior created a risk of future harm, and through the lens of hindsight we know that soon thereafter, D. embarked on a course of conduct that has led to multiple and continuous incarcerations, lasting to this day. The injuries D. sustained did not manifest credible evidence of a substantial injury, imminent danger, a protracted injury or excessive corporal punishment.

The Division took exception and sought review by the agency head. On October 1, 2015, the Assistant Commissioner rejected the

ALJ's recommendation of reversal and affirmed the substantiated finding of abuse, concluding that D.M.'s actions constituted excessive corporal punishment. The Assistant Commissioner accepted the ALJ's factual findings. However, the Assistant Commissioner distinguished K.A., supra, and instead found D.M.'s case analogous to N.J. Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472 (App. Div.), reaff'd on reconsid., 416 N.J. Super. 414 (App. Div. 2010), certif. denied, 207 N.J. 188 (2011). The Assistant Commissioner then applied the standard adopted in G.S. v. N.J. Div. of Youth & Family Servs., 157 N.J. 161 (1999) and N.J. Div. of Youth & Family Servs. v. M.C., III, 201 N.J. 328, 344 (2010) to the ALJ's findings of fact. After considering the totality of the circumstances, the Assistant Commissioner concluded that D.M. failed to exercise a minimum degree of care because she disregarded the substantial probability that injury would result from her intentional conduct.

The Assistant Commissioner determined that D.M.'s conduct qualified as abuse under N.J.S.A. 9:6-8.21(c)(4) "as [D.M.] knew or should have known that her actions of back handing and hitting a child with a broom could potentially cause physical injury[,] and [D.M.] disregarded the substantial likelihood that injury could result." As the Assistant Commissioner noted, "D.M.'s actions of hitting D. with her hand and a broom with such force

to have caused that broom to break and injuries to result clearly amounted to a failure to exercise a minimum degree of care." Further, although "D.'s injuries were not life-threatening[,] . . . he needed medical attention" and "[D.M.] was neither remorseful nor did she have any justifiable reason for hitting [D.]" The Assistant Commissioner acknowledged that "D. had a history of behavioral issues and was diagnosed with severe psychotic disorder, conduct disorder and severe cognitive disability[,]" but found that this history did not justify D.M.'s actions because "she had an option to resort to other passive discipline methods; instead, she chose to follow D. into his room after having backhanded him in the face and hit him with a broom causing further injuries." The Assistant Commissioner concluded that these circumstances were distinguishable from "a slap to a face of a defiant teenager" countenanced in N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 36 (2011). Accordingly, the Assistant Commissioner indicated that D.M.'s name should remain on the Central Registry.

This appeal followed. On appeal, D.M. argues that the Assistant Commissioner's decision should be reversed because it is "arbitrary, capricious and unreasonable[.]" Specifically, D.M. asserts that the Assistant Commissioner "failed to cite with particularity any new or modified finding supported by competent

and credible evidence in the record[,]" applied an improper "standard in its analysis of this case[,]" and did not properly account for the factors articulated in K.A., supra, 413 N.J. at 512. Further, D.M. seeks the removal of her name from the Central Registry because she asserts the allegation of abuse "was not properly substantiated."

Our role in reviewing the final decision of an administrative agency is limited. In re Taylor, 158 N.J. 644, 656 (1999). We review administrative decisions to determine whether: (1) the decision violates express or implied legislative policies; (2) is unsupported by substantial evidence in the record; and (3) the agency made a decision "that could not reasonably have been made on a showing of the relevant factors." In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385 (2013) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)). While we accord a "strong presumption of reasonableness" to an agency's "exercise of statutorily delegated responsibility[,]" City of Newark v. Nat. Res. Council, 82 N.J. 530, 539, cert. denied, 449 U.S. 983, 101 S. Ct. 400, 66 L. Ed. 2d 245 (1980), we owe no deference to an agency's interpretation or application of a statute, if it is contrary to the language of the statute or "'undermines the Legislature's intent.'" N.J. Div. of Youth &

Family Servs. v. T.B., 207 N.J. 294, 302 (2011) (quoting Reilly v. AAA Mid-Atl. Ins. Co. of N.J., 194 N.J. 474, 485 (2008)).

"Absent arbitrary, unreasonable or capricious action, the agency's determination must be affirmed." C.H., supra, 414 N.J. Super. at 480 (quoting G.S., supra, 157 N.J. at 170). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div.), certif. denied, 188 N.J. 219 (2006). Where an agency's expertise is a factor, a court defers to that expertise, particularly in cases involving technical matters within the agency's special competence. In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004). The court "may not vacate an agency determination because of doubts as to its wisdom or because the record may support more than one result," but is "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re N.J. Pinelands Comm'n Resolution PC4-00-89, 356 N.J. Super. 363, 372 (App. Div.), certif. denied, 176 N.J. 281 (2003).

