

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3455-20

DEPARTMENT OF CHILDREN
AND FAMILIES,

Petitioner-Respondent,

v.

D.S.,

Respondent-Appellant.

Submitted December 12, 2022 – Decided January 6, 2023

Before Judges Mawla, Smith and Marczyk.

On appeal from the New Jersey Department of Children and Families, Docket No. 19-0572.

Michael Pastacaldi, LLC, attorney for appellant (Michael Pastacaldi, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Sookie Bae, Assistant Attorney General, of counsel; Alicia Bergman, Deputy Attorney General, on the brief).

PER CURIAM

Defendant, D.S., appeals from the July 16, 2021 final decision of the Commissioner of the Department of Children and Families, Division of Child Protection and Permanency (the Division) which substantiated allegations that he sexually abused his granddaughter, pursuant to N.J.S.A. 9:6-8.21(c)(3). On appeal, defendant argues the Division's findings were arbitrary and capricious, and the allegations of abuse were unfounded. Defendant also argues the trial court erred by failing to bar the Division's expert testimony as a net opinion. We affirm for the reasons that follow.

I.

We glean the facts from the record established in the Office of Administrative Law (OAL) hearing conducted on March 30, 2021. The Administrative Law Judge (ALJ) admitted into evidence investigative reports, an expert witness report, and screenshots of various text messages. Nine witnesses testified, including: Kora¹ (defendant's granddaughter and victim); her mother Diana; forensic psychologist Dr. Michelle Fanciullo, Psy.D., the Division's expert witness; defendant's three school-age children; and defendant's wife. Defendant did not testify.

¹ We use initials and pseudonyms to protect the privacy of the minor child and the parties involved. R. 1:38-3(d)(12).

In January 2019, Kora had a panic attack at school, and school staff learned that Kora had confided in friends that she had experienced sexual abuse and just the day before had sent a suicide text to her boyfriend. The school sent Kora to a hospital via ambulance for assessment. At the hospital, Kora and her mother spoke with police, who in turn contacted the Division.

Kora told the Division she sent the suicide text because she was feeling depressed and wanted to harm herself. She told the Division that defendant had molested her in his home between the ages of seven and eleven. Diana informed the Division caseworker she was not aware of the abuse allegations until the school contacted her. She also told the caseworker Kora seemed depressed, stayed in her room a lot, and slept and ate excessively. Diana also informed the caseworker that Kora often spoke about boys and had told her she tried to have sex in 2018 at age thirteen.

Kora and her mother were next interviewed by the Hudson County Prosecutor's Office Special Victim Unit (HCPO). Kora told investigators the sexual abuse by her grandfather occurred almost every morning in various locations around his home, and that he touched her both over and under her clothes.

Kora reported that in the bathroom of defendant's home, he put his hands down her pants and moved it "in circles" on top of her vagina. Kora told the investigator defendant also touched her breasts over her clothing, despite her objections. In response, defendant continued, telling her "you are going to like it." Kora also reported that defendant kissed her on the mouth and cheek during this incident. Kora told investigators about several other incidents of sexual abuse at the hands of defendant, including: an encounter in the kitchen where defendant had Kora sit on his lap and touch his penis; an encounter at the top of the staircase when he attempted to kiss her; and an incident in the living room when he had her sit next to him and touch his penis.

Kora explained the abuse would occur when she and her siblings were dropped off at defendant's house before school. Defendant would touch her when her uncles (defendant's school-age children) were either sleeping or getting ready for school and she was alone with her grandfather. The abuse stopped at age eleven when her mother allowed her to walk to and from school on her own.

At the hearing, Kora testified that the reason she did not disclose the sexual abuse sooner is because she was scared. She testified she did not think anyone would believe her over her grandfather. Kora also testified that she had

disclosed to a friend in the summer of 2018, and that she disclosed to her uncles the same summer. She also explained that she had sent her uncles a suicide text that summer, which read: "This is the end. The end of sadness. The end of pain . . . to the people who hurt me you know what you did."

In April 2019, Kora was evaluated by Dr. Fanciullo at the Audrey Hepburn Children's House Northern Regional Treatment and Diagnostic Center (AHCH). Dr. Fanciullo reviewed HCPO's videotaped interview with Kora and the Division's records. She also interviewed Kora, Diana, and a Division caseworker, and conducted testing with Kora.

During the interview with Dr. Fanciullo, Kora repeated her previous disclosures, but the doctor noted Kora included certain idiosyncratic details. Kora told the doctor that during the abuse, the "skin" around appellant's penis "would go down and [his penis] would get bigger." Kora told Dr. Fanciullo that she could not remember the exact number of times the abuse occurred, but that it was more than ten but fewer than fifty times.

Dr. Fanciullo found Kora exhibited several symptoms of PTSD but did not meet the full criteria. She found Kora was suffering from other specified trauma and a stressor-related disorder due to her sexual abuse. Additionally, she diagnosed Kora with major depressive disorder. Dr. Fanciullo concluded

Kora's allegations were clinically supported because Kora provided consistent accounts of the abuse, provided significant idiosyncratic details, experienced affective emotional responses to the abuse, and lacked motive to fabricate.

Defendant denied the allegations to investigators. He admitted to "accidentally" touching Kora's breast while tickling her once. He confirmed that Kora would come over to his house before school while his wife was at work and his other children were home. He stated that Kora was lying, and that Diana must have been coaching her to make these allegations because she did not like him. Victor, one of defendant's school-age children, was also interviewed. During his interview, Victor called Kora an "attention seeker" and said she sent him a suicide text in 2018.

Upon conclusion of the hearing, the ALJ made findings in a written statement of reasons. The ALJ found: Kora's, Diana's, and Dr. Fanciullo's testimony was credible; Dr. Fanciullo's testimony was uncontested; defendant's denial of the allegations was unpersuasive in light of Kora's testimony; defendant's family's testimony was neither credible nor relevant; the time-outs Kora received as punishment from defendant were not motive for her to fabricate the allegations against him; and finally, defendant's family's testimony was actually corroborative of Kora's testimony.

The ALJ found a preponderance of the evidence showed defendant's actions constituted sexual abuse in violation of N.J.S.A. 9:6-8.21(c)(3), and affirmed the Division's finding of substantiation under N.J.A.C. 3A:10-7.3(c) and N.J.A.C. 3A:10-7.4.

On July 16, 2021, the Commissioner adopted the ALJ's initial decision as final. Defendant appealed.

II.

Judicial review of quasi-judicial agency determinations is limited. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). "[A]n appellate court reviews agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019) (citing In re Stallworth, 298 N.J. 182, 194 (2011)). "An agency's determination on the merits 'will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo, 206 N.J. at 27). The party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

"Appellate courts owe deference to the trial court's credibility determinations . . . because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" C.R. v. M.T., 248 N.J. 428, 440 (2021) (quoting Gnall v. Gnall, 222 N.J. 414, 428 (2015)). The deferential standard is applied "because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595 (2020).

The appellate court applies "de novo review to an agency's interpretation of a statute or case law." Russo, 206 N.J. at 27 (citing Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)); See also Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992) ("Agencies . . . have no superior ability to resolve purely legal questions, and . . . a court is not bound by an agency's determination of a legal issue").

An "abused or neglected child" is defined under N.J.S.A. 9:6-8.21(c)(3) as "a child less than [eighteen] years of age whose parent or guardian . . . commits or allows to be committed an act of sexual abuse against the child."

N.J.S.A. 9:6-8.21(a) defines parent or guardian in pertinent part as: "any natural parent, adoptive parent, resource family parent, stepparent . . . or any

person who has assumed responsibility for the care, custody, or control of a child
...."

Under regulations associated with Title IX, 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 Children & Fams. v. R.R., 454 N.J. Super. 37, 40 (App. Div. 2018) (citing Dep't of Children & Fams. v. D.B., 443 N.J. Super. 431, 441-42 (App. Div. 2015)).

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 outlined under 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. Pursuant to N.J.A.C. 3A:10-7.3(d), "[a] finding of either established or substantiated shall constitute a determination by the Department that a child is an abused or neglected child pursuant to N.J.S.A. 9:6-8.21."

Mindful of the legislative and regulatory scheme as set forth above, and because we find substantial, credible evidence in the record to support the Division's findings, we affirm substantially for the reasons set forth in the Commissioner's final decision. We add the following comments.

The ALJ had the opportunity to hear testimony, review exhibits, and make credibility determinations. The ALJ also heard from the Division's expert witness, Dr. Fanciullo, the forensic psychologist. The expert's qualifications were stipulated to, and her uncontroverted testimony was based on her observations and evaluation of Kora as well as her review of the substantial record in the case. "The net opinion rule bars admission 'of an expert's conclusions that are not supported by factual evidence or other data.' Matter of Civ. Commitment of A.Y., 458 N.J. Super. 147, 169 (App. Div. 2019) (quoting Townsend v. Pierre, 221 N.J. 36, 53-54 (2015)). Here, there is ample evidence and data supporting Dr. Fanciullo's testimony, and her methodology and factual basis were adequately described as required by Townsend, 221 N.J. at 55.

On this record we are persuaded the agency decision is neither arbitrary, capricious, nor unreasonable.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION