

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0589-20

S.C.,

Petitioner-Appellant,

v.

DEPARTMENT OF CHILDREN
AND FAMILIES,

Respondent-Respondent.

Argued October 6, 2022 – Decided September 18, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the New Jersey Department of Children and Families, Division of Child Protection and Permanency, Case No. 16739248.

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

Peter Alvino, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Melissa Raksa, Assistant Attorney General, of counsel; Peter Alvino, on the brief).

The opinion of the court was delivered by
ACCURSO, P.J.A.D.

This administrative abuse and neglect matter returns to us following the Supreme Court's remand to the Department of Children and Families, Division of Child Protection and Permanency to "provide[] greater clarity" of the basis for its investigatory conclusion that the 2016 allegation that S.C. physically abused her son Luke was "not established," and to allow her "an informal opportunity . . . to rebut and/or supplement the record" in advance of any final finding, thus permitting the "development of a proper record that can be reviewed on appeal for abuse of discretion." S.C. v. New Jersey Dep't of Children & Families, 242 N.J. 201, 212, 240 (2020).¹ That process now

¹ We affirmed the Division's "not established" finding based on our review of the Division's investigation record and rejected S.C.'s claim she was entitled to an administrative hearing to challenge the investigatory finding. S.C. v. New Jersey Dep't of Children & Families, A-4792-15 (App. Div. Aug. 31, 2018) (slip op. at 9-12). Judge Messano concurred in the judgment, agreeing S.C. was not entitled to an administrative hearing, and the Division's decision was not arbitrary or capricious. Id. at 20. He wrote separately to express his concern over the lack of specific findings in the letter notifying S.C. of the conclusion of its investigation and the necessity for the Division to "accurately express its findings and conclusions in sufficient detail." Id. at 26.

The Supreme Court granted S.C.'s petition for certification, 237 N.J. 165 (2019), and reversed, 242 N.J. 201 (2020). Although agreeing S.C. was not entitled to an administrative hearing to challenge the "not established" finding,

complete, S.C. again appeals, contending the Division's readopted finding is not supported by any credible evidence. Because we cannot find the Division abused its discretion in coming to its investigatory conclusion on remand, we affirm.

The facts of the Division's investigation into the 2016 allegation that S.C. physically abused one of her second-grade triplets, Luke, by hitting him with an open hand and a spatula are set forth at length in the Court's opinion, id. at 213-17, and need not be repeated here. We pick up the story on remand.

In its amended findings letter issued in August 2020, the Division set forth the "credible evidence" gathered in the course of its investigation into whether S.C. harmed Luke "or placed [him] at risk of harm," N.J.A.C. 3A:10-7.3(c), which formed the basis of its "not established" finding:

— [Luke] stated that he hated his mother, that she counts to 3 "a lot" and hits him when she gets to 3;

— [Luke] stated that he had been hit by [S.C.] in the face, stomach and buttocks, that on one occasion his buttocks had become as "red as a fire truck" from

the Court concluded the record was inadequate to "assess whether the 'not established' finding in this instance was arbitrary or capricious," necessitating a remand in accordance with the Court's revised requirements for "(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." S.C., 242 N.J. at 212, 238.

being hit, and that he had been hit more than one time after telling her the spanking did not hurt;

— [Luke] stated that he had been hit with a spatula;

— [S.C. and her husband, Luke's father] both stated that they had each hit Luke, but [S.C.] said she only hit the counter with a spatula to threaten him, and [Luke's father] said he had seen [S.C.] hit the counter with a spatula and had not seen her hit Luke with it;

— [S.C.] stated she was frustrated with the children's behavior and the inefficacy of her disciplinary techniques (including hitting);

— [Luke's two sisters] stated that they had been hit by both parents with an open hand, and that on the occasions they witnessed [Luke] being hit by [S.C.], it was with her hand.

Your repeated use of corporal punishment, your admitted frustration that it did not work, and [Luke's] statements that he got hit more after saying it did not hurt, that once his buttocks were "as red as a fire engine" from hitting, and that he was hit with a spatula, as well as his attitude toward you the day of the referral and your admission that you hit the counter with a spatula when frustrated with [Luke], all constitute some evidence of harm or risk of harm.

The letter further advised S.C. she could provide "additional information" for the Division's consideration. The letter informed her that all such information would "be added to the case record," and that the Division would review it and would inform S.C. of the outcome of its review.

S.C. did not submit any additional evidence for the Division to consider. Instead, her lawyer submitted an eight-page "rebuttal and response to the 'credible evidence' contained in [the Division's findings] letter" based almost entirely on information favorable to S.C. contained in the Division's investigation summary, recounted in both our prior opinion, S.C. v. New Jersey Dep't of Children & Families, A-4792-15 (App. Div. Aug. 31, 2018) (slip op. at 2-7) and that of the Supreme Court, 242 N.J. at 213-17. S.C.'s counsel asserted there was "no credible evidence to show that [S.C.] harmed or placed [Luke] at risk of harm," and that it was "clear" the Division relied "solely upon [Luke's] statements to constitute the evidence against [S.C.]" and "ignored completely the statements of the parents and the school" in arriving at the "not established" finding.

The only information beyond the investigation summary offered by S.C. was her counsel's assertion that Luke's "behavioral issues were not subsiding" at the time of his allegations of physical abuse. Counsel claimed Luke "was diagnosed with ADHD coupled with Oppositional Defiance Disorder, Disruptive Mood Dysfunction Disorder, sees a psychiatrist regularly, and is on medication prescribed by that psychiatrist." Counsel also contended Luke "was recommended to work with a Cognitive Behavior Therapist and has

refused to participate in same, therefore [S.C.] meets with that psychologist weekly to guide her in teaching [Luke] how to have a productive life given his multiple diagnoses." S.C. did not submit any medical reports to the Division of Luke's "multiple diagnoses" and it's unclear from counsel's submission as to whether they existed in 2016 at the time of these allegations or whether counsel was addressing Luke's condition in 2020.

As noted by the Court, Luke, days short of his eighth birthday at the time of these events, "was a special needs student, classified as emotionally disturbed," and although he'd "been challenged by behavioral issues in the past (while in kindergarten, he had ripped down a shelf holding a TV monitor), according to his education case manager, he was doing much better." S.C., 242 N.J. at 214. S.C. agreed with that assessment in 2016, telling "the investigator that she was endeavoring to have Luke's classified status removed." Id. at 215.

In S.C.'s submission to the Division on remand, her counsel argued that it was "the caseworker's personal feelings regarding light open-handed spanking [that] drove the course of this investigation," claiming she'd "preach[ed] her own feelings regarding physical discipline" throughout. Counsel claimed the Division's finding that S.C. placed Luke at risk was

"based solely on the caseworker's disagreement with the disciplinary measures taken in the home." Counsel complained that despite the Court's holding that S.C. was "entitled to meaningful notice of the investigatory finding, at which time the Department's reasoning should be transparently disclosed, . . . the only transparency which has occurred is the Division is still relying on the uncorroborated statements of a seven-year-old child with documented behavioral issues."

S.C.'s counsel urged the Division to review S.C.'s briefs on appeal, both in this court and the Supreme Court, as well as "Justice Albin's dissenting opinion wherein he stated that 'the investigation uncovered nothing that even remotely established that these parents engaged in excessive corporal punishment.'" Id. at 243 (Albin, J. dissenting). S.C. contended the Division should keep "in mind" Justice Albin's statement that he would "end this case today and spare S.C. the hardship and expense of a remand," id. at 252, "when moving forward . . . and focus on the fact that the use of an open-handed spank does not, under the law, meet the standard of credible evidence to find the child was placed at risk of harm."

The Division subsequently wrote S.C. acknowledging receipt of "the additional information" submitted by her counsel, which the Division noted

had "been added to the case record and considered in reaching" its decision that it would "not be changing the Not Established finding as the information submitted did not alter [the Division's] investigatory conclusion."

S.C. appeals, arguing the Division violated her due process rights by failing to follow "the new procedure outlined by the Supreme Court," thus depriving her of "a meaningful opportunity to challenge the investigatory finding through the administrative process," and "failed to prove by credible evidence that S.C. harmed or placed her children at risk of harm," rendering its amended finding arbitrary and capricious. We reject those arguments.

The Supreme Court remanded this matter to the agency for two very specific purposes. The Division was ordered to provide S.C. a notice of "greater clarity" for the basis of its "not established" finding, including a summary of the credible evidence supporting the finding, in a way that "transparently discloses" the Division's reasoning, and to allow her "the opportunity to rebut or supplement the Department's record" following her receipt of that notice. Id. at 238-240.

S.C. claims the revised findings letter violated the Court's remand order by failing to include pertinent facts from the investigation, including "that Luke was diagnosed with ADHD, Oppositional Defiance Disorder, and

Disruptive Mood Dysfunction Disorder and under the care of both a psychiatrist and a Cognitive Behavior Therapist," and not explaining the reasoning behind its "not established" conclusion. She contends there was a "complete lack of transparency" in the Division's amended notice to her, as it consisted only of "a mere recitation of allegations made and no thoughtful arguments or position as to how that constitutes credible evidence."

S.C. maintains she "responded and supplemented the record pursuant to the new directive outlined by the Supreme Court and contradicted each and every statement" on which the Division relied for its "not established" finding, and the Division "failed to prove" that S.C. harmed Luke or placed him at risk of harm. S.C. claims that given Luke's "diagnosis of Oppositional Defiance Disorder and Disruptive Mood Dysfunction Disorder," which she claims are "categorized with behaviors of irritability, anger, outbursts, defiance or vindictiveness toward parents or authority figures," that "it is outrageous to think that the Division has based its finding solely on the statements of this one child when the other children in the home — all of whom are the same age, denied the allegations made by their brother."

S.C. misapprehends both the purpose of the notice and the nature of investigatory findings. The notice is not a recapitulation of the Division's

investigation summary. Thus, S.C.'s complaint the Division failed to include in the notice facts gathered in the course of the investigation that were favorable to her is misplaced. Its purpose is to provide "meaningful notice" to the individual the Division is investigating for suspected child abuse or neglect as defined in N.J.S.A. 9:6-8.21(c) of the agency's "planned investigatory conclusion of a 'not established' finding" that is, that the investigation has uncovered some credible evidence that a child was harmed or placed at risk of harm. S.C., 242 N.J. at 238; 45 N.J.R. 738(a), response to comment 82 (explaining "[t]he critical distinction between findings of not established and unfounded is that not established findings are based on some evidence, though not necessarily a preponderance of evidence, that a child was harmed or placed at risk of harm").

The Court in S.C. found the "conclusory letter" first sent to S.C. advising her of the "not established" finding, which stated only that "the Division enters a finding of 'not established' when some evidence indicates that a child was harmed or placed at some risk of harm, but there is not a preponderance of evidence that the child has been abused or neglected per N.J.S.A. 9:6-8.21," was inadequate for due process purposes, and that on remand the Division must include in its amended notice "a summary of the

support for the finding." 242 N.J. at 238-39. In our view, the Division cured that failing on remand.

The amended notice to S.C. included the evidence the Division found credible — Luke's specific allegations that S.C. would often count to three and then hit him with her hand, and had on occasion hit him with a spatula; that S.C. and her husband acknowledged hitting all three children with an open hand on their legs or backsides; S.C.'s acknowledged frustration with trying to discipline the triplets; and that everyone in the family admitted S.C. would slap a spatula on the kitchen counter, which S.C. admitted she did to threaten Luke, although she claimed, contrary to Luke's report, she never followed through. The Division also explained to S.C. that her "repeated use of corporal punishment," and "admitted frustration" that her attempts to discipline the triplets were not effective, and Luke's

statements that he got hit more after saying it did not hurt, that once his buttocks were "as red as a fire engine" from hitting, and that he was hit with a spatula, as well as his attitude toward [S.C.] the day of the referral and [her] admission that [she] hit the counter with a spatula when frustrated with [Luke], all constitute some evidence of harm or risk of harm.

That augmented notice, which identified the evidence the Division deemed credible and explained the basis for its determination that there was

thus "some evidence" that S.C. had either harmed Luke or placed him at risk of harm, along with advising her that she could submit any additional information, which the Division would consider before finalizing its finding, was all the Court required. Thus, we find no basis in the record for S.C.'s claim that the Division's amended notice denied her "a meaningful opportunity to challenge the investigatory finding through the administrative process."

Although S.C. further faults the Division for only identifying the credible evidence on which it based its "not established" finding without "thoughtful arguments or position as to how [it] constitutes credible evidence," the Division is not required to explain why its investigator determined to credit one person's account and discount another as it would in an adjudicatory hearing. See In re R.P., 333 N.J. Super. 105, 116 (App. Div. 2000) (explaining the difference between investigatory and adjudicatory agency findings). "An investigator simply interviews witnesses and examines other available evidence, reviews and analyzes this information and makes a recommendation as to whether any action should be taken against the subject of the investigation." Id. at 116-117.

As Justice LaVecchia explained in S.C.,

The Department's use of the word "finding" cannot be allowed to obscure what the classification of "not

established" actually signifies here: the Department 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 234-235.]

Because the Division's "not established" finding is not an adjudicatory finding, S.C.'s claim that the Division was required "to prove by credible evidence that S.C. harmed or placed her children at risk of harm" is incorrect. Indeed, the Division has never alleged that Luke is an abused or neglected child under N.J.S.A. 9:6-8.21(c). It only concluded that its investigation revealed some credible evidence indicating Luke was harmed or placed at risk of harm. See N.J. Dep't of Children & Families v. R.R., 454 N.J. Super. 37, 42 (App. Div. 2018) (explaining a "'not established' finding . . . 'indicates' only a 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)" (quoting N.J.A.C. 10:129-7.3(c))).

The only significant issue on this appeal is whether S.C. is correct that the Division's conclusion that the report of Luke's abuse was "not established" as opposed to "unfounded" was arbitrary and capricious based on the record on remand. See id. at 42 (applying the "arbitrary, capricious, or unreasonable"

standard of review to a "not established" finding). Our fresh look at that record, including S.C.'s rebuttal to the Division's revised notice, in which she incorporated the briefs she filed in her first appeal in this court and the Supreme Court, leads us again to the conclusion that the information the Division gathered in the course of its investigation "might reasonably lead a Division investigator to conclude there was 'some [credible] evidence,' certainly less than a preponderance, indicating that S.C. had placed Luke at risk of harm, leading to a 'not established' finding." S.C., slip op. at 17.

As we've already noted, S.C. did not submit any additional evidence for the Division to consider on remand. Thus, the record evidence remains as it was when we first considered her appeal. Instead of supplementing the record, as was her right, S.C. submitted what was in essence a brief rebutting the facts on which the Division relied in support of its finding and assailing Luke's credibility.

S.C.'s rebuttal of the Division's findings draws from other, more favorable, information included in the Division's investigation summary. But the basis of her assault on Luke's credibility — that he's on medication, sees a psychiatrist, refused the assistance of a cognitive behavioral therapist and that his "diagnosis of Oppositional Defiance Disorder and Disruptive Mood

Dysfunction Disorder[,] both which are categorized with behaviors of irritability, anger, outbursts, defiance or vindictiveness toward parents or authority figures," make his allegations unworthy of belief — lacks any support in the record.

S.C. did not submit any medical reports to the Division diagnosing Luke with those conditions, despite the opportunity provided her on remand, and there is nothing in the record that would otherwise support counsel's unsworn claims. See Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 1:6-6 (2024) (noting "the attempted presentation of facts which are neither of record, judicially noticeable, nor stipulated, by way of statements of counsel made in supporting briefs . . . do not constitute cognizable facts"). As already noted, it's not even clear whether S.C. is asserting Luke suffered from those conditions at the time of his report in 2016, or whether counsel was describing Luke's current state of health. More important, the investigator took note of Luke's classification and discussed it with school officials and S.C.

As the Court in S.C. recounted, "[a]lthough Luke had been challenged by behavioral issues in the past (while in kindergarten, he had ripped down a shelf holding a TV monitor), according to his education case manager, he was doing much better." 242 N.J. at 214. S.C. also reported a marked

improvement in Luke's behavior in 2016, telling the investigator "she was endeavoring to have Luke's classified status removed." Id. at 215. Thus, that Luke suffered from conditions making him prone to "irritability, anger, outbursts, defiance or vindictiveness toward parents or authority figures," is not only without support in the record, it's contradicted by the contemporaneous statements of S.C. and Luke's education case manager. Indeed, the investigator cited Luke's uncharacteristic behavior on the day he reported the alleged abuse as part of the credible evidence of harm or risk of harm.

We reject S.C.'s claim it was "the caseworker's personal feelings regarding light open-handed spanking [that] drove the course of this investigation." As we noted when we first reviewed the matter, "the record of the investigation reveals a conscientious investigator, thoroughly pursuing all relevant information, with no discernible bias, who established an easy rapport with these three eight-year-olds," and "was quick to both record and take into account all information, including information supporting a conclusion that Luke and his sisters were safe and well-cared for by their parents and had been placed at no risk of harm." S.C., slip op. at 13.

It was "[t]he competence and completeness of the investigation in this case" that we found distinguished it from R.R., "in which we reversed a not established finding by the Division and directed the allegation be deemed unfounded because the Division investigator 'failed to consider essential documents and relevant facts,' resulting in a one-sided investigation and a finding lacking fair support in 'the record the Division did compile.'" Id. at 20 (quoting R.R., 454 N.J. Super. at 46). Our inability to identify any flaw in the investigation, and thus any "dereliction in the Division's discharge of its statutory responsibilities," is what convinced us that "reversing the Division's investigatory finding and directing Luke's allegation be treated as unfounded instead of not established would be merely substituting our judgment for the Division's, a result plainly not permitted us." Id. at 21 (citing In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. 377, 384 (2001) (noting that "when reviewing an administrative agency's factual findings, our function is not to substitute our judgment for that of the agency, particularly when that judgment reflects agency expertise"))).

As Justice LaVecchia reminded in S.C., the Legislature has charged the Department with "the broad responsibility to investigate allegations of child abuse and neglect and to take immediate action as 'necessary to insure the

safety of the child." 242 N.J. at 224 (quoting N.J.S.A. 9:6-8.11). "In carrying out this great responsibility, the Division's paramount concern is the safety of the children it serves, and its primary consideration is the children's best interests." N.E. for J.V. v. State Dep't of Children and Families, Div. of Youth and Family Services, 449 N.J. Super. 379, 398 (App. Div. 2017).

Here, an investigator conducted an immediate and thorough investigation of Luke's report that his mother had hit him on numerous occasions with an open hand when she could not otherwise compel him to do as he was told, sometimes with a spatula, and that on one occasion his backside was "as red as a fire truck" afterward, and on another she'd hit him twice when he said the first time didn't hurt. Taking into account that Luke was reported to be uncharacteristically "distraught" around the time he made his report to the education case manager who counsels him at school; that there was no dispute that both parents hit Luke and his sisters with an open hand; that S.C. admitted smacking a spatula on her kitchen counter to threaten Luke, but claimed she never followed through; and that she reported she found the constant "playing and fighting" among her three eight-year-olds sometimes "challenging," expressing frustration that none of the methods she had tried to discipline them, including hitting, were effective; the investigator concluded

the preponderance of the credible evidence was insufficient to establish S.C. had abused or neglected her son.

But the investigator also concluded she could not declare the report "unfounded" as there was "some" credible evidence indicating S.C. had harmed Luke or put him at risk of harm, leading her to conclude the report was "not established." S.C. has not carried her burden to clearly show that conclusion "is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 301 (App. Div. 2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). Although S.C. assails the Division investigator's credibility findings, she has not provided us any compelling reason to accept her assessment of the witnesses over that of what appears to us to be a competent, conscientious, and unbiased investigator. It is simply not the place of this court to substitute its judgment for that of the agency on so complete an investigatory record. "Deference controls." Herrmann, 192 N.J. at 28.

S.C.'s remaining arguments, to the extent we have not addressed them, lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(D) and (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