

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2312-20

DEPARTMENT OF CHILDREN  
AND FAMILIES,

Petitioner-Respondent,

v.

B.C.,<sup>1</sup>

Respondent-Appellant.

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Argued October 11, 2022 – Decided November 2, 2022

Before Judges Mayer and Bishop-Thompson.

On appeal from the New Jersey Department of Children and Families, Division of Child Protection and Permanency, Docket No. 17291358.

Alvin E. Richards, III, argued the cause for appellant (Williams Law Group, LLC, attorneys; Victoria D. Miranda, of counsel and on the briefs).

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<sup>1</sup> We use initials and pseudonyms to protect the family's identity. R. 1:38-3(d)(12) and N.J.S.A. 9:6-8.10a(a).

Peter Alvino, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Jane C. Schuster, Assistant Attorney General, of counsel; Mary C. Zec, Deputy Attorney General, on the brief).

## PER CURIAM

B.C. (Bob) appeals from a March 10, 2021 final agency determination issued by the New Jersey Department of Children and Families, Division of Child Protection and Permanency (Division) finding allegations he abused or neglected his son, J.C. ("Jacob"), were "not established." N.J.A.C. 3A:10-7.3(c)(3). Because the "not established" finding is supported by some credible evidence and is not arbitrary, capricious, or unreasonable, we affirm.

This case returns to us following our remand for the Division to consider the New Jersey Supreme Court's decision in S.C. v. N.J. Dep't of Child. & Fams., 242 N.J. 201 (2020). See N.J. Dep't of Child. & Fams. v. B.C., No. A-2218-18 (App. Div. July 14, 2020) (slip op. at 4). We summarize the facts leading to the Division's March 10, 2021 determination.

On November 15, 2018, a school guidance counselor called the Division about an incident involving Jacob, who was then ten years old. The guidance counselor reported Jacob arrived at school with an ice pack and a bump on the back of his head. Jacob told his teacher that his father, Bob, yelled at him to put

on his coat before leaving for school. According to Jacob, Bob pushed him for refusing to listen. When Bob pushed Jacob, he fell backward and hit his head on the corner of a table.

Jacob's then seven-year-old brother, L.C. (Liam), and mother, K.C. (Kim), were upstairs when they heard yelling. Liam and Kim then ran downstairs. Liam started hitting Bob to "protect" Jacob and Kim yelled at Bob. Kim applied ice to Jacob's head and got the boys ready for school.

After he arrived at school, Jacob complained his head hurt. Jacob's teacher sent him to the school nurse and Jacob told the nurse about his head injury. The nurse determined Jacob did not require medical attention.

When he returned from the nurse's office, the guidance counselor spoke to Jacob. Jacob repeated the same information he gave to his teacher and the school nurse. Jacob explained he was putting on his jacket to get ready for school and started rolling around on the floor at home. Bob was upset and started "yelling at him and pushing him and screaming in his face." Liam, upset by his father's reaction, started hitting Bob. Kim became upset and yelled at Bob.

Jacob further reported Bob became upset and aggressive about once a month. Jacob described that Bob would "put his face in [Jacob's] face, nose to

nose and corner [] him into [a] wall." Jacob said his head hurt "from dad pushing on his face and saying bad words."

A Division case worker met Jacob in the school's guidance office the day after the incident. Jacob told the case worker the same version of the events he previously reported to his teacher, school nurse, and guidance counselor. Jacob informed the case worker that he and Bob talked after Jacob got home from school on the day of the incident. According to Jacob, he and Bob agreed to work to make "things . . . better." Jacob reported Bob apologized "a lot" during their conversation.

Thereafter, the family went away for the Thanksgiving holiday. Thus, the Division's case worker was unable to speak with Liam until eleven days after the incident. The case worker met with Liam at his school and the school principal attended the interview.

Liam corroborated Jacob's account of the November 15 events. Liam said he was upstairs with his mother, while Jacob and his father were downstairs. While he was upstairs, Liam heard Jacob and Bob yelling. Liam ran downstairs and saw Bob push and slap his brother. Liam then "jump[ed] in to protect his brother."

On November 28, 2018, the Division's case worker contacted Jacob's parents to schedule an interview with them. Kim said she contacted her attorney and would respond to the case worker by the end of the week. Because she had not heard from Kim or Bob by the end of the week, the case worker telephoned the parents on December 3, 2018. During this conversation, Kim provided the contact information for her attorney. Thereafter, a deputy attorney general spoke to the parents' attorney, who stated Bob and Kim would cooperate with the Division and submit to interviews.