"We do not, however, simply 'rubber stamp the agency's decision.'" N.J. Dep't of Children & Families' Inst. Abuse Investigation Unit v. S.P., 402 N.J. Super. 255, 268 (App. Div. 2008) (quoting Paff v. N.J. Dep't of Labor, 392 N.J. Super. 334,

340 (App. Div. 2007)). If "there is a clear showing that [the agency's decision] is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record[,]" we are obliged to provide a remedy. K.A., supra, 413 N.J. Super. at 509 (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). There is a "particularly strong need for careful appellate review" where the agency's factual findings are contrary to those of an ALJ. In re Lalama, 343 N.J. Super. 560, 565 (App. Div. 2001).

The Division is the agency charged with investigating child abuse and neglect. The regulations in effect at the time of the investigation required the Division to make a finding that the allegations were either substantiated, not substantiated, or unfounded once such an investigation was concluded. N.J.A.C. 10:129-3.3(a).[4] A "substantiated" finding was defined as a finding made "when the available information, as evaluated by the Division representative, indicates that a child is an abused or neglected child as defined in N.J.A.C. 10:133-1.3 because the child has been harmed or placed at risk of harm by a parent[.]" Where the

[4] Effective April 1, 2013, DCF redefined the investigative findings for "substantiated" and "unfounded" and added two intermediary investigative findings of "established" and "not established." See 49 N.J.R. 357(a); 49 N.J.R. 2437(a); 49 N.J.R. 738(a) (April 1, 2013). Additionally, effective January 3, 2017, DCF recodified its rules from Title 10 to Title 3A. See 49 N.J.R. 98(a) (Jan. 3, 2017). Where applicable, we cite the regulations extant in 1998 when the investigative findings were rendered.

Division's investigation has "substantiated" child abuse or neglect, the regulations allow for a hearing. N.J.A.C. 3A:5-4.3(a)(2).

Under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to-21, the ALJ conducts a hearing and issues a recommended report and decision containing recommended findings of fact and conclusions of law. N.J.S.A. 52:14B-10. The agency is the "primary factfinder" and has the "ultimate authority, upon a review of the record submitted by the ALJ[,] to adopt, reject or modify the recommended report and decision of the ALJ." N.J. Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 189 N.J. Super. 491, 507 (App. Div. 1983) (citing N.J.S.A. 52:14B-10(c)). "[T]he agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so." N.J.S.A. 52:14B-10(c); see also N.J.A.C. 1:1-18.6(c). Where an agency head rejects a recommendation of an ALJ, the basis for rejection must be set forth with particularity, and new or modified findings must be supported by sufficient, competent, and credible evidence in the record. N.J.S.A. 52:14B-10(c).

A child is considered abused or neglected when "[a parent or] guardian fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and . . . recklessly

creates a risk of serious injury to that child." G.S., supra, 157 N.J. at 181. Failure to exercise a minimum degree of care includes "the infliction of excessive corporal punishment." N.J.S.A. 9:6-8.21(c)(4). "Corporal punishment" is not prohibited, but Title Nine does prohibit "excessive corporal punishment[.]" K.A., supra, 413 N.J. Super. at 510.

While excessive corporal punishment is not defined by the statute, our case law has come to define "excessive" as "beyond what is proper or reasonable." Id. at 511. Punishment will be considered excessive where a parent's intentional act exposes a child to the substantial probability that injury would result from the parent's conduct. M.C. III, supra, 201 N.J. at 345. In this regard, courts focus on "the harm suffered by the child, rather than the mental state of the accused abuser[.]" K.A., supra, 413 N.J. Super. at 511. Although what constitutes excessive corporal punishment to sustain a finding of abuse under N.J.S.A. 9:6-8.21(c)(4) is "generally fact-sensitive" and "idiosyncratic[,]" P.W.R., supra, 205 N.J. at 33, and the Division bears the burden of proving a child is abused or neglected by a preponderance of the evidence, N.J.S.A. 9:6-8.46(b), our Supreme Court has implicitly found corporal punishment can be excessive where the discipline results in bruises or marks. P.W.R., supra, 205 N.J. at 36-37. Further, N.J.A.C. 10:129-2.2(a) lists bruising and

abrasions as injuries that may constitute abuse. See also P.W.R., supra, 205 N.J. at 36 (finding that "[a] slap of the face of a teenager as a form of discipline — with no resulting bruising or marks — does not constitute excessive corporal punishment" (internal quotation marks omitted)).

As we recently observed:

> [E]xcessive corporal punishment was found where a mother used a belt to hit her six-year-old son and left visible welts. N.J. Div. of Youth & Family Servs. v. B.H., 391 N.J. Super. 322, 340 [(App. Div.), certif. denied, 192 N.J. 296 (2007)]. Similarly, a mother inflicted excessive corporal punishment by beating her daughter with a paddle in the face, arms, and legs. [C.H., supra, 414 N.J. Super. at 476]. In both B.H. and C.H., our conclusions were based on the use of an instrument to hit the child with such force that visible marks were left, the unreasonable and disproportionate parental response, and the fact that the incidents were not isolated but part of a pattern of physical punishment. See B.H., supra, 391 N.J. Super. at 338-40; C.H., supra, 414 N.J. Super. at 481.
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> [N.J. Div. of Youth & Family Servs. v. S.H., 439 N.J. Super. 137, 146-47 (App. Div.), certif. denied, 222 N.J. 16 (2015).]

Nonetheless, a single occurrence of corporal punishment may be deemed excessive if medical intervention is necessary and the injury was foreseeable. K.A., supra, 413 N.J. Super. 511. For example, in M.C. III, supra, 201 N.J. at 335, a two-hundred pound father chased his two teenage children, caught and grabbed them,

and all three ended up on the floor. Both children were injured. One child sustained a bruised and swollen hand, while the other had rib tenderness and an abrasion behind the ear. Id. at 335. Our Supreme Court held that, although the father "may not have intended to harm his children, his actions were deliberate" and constituted abuse because he "intentionally grabbed the children and disregarded the substantial probability that injury would result from his conduct." Id. at 345.

In K.A., we reversed a finding of abuse where a mother punched her eight-year-old, autistic daughter on the shoulder four to five times with a closed fist, leaving bruises; however, the circumstances of that case were unique. K.A., supra, 413 N.J. Super. at 505-06. After examining the reasons underlying the mother's conduct, "the isolation of the incident[,]" and "the trying circumstances which [the mother] was undergoing due to [the child's] psychological disorder," we determined that the mother's conduct was aberrational and excusable under the circumstances. Id. at 512. We noted that the child was unwilling to follow verbal instructions or adhere to passive means of discipline such as a time-out and

> [the mother] was alone, without support from either her spouse/co-parent or from other members of her extended family, such as an experienced mother or aunt. Out of sheer frustration, or through an ill-advised

> impulse, she 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 part of a pattern of abuse.
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> [Ibid.]

In addition, we noted that the mother accepted full responsibility for her actions and willingly engaged in Division services. Ibid.

Applying these principles, we conclude that the final agency decision here is not arbitrary or capricious and does not lack sufficient evidential support in the record. The Assistant Commissioner clearly identified adequate grounds to reach a different regulatory conclusion than the ALJ, based upon the ALJ's factual findings. We concur with the Assistant Commissioner's determination that back-handing D. with sufficient force to cause a nose bleed and striking D. with a broom with enough force to break the broom and injure D. amounted to excessive corporal punishment as contemplated under N.J.S.A. 9:6-8.21(c)(4). We acknowledge, as did the Assistant Commissioner, that D.'s history of psychiatric and behavioral disorders presented challenges. Moreover, some of the mitigating circumstances that were present in K.A. exist here. However, "K.A. is readily distinguishable from the facts herein, primarily due to the nature and extent of the injuries to [D.] and the instrumentalit[y] used to inflict them." S.H., supra, 439 N.J. Super. at 146 (finding that corporal

punishment was excessive where a mother used a golf club and her teeth on her teenager, causing a contusion and bite marks). Unlike K.A., D.M. used a broom as well as her hand to discipline D., and the force she used lacerated D.'s skin, prompting the police to send him to the hospital for medical intervention.

Further, we have stated that

> [w]e do not read K.A. to suggest that the test for determining excessive corporal punishment should be any different when the child has a disability. While these children may be more difficult to control, present additional challenges to a family, and be unresponsive to traditional forms of discipline, they are entitled to the same protection under Title Nine as non-disabled children. We read K.A. to hold only that the underlying behavior of a child, with or without a disability, can be a relevant factor among the totality of circumstances in assessing the reasonableness of the parent's response to the child's outburst.
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> [S.H., supra, 439 N.J. Super. at 149-50.]

We recognize and, indeed, commend D.M. for her exemplary career in child care and the fact that no incidents were reported subsequent to the abusive conduct in question. Even so, a parent's post-incident improvement does not excuse past abuse or neglect, for case law requires us to look only at the risk of harm as of the time of the abuse and not at the time of the hearing. See N.J. Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 189 (2015). Although we are very mindful of the negative

consequences to D.M. of being kept on the Child Abuse Registry, we are unable to conclude that the Assistant Commissioner's decision to do so on this record is arbitrary, capricious, or lacking in evidentiary and legal support.

Affirmed.