

SUPREME COURT OF NEW JERSEY

DOCKET NO. 073916

N.J. Dept. of Children &  
Family, Division of Child  
Protection and Permanency,

Respondent

v.

E.D.-O.,

Appellant.

CIVIL ACTION

APPELLATE DOCKET NO. A-3825-12T4

AGENCY DOCKET NO. AHU 09-0740

ON CERTIFICATION TO THE NEW JERSEY  
SUPERIOR COURT, APPELLATE DIVISION

SAT BELOW:

HON. CLARKSON S. FISHER, JR.

HON. MARIANNE ESPINOSA

HON. ELLEN L. KOBLITZ

---

BRIEF AND APPENDIX OF *AMICUS CURIAE*  
LEGAL SERVICES OF NEW JERSEY

---

Legal Services of New Jersey  
Melville D. Miller, Jr., President  
100 Metroplex Drive, Suite 402  
Edison, New Jersey 08818-1357  
Phone Number: (732) 572-9100  
Fax Number: (732) 572-0066

On the Brief:

Jeyanthi Rajaraman  
[JRajaraman@lsnj.org](mailto:JRajaraman@lsnj.org)  
Attorney ID No. 001092005

Mary M. McManus-Smith  
[MMcManus@lsnj.org](mailto:MMcManus@lsnj.org)  
Attorney ID No. 017651995

Melville D. Miller  
[DMiller@lsnj.org](mailto:DMiller@lsnj.org)  
Attorney ID No. 256481969

## TABLE OF CONTENTS

## PAGES

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
OVERVIEW OF INTEREST OF PROPOSED AMICUS AND THIS BRIEF .....	1
BACKGROUND: THE STATE CHILD WELFARE INVESTIGATIVE AND FINDINGS' PROCESS .....	3
STATEMENT OF FACTS AND PROCEDURAL HISTORY .....	10
ARGUMENT .....	11
I. PROCEDURES FOLLOWED IN THIS AND SIMILAR CASES TRANSGRESS BOTH MINIMUM CONSTITUTIONAL STANDARDS OF DUE PROCESS AND FUNDAMENTAL FAIRNESS AND STATUTORY REQUIREMENTS FOR DETERMINING CHILD ABUSE AND NEGLECT. ....	11
A. The need for an evidentiary hearing before an impartial examiner.....	12
B. The inappropriateness of the Appellate Division's "presumption" of a reckless act.....	15
C. The time delay in reviewing and processing a request to appeal a substantiation.....	18
D. Lack of or improper notice concerning the appeal process and the impacts of Registry listing.....	20
II. THE DECISION BELOW REVEALS THAT ADDITIONAL JUDICIAL GUIDANCE IS REQUIRED CONCERNING THE APPLICATIONS OF THE STATUTORY DEFINITION OF ABUSE AND NEGLECT TO SITUATIONS WHERE CHILDREN HAVE BEEN TEMPORARILY LEFT ALONE .....	24
A. Guidance from this Court is needed concerning which factors properly bear on evaluation of the recklessness of the act in cases where children have been left alone .....	24
B. In the absence of an actual impairment, a finding of child abuse or neglect under N.J.S.A. 9:6-8.21(c)(4) requires evidence of imminent future risk.....	26

C. No required causative link exists beyond the isolated act and any imminent future risk of impairment .....	27
CONCLUSION .....	29
APPENDIX .....	a1

## TABLE OF AUTHORITIES

### CASES

### PAGES

<i>G.S. v. N.J. Div. of Youth &amp; Family Servs.</i> , 157 N.J. 161 (1999) .....	16
<i>In Re Allegations of Sexual Abuse at East Park High School</i> , 314 N.J. Super. 149 (1998) .....	7-9, 11, 15
<i>In re Arndt</i> , 67 N.J. 432 (1975) .....	19
<i>Johnson v. New Jersey State Parole Bd.</i> , 131 N.J. Super. 513 (App. Div. 1997) .....	18
<i>N.J. Dep't of Children &amp; Families v. G.R.</i> , 436 N.J. Super. 392, 402 (App. Div. 2014) .....	19
<i>N.J. Dep't of Children &amp; Families v. E.D.-O.</i> , 434 N.J. Super. 154 (2014) .....	<i>passim</i> .
<i>N.J. Dep't of Children &amp; Families v. T.B.</i> , 207 N.J. 294 (2011) .....	16
<i>N.J. Div. of Youth &amp; Family Servs. v. A.L.</i> , 213 N.J. 1 (2014) .....	17, 27
<i>N.J. Div. of Youth and Family Servs. v. D.F.</i> , 377 N.J. Super. 59 (App. Div. 2005) .....	8
<i>N.J. Div. of Youth &amp; Family Servs. v. F.M.</i> , 211 N.J. 420 (2012) .....	17
<i>N.J. Div. of Youth &amp; Family Servs. v. J.L.</i> , 410 N.J. Super. 159 (App. Div. 2009) .....	8, 13-14
<i>N.J. Div. of Youth &amp; Family Servs. v. M.D.</i> , 417 N.J. Super. 583 (App. Div. 2011) .....	22
<i>N.J. Div. of Youth &amp; Family Servs. v. M.R.</i> , 314 N.J. Super. 390 (App. Div. 1998) .....	8-9, 15
<i>N.J. Div. of Youth &amp; Family Servs. v. P.W.R.</i> , 205 N.J. 17 (2011) .....	17
<i>N.J. Div. of Youth &amp; Family Servs. v. R.G.</i> , 217 N.J. 527 (2014) .....	17
<i>N.J. Div. of Youth &amp; Family Servs. v. S.S.</i> , 372 N.J. Super. 13, cert. den'd 182 N.J. 426 (2005) .....	17
<i>N.J. Div. of Youth &amp; Family Servs. v. V.M.</i> , 408 N.J. Super. 222 (App. Div. 2009) .....	8

**CASES****PAGES**

<i>N.J. Div. of Youth &amp; Family Servs. v. V.T.</i> , 423 N.J. Super. 320 (2011) .....	17
<i>O'Keefe v. Snyder</i> , 83 N.J. 478 (1980) .....	13-14

**REGULATIONS****PAGES**

<i>N.J.A.C.</i> 1:1-12.5 .....	18
<i>N.J.A.C.</i> 10:120A-2.5 .....	5
<i>N.J.A.C.</i> 10:120A-2.7 .....	5
<i>N.J.A.C.</i> 10:120A-4.1 .....	5-6
<i>N.J.A.C.</i> 10:120A-4.1 to 3 .....	5
<i>N.J.A.C.</i> 10:120A-4.2 .....	5-6
<i>N.J.A.C.</i> 10:120A-4.3 .....	15
<i>N.J.A.C.</i> 10:129-7.3 .....	3, 7
<i>N.J.A.C.</i> 10:129-7.3 to <i>N.J.A.C.</i> 10:133-1.6 .....	3
<i>N.J.A.C.</i> 10:129-7.4 .....	20
<i>N.J.A.C.</i> 10:129-7.6 .....	3
<i>N.J.A.C.</i> 10:129-7.7 .....	7

**STATUTES****PAGES**

<i>N.J.S.A.</i> 9:3-40 .....	8
<i>N.J.S.A.</i> 9:6-8.1 <i>et seq.</i> .....	3
<i>N.J.S.A.</i> 9:6-8.10a .....	7, 9, 21
<i>N.J.S.A.</i> 9:6-8.10c .....	9
<i>N.J.S.A.</i> 9:6-8.10e .....	8
<i>N.J.S.A.</i> 9:6-8.11 .....	3, 7
<i>N.J.S.A.</i> 9:6-8.18 .....	3
<i>N.J.S.A.</i> 9:6-8.21 .....	<i>passim.</i>
<i>N.J.S.A.</i> 9:6-8.27 .....	6
<i>N.J.S.A.</i> 9:6-8.28 .....	6
<i>N.J.S.A.</i> 9:6-8.30 .....	5
<i>N.J.S.A.</i> 9:6-8.40a .....	7, 15
<i>N.J.S.A.</i> 9:6-8.43 .....	23

<i>N.J.S.A.</i> 9:6-8.44 .....	6,12,14,18
--------------------------------	------------

## **STATUTES**

## **PAGES**

<i>N.J.S.A.</i> 9:6-8.46 .....	14,15
<i>N.J.S.A.</i> 30:4C-1 <i>et seq.</i> .....	6
<i>N.J.S.A.</i> 30:4C-6.2 .....	8
<i>N.J.S.A.</i> 30:4C-12 .....	6
<i>N.J.S.A.</i> 30:4C-27.7 .....	9
<i>N.J.S.A.</i> 30:4C-27.22 .....	8
<i>N.J.S.A.</i> 30:4C-86 .....	9
<i>N.J.S.A.</i> 30:5B-25.3 .....	8
<i>N.J.S.A.</i> 52:14B-1 <i>et seq.</i> .....	6
<i>N.J.S.A.</i> 52:14B-2(b) to 10(c) .....	15

## **RULES OF COURT**

## **PAGES**

<i>R.</i> 2:2-3(a)(2) .....	6
-----------------------------	---

TABLE OF CONTENTS TO APPENDIX

PAGES

DCPP 2009 substantiation form letter ..... a1

OVERVIEW OF INTEREST OF PROPOSED  
AMICUS AND THIS BRIEF

Legal Services of New Jersey (LSNJ) seeks *amicus* participation in this appeal because of the negative procedural and substantive consequences of the appellate holding below. Placement on the state Child Abuse Registry has severe, frequently life-altering effects, triggering constitutional protections and requiring strict adherence to statutory requirements.

This case stems from an administrative agency decision, not a trial court judgment. No adjudicatory fact-finding proceeding occurred, contravening statutory and constitutional requirements. This Court's review of the appellate decision below holds sweeping importance for future cases. Encompassed in the certified and presented questions are:

- Clear Appellate Division error in treating this appeal as solely involving a question of law. It is nothing of the sort, but rather presents a new judicially-created and unfounded legal presumption, substituted for actual findings of fact.
- Clear Appellate Division error in examining only one of the three statutorily-required elements for a determination that there has been abuse and neglect of a child.



- Failure to conduct a statutorily and constitutionally required fact-finding hearing. Such a hearing and findings *must* be carried out before an individual's name may be placed on the Child Abuse Registry, unless knowingly waived upon the advice of competent counsel.
- The need to establish practical and legally adequate protocols for analyzing, in a child welfare context, whether a child left temporarily alone - here in an automobile - has been the victim of abuse and neglect.
- Similarly, the need to establish protocols for analyzing the *imminent risk of future impairment*, a statutory requirement in the absence of actual impairment.

LSNJ will address each after a preliminary summary of relevant administrative and judicial process in cases alleging abuse or neglect.

**BACKGROUND**  
**THE STATE CHILD WELFARE INVESTIGATIVE AND**  
**FINDINGS' PROCESS**

The Division of Child Protection and Permanency (DCPP) is the state agency responsible for responding to reports of alleged child abuse or neglect. *N.J.S.A. 9:6-8.18*. When the DCPP receives information concerning alleged child abuse or neglect, it is responsible to investigate and respond, pursuant to *N.J.S.A. 9:6-8.1 et seq.* and *N.J.S.A. 30:4C-1 et seq.*

**Referral**

DCPP is required to forward any report of child abuse or neglect to the state Child Abuse Registry (Registry) within 72 hours. *N.J.S.A. 9:6-8.11*. An ensuing child protection investigation must be concluded, with a definitive finding, within 60 calendar days of receipt of the referral and assignment of the intake to a local DCPP office. *N.J.A.C. 10:129-7.3*.

**Service and Need Assessment**

DCPP will assess the degree of risk and the level of need for its services, following the agency's protocol. *N.J.A.C. 10:129-7.3* to *N.J.A.C. 10:133-1.6*; *N.J.A.C. 10:129-7.6*. Depending on the needs and risks found, DCPP may provide various types of support, including safety and case planning and homemaker and

therapeutic services for a family. The majority of DCPD cases solely involve provision of in-home preservation services.<sup>1</sup>

#### Agency Administrative Determination

At the conclusion of the investigation, DCPD makes a determination of whether or not the report has been "substantiated". It bears emphasis that this initial determination does not involve any kind of contested evidentiary and fact-finding hearing before the agency. DCPD is required to notify the investigated individual of its findings within 10 days by certified and regular mail. *N.J.A.C. 10:129-7.6(b)*. In 2009, at the time of the report in this case, there were only two possible investigatory conclusions. An allegation was to be "substantiated" if the preponderance of the evidence indicated that a child is an "abused or neglected child" as defined in *N.J.S.A. 9:6-8.21* and *N.J.A.C. 10:129-7.4*. An allegation was "unfounded" if there was 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*. In April 2012 the regulations were amended to include two additional investigatory conclusions, "established" and "not established". *N.J.A.C. 10:129-7.4*.

---

<sup>1</sup> In 2013, approximately 45,037 children received only in-home services from DCPD. <http://www.state.nj.us/dcf/childdata/dcpdemo/Age Children-in-own-homeReceivingServices.pdf>

It is not uncommon for both administrative and judicial proceedings to occur in the same DCPD-initiated case. As discussed below, DCPD may initiate a judicial Title 9 action to assume custody and care of a child in order to provide protection and services, pursuant to *N.J.S.A. 9:6-8.30*. Frequently judicial proceedings are commenced to enable protection and services to proceed, and then dismissed or withdrawn, as happened here.

#### **Administrative Appeal and Hearing Process**

If an individual chooses to appeal an agency substantiation determination, he or she must do so within 20 calendar days from the date of the notification letter. *N.J.A.C. 10:120A-2.5*. Under *N.J.A.C. 10:120A-2.7*, DCPD conducts an internal review of the appeal request with the supervisory caseworkers, managers and often a deputy attorney general, and an administrative reviewing officer will send a letter confirming receipt of the individual's request and ask for additional information concerning why he or she disagrees with the substantiation. *N.J.A.C. 10:120A-4.1*. If DCPD concludes that the finding should stand, the appeal is then to be transmitted to the Office of Administrative Law (OAL) as a contested case. *N.J.A.C. 10:120A-4.1 to 3*. DCPD, however, has reserved the right to make a unilateral internal determination that there is "no issue of material fact", and then decline to transmit the case to the

OAL. *N.J.A.C.* 10:120A-4.1(c), 4.2. Such a declination occurred in this case. PsB3 to 5<sup>2</sup>. The New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.*, governs the appeal process once the case is transmitted to the OAL. After The OAL process and hearing, its opinion is returned to the agency for a final decision. As in all final state administrative agency determinations and actions, appeal from this final decision may be taken to the Appellate Division of the Superior Court. *R.* 2:2-3(a)(2). The Title 9 statutory standards continue to govern the substantive questions. *N.J.S.A.* 9:6-8.44.

#### **Filings and Hearings before the Family Part**

If at any time during the investigation, DCPD takes protective custody of the child under an emergency removal, or seeks physical custody or care and supervision of the child, it is required to file a complaint in the Family Part of the Superior Court. *N.J.S.A.* 9:6-8.28.; *N.J.S.A.* 30:4c-12. Emergency removals are governed by *N.J.S.A.* 9:6-8.27. The Family Part must then determine whether its actions and decisions met Title 9 standards, *N.J.S.A.* 9:6-8.21, through a required fact-finding hearing pursuant to *N.J.S.A.* 9:6-8.44. If after such a hearing the trial judge finds that there was no abuse or neglect, DCPD must change its agency determination from "substantiated" to

<sup>2</sup> PB refers to E.D.-O's petition brief dated January 31, 2014. PsB refers to E.D.-O.'s supplement brief dated September 25, 2014. RoB refers to DCPD's opposition

"unfounded" and remove the affected individual's name from the Registry within 30 days. *N.J.A.C. 10:129-7.3*. The judicial fact-finding decision is binding and there is no subsequent administrative appeal process available after the trial court's decision; only judicial appeal is possible. *Ibid.* Unfounded allegations must be expunged from DCPD records pursuant to *N.J.S.A. 9:-6-8.40a*.

### Consequences of Placement on the Registry

When a finding of child abuse or neglect is substantiated, the consequence is the placement of that individual's name on the New Jersey Child Abuse Registry (Registry). *N.J.S.A. 9:6-8.11*. Although Registry reports are deemed confidential, they "may be disclosed as authorized in *N.J.S.A. 9:6-8.10a*, subject to certain restrictions." *N.J.S.A. 9:6-8.10a* lists twenty-three entities entitled to request and receive the records, including law enforcement, medical and treatment service providers, state legislative committees, and government entities and agencies as well as others mandated by statute to consider such information when conducting background screenings of employees, prospective employees, interns, or volunteers who provide or seek to provide services to children. *N.J.S.A. 9:6-8.10a.; N.J.A.C. 10:129-7.7*.

Courts have "recognized that a substantial constitutionally protected liberty interest is implicated by inclusion on the... Registry." *In Re Allegations of Sexual Abuse at East Park High*

*School*, 314 N.J. Super. 149, 166 (1998) (citing the majority and concurring opinions in *N.J. Div. of Youth & Family Servs. v. M.R.*, 314 N.J. Super. 390 (App. Div. 1998)). Former Justice Long, writing for the Appellate Division in *East Park*, held that a person accused of child abuse or neglect has protectable liberty interests in reputation, employment opportunities, and adoption or foster parentage. *Ibid.* See also, *N.J. Div. of Youth & Family Servs. v. D.F.*, 377 N.J. Super. 59 (App. Div. 2005); *N.J. Div. of Youth & Family Servs. v. V.M.*, 408 N.J. Super. 222 (App. Div. 2009); *N.J. Div. of Youth and Family Servs. v. J.L.*, 410 N.J. Super. 159 (App. Div. 2009).

The statutorily required release of information to employers and the limits on employment for individuals listed on the Registry has significantly expanded since the *East Park* and *M.R.* decisions. It now includes child care center employees (N.J.S.A. 30:4C-6.2), registered family childcare applicants and their adult household members (N.J.S.A. 30:5B-25.3), residential treatment center employees (N.J.S.A. 30:4C-27.22), and professional guardians for elderly adults (N.J.S.A. 9:6-8.10e). Additionally, both the Department of Children and Families and private adoption agencies are required to check the Registry for names of their employees. N.J.S.A. 9:3-40. Employees found to be on the Registry are subject to dismissal, but employment is

not statutorily barred. *Ibid.* N.J.S.A. 9:6-8.10a(g) requires release of information from the Registry

to a unified