The Division's case worker met with Bob and Kim at their home on December 13, 2018. The case worker first spoke with Bob. According to Bob, on the day of the incident, he and Kim were rushing because Kim had a biopsy appointment. Bob and Kim did not tell the children about the appointment. Jacob and Kim argued because Jacob wanted to wear shorts and Kim insisted he wear pants. When Jacob came downstairs, he and Bob started arguing because Jacob wanted to wear a sweatshirt rather than a coat. Bob denied pushing Jacob. Bob said he put his hand in front of Jacob to stop his son from leaving the house without a coat.

Bob explained Jacob is "dramatic" and often "throws" himself on the chaise or floor when he is "wound up." Bob stated Jacob hit his head on the

table while throwing himself onto a chaise. Because Jacob complained his head hurt, Kim gave him an ice pack.

Due to Kim's health concerns, Bob told the case worker they had been "on edge." As a result, Kim yelled at Jacob for not wearing appropriate clothing and yelled at Bob for arguing with Jacob rather than deescalating the situation. Bob did not inform the case worker of any medical or behavioral issues concerning Jacob. To the contrary, Bob reported Jacob and Liam acted like "any other kid[s]."

The Division's case worker then spoke with Kim. Kim explained she had a medical appointment on the day of the incident but did not tell the children. She told Jacob to wear pants instead of shorts and asked Bob to convince Jacob to wear a coat. Kim remained upstairs to get ready. She then heard yelling, went downstairs, and saw Bob holding Jacob's coat. Kim said Jacob is "dramatic" and often "flops himself on the chaise." Kim stated Jacob "flopped back on the chair" and "hit his head on the edge of the table by the chaise in the living room." According to Kim, Liam ran over and swatted Bob to protect Jacob. She gave Jacob an ice pack and yelled at Bob for escalating the situation. She explained the "high level of stress" that morning caused the situation to become "messy." Kim denied Bob struck Jacob during the incident. Kim told

the case worker that Jacob "suffers from anxiety and sees a therapist 'off and on' for this." She declined to describe Jacob's behavior as a "tantrum[]." Rather, Kim described her oldest son as a "resistant [] teenager, won't change his mind."

Immediately after speaking with Bob and Kim, the Division's case worker conducted follow-up interviews with Jacob and Liam. Both boys said there were no further incidents between Bob and Jacob since November 15.

The Division requested medical and school collaterals as part of its investigation. A local police check found no police involvement with the family. The school evaluation regarding Jacob revealed no concerns or behavioral issues. The pediatric records indicated Jacob was developing normally but noted he experienced "anxiety and encopresis."<sup>2</sup>

Based on the interviews and review of the relevant records, the Division concluded the allegation of physical abuse as to Jacob was "not established." On January 15, 2019, the Division provided Bob with written notice of its findings. The Division concluded the "not established" finding was appropriate because there was some evidence the child was harmed or placed at risk of harm.

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<sup>2</sup> Encopresis is "[t]he repeated, generally involuntary passage of feces into inappropriate places (e.g. clothing)." Stedman's Medical Dictionary 637 (28th ed. 2005).

On January 28, 2019, Bob appealed the Division's "not established" finding. Bob argued the finding was arbitrary, capricious, and unreasonable, and the Division should change the finding to "unfounded." Alternatively, Bob asserted entitlement to a remand for the Division to conduct a hearing to protect his due process rights.

On July 14, 2020, we remanded the matter for the Division to follow the procedures set forth in S.C. In our remand decision, we instructed the Division to accord Bob "the opportunity to rebut or supplement the [Division's] record," and "allow development of a proper record that can be reviewed on appeal for abuse of discretion." B.C., No. A-2218-18, slip op. at 4 (quoting S.C., 242 N.J. at 240).

In an August 14, 2020 letter, the Division explained its "not established" finding and summarized the incident as reported by Jacob and Liam. The Division concluded there was some credible evidence that Jacob was harmed or placed at risk of harm by Bob's actions based on the following: Jacob had "a bump on the back of his head and was sent to the nurse"; Jacob "reported that he got the bump on his head from being pushed by his father"; Jacob "reported that his father got upset" and "[h]is father yelled, pushed, and screamed in his face for getting his jacket dirty after rolling on the floor"; Jacob "reported that



his dad becomes angry and aggressive about once a month"; Liam "reported that his dad pushed and slapped Jacob"; Liam "reported that he intervened by hitting his dad"; and "[b]oth children reported that their dad pushed [Jacob]." The Division determined the foregoing "constitute[d] some evidence that [Jacob] was harmed or placed at risk of harm" but declined to find Bob abused or neglected Jacob. The Division advised Bob could "provide additional information for consideration" within twenty days of receipt of the letter and "[a]ll information received w[ould] be considered and added to the case record."

On August 31, 2020, Bob responded to the Division's August 14 letter. He argued the Division based its finding solely on Jacob's statements and ignored contrary evidence proffered by Bob and Kim. He also submitted documentation regarding Jacob's medical diagnoses, including the following: a February 26, 2019 audiology evaluation, diagnosing Jacob with auditory processing difficulties; a March 12, 2019 report from Jacob's pediatrician, indicating Jacob experienced inattention and was borderline for attention-deficit hyperactivity disorder (ADHD); and a March 8, 2019 letter from Jacob's therapist, stating Jacob demonstrated restlessness, distractibility, and tangential thinking.

On March 10, 2021, after reviewing and considering Bob's supplemental information, the Division declined to "chang[e] the Not Established finding as the information submitted did not alter [the Division's] conclusion." The Division did not conduct a hearing prior to reaching its decision.

On appeal, Bob argues that he was entitled to a finding of "unfounded" rather than "not established." He contends the Division's finding was arbitrary, capricious, and unreasonable because the Division gave greater weight to Jacob's contradictory interview statements and Liam's non-eyewitness account of the incident rather than the statements provided by Bob and Kim. He further asserts the Division failed to consider Jacob's behavioral evaluations and medical diagnoses. In support of his arguments, Bob relies on N.J. Dep't of Child. & Fams. v. R.R., 454 N.J. Super. 37 (App. Div. 2018), where this court remanded the Division's determination of "not established" because the Division failed to consider key documents and inaccuracies in their reporting. Additionally, Bob contends his due process rights were violated because the Division failed to follow the procedures mandated by S.C., including the right to an evidentiary hearing. We disagree.

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) (citing Clowes v. Terminix Int'l, 104 N.J. 575, 587 (1988)). We "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)).

Here, we consider whether the Division's "not established" finding is "arbitrary, capricious, or unreasonable" or lacked "fair support in the record." Dep't of Child. & Fams. v. T.B., 207 N.J. 294, 301-02 (2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)); see also Dep't of Child. & Fams. v. D.B., 443 N.J. Super. 431, 440 (App. Div. 2015). "However, we are 'in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" T.B., 207 N.J. at 302 (alterations in original) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). "[I]f an agency's statutory interpretation is contrary to the statutory language, or if the agency's interpretation undermines the Legislature's intent, no deference is required." Reilly v. AAA Mid-Atl. Ins. Co. of N.J., 194 N.J. 474, 485 (2008) (quoting In re N.J. Tpk. Auth. v. AFSCME, Council 73, 150 N.J. 331, 351 (1997)).

A "not established" finding "is one of four outcomes the Division may reach after investigating an abuse or neglect allegation." R.R., 454 N.J. Super. at 40. The Division "shall make a finding that an [abuse or neglect] allegation is 'substantiated,' 'established,' 'not established,' or 'unfounded.'" N.J.A.C. 3A:10-7.3(c)(1)-(4). "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." R.R., 454 N.J. Super. at 40 (emphasis omitted) (quoting N.J.A.C. 3A:10-7.3(c)(3)).

A finding of "not established" differs from a finding that child abuse or neglect was "established" or "substantiated." As we noted in R.R.:

[P]lacing 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. As the Department explained, "Where utilized, 'evidence indicates' refers to a child having been harmed or placed at risk of harm. This is a lesser standard than satisfaction of the statutory requirement in N.J.S.A. 9:6-8.21."

[Id. at 42-43 (citing 45 N.J.R. 738(a) (response to Comment 45)).]

In S.C., the Court held a "not established" finding requires "less than a preponderance of the evidence and involves 'some' evidence . . . [which] must be understood to be 'credible evidence.'" S.C., 242 N.J. at 239.

Bob asserts the record failed to provide credible evidence that Jacob suffered injury or was in jeopardy of suffering future harm to support a "not established" finding. He also claims the Division gave greater weight to the statements provided by Jacob and Liam over the statements he and Kim provided.

Having reviewed the record, we are satisfied there is some credible evidence that Jacob suffered harm and may suffer future harm to sustain the Division's "not established" finding. Jacob told his teacher, the school nurse, and a guidance counselor that Bob pushed him, causing Jacob to hit his head. Jacob provided the same account of the incident to the Division's case worker. As contemporaneously reported to four different individuals, Jacob's version of the events remained consistent.

Contrary to Bob's assertion, Jacob never contradicted his account of the incident. Bob contorts the record by claiming Jacob denied any physical discipline during his interview on December 13. Jacob's statements, on which Bob relies, were provided nearly a month after the incident and simply

confirmed there had been no physical confrontations between Jacob and Bob after the November 15 incident. Because Jacob consistently and contemporaneously told three adults that Bob pushed him, the Division accorded greater weight to Jacob's report regarding the incident.

The Division also found Liam's version of the incident to be credible. Liam said he and his mother were initially upstairs. When Liam heard yelling, he "jumped in" to protect his brother. According to his own statement, Liam was downstairs with Bob and Jacob during the incident and witnessed the confrontation between father and son. Despite not speaking with the Division's case worker until eleven days after the incident, Liam's report of the events was consistent with Jacob's report to his teacher, school nurse, guidance counselor, and the Division's case worker.

On the other hand, Bob and Kim had nearly a month after the incident to prepare for their interview with the Division's case worker. During that one-month period, Bob and Kim had sufficient time to obtain medical information, diagnoses, or evaluations regarding Jacob's behaviors. Only after the Division issued its "not established" finding did Bob obtain medical reports, diagnoses, and evaluations concerning Jacob. At no time when speaking with the Division's case worker prior to the "not established" finding did Bob or Kim indicate Jacob

suffered from borderline ADHD and any other behavioral issues to explain what transpired on November 15.

Bob claims the Division erred by not crediting the contrary accounts he and Kim gave of the incident, arguing their statements were supported by medical evaluations showing "[Jacob] was suffering from disturbing behaviors due to several diagnoses." However, the Division declined to credit the parents' account of the events when weighed against the statements by Jacob and Liam. The boys' statements were taken closer in time to the incident and they did not consult with an attorney or anyone else prior to speaking with the Division's case worker. Moreover, only after the Division issued its January 15, 2019 "not established" finding did Bob and Kim solicit medical opinions and evaluations regarding Jacob's behaviors. On this record, we are satisfied the Division's findings are not arbitrary, capricious, or unreasonable and there is some credible evidence that Bob harmed Jacob on November 15, 2018.

We reject Bob's argument that the Division failed to consider Jacob's medical evaluations included as part of his supplemental information responding to the Division's "not established" finding. At the time it rendered the January 15, 2019 finding, the Division had no knowledge or information regarding any medical or behavioral evaluations as to Jacob. Neither Bob nor Kim expressed

any developmental concerns regarding Jacob when they spoke to the Division's case worker on December 13, 2018. Nor did the parents inform the Division's case worker that they were seeking medical evaluations for Jacob at that time. Instead, Bob and Kim reported Jacob was "dramatic" and "wound up." Bob even told the Division's case worker that his children behaved like "any other kid[s]."

The medical evaluations and reports post-dating the Division's January 15, 2019 "not established" finding, suggesting adolescents with auditory processing difficulties have trouble understanding and communicating, did not persuade the Division to change its finding. The Division's case worker had no difficulty understanding or communicating with Jacob. Importantly, the school collateral information provided to the Division indicated no behavioral or development concerns regarding Jacob. Nor is there any evidence in the record that Jacob had difficulty discussing the incident with his teacher, school nurse, and guidance counselor who likely interacted more frequently with Jacob than the Division's case worker.

We are satisfied there is some credible evidence contemporaneous with the incident on November 15, 2018, by way of the statements provided by Jacob and Liam, to support the Division's "not established" finding. Jacob's evaluations and diagnoses obtained three months after the incident and about a



month after the Division's January 15, 2019 "not established" finding do not undermine Jacob's credibility in his reporting of the incident.

We also reject's Bob's denial of due process claim. In S.C., the Court addressed the constitutional due process concerns implicated in connection with the Division's review of abuse or neglect allegations. S.C., 242 N.J. at 230-35. The Court noted our case law has repeatedly characterized determinations of "not established" as being investigatory rather than adjudicatory in nature. Id. at 232. The Court noted that findings of "not established" involve "no determination of . . . accuracy," but only "interviews and 'other available evidence' followed by a review and analysis of the information." Id. at 233 (quoting In re R.P., 333 N.J. Super. 105, 117 (App. Div. 2000)). As the S.C. Court explained, the agency "has not adjudicated facts or reached any sort of conclusion about what actually occurred when it applies a 'not established' finding; rather it merely ascribes what functions as a working label to the evidence collected through investigation." Id. at 235. The Court held a party's due process rights can be satisfied through: "(1) meaningful notice of the Department's planned investigatory conclusion of a 'not established' finding and (2) affording the investigated subject an informal opportunity to be heard by the agency before the investigatory finding is finalized." Id. at 238.

Here, the Division followed the procedures announced in S.C., providing "meaningful notice" of its "not established" finding. The Division's March 10, 2021 determination also provided the reasons for its conclusion. Further, the Division accorded an "informal opportunity to be heard" by allowing Bob to submit supplemental information before the agency issued its final determination. We are also satisfied Bob was not entitled to a hearing because the Division's finding was investigatory and not adjudicatory. Moreover, in remanding the matter for the Division to comply with S.C., we declined to require a hearing despite Bob's request in his prior appeal that we remand for an evidentiary hearing.

To the extent we have not addressed a particular argument, it is because either our disposition of the appeal renders it unnecessary, or the argument was without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION