

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3149-22

DEPARTMENT OF CHILDREN
AND FAMILIES, DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Petitioner-Respondent,
v.

B.D.,¹

Respondent-Appellant.

Submitted May 30, 2024 – Decided June 24, 2024

Before Judges Firko and Susswein.

On appeal from the New Jersey Department of Children
and Families, Docket No. 18-0744.

Legal Services of New Jersey, attorneys for appellant
(Sylvia L. Thomas, of counsel and on the briefs; Mary
M. McManus-Smith, on the briefs).

Matthew J. Platkin, Attorney General, attorney for
respondent (Janet Greenberg Cohen, Assistant Attorney

¹ We use initials and pseudonyms to protect the privacy and confidentiality of these proceedings. R. 1:38-3(d)(1).

General, of counsel; Alicia Y. Bergman, Deputy Attorney General, on the brief).

PER CURIAM

In this Title 9 case brought by the Department of Children and Families (DCF), defendant B.D. (Betty) appeals from the April 25, 2023 final agency decision finding that she neglected three-year-old Ann by violating a written family agreement (the agreement) and verbal agreements regarding her care and supervision. Betty left Ann outside alone with her daughter Jane, the child's mother. Jane has a severe drug problem and engaged in an illegal drug transaction in Ann's presence. We affirm.

I.

The pertinent facts were developed at the September 15, 2020 plenary hearing conducted before an Administrative Law Judge (ALJ). Betty is Ann's maternal grandmother. On May 6, 2016, Betty obtained temporary legal and physical custody of Ann and a month later, became her legal guardian. Ann and Jane had lived with Betty up until that time. Betty was aware of Jane's extensive history with DCF. During a DCF investigation, Jane admitted to using up to ten bags per day of heroin cut with cocaine and abusing prescription pills.

On June 1, 2016, Betty signed the agreement, which provided she would "supervise all contact" between Jane and Ann and ensure Jane "w[ould] not be

left in a caretaking role and/or [be] alone with [Ann]." The agreement memorialized that Betty had legal and physical custody of Ann due to Jane's "substance abuse [and] mental health issues."

Michelle Marchese, an investigator in the DCF's intake unit, discussed the need for supervision—what it is and why it is needed—with Betty and explained that Jane should not be left alone unsupervised with Ann. Marchese "strongly urged" Betty "to be mindful of drug addict behavior, such as lying and manipulation." DCF continued to be involved with the family because of additional referrals.

DCF consistently reminded Betty of the importance of direct line-of-sight supervision.² Betty confirmed her understanding of line-of-sight supervision and agreed that she "would not make any mistakes that could cause her to jeopardize Ann." On May 18, 2018, during an undercover narcotics operation by the Warren County Prosecutor's Office Narcotics Task Force, a cooperating witness purchased crack cocaine from Jane outside of the front of Betty's home. Ann was present with Jane and the cooperating witness. The transaction was

² Line-of-sight supervision means that when the child is awake, the child must be in the viewing sight of an adult who is "on duty" caring for that child. See Merriam-Webster's Collegiate Dictionary 724 (11th ed. 2020).

audio recorded through the cooperating witness and broadcast in real time to Detectives Raymond Krov and Stephen Zaro, who were approximately 100 yards away conducting surveillance.

Detective Zaro testified³ that during the drug transaction, he did not see Betty or any other adults outside other than Jane and the cooperating witness. Although Detective Zaro could not remember where Ann was in relation to the drug transaction, he testified that she had to be in the same area as Jane and the cooperating witness because he could hear a conversation between the witness and Ann. He noted that during the transaction, Ann "had to be within cell phone range."

The police obtained a search warrant for Betty's home and seized drug paraphernalia from a pillowcase in the second-floor bedroom and a digital scale with controlled dangerous substance (CDS) residue on it, which was found in the bedroom Betty shared with Ann in the nightstand next to the bed. On May 31, 2018, Jane was arrested and charged with possession and possession with intent to distribute a CDS, N.J.S.A. 2C:35-10(a)(1) and -5(b)(3), and child

³ Detective Zaro's testimony was not recorded due to technical issues. The parties agreed to rely upon a joint stipulation regarding his testimony.

endangerment, N.J.S.A. 2C:24-4(a)(2), on the basis Jane placed Ann at risk by the offense. Following Jane's arrest, Detective Krol made a referral to DCF.

On July 2, 2018, Betty signed another family agreement, which noted that "[i]t was reported that [Jane] has been alone in the alleyway of the home . . . [with Ann] while [Betty] was in the home within ear distance, which has been made clear multiple times was not appropriate." The agreement stated, "[Betty] will not allow [Jane] to be left alone unsupervised with [Ann]," and explained that "[s]upervision looks like the following: Direct eye contact of [Ann and Jane] at all times. They cannot be in ear distance." Betty was also instructed not allow Jane at the house when Ann was present if Jane appeared under the influence. Betty took the house key back from Jane, who moved out.

By letter dated August 13, 2018, the DCF notified Betty of the established-neglect determination. Specifically, the letter informed Betty that on June 1, 2018, DCF received a report regarding Ann, and that the "investigation determined that neglect was [e]stablished for [i]nadequate [s]upervision." Betty appealed the substantiation to the Office of Administrative Law (OAL), and the matter was assigned to an ALJ for a hearing.

On September 15, 2020, a hearing was conducted before the ALJ. At the hearing, the DCF presented three witnesses: Detectives Krov and Zaro; and DCF investigator Michelle Marchese. Betty testified on her own behalf.

Detective Krov testified about his statement from a preliminary law enforcement incident report which read, "[c]hild was present at time of offense and child was placed at risk by the offense." It was his opinion that "in any narcotics transaction, there's an inherent risk for a child being around narcotics." He explained that was because "narcotics themselves are dangerous" and "there's obviously violence that could occur." When Detective Krov was asked about his concern for Ann's safety he responded, "she obviously wasn't giving the drugs off herself and did not seem to be in a threat at that exact moment. But obviously, . . . being around the nature of narcotics, it can be threatening." He later clarified, "[i]f the child was in imminent danger, I would have made the phone call then. We would have stepped in then on May 18th."

Detective Zaro testified that during the transaction, "[Ann] did not appear harmed or distressed playing in the alley." He also noted that he had no immediate concern for Ann's safety, and confirmed "if he saw a safety issue, he would have immediately acted." Like Detective Krov, Detective Zaro testified

"that child welfare would have been notified on the date of the incident if the child was in danger."

Marchese first testified about her interactions with Betty after the May 18, 2018 drug transaction. Marchese noted she spoke with Betty on June 4, 2018, and Betty said "that she found [the allegations] hard to believe because she did not allow [Jane] to be alone with [Ann]." Marchese also testified that Betty "ultimately admitted that she did allow [Jane] to take [Ann] into the alley, but that she could hear her from the living room" due to the new screen door she had installed on the front door. Marchese testified that she "reminded [Betty] that [they've] had multiple conversations in the past . . . about the importance of having direct line[-]of[-]sight," and that Betty responded "she understood and she only did it once and she wouldn't do it again."

Marchese also testified about another conversation she had with Betty where she explained "that there's evidence to prove that [Ann] was present with [Jane] during a drug exchange," and Betty advised Marchese that it was "impossible because [she] was present the entire time." Marchese explained that she had to remind Betty that was untrue because Betty had previously informed her she was inside the home at the time the drug transaction occurred.

Regarding an August 1, 2018 unannounced visit, Marchese described that she knocked on the door; heard what she believed to be Betty's voice in the living room; and observed an individual on the third-floor peek through the blinds. Marchese then testified that she asked Betty if she knew where Jane was, and Betty replied "in the projects." When discussing the police report indicating what the police found in the home and how it posed a safety concern to Ann, Marchese stated that Jane came down the stairs very quickly yelling that it was "a lie." Marchese noted that Betty "did not seem surprised by any means that [Jane] was in the house." Marchese testified that Ann and Jane were both upstairs and unsupervised when Marchese was talking to Betty in the kitchen.

Marchese also clarified that the established finding was primarily based on "what happened during this alleged drug transaction on 5/18 . . . [,] the search of the residence which found the paraphernalia[,]" and the fact that Betty was "aware of [Jane]'s longstanding history of substance abuse, and despite that and knowing . . . her daughter lied and was actively using more drugs than . . . she initially had said, . . . she still continued to allow [Jane] to be alone, unsupervised with [Ann]." Marchese continued to reiterate that her conversations with Betty always conveyed that the level of supervision expected was "direct line[-] of[-]sight."

Betty testified that she was present at the home on May 18, 2018, and was not aware of the drug transaction when it was taking place. Betty explained that she was sitting on the porch while Ann was riding her bicycle. When Betty's back started to ache, she stood in the door and propped open the screen door with her hand. Betty testified that although she was standing in the doorway, she did not observe the drug transaction and stated, "if there was any transaction made, it was done between my front door and that corner."

Regarding the June 4, 2018 visit, Betty testified that the statement in Marchese's report about when she told the worker she purchased the new screen door so that Jane could be outside with Ann riding her bike while Betty was in the living room was inaccurate. Regarding the August 1, 2018 visit, Betty denied: there were other children in the house; she babysits; there was a man in the home; and that she sent Ann upstairs, stating Ann was playing in the living room when she spoke to the worker.

Finally, when asked about the drug paraphernalia found in her house, Betty responded she believed it was placed there when Jane was in the home alone getting her clothes. Betty testified, "I slept in that bed that night. [Ann] and I were in bed[,] and we got out of bed in the morning[,] and I made the bed and there was no needles when I made the bed. I would have seen it."

On January 23, 2023, the ALJ issued her initial findings and decision. The ALJ noted that Jane does not live in Betty's home but has a bedroom on the third floor in case she spent the night. The ALJ found "Marchese, Krov, and Zaro to be forthright and credible witness[es]." The ALJ explained that they "offered consistent and persuasive testimony as to the pertinent facts, which was corroborated by the police reports, the audiotape, the photographs and the DCF records." The ALJ found Detective Zaro observed the drug transaction and was about "100 yards away."

In contrast, the ALJ found Betty's testimony "to be inherently improbable and not 'hanging together' with, and discredited and overborne in significant respects by, other evidence in the record." The ALJ explained "a canvas of the totality of the evidence casts substantial doubt on the accuracy, reliability, and believability of [Betty]'s version of the events." The ALJ specifically noted that Betty's statements claiming she was watching Ann in the doorway during the alleged drug transaction were "irreconcilable with [Detective] Zaro's observations who did not see [Betty] outside the home."

The ALJ determined that "[Betty] failed to exercise a minimum degree of care in providing Ann with proper supervision on May 18, 2018, and her actions [rose] to the level of grossly negligent or reckless conduct." The ALJ cited our

Court's decision in G.S. v. Dept. of Human Servs., 157 N.J. 161, 178 (1999), where the phrase "minimum degree of care" defined in N.J.S.A. 9:6-8.21(c)(4)(b) "[is] conduct that is grossly or wantonly negligent, but not necessarily intentional." The ALJ specifically found:

[Betty] was aware of Jane's serious drug use issues and had been previously warned by the [DCF] that she must supervise, via direct eyesight, all contact between Jane and Ann. Indeed, [Betty] signed a Family Agreement on June 1, 2016, in which she explicitly agreed that Jane "will not be left in a caretaking role and/or alone with [Ann]," and [she] "will supervise all contact" between Ann and Jane. [Betty] also knew of the [DCF]'s concern that she could not always recognize when Jane was under the influence. Plainly, [Betty] reasonably should have known that leaving Ann alone outside with Jane and an individual who, according to [Betty]'s testimony, had a drug history and was banned from her home, posed dangerous risks and potentially serious consequences. Notwithstanding, and with reckless disregard for Ann's safety, [Betty] allowed Ann to be outside, alone with Jane, during which Jane executed a drug transaction.

Notwithstanding those findings, the ALJ concluded that the DCF did not prove by a preponderance of the evidence that Betty's conduct placed Ann in imminent danger or at a substantial risk of harm. The ALJ noted "the audio recording [did] not support any signs of physical, mental, or emotional impairment of Ann."

The ALJ also found significant that both Detectives Krov and Zaro testified that Ann did not appear distressed or harmed during the drug transaction that occurred on May 18, 2018. Thus, the ALJ reversed the DCF's "established" finding of neglect, and instead found the allegations were "not established."

On January 30, 2023, the DCF filed written exceptions to the initial decision issued by the ALJ; Betty did not reply to the exceptions. On April 25, 2023, DCF Assistant Commissioner Laura Jamet issued a final decision. The Assistant Commissioner reviewed the ALJ's findings and conclusions and rejected the ALJ's recommendation. The Assistant Commissioner found "that the evidence in the record support[ed] an established finding that Ann was placed at substantial risk of harm when she was inadequately supervised by [Betty]" and reaffirmed the "established" finding against Betty.

The Assistant Commissioner accepted the ALJ's credibility findings, factual findings, and legal conclusion that Betty failed to exercise the minimum degree of care in providing Ann with adequate supervision. The Assistant Commissioner emphasized that not only did Betty sign a family agreement agreeing to supervise and not leave Jane alone with Ann, but she also had

subsequent conversations with DCF about the importance of direct line-of-sight supervision.

The Assistant Commissioner ultimately disagreed with the ALJ's conclusion that Betty's actions did not place Ann at substantial risk of harm. The Assistant Commissioner cited State v. Spivey, 179 N.J. 229, 240 (2004), to support the proposition that "a drug transaction is an inherently dangerous activity." She found that "[a]lthough both [d]etectives testified that they had 'no immediate concerns for Ann's safety'" during the drug transaction, Detective Krov nevertheless recognized that "there is an obvious inherent risk" for a child being around narcotics. Overall, the Assistant Commissioner noted:

[The] ALJ . . . was correct in finding that [Betty] failed to adequately supervise Ann by allowing Ann to be in Jane's presence, without a direct line[-]of[-]sight supervision where [Betty] knew or should have known of the risk of harm Jane presented to Ann. Thereafter Jane exposed Ann to an inherently dangerous incident engaging in a drug transaction with all its accompanying risks to a vulnerable child of three years old. Therefore, it was [Betty]'s lack of supervision that placed Ann at a substantial risk of harm in contravention of N.J.S.A. 9:6-8.21.

Therefore, the Assistant Commissioner reversed the ALJ's decision and affirmed the finding of substantial risk of harm. This appeal followed.

On appeal, Betty asserts the Assistant Commissioner erred in finding facts that were not supported by the evidence, rendering it arbitrary and capricious, and in relying on per se presumptions rather than individualized evidence. Betty also asserts the Assistant Commissioner erred in finding she was or should have been reasonably aware that a drug transaction did or could occur. We are unconvinced.

II.

The scope of judicial review of an administrative decision is limited. In re Herrmann, 192 N.J. 19, 27 (2007). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it [was] arbitrary, capricious, or unreasonable, or that it lack[ed] fair support in the record." Id. at 27-28.

An appellate court is limited to determining:

- (1) whether the agency's action violate[d] express or implied legislative policies, that is, did the agency follow the law;
- (2) whether the record contain[ed] substantial evidence to support the findings on which the agency based its action; and
- (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[In re Carter, 191 N.J. 474, 482-83 (2007) (quoting Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995)).]

"[I]f substantial credible evidence supports an agency's conclusion, a court may not substitute its own judgment for the agency's even though the court might have reached a different result." Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988)). "[A] reviewing court . . . will not weigh the evidence, determine the credibility of witnesses, draw inferences and conclusions from the evidence, or resolve conflicts therein." De Vitis v. N.J. Racing Comm'n, 202 N.J. Super. 484, 489-90 (App. Div. 1985).

"In proceedings before an administrative agency . . . it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt." Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) (citing Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960)); See also N.J.S.A. 9:6-8.46(b). "[I]n challenging an agency's determination, an appellant carries a substantial burden of persuasion, and the agency's determination carries a presumption of reasonableness." Dep't of Child. & Fams. v. C.H., 414 N.J. Super. 472, 479-80 (App. Div. 2010), adhered to on reconsideration, 416 N.J. Super. 414 (App. Div. 2010).

Betty asserts there was insufficient evidence for DCF to substantiate her for abuse and neglect under N.J.S.A. 9:6-8.21(c). Considering the totality of the circumstances, Betty argues that there is no evidence she failed to adequately supervise Ann by allowing Ann to be in Jane's presence without direct line-of-sight supervision. Betty contends the 2016 agreement "did not specify 'line[-] of[-]sight' supervision of all contact," and the 2016 agreement was entered "because of an incident where [she] was in the midst of caring for her ailing husband and feeding Ann at the same time."

In that "singular moment," Betty claims Ann "accidentally ingested" some of Betty's husband's medication. In Betty's view, the 2016 agreement states three things: (1) "Jane is restricted from caretaking and being left alone with Ann"; (2) Betty "agreed to remove all medication from Ann's reach"; and (3) "Ann could not be around while [Betty] gave her husband his medication, specifying that the child can be either asleep or in her high chair." Betty contends the Detectives who conducted the undercover operation were not concerned about Ann being exposed to any harm during the exchange, the cooperating witness is a "known acquaintance," and the audio recording is "innocuous in nature."

Substantively, "Title 9 controls the adjudication of abuse and neglect cases." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (citing N.J.S.A. 9:6-8.21 to -8.73). "The focus of Title 9 'is not the "culpability of parental conduct" but rather "the protection of children."'" N.J. Div. of Child Prot. & Permanency v. A.B., 231 N.J. 354, 368 (2017) (quoting Dep't of Child. & Fams. v. E.D.-O., 223 N.J. 166, 178 (2015)).

The statutory framework specifically defines an "abused or neglected child." N.J.S.A. 9:6-8.21(c). In this matter, the DCF relies on N.J.S.A. 9:6-8.21(c)(4)(b), which provides that a child is considered "abused or neglected" if the child is less than eighteen years of age and:

[the child's] 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 . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . ; or by any other acts of a similarly serious nature requiring the aid of the court[.]

The "minimum degree of care" element in subsection (c)(4) reflects "the intermediary position between simple negligence and the intentional infliction of harm." A.B., 231 N.J. at 369 (citing G.S., 157 N.J. at 179). Upon considering the totality of the surrounding circumstances and assessing each case on its facts,

the court must determine whether the parent or guardian "fail[ed] to exercise a minimum degree of care when [they are] aware of the dangers inherent in a situation and fail[] adequately to supervise the child or recklessly creates a risk of serious injury to that child." Ibid.

In other words, there must be "more than ordinary negligence" found against the parent or guardian. N.J. Div. of Youth & Fam. Servs. v. S.I., 437 N.J. Super. 142, 153 (App. Div. 2014) (quoting G.S., 157 N.J. at 178). Instead, "a gross or wanton negligence standard should be employed in determining whether the parent or guardian had failed to exercise 'a minimum degree of care' and therefore had committed an act of child abuse or neglect." N.J. Div. of Youth and Fam. Servs. v. N.M., 438 N.J. Super. 419, 428 (App. Div. 2014) (quoting G.S., 157 N.J. at 178). Willful or wanton actions are those that are done knowing that injury is likely or probably likely to occur. Ibid.

In the absence "of actual harm, . . . the statute requires a showing of 'imminent danger' or a 'substantial risk' of harm before a parent or guardian can be found to have abused or neglected a child." S.I., 437 N.J. Super. at 154 (quoting N.J. Dep't of Child. & Fams. v. A.L., 213 N.J. 1, 8 (2013)). The DCF is not required to "wait until a child is actually harmed or neglected before it can act to address parental conduct adverse to a minor's welfare." Ibid. (citing N.J.

Div. of Youth & Fam. Servs. v. V.M., 408 N.J. Super. 222, 235-36 (App. Div. 2009) (Carchman, P.J.A.D., concurring)). See also N.J. Div. of Child Prot. & Permanency v. B.P., 257 N.J. 361, 366 (2024) (holding that the action of leaving a child at a hospital and not returning did not impair the child or put the child "in imminent danger of being impaired.")

Under regulations associated with Title 9, allegations that a child has been abused or neglected can either be "substantiated," "established," "not established," or "unfounded." N.J.A.C. 3A:10-7.3(c); see also N.J. Dep't of Child. & Fams. v. R.R., 454 N.J. Super. 37, 40 (App. Div. 2018) (citing Dep't of Child. & Fams. v. D.B., 443 N.J. Super. 431, 441-42 (App. Div. 2015)). An "established" finding occurs when "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.'"⁴ N.J.A.C. 3A:10-7.3(c)(2). By comparison, the DCF shall make a finding of "not established" when "there is not a preponderance of the evidence that a child is

⁴ "An allegation shall be 'substantiated' if the preponderance of the evidence indicates that a child is an 'abused or neglected child' as defined by 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. 3A:10-7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 3A:10-7.5." N.J.A.C. 3A:10-7.3(1).

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." N.J.A.C. 3A:10-7.3(c)(3).

We are satisfied the Assistant Commissioner's reversal of the ALJ's initial decision was not arbitrary, capricious, or unreasonable, and it did not lack substantial support in the record. The DCF did not disregard the ALJ's credibility findings. The Assistant Commissioner acknowledged the ALJ's finding that the DCF's witnesses were credible and noted Marchese confirmed the plethora of conversations she had with Betty about the importance of having direct line-of-sight supervision on Ann.

Moreover, the Assistant Commissioner pointed to the 2016 family agreement, which cleared memorialized the requirement that Jane not be left alone with Ann "due to her concerns regarding substance use and mental health issues."⁵

⁵ In her merits brief, Betty takes issue with the fact that the Assistant Commissioner's final decision incorrectly stated direct line-of-sight supervision was memorialized in the 2016 family agreement. While the agreement does not explicitly state direct line-of-sight supervision, the agreement required Betty to "supervise all contact" and make sure Jane would "not be left in a care taking role and/or alone with [Ann]." We conclude the Assistant Commissioner's statement was harmless error. See R. 2:10-2 (stating "any error or omission

The Assistant Commissioner also found the record supported the determination of abuse and neglect because Detective Krov credibly testified that in any narcotics transaction, "there's obviously an inherent risk [for a child] being around both narcotic[s] and what can surround that type of transaction," such as violence. The Assistant Commissioner relied on evidence in the record to contradict the ALJ's conclusion that the DCF failed to meet the preponderance of the evidence standard to establish imminent danger or a substantial risk of harm to Ann pursuant to N.J.S.A. 9:6-8.21.

In the final agency decision, the Assistant Commissioner clearly stated her reasons for rejecting the ALJ's conclusion. As stated, the DCF warned Betty multiple times that supervision of Ann meant direct line-of-sight prior to the May 18, 2018 drug transaction. It is inconsequential that the words "line-of-sight" are not spelled out in the 2016 agreement because the Assistant Commissioner clearly found the DCF warned Betty repeatedly about having a direct line-of-sight of Jane's interactions with Ann.

Further, the 2018 agreement—signed by Betty—memorialized that she was told multiple times by the DCF worker that being within "ear distance" of

shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result").

Ann was not appropriate or sufficient supervision. Thus, the Assistant Commissioner properly observed that Betty was aware she was not allowed to leave Ann alone with Jane. The record supports the Assistant Commissioner's determination that Betty failed to adequately supervise Ann.

Also unavailing is Betty's argument that the Assistant Commissioner's conclusions "all rest upon the fact that [Betty's] voice [was] not amongst those on the audio recording," and did not consider evidence, such as her testimony, that she was supervising Jane's contact with Ann using "sight and sound" through the screen door. However, the Assistant Commissioner rejected Betty's testimony based on the ALJ's finding that "a canvas of the totality of the evidence cast[ed] substantial doubt on the accuracy, reliability, and believability of [her] version of the events."

Instead, the Assistant Commissioner relied on Detective Zaro's testimony—deemed credible by the ALJ—that during the drug transaction, he could see the screen door from his vantage point. The Assistant Commissioner appropriately evaluated the evidence presented and accepted the ALJ's findings of fact that are supported by the record.

Betty asserts the Assistant Commissioner erred by relying on per se assumptions rather than individualized evidence and applying a criminal

standard rather than the required "minimum degree of case standard." We reject Betty's argument. The Assistant Commissioner accurately recited the appropriate standard in her final decision:

The New Jersey Supreme Court in G.S. opined that "[w]hether a parent or guardian has failed to exercise a minimum degree of care is to be analyzed in light of the dangers and risks associated with the situation." G.S., 157 N.J. at 182-183 . . . "Absent evidence of actual harm, the focus shifts to whether there is a threat of harm. In those circumstances, the Division must show imminent danger or a substantial risk of harm by the preponderance of the evidence[.]"

Moreover, the Assistant Commissioner cited Spivey, 179 N.J. at 240, for the proposition that in a criminal case, drug dealing is a violent and inherently dangerous activity. This does not equate to erroneously applying a criminal standard in the matter under review.

Betty's argument that it was unreasonable for the Assistant Commissioner to assume Betty should have known Jane would sell narcotics and hold her accountable is also unavailing. The fact remains Betty left Ann alone with Jane during an inherently dangerous drug transaction, ignoring the heightened level of supervision required by the 2016 Agreement, and she placed Ann at substantial risk of harm.

Finally, Betty contends that unlike the ALJ's initial decision, the Assistant Commissioner's final decision failed to give consideration to the Detectives' assessment of harm at the moment of the drug transaction. The Assistant Commissioner acted well within her discretion in rejecting the ALJ's initial decision. See N.J.S.A. 52:14B-10(c) (establishing that "[t]he head of the agency, upon a review of the record submitted by the [ALJ], shall adopt, reject or modify the recommended report and decision . . . but shall state clearly the reasons for doing so").

The fact that opinions may differ on the severity of the conduct does not result in a finding that the Assistant Commissioner's conclusion, supported by the record evidence, was arbitrary, capricious, or unreasonable, and was not a misinterpretation of the ALJ's finding.

DCF is not required to wait and see if a more dangerous or violent event involving Jane, Betty, and drugs will occur around Ann. S.I., 437 N.J. Super. at 154. There is support in the record that Ann was placed at substantial risk of harm when she was inadequately supervised by Betty. N.J.S.A. 9:6-8.21. Given our own review of the record and the deferential standard with which we undertake that review, we discern no basis to overturn the finding of abuse and neglect.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION