

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2856-21

E.S.,

Petitioner-Appellant,

v.

DEPARTMENT OF CHILDREN
AND FAMILIES,

Respondent-Respondent.

Submitted March 21, 2023 – Decided May 15, 2023

Before Judges Messano and Gilson.

On appeal from the New Jersey Department of Children and Families, Division of Child Protection and Permanency, Docket No. 21-354019.

Weinberg, Kaplan & Smith PA, attorneys for appellant (Theodore J. Baker, of counsel and on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Morgan R. Merkowsky, Deputy Attorney General, on the brief).

PER CURIAM

E.S. (Edwin) appeals from a final agency decision of the Department of Children and Families, Division of Child Protection and Permanency (Division), which determined that allegations of abuse and neglect against Edwin were "not established" under N.J.A.C. 3A:10-7.3(c)(3).¹ Edwin argues that the Division did not identify any credible evidence supporting its determination. Having considered the parties' arguments in light of the record and applicable law, we vacate the Division's determination and remand for further proceedings.

I.

We summarize the facts from the Division's investigation file. In doing so, we recognize that the facts have not been established by any independent adjudicative proceedings; rather, they are based on written summaries prepared by Division caseworkers.

Edwin and E.L. (Esther) are the parents of Em.S. (Eve), who was born in May 2016. Edwin and Esther are divorced, and they have a contentious relationship. In 2021, Esther was the parent of primary residential custody and she and Eve lived in Pennsylvania. At that time, Edwin lived in New Jersey with his grandfather and had parenting time with Eve every other weekend.

¹ We use initials and pseudonyms in order to protect the privacy interests of the family. R. 1:38-3(d)(12).

On December 17, 2021, a representative from the Pennsylvania child abuse hotline contacted the Division. A therapist, who had met with Eve and Esther the day before, had reported that Eve had told Esther that Edwin had touched her on her vagina and buttocks. The Division initiated an investigation, and a Division caseworker proceeded to conduct a series of interviews.

Immediately after receiving the referral, the caseworker contacted Esther. According to Esther, Eve told the therapist "daddy was touching her privates." When the therapist asked Eve where Edwin touched her, Eve pointed to her vagina. Esther also stated that on December 12, 2021, the Sunday before the meeting with the therapist, Eve had "opened her butt cheeks by herself," which was a "new behavior." Esther did not recall how the disclosure came up during therapy and she denied that Eve had disclosed the information to her before the disclosure to the therapist. Esther further reported that Eve had made some concerning statements to her, including about Edwin "being asleep for hours" and Eve feeling like she had "to make [Edwin] happy" and "keep secrets." Finally, Esther expressed concern about Eve visiting Edwin that coming weekend.

After speaking with Esther, the Division caseworker called the therapist. The therapist stated that it was Esther, not Eve, who had mentioned Edwin's

alleged inappropriate touching of Eve. According to the therapist, Esther had explained that she had been bathing Eve when Eve started "acting weird and told [Esther] not to touch her there and reported that [Edwin] touche[d] her there." The therapist also informed the caseworker that none of the sexual abuse was disclosed or shown directly to her. Instead, the information came from Esther and Eve was playing on a phone while the therapist was speaking with Esther. The therapist also reported that Eve had mentioned that Edwin often slept when she was visiting him, and she had difficulty waking him up.

The Division casework then called Esther a second time. Esther repeated that Eve had told the therapist that Edwin touched her. Esther acknowledged that she had taught Eve the words for her body parts. Esther also reported additional information regarding Eve's bath on December 12, 2021. Esther stated that in addition to "open[ing] her butt cheeks by herself," Eve had "pointed to her vagina and touched her vagina lips after she was done in the bath."

Later that same day, the Division caseworker spoke to a Pennsylvania child protective services caseworker. The Pennsylvania caseworker had met with and spoken to Eve and Esther at their home. The Pennsylvania caseworker reported that he had explained to Eve what the word "safe" meant and that she

reported feeling safe with Esther but not Edwin. The caseworker also asked Eve whether anyone had inappropriately touched her, and Eve nodded her head yes. He then asked Eve whether Edwin touched her, and she responded, "yea." Eve denied being touched by anyone else.

The Division determined to implement a safety protection plan, contacted Edwin, and arranged to meet with him that evening. During that meeting, Edwin denied ever having abused or neglected Eve. Edwin stated that he believed the referral was an outcome of Esther wanting control and he related a disagreement that he had had with Esther about a dance recital Eve was scheduled to attend that weekend. Edwin did agree to the Division's proposed safety protection plan, which required Edwin's mother to supervise all of Edwin's parenting time with Eve that weekend.

On December 20, 2021, the Division caseworker received messages left by Esther over the weekend. Esther asserted that Edwin had violated the safety protection plan by bringing Eve into a Wawa by himself. Esther also reported that Eve had told her that Edwin had bathed Eve alone over the weekend.

On December 21, 2021, Eve and Esther were interviewed by a detective from the Camden County Prosecutor's Office (the Prosecutor's Office). In interviewing Eve, the detective explained to her the importance of telling the

truth and pointed out that if she did not know the answer to a question, she could simply state she did not know. The detective then discussed body safety and asked Eve whether there were "any places on her body that no one can touch." Eve responded yes. The detective then asked if anyone had touched those places and Eve said yes, identifying Edwin as the person who touched her. Referring to a drawing of the female body provided by the detective, Eve explained that Edwin touched her vagina, on top, and her buttocks. She stated that Edwin touched her in the bathroom after she had taken baths but that he did the touching when her clothes were on. She explained that that touching made her feel sad and angry.

The detective then interviewed Esther. Esther stated that on the day she took Eve to the therapist, she gave Eve a bath and Eve told her, "don't wash me like daddy does." Eve then showed Esther what she meant and touched her vagina. Esther stated that she had told the therapist about Eve "spread[ing] her butt cheeks and point[ing] to her vagina."

Later in the day on December 21, 2021, a doctor at the CARES Institute evaluated Eve. The doctor explained to Eve the importance of telling the truth and saying "I don't know" when she did not know the answer to a question. The doctor asked Eve about certain parts of her body and Eve correctly identified

her chest, vagina, and buttocks. The doctor then explained to Eve that there were rules about those body parts and that other people were not supposed to look at or touch them, except in certain circumstances. When the doctor asked Eve if anyone had broken those rules, Eve replied, "my daddy." Eve then stated that Edwin touched her vagina and buttocks every Friday. According to Eve, Edwin did that after he had put her pajamas on following her bath. Eve explained that Edwin touched her with his hands on top of her clothes and she demonstrated how that was done. Eve stated that the touching made her feel angry and made her vagina and buttocks feel "scared." In her subsequent report, the doctor opined that the touching was "inappropriate" because "there does not appear to be a reason why [Edwin was] touching there in this manner."

On December 23, 2021, a detective with the Prosecutor's Office interviewed Edwin. Edwin acknowledged that he gave Eve baths, but he denied ever touching Eve inappropriately. He repeated his view that the referral was about his disagreement with Esther regarding Eve's dance recital and contended that Esther had fed Eve lies. He also expressed his view that Eve felt safe with him.

Several weeks later, on January 6, 2022, the Division caseworker testified before a judge of the Pennsylvania Court of Common Pleas in connection with

Esther's application for a protective order prohibiting Edwin from having contact with Eve. That application was granted, and the order issued by the Pennsylvania court prohibited Edwin from having contact with Eve for the next year. In that regard, the protective order expired on January 6, 2023.

On January 18, 2022, the Division caseworker spoke with Eve's therapist again. The therapist reported that Eve had made additional disclosures during subsequent therapy sessions. According to the therapist, Eve reported that Edwin had come into her room at night while she was asleep at his house and had touched "her private parts." The therapist stated that this disclosure was unprompted and had come up during an exercise about what made Eve angry. The therapist also noted that Eve had mentioned feeling happy that she did not have to see Edwin and she denied missing him.

That same day, the Division caseworker interviewed Esther and Eve at their home. The worker first met with Esther. According to Esther, Eve had nightmares most nights, but she was having less of them since she had stopped visiting Edwin. Esther apologized for initially denying that she, rather than Eve, had made the first disclosure to Eve's therapist regarding Edwin's alleged inappropriate touching of Eve. She explained that the main reason she had taken

Eve to therapy "was due to [Eve] spreading her butt cheeks and touching her vagina."

The Division caseworker then spoke with Eve. The worker began by explaining to Eve what the word "safe" meant, and then asked Eve whether she felt safe with Esther. Eve stated that she did. When the Division caseworker asked Eve if she felt safe with Edwin, Eve "shook her head no" but did not explain why. Eve also denied fearing anything at Edwin's home. Eve went on to state that she had had difficulty waking Edwin up when she stayed with him, but she could not remember the last time that had happened.

On February 8, 2022, the Prosecutor's Office informed the Division that it was not pursuing charges against Edwin. That same day, the Division completed its investigation.

In a letter dated February 10, 2022, the Division notified Edwin that it had "determined that child abuse was Substantiated for Sexual Abuse – Sexual Molestation." Edwin administratively appealed the Division's determination. Before any administrative adjudicative proceedings were conducted, the Division revised its position. On March 4, 2022, the Division sent Edwin a letter stating that it had changed its finding from "Substantiated" to "Not Established" following an "administrative review." The March 4, 2022 letter did not discuss

or identify any facts or evidence supporting the determination of "Not Established," nor did it disclose any reason why the Division had changed its finding.

In a subsequent letter dated April 14, 2022, however, the Division explained that after reviewing Edwin's case "for transmittal . . . to the Office of Administrative Law, it was determined that [Edwin's] action or inaction did not constitute abuse/neglect and that a finding of 'Not Established' was appropriate."

The letter went on to state:

The Division's finding of Not Established is based upon the following facts:

The child made a disclosure of inappropriate contact. However, there were inconsistencies noted in the disclosures and insufficient evidence to support a substantiated finding of sexual abuse.

The letter provided no other facts but stated that Edwin could provide additional information for the Division's consideration within twenty days. The letter went on to state that any information provided would be reviewed and then Edwin would be "promptly notif[ied] . . . of the outcome of that review." Finally, the letter stated that if Edwin did not provide additional information within the twenty days, the Division's finding of "Not Established" would

become a final agency decision that could be appealed to the New Jersey Superior Court, Appellate Division.

The record does not indicate that Edwin provided the Division with any additional information. Instead, Edwin now appeals the Division's final determination of "not established."

II.

The Division "is charged with the responsibility to investigate all allegations of child abuse or neglect." S.C. v. N.J. Dep't of Child. & Fams., 242 N.J. 201, 211 (2020). After the Division has conducted an investigation, it makes one of four possible findings: "substantiated," "established," "not established," or "unfounded." N.J.A.C. 3A:10-7.3(c); S.C., 242 N.J. at 211. A "substantiated" or "established" finding is one in which "the preponderance of evidence indicates that [the] child is an 'abused or neglected child' as defined in N.J.S.A. 9:6-8.21." N.J.A.C. 3A:10-7.3(c)(1) and (2).

By contrast, a "not established" finding is one in which "there is not a preponderance of the evidence that [the] child is an abused or neglected child . . . , but evidence indicates that the child was harmed or was placed at risk of harm." N.J.A.C. 3A:10-7.3(c)(3). Our Supreme Court has explained that a "not established" finding requires some "credible evidence" that the child was

harmed or placed at risk of harm. S.C., 242 N.J. at 239. The Court has also explained that the Division's "finding" is not based on "adjudicated facts . . . ; rather, it merely ascribes what functions as a working label to the evidence collected through investigation." Id. at 235.

"Thus, a 'not established' finding . . . differ[s] from an 'established' or 'substantiated' finding of abuse or neglect [in] two ways: first, relating to the quantum of evidence, and second, the nature of the finding." N.J. Dep't of Child. & Fams. v. R.R., 454 N.J. Super. 37, 41 (App. Div. 2018). "[I]n a 'not established' finding, that lesser quantum of evidence 'indicates' only [the] child 'was harmed or was placed at risk of harm,' and does not establish the child was an 'abused or neglected child' under N.J.S.A. 9:6-8.21(c)." Id. at 42 (quoting N.J.A.C. 3A:10-7.3(c)(3)). Indeed, "placing a child 'at risk of harm' may involve a lesser risk than the 'substantial risk of harm' or 'imminent danger' required to establish abuse or neglect under the statute." Ibid. If "the evidence indicates that a child was not harmed or placed at risk of harm," the allegation is deemed "unfounded." N.J.A.C. 3A:10-7.3(c)(4).

A record containing a "not established" finding is required to be retained by the Division. Although the record is confidential, it is subject to disclosure in certain circumstances pursuant to N.J.S.A. 9:6-8.10a. S.C., 242 N.J. at 228-

29. By contrast, an "unfounded" finding is subject to expunction. N.J.A.C. 3A:10-7.7(b).

Our Supreme Court has held that due process does not require an adjudicatory proceeding to make a determination of "not established" because the Division's findings are only investigatory findings. Nevertheless, the Court has also held that the Division must provide meaningful notice of its finding of "not established" and afford "the investigated subject an informal opportunity to be heard by the agency before the investigatory finding is finalized." S.C., 242 N.J. at 238. In that regard, the Court has stated that the notice "should include a summary of the support for the finding, and the [Division's] reasoning should be transparently disclosed." Id. at 238-39. "Moreover, the individual must be informed of his or her opportunity to rebut the [Division's] conclusion or supplement the record so that the informal opportunity to be heard before the agency is not illusory." Id. at 239.

III.

The scope of our review of a final agency decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011). We "must defer to an agency's expertise and superior knowledge of a particular field," Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992), and "extend substantial deference to an

'agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible' based on the agency's expertise," R.R., 454 N.J. Super. at 43 (quoting In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004)). Nevertheless, when an agency's decision is not accompanied by the necessary findings of fact, we generally remand the matter to provide the agency the opportunity to correct the deficiency. See DiMaria v. Bd. of Trs. Pub. Emps.' Ret. Sys., 225 N.J. Super. 341, 347 (App. Div. 1988).

IV.

Before us, Edwin argues that the Division's investigation did not yield the quantum of credible evidence required to sustain the finding of "not established," and, therefore, he was entitled to a finding of "unfounded." Consequently, he requests that we order the Division to change its finding from "not established" to "unfounded."

The record before us does not support going as far as Edwin requests. In the brief submitted on behalf of the Division, the Division lays out the investigation it conducted and points out that Eve disclosed the alleged sexual abuse to five different people: Esther, the therapist, a detective, a doctor, and a Pennsylvania caseworker.

The flaw in the Division's argument is that those facts were set forth only in its brief on this appeal. They are not facts set forth by the Division itself; rather, the facts come from its lawyers. More critically, those facts were not set forth in the Division's notice to Edwin. The Supreme Court has made clear that the notice of the conclusion of the investigation must be "meaningful" and must "include a summary of the support for the finding." S.C., 242 N.J. at 238-39. In addition, the Division's reasoning for its finding must be "transparently disclosed." Ibid.


The notices to Edwin did not disclose any facts supporting the Division's finding of "not established." In its March 4, 2022 letter to Edwin, the Division informed him that it was changing its finding from "substantiated" to "not established," but it did not provide any reasons for that change. In its April 14, 2022 letter, which the Division identifies as its final determination, the Division stated: "The child made a disclosure of inappropriate contact. However, there were inconsistencies noted in the disclosures and insufficient evidence to support a substantiated finding of sexual abuse." The Division did not identify any credible evidence that Eve was harmed or placed at the risk of harm. In addition, the Division's reasoning for its finding of "not established" was not "transparently disclosed." Ibid. Further, given the way that finding was made

we are not convinced that Edwin had a meaningful opportunity to rebut the Division's conclusion or to supplement the record.

Consequently, we vacate the Division's finding set forth in its letters of March 4, 2022, and April 14, 2022, and remand for further proceedings. Because the Division has already determined that the allegations were not substantiated, the Division has two possible findings: "not established" or "unfounded." Edwin should be accorded an opportunity to submit information to the Division before the Division issues its new finding. The new determination should set forth the specific facts supporting the finding and the Division's reasoning should be clearly disclosed. We express no view on what the Division's finding should be.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION