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S.C. Plaintiff/Petitioner, v. N.J. Dept. of Children and Families, Defendant/Respondent.	: SUPREME COURT OF NEW JERSEY : Docket No. 081870 : : CIVIL ACTION : : Appellate Division : Docket No.: A-004792-15 : Final State Agency Determination : CASE ID No. 16739248 : INVESTIGATION No. 19894506 : : Sat Below: : Carmen Messano, J.A.D. : Allison E. Acurso, J.A.D. : Francis J. Vernoia, J.A.D.

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

The Supreme Court of the United States noted long ago that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442 (1944); see also Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388 (1982). Similarly, the Court in In re Baby M, 109 N.J. 396 (1988), recognized that a parent has a constitutionally protected, albeit limited, fundamental right to the companionship of his or her child. Id. at 450, 452 n.16; see also Adoption of Children by G.P.B., 161 N.J. 396, 403 (1999).

The right to rear one's child is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Wisconsin v. Yoder, 406 U.S. 205, 232-33, 92 S. Ct. 1526, 1541-42 (1972) (explaining "primary role" of parents in raising their children as "an enduring American tradition" and the Court's historical recognition of that right as fundamental). Although often expressed as a liberty interest, childrearing autonomy is rooted in the right to privacy. See Prince, 321 U.S. at 166, 64 S. Ct. at 442 (observing existence of "private realm of family life which the state cannot enter"); V.C. v. M.J.B., 163 N.J. 200, 218 (remarking that "the right of a legal parent to the care and

custody of his or her child derives from the notion of privacy"), cert. denied, 531 U.S. 926, 121 S. Ct. 302 (2000). In Meyer v. Nebraska, the United States Supreme Court characterized the right of parents to bring up their children "as essential to the orderly pursuit of happiness by free men." Meyer, 262 U.S. 390, 399, 43 S. Ct. 625, 626 (1923).

In this case, the Court is asked to consider the due process rights that should be attendant with a Division of Child Protection and Permanency (DCPP) finding of "not established," due to the potential and significant impact such a finding could have on a parent/caregiver's well-established constitutional right to parent. The New Jersey State Bar Association (NJSBA) urges the Court to invalidate "not established" as a potential finding, as it is based on an amorphous standard that leads to arbitrary and capricious decisions, which can have a lasting and grievous effect on both a parent/caregiver's right to parent and that individual's reputation.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA relies on the Procedural History and Statement of Facts as submitted by the parties.

LEGAL ARGUMENT

POINT I

A FINDING OF "NOT ESTABLISHED" FAILS TO ARTICULATE ANY CONSTITUTIONAL BASIS FOR SUCH FINDING AND MAY INTERFERE WITH THE RIGHT TO PARENT AND RESULT IN A TARNISHING OF A PARENT/CAREGIVER'S REPUTATION IN VIOLATION OF HIS/HER CONSTITUTIONAL RIGHT TO DUE PROCESS.

A. The Evidentiary Standard For A "Not Established" Finding Is Purely Investigatory, is Based on an Amorphous Evidentiary Standard And Leads To Arbitrary, Capricious And Unreasonable Results.

It is respectfully submitted that a finding of "not established" leads to arbitrary, capricious, and unreasonable results because it does not require a showing of abuse or neglect by a preponderance of the evidence. Further, despite having far more lasting consequences than a finding of "unfounded," there is no objective legal standard to differentiate between findings that are "not established" and findings that are "unfounded."

Pursuant to the four-tier framework adopted by the Department of Children and Families (DCF), N.J.A.C. 3A:10-7.3(c)(3), whenever DCF investigates an allegation of abuse, it shall render one of four findings, which include:

1. An allegation shall be "substantiated" if 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 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.

2. An allegation shall be "established" if 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" as defined in (c)1 above.

3. 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.

4. An allegation shall be "unfounded" if there is not a preponderance of the evidence indicating that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, and the evidence indicates that a child was not harmed or placed at risk of harm.

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

Consequently, if DCF demonstrates by a preponderance of evidence that a child was subject to abuse or neglect, it must

render a finding of "established" or "substantiated." On the contrary, if DCF cannot demonstrate that a child was subject to abuse or neglect by a preponderance of the evidence, but evidence indicates the child was harmed or placed at risk of harm, it must render a finding of "not established."

There is, however, no way of knowing what standard of proof is meant by "not a preponderance of the evidence." The New Jersey Rules of Evidence set forth three standards of proof: a preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. N.J.R.E. 101(b)(1). The preponderance of the evidence standard applies in civil actions. State v. Seven Thousand Dollars, 136 N.J. 223, 238 (1994) ("In civil cases, the standard of proof is a preponderance of evidence."). A preponderance of the evidence is also "the usual burden of proof for establishing claims before state agencies in contested administrative adjudications." In re Polk License Revocation, 90 N.J. 550, 560 (1982).

Under the preponderance standard, "a litigant must establish that a desired inference is more probable than not. If the evidence is in equipoise, the burden has not been met." Biunno, Current N.J. Rules of Evidence, comment 5a on N.J.R.E. 101(b)(1) (2005); see also 2 McCormick on Evidence 339 (Strong ed., 5th ed. 1999) ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury

to find that the existence of the contested fact is more probable than its nonexistence."). Application of the preponderance standard reflects a societal judgment that both parties should "share the risk of error in roughly equal fashion." Addington v. Texas, 441 U.S. 418, 423 (1979). The decision to apply any other standard of proof "expresses a preference for one side's interests." Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). There is no similar authority explaining what "not a preponderance of the evidence" means.

Further, there is no objective or measurable standard to differentiate between findings of "not established," and findings of "unfounded." Both findings fall short of a preponderance of the evidence, but findings of "not established" result in DCF making the determination that there was "some evidence," of abuse. This can have lasting consequences on a parent or caregiver investigated by the agency, as DCF acknowledges that its database contains all information regarding investigations of child abuse and neglect and is empowered to disclose 'all information' from its investigations of abuse or neglect regardless of whether the allegations are substantiated. N.J.A.C. 3A:10-7.3(d); N.J. Div. of Child Prot. & Permanency v. V.E. 448 N.J. Super. 374, 391 (App. Div. 2017).

The Division must indefinitely retain on file the record of "not established" findings indicating by less than a preponderance

of evidence that a child was harmed or placed at risk of harm. N.J. Dep't of Children & Families v. R.R., 454 N.J. Super. 37, 41 (App. Div. 2018) quoting N.J.A.C. 3A:10-8.1(b). Nowhere in the DCF Parents' Handbook (revised April, 2017) or DCF Policy Manual are there any standards for what conduct constitutes "harm" but would be considered "not established." There are no guidelines or requirements for delineating how the child was harmed or placed at risk of harm. Yet, since the file is retained the allegation of abuse may also be provided in the future if the alleged abuser applies for certain employment or participates in custody and parenting-time litigation. N.J.S.A. 9:6-8.10a(b). Comparatively, findings of "unfounded" are generally expunged. R.R., 454 N.J. Super. at 42. Consequently, a finding of "not established," can permanently "tar" a parent with a finding that there was some credence to the allegation. Id. at 39.

Despite the vastly different consequences between findings of "unfounded" and "not established," the only guidance the applicable regulations provide to differentiate between "unfounded" and "not established" is whether the evidence "*indicates*" that a child was harmed or was placed at risk. N.J.A.C. 3A:10-7.3(c)(3). The Division previously explained that "the 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." R.R., 454 N.J. Super. at 41 quoting 45 N.J.R. 738(a) (April 1, 2013) (response to Comment 86).

Agency decisions are given deference by the courts except in narrow circumstances. In reviewing a final agency decision, our Courts "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). Reviewing courts 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 41. New Jersey courts must uphold an agency's decision unless there is a clear showing that the agency's decision is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record. Dep't of Children & Families, Div. Of Youth & Family Services v. T.B., 207 N.J 294, 301-02 (2011). Although not capable of a precise definition, "abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002).

It is respectfully submitted that distinguishing between "unfounded" and "not established" will almost always be arbitrary and capricious, as there can be no rational explanation for one finding over another. There is no objective standard to distinguish

between the two findings, as both are based on something short of the preponderance of the evidence standard. Viewed differently, the amorphous and ill-defined finding of "not established" was created by the agency and it is entirely up to the agency to interpret whether the evidence "indicates" possible abuse or neglect. This arbitrary determination, not established by statute and not supported by any rational explanation, ultimately dictates whether the agency finds an allegation "unfounded" or "not-established."

Without some meaningful objective and evidentiary standard, the agency is allowed to make its own individualized determinations as to allegations constituting evidence of harm. Without corroboration or any requirement that an allegation be more likely true than not, individual investigators are left with wide discretion to make findings of "not established" and "unfounded."

To demonstrate the arbitrary and capricious nature of this standard, the Appellate Division's decision in R.R. is instructive. There, the parents of the child at issue were proceeding with a divorce. The child was throwing a tantrum and the husband, in attempting to stop her tantrum, was unable to prevent a fall which caused the child injury. The Division became involved in the matter, which ultimately found the allegations "not established." During the divorce proceedings, the wife admitted to wanting the husband removed from the home and to

seeking the case worker's help in removing him. Despite making a finding of "not established," the record reflects that the agency did not review any of the court pleadings, review any testimony from the court proceedings, or accurately take down the Court's instructions when making the referral to the agency.

The Appellate Division reversed and instructed the Division to alter the finding to "unfounded," since there was no evidence establishing that the defendant contributed to the child's risk of harm, and that failure to consider all evidence in a record would perforce lead to arbitrary decision making. R.R., 454 N.J. Super. at 47 quoting In re Proposed Quest Acad. Charter Sch. Of Montclair Founders Grp., 216 N.J. 370, 386 (2013). The Court was also concerned that no weight or consideration was given to the mother's admission that she wanted the father removed from the home. R.R., 454 N.J. Super. at 47.

Though unpublished, the Appellate Division's decision in Dep't of Children & Families v. J.S., No. A-1001-17T3 (App. Div. May 30, 2019) (attached as Exhibit A) also demonstrates the arbitrary nature of the Division's determinations. In this matter, a *per curiam* panel of the Appellate Division reversed a finding of "not established," and directed the agency to change the finding to "unfounded." In J.S., the agency determined that an allegation of sexual abuse was "not established," following allegations that the defendant had spread a cream on a young child's vagina. The

child provided inconsistent accounts of the touching, and during the course of examinations by two reviewing experts, neither expert could conclude whether the touching was done in a sexual manner or as part of normal caretaking. The agency concluded that the allegation of abuse was "not established," but the Appellate Division found this finding arbitrary, capricious, and unreasonable, noting that DCPP concluded that defendant harmed or placed the child at risk of harm without articulating the basis for that conclusion.

As the underlying record in this matter reflects, very often the Division provides little more than a letter explaining the nature of the administrative finding. This practice was admonished by Judge Carmen Messano in the concurring opinion of the Appellate Division. (Pca29). It is commonplace that parties receive no guidance as to the specific factual findings of the Division in support of a determination of a "not established" and no information as to what, if any, records were reviewed by the Division.

Given the lack of transparency, coupled with the amorphous and overbroad guidance afforded to the agency, the discretion to choose between findings of "not established," and "unfounded" clearly lies within the judgment of individualized investigators and will almost always result in arbitrary and capricious outcomes in violation of a parent/caregiver's constitutional rights.

B. A Parent or Caregiver's Permanent Placement in the Division's Files Based on a "Not Established" Finding May Result in Interference with the Right to Parent and a Tarnishing of Reputation Based on Nothing More than an Investigation.

While a finding of "not established" by the Division of Child Protection and Permanency ("DCPP") is not based on any established evidentiary standard and merely reflects an investigator's sense that "some evidence" indicates harm or a risk of harm, such a finding may very well impact a parent's fundamental and constitutional right to parent their child. This was firmly set forth by Judge Ostrer, J.A.D., in the opinion set forth in R.R., where he noted the following:

> One might wonder why a person would appeal such an apparently favorable finding ("not established" finding), but the meaning of "not established," is not what it seems. As we discuss, it still permanently tars a parent with a finding that there was something to the allegation.

R.R., 454 N.J. Super. at 39.

All too often in custody litigation, these "findings" by DCPP are used by litigants as a sword, instead of as a shield, as it was intended. This is similar to the application by some litigants to utilize the domestic violence statute as a sword, to gain an advantage from the outset of litigation, instead of as the shield it was intended to be for domestic violence victims. With regards to custody litigation, these findings and the accompanying letters

submitted by DCPP are often used as weapons by one litigant against another litigant in the battlefield of custody litigation.

This precise occurrence existed between the parties in R.R. See R.R., 454 N.J. Super. 37. In that case, the parties were going through a divorce proceeding and the wife made it clear, both in the divorce proceeding and the DCPP investigation that followed, that her motivating factor was the removal of the husband from the marital home. Had the Appellate Division not overturned the "not established" finding, this would have resulted in the victory that the wife sought because she could have then held it against the husband throughout the custody litigation. In fact, the wife was so improperly motivated that she began filming the incident between the husband and their daughter rather than provide him with assistance in calming down the child during a temper tantrum.

The second part of the "not established" finding is clearly the most confusing and potentially damaging portion. It suggests that a child was harmed or placed at risk of harm, based upon "some" evidence not amounting to the preponderance of the evidence. There are multitudes of scenarios where children are harmed or placed at risk of harm in everyday scenarios by parents not under investigation. For example, every time a parent places a child in a car, the child is being placed at risk of harm. Every time a child is brought to a playground or to participate in organized sports/activities, they are technically being placed at risk of

harm. Trying new foods that have the potential of eliciting an allergic reaction, enjoying the rides at an amusement park, jumping the waves in the ocean or a multitude of other ordinary, everyday life occurrences and experiences could potentially fall into the category of placing a child at risk of being harmed. Some individuals would even cite getting a child vaccinated or choosing not to get a child vaccinated as placing a child at risk. It could not have been envisioned that parents who simply make decisions about their children's activities on a daily basis would potentially be subject to a "not established" finding of abuse and neglect, possibly impacting their right to parent and leading to the permanent tarnishing of their character and reputation.

The Division argues that only a "substantiated" finding leads to inclusion in the Department's child abuse registry and disclosure to outside entities in response to a CARI inquiry. N.J.A.C. 10:129-7.6(c)(2) and 7.7. However, as the Division acknowledged, despite Division records of agency investigations being confidential, they are eligible for release under at least twenty-three (23) statutory circumstances. N.J.S.A. 9:6-8.10a. See also State in the Interest of Z.W., 408 N.J. Super. 535 (App. Div. 2009). For instance, it can be accessed even by private organizations for certain internal organizational use related to employment applicants, employees and volunteers. It can also be given dispositive effect in private custody and parenting time

proceedings, rule-outs of relatives for foster care placements, and a host of non-child welfare proceedings. An appellate panel recognized that respondent's power of disclosure is nearly limitless under N.J.S.A. 9:6-8.10a, finding it empowered the Department to disclose "all information" contained in its repository of reports and investigations "regardless of whether the allegations are substantiated and whether or not the information has been entered into the Central Registry." N.J. Div. of Youth & Family Services v. M.R., 314 N.J. Super. 390, 409 (App. Div. 1998).

These potential consequences invoke constitutionally protected, fundamental liberty and property interests, triggering due process requirements. In fact, while the NJSBA argued that the possibility of DCPP records being disclosed in a limited fashion does not rise to the level of a "consequence of magnitude" necessitating a constitutional right to counsel in an administrative hearing, the Appellate Division recently found otherwise. See N.J. Dep't of Children and Families, Div. of Child Protection and Permanency v. L.O., ____ N.J. Super. ___ (App. Div. 2019).

The Division further argues that since "not established" findings are not disclosed in CARI checks, and because they are not findings of abuse or neglect, at most (if at all) they may inform future Division actions relating to such matters as

guardianship, adoption, or resource parenting, but will not preclude an applicant's eligibility. See N.J.A.C. 10:129-7.7(a). The NJSBA submits, however, that an individual should never endure the potential for having such fundamental rights and liberties impinged simply by a "not established" finding. Subsequent to a "not established" finding, that individual will be forced to disclose same on all future employment applications, all future volunteer applications, and any applications for guardianship, adoption, or resource parenting, which could and should not have ever been contemplated or anticipated.

Further, the Appellate Division in V.E. noted that all records for which abuse and neglect has been 'substantiated,' 'established,' or 'not established' are retained by the Department. N.J.A.C. 3A:10-8.1(b). The Department, however, does not isolate those matters where abuse or neglect was substantiated. "Rather, one database contains all information regarding investigations of child abuse and neglect. N.J.A.C. 3A:10-7.3(d)." V.E., 448 N.J. Super. at 391. The Division is "empowered to disclose 'all information' from its investigations of abuse or neglect 'regardless of whether the allegations are substantiated and whether ... the information has been entered in the Central Registry."' Id. at 392. The mere fact that DCPP maintains records of the "not established" findings, when they do not keep such records of the "unfounded" findings, indicates the level of

importance and forecasts anticipated use in the future of those "not established" findings for a myriad of potential reasons.

To illustrate the far-reaching implications of a "not established" finding, the NJSBA notes that a number of applications for volunteer positions within common organizations, including Court Appointed Special Advocates (CASA), Little League, Boy Scouts of America and the NJSBA, in one way or another, would require the disclosure of a "not established" finding by DCPP. This information would in turn be utilized to make a determination as to whether or not that individual could serve as a volunteer for the organization. In fact, the CASA application specifically asks the following question:

> Have you ever had personal experience with NJ Division of Youth and Family Services (DYFS) or NJ Division of Child Protection & Permanency (DCPP)? If you answered yes to this question, please explain in detail each situation; please give dates, location, and disposition below. This information will not necessarily preclude you from consideration unless this personal experience relates adversely to the volunteer position sought.

In addition, imagine the embarrassment and harm to one's reputation that a parent would experience having to explain to other parents the "not established" finding simply because they wanted to coach their child's little league baseball team or serve as a volunteer in their child's scouting troop. This would be particularly difficult given the amorphous standard on which such a finding is based and the dearth of information that is provided

to a parent to support such a finding. Imagine again the harm to the reputation of an attorney having to divulge a "not established" finding as part of an application to serve as one of the NJSBA's leaders/trustees. There is nothing more valuable to an attorney than his/her reputation, which, like trust, once lost is nearly impossible to get back.

Teachers, however, are entitled to more protection than parents or caregivers. In N.J. Dep't of Children & Families, Institutional Abuse Investigation Unit v. D.B., 443 N.J. Super. 431 (App. Div. 2015), the Court found that teachers were "entitled to findings letters that state, after the conflicting witness statements are presented, that no determination as to the accuracy of the statements has been made." Id. at 446. Parents, unfortunately, do not have that same right in the State of New Jersey. Another panel found, as follows:

> A teacher against whom a finding has been made by DYFS expressing concern about the teacher's conduct 'has a due process right to challenge the wording of such a finding on the ground that it is misleading and unfairly damaging to his reputation.' 'The impact upon a teacher's reputation of a finding by DYFS expressing concern about the teacher's conduct may be significant, especially if it is accompanied by what appears to be an affirmative finding by DYFS that a teacher has had improper physical contact with a student.' 'The investigatory findings and concerns about the teacher's conduct, warrant some due process protection; by judicial review and correction of the findings to curb administrative abuses.'

N.J. Dep't of Children & Families' Institutional Abuse Investigation Unit v. S.P., 402 N.J. Super. 255, 270 (App. Div. 2008).

Based upon the above, it appears as though a teacher has more rights and privileges when it comes to a finding by DCPP relative to a child than that child's own parents. Such a result is clearly unacceptable and must be addressed. There is no basis for a teacher's right to teach being greater than a parent's right to parent. That is not in any way an indictment on the importance of teachers having the ability to teach, but rather a testament to the importance that parents should be able to parent their children.

CONCLUSION

In conclusion, "not established" findings have no legitimate purpose and should be eradicated as a possible outcome to a DCPP investigation. Even an opportunity to object to the finding at a hearing would not cure the constitutional infirmities associated with a "not established" determination. The potential for misuse, the likelihood of interference with an individual's right to parent, and the consequence of a damaged reputation with no real course of remediation is clear and harmful. The standard for arriving at a "not established" determination is not supported by statute, is amorphous and will always result in an arbitrary and capricious conclusion. For these reasons, the NJSBA urges the Court to invalidate "not established" findings and require any finding by DCPP that may impact a parent's constitutional right to parent to meet, at a minimum, the established standards of a preponderance of the evidence.

Respectfully,

New Jersey State Bar Association

By Evelyn Padin/Sab
Evelyn Padin, Esq.
President
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Dated: 8/15/19

APPENDIX

RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1001-17T3

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner-Respondent,

v.

J.S.,

Respondent-Appellant.

Argued telephonically February 7, 2019 – Decided May 30, 2019

Before Judges Fasciale and Gooden Brown.

On appeal from the New Jersey Department of Children and Families, Division of Child Protection and Permanency, Case Id No. 17126447.

Michael R. Ascher argued the cause for appellant (Einhorn Harris Ascher Barbarito & Frost PC, attorneys; Michael R. Ascher, on the briefs).

Peter Damian Alvino, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Jason Wade Rockwell,

Assistant Attorney General, of counsel; Peter Damian Alvino, on the brief).

PER CURIAM

Defendant J.S.[1] appeals from the October 6, 2017 final agency decision of the Department of Children and Families (DCF), Division of Child Protection and Permanency (DCPP), finding that allegations he abused his then seven-year-old daughter S.S. were "not established."[2] The finding stemmed from an allegation that defendant sexually abused S.S. by touching her vagina in an inappropriate manner.

On appeal, defendant raises the following arguments for our consideration:

POINT I

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[1] Pursuant to Rule 1:38-3(d)(12), we use initials to protect the confidentiality of the participants in these proceedings.

[2] The agency's letter referred to N.J.A.C. 10:129-7.3(c)(3), which was later recodified to Title 3A of the New Jersey Administrative Code. See 49 N.J.R. 98(a) (Jan. 3, 2017). In this opinion, we will refer to the current citation of the rule at N.J.A.C. 3A:10-7.3(c)(3). Because a "not established" finding is considered purely investigatory, rather than adjudicatory in nature, and the regulations do not permit an administrative hearing for a "not established" finding, we "deem it a final decision subject to appellate review under Rule 2:2-3(a)(2)." N.J. Dep't of Children & Families v. R.R., 454 N.J. Super. 37, 40 n.3 (App. Div. 2018).

THE "NOT ESTABLISHED["] FINDING WAS THE RESULT OF [DCPP'S] ARBITRARY, CAPRICIOUS[,] AND UNREASONABLE ACTION LACKING FAIR SUPPORT IN THE ADMINISTRATIVE RECORD AND REQUIRING ITS REVERSAL AND THE ENTRY OF [AN] "UNFOUNDED" FINDING[.]

POINT II

[DCPP'S] OWN POLICIES AND MANUAL REGARDING ABUSE AND NEGLECT INVESTIGATIONS DO NOT SUPPORT A FINDING OF "NOT ESTABLISHED[.]"

POINT III

THE "NOT ESTABLISHED" FINDING INURES TO THE DETRIMENT OF [DEFENDANT] IN FUTURE CUSTODY MATTERS[.]

Having considered defendant's arguments in light of the administrative record and the governing legal standards, we reverse.

DCPP's investigation began when it received a referral from Dr. Shannon Albarelli, S.S.'s psychologist. After her parents divorced, S.S. began treatment with Albarelli in November 2016 due to difficulty adjusting to the transition and "feelings of sadness surrounding spending time at [defendant's] house." On July 7, 2017, Albarelli reported to DCPP that S.S. had disclosed to her during therapy that on the morning of July 6, 2017, during an overnight visit with defendant,

defendant "woke [S.S.] up[,] . . . put her in the shower[,]" and then "proceeded to rub her private parts, (vagina)." Albarelli also stated that defendant reportedly "looks at [S.S.'s] vagina [everyday] that she . . . visits," and "wakes [S.S.] up before her [two brothers] and takes her to the shower." S.S.'s brothers, A.S., S.S.'s twin, and Ar.S., then three years old, accompanied S.S. during her visits to defendant's home.

Based on Albarelli's referral, on July 7, 2017, DCPP workers interviewed L.M., S.S.'s mother, who stated that S.S. had never disclosed any sexual abuse to her. According to L.M., although they had joint custody and a court ordered shared parenting plan, S.S. did not like to visit with defendant because he was easily angered and difficult to talk to, which made S.S. feel "pushed around." L.M. described defendant as a very intense individual who had problems respecting the boundaries of others, a trait S.S. did not like. According to L.M., defendant also had anxiety issues and difficulty managing the children.[3] When asked if S.S. had ever disclosed any inappropriate behavior by defendant, L.M.

[3] In January 2017, a prior allegation of child abuse involving the family was deemed "unfounded." There, defendant had allegedly pulled A.S.'s wrist in anger and the treating doctor reported the allegation to DCPP. According to L.M., the incident demonstrated defendant's difficulty managing the children.

responded that he gave S.S. "raspberries" on her chest under her clothing.[4] In a later interview, L.M. explained that S.S. does not like to be touched, but defendant was always hugging and giving her kisses.

DCPP workers also interviewed A.S., who "denied that [defendant] wakes [S.S.] . . . up first or . . . takes her from [her bedroom]." According to A.S., "he is the first to wake up at both of his homes." A.S. also denied that his siblings spent any "alone time with [defendant,]" and "denied being afraid of anyone in each of his homes" or feeling unsafe. Attempts to interview Ar.S. were unsuccessful, given his age. DCPP promptly implemented a safety protection plan, discontinuing S.S.'s visits with defendant pending completion of the investigation, and requiring visits between defendant and his sons to be supervised by defendant's current wife, P.S. Additionally, DCPP reported the allegation to the Morris County Prosecutor's Office (MCPO), and was advised not to interview S.S. or defendant while the criminal investigation was ongoing. DCPP also referred S.S. for medical and psychological evaluations.

On July 7, 2017, MCPO Detective Hill interviewed S.S. about the allegations. During the interview, S.S. informed Hill that despite having her

[4] L.M. described "raspberries" as "blow[ing] in the children['s] stomach" and "mak[ing] like a spit[t]ing/farting sound."

own bathroom at defendant's house, sometimes, "[defendant] sees her 'naked in the morning'" "while she is in the shower." S.S. explained that although "she showers alone," defendant "turn[s] the water on to make sure it is not hot[,]" checks on her while she showers to make sure "she is okay[,] and tells her to hurry up." When Hill asked whether "[defendant] touches her while she is in the shower," S.S. replied "[defendant] touches her on her 'toto' [(vagina in Catalan language)]" and, after her shower, "puts cream on it when it is red."

When Hill "asked [S.S.] to describe how [defendant] applie[d] the cream[,]" S.S. explained that "[defendant] makes his fingers go in circles" for "about [one] minute[,]" and stated "[defendant] only touches the top of [the] [t]oto and not inside." Using anatomical dolls, S.S. demonstrated for Hill "how [defendant] rubbed her 'toto'" by "pull[ing] the underwear off the girl doll and rub[bing] the top of [the] toto." However, contrary to her earlier statement, S.S. said "sometimes [defendant] goes inside [the] toto." Additionally, while S.S. denied "knowing how often this has occurred," she "also said that [defendant] has not touched her toto more than once."

When asked whether defendant touched her elsewhere, S.S. "informed [Hill] that [defendant] touched her boob five months ago, but then said it occurred when she was a baby." Further, S.S. denied seeing "[defendant]

touching himself" but disclosed that "she sometimes sees [defendant] pee and it takes a really long time, but noted that this [was] not usual." She elaborated that "she will be in the bathroom and [defendant] will come into the bathroom and pee." After the interview, Hill conferred with L.M., who felt that S.S.'s disclosure was "a little different than what she said earlier" to Albarelli.[5]

On July 25, 2017, child abuse pediatrician Julia DeBellis, M.D., conducted a medical evaluation of S.S. During the evaluation, S.S. disclosed that "[defendant] touches [her] toto." When asked to elaborate, S.S. explained that "almost each time she takes a shower[,]" defendant "come[s] into the bathroom . . . , touches and pats her 'toto' and then leaves the bathroom." S.S. reported that defendant "touches [her] toto" and tells her "to wash [it]" when "[she] already did." Notably, S.S. made no mention of defendant applying cream to her vagina, and, although S.S. denied any penile contact with defendant, she "stated that she has seen [defendant's] 'private part'" because "he goes to the bathroom and does [not] lock the door."

Based on her evaluation of S.S., DeBellis concluded that "[t]he general physical and the anogenital examinations revealed no abnormalities." She found

[5] According to Albarelli, L.M. was present when S.S. made the disclosure at the end of their therapy session.

that the examination "neither confirm[ed] nor denie[d] the possibility of sexual abuse and should in no way discredit [S.S.'s] disclosure." She also noted that "[a]t this point in time, it [was] unclear if the genital touching described was in a caretaking manner or one that [was] abusive." Thus, "[t]here should be further investigation into [S.S.'s] feeling about this activity and the need for this level of child care." DeBellis recommended "on-going therapy to assess the possibility of any emotional trauma that [S.S.] may have suffered from this event and to better understand the nature of the genital touching that she described."

On the same date, psychologist Sarah Seung-McFarland, Ph.D., conducted a psychosocial mental health evaluation of S.S. Initially, S.S. refused to discuss defendant "touch[ing] her privates" when it "[was] red" and informed Seung-McFarland that she had already told "1000 people!" S.S. only reported that defendant never allowed her privacy, was "bothering [her,]" was "mean to [her,]" and paid more attention to her brothers than to her.

However, after being prodded by L.M., S.S. reported the following to Seung-McFarland:

> [S.S.] informed that her father touches her in the shower every visit since January. She stated it only occurs in the shower. She noted her father comes in when the shower is running and opens the shower door. She further stated he says, "[S.S.], you[r] toto [is] red . . . and says different things every time." She also stated

> he will tell her she needs to wash it after she already washed it. When asked if she uses a sponge, she stated she does[,] but her father does not. When asked what she thinks about him doing it, [S.S.] stated it is "unpolite" and she feels "bad" about it. Asked what makes him stop, [S.S.] stated, "I have to wait until he [is] done." [S.S.] denied that she needs help in the shower.

S.S. stated further that defendant touched her on her "boob" "more than once when she turned seven[,]" but "she forgot what [defendant] said when [he] touched her there." She also said that her father and mother both put cream on her privates, but she had no idea why. However, when questioned by Seung-McFarland about the latter disclosure, L.M. denied putting cream on S.S.'s privates, explaining that at her home, S.S. applies cream by herself if needed.

Based upon her evaluation, Seung-McFarland diagnosed S.S. with "Adjustment Disorder with [A]nxiety[,]" "Parent-Child Relational Problem[s,]" and "Disruption of Family by Separation or Divorce." She concluded:

> With regard to the allegations, this evaluation cannot determine with any degree of psychological certainty whether or not [S.S.] was sexually abused by her father as suggested. Nevertheless, [S.S.] reported that her father touched her on her private area (e.g., toto) while showering, made comments that it is red, and put cream on it more than once. There are also reports that he sees her naked, comes into the bathroom to pee when she is there, and does "raspberries." At the very least, these behaviors suggest inappropriate boundaries, and are consistent with reports that [defendant] does not respect

> the children, is dismissive of them, and treats the twins like babies.

Seung-McFarland noted that S.S.'s "poor mood regarding her father suggests her problematic relationship with him is significant for her" and "[h]er reported desire for her father's attention . . . along with her perception that he is mean, yells, and lies suggests that [S.S.] has not been able to establish a supportive and nurturing relationship with her father." Further, according to Seung-McFarland, "[S.S.'s] reported irritability after visits with her father further reflects her problematic adjustment to the family structure/dynamics." Seung-McFarland recommended that S.S. should "continue to participate in therapy to address her problematic relationship with her father, her recent disclosure of inappropriate touching, her parent's divorce, and family dynamics."

On August 29, 2017, Hill interviewed defendant about the allegations. Defendant stated that on the morning of the alleged incident, July 6, 2017, he was on a 6:00 a.m. flight to San Francisco for work and S.S. was still sleeping when he left. Defendant admitted that "on one occasion [S.S.] told him that her vagina area was itching." After "[h]e had [S.S.] point to where she was itching[,] . . . he put [Desitin] cream on her vagina." According to defendant, "the second time [S.S.] complained" of vaginal itching, "he gave her cream" and had her put

the cream on herself. He denied ever "put[ting] his hand inside [S.S.'s] vagina" and acknowledged that S.S. "is not a person who likes to be touched[,] . . . hugged[,] [or] kiss[ed]."

Defendant explained further that A.S. and S.S. have been bathing by themselves for about a year, but that he or his nanny would bathe Ar.S. Defendant stated that "in the morning[,] he goes into [the bathroom] to set the bath or shower temperature, while [S.S.] is taking off her pajamas preparing to get in the bathroom." "[A]fterwards he goes [downstairs]." According to defendant, when "[S.S.] is taking a shower[,] he will knock on the door to see [i]f she is okay" as "knocking is a rule in his home." He also stated that he may "yell" for her "to hurry up" if she is taking too long, and will enter the bathroom "if she does [not] answer."

Defendant informed Hill that prior to the divorce, "his relationship with [S.S.] was okay," but that "she is closer to her mother." He indicated that "[S.S.] feels . . . he shows favoritism to [Ar.S.]" and "sometimes[,] when he goes to pick up the children[,] [S.S.] wants to stay with her mother." However, once "she gets to his home[,] she is fine." While "[h]e described his relationship with his children as wonderful[,]" defendant acknowledged that his current wife was not always "excited about being with the children." He stated that S.S. had

"complained to her mother that his wife treats them different[ly] when he is not there." He also reported that "[S.S.] sometimes likes to tell stories" and "push[es] her limits with him."

Defendant was administered a polygraph exam, which he passed to Hill's satisfaction. Thereafter, Hill informed DCPP that his office would not pursue the matter further because, in his opinion, while "the incident happened," it was not "sexual[] [in] nature." Following DCPP's investigation, which was detailed in an investigation summary, DCPP also determined that while "the incident did happen[], . . . there [was] insufficient documentation to support that it was in a sexual manner." Based on this finding, DCPP determined that "[t]he allegation of [s]exual [a]buse-[s]exual [m]olestation of [S.S.] . . . by [defendant] is [not] [e]stablished. There is not a preponderance of evidence that [S.S.] is . . . abused or neglected by definition, but evidence indicates that [S.S.] was harmed or placed at risk of harm."

On October 6, 2017, DCPP mailed defendant its determination letter, which was signed by the DCPP worker who conducted the field investigation and the worker's supervisor. In addition to notifying defendant of the "[n]ot [e]stablished" finding, the letter informed defendant that "[a] record of the

incident [would] be maintained in [DCPP's] files" but would "not be disclosed by [DCPP] except as permitted by N.J.S.A. 9:6-8.10a." This appeal followed.

The scope of our review is limited. In re Stallworth, 208 N.J. 182, 194 (2011). In reviewing a final agency decision, we "must defer to an agency's expertise and superior knowledge of a particular field[,]" Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992), and "extend substantial deference to an 'agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible' based on the agency's expertise." R.R., 454 N.J. Super. at 43 (quoting In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004)).

"Thus, we are bound to uphold an agency's decision 'unless there is a clear showing that it 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, 301-02 (2011) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007)). In applying that standard of review, our function is not to substitute our judgment for that of the administrative agency. Barrick v. State, 218 N.J. 247, 260 (2014). "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 (first alteration in original) (quoting Mayflower Sec. Co. v.

Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Public Safety, 64 N.J. 85, 93 (1973)), and "if 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)).

Defendant argues "the 'not established' finding was clearly arbitrary, capricious[,] and unreasonable or lack[ed] fair support in the . . . record" because the "investigation did not produce evidence indicating that S.S. was either actually harmed or placed at risk of harm by [defendant's] conduct, which was specifically alleged to be sexual in nature." According to defendant, instead, through its experts, DCPP "was only able to conclude that there existed a problematic relationship between S.S. and her father, arising from her parents' divorce and the family dynamics." Thus, defendant continues, "[u]nder the circumstances, the determination . . . should have been designated 'unfounded.'" We agree.

A "not established" finding "is one of four outcomes [DCPP] may reach after investigating an abuse or neglect allegation." R.R., 454 N.J. Super. at 40. See N.J.A.C. 3A:10-7.3(c)(1) to (4); Dep't of Children & Families v. D.B., 443

sexual abuse inconclusive, neither expert determined that S.S. was harmed or placed at risk of harm as a result of "the incident." Instead, DeBellis recommended "on-going therapy to assess the possibility of any emotional trauma that [S.S.] may have suffered from this event" and Seung-McFarland's diagnosis of S.S. related to S.S.'s "problematic relationship with her father," her "parent's divorce," and her "family dynamics." Conspicuously absent from Seung-McFarland's diagnosis was any condition related to sexual abuse.

Because we conclude DCPP "erred in finding the allegation was 'not established,' [DCPP] shall deem the allegation to be 'unfounded' and treat the records accordingly." Id. at 48. Based on our decision, we need not address defendant's remaining arguments, other than to point out that we reach this result mindful that a "not established" finding "still permanently tars a parent with a finding that there was something to the allegation." Id. at 39. While a "not established" finding is purely investigative in nature and is not made public through inclusion of the perpetrator's name on the Central Registry or during a Child Abuse Record Information (CARI) check, the permanent retention of "not established" findings means that records continue to be subject to disclosure in

a host of situations. See N.J.S.A. 9:6-8.10a(b).[8] Given the nature of the allegation in this case, we agree with defendant that such disclosure "inures to [his] detriment."

Reversed.

[8] For example, since they are not subject to expungement, the Division's "records," "information," and "reports of findings" of a "not established" determination would be accessible upon written request to "[a]ny person or entity mandated by statute to consider child abuse or neglect information when conducting a background check or employment-related screening of an individual employed by or seeking employment with an agency or organization providing services to children[.]" N.J.S.A. 9:6-8.10a(b)(13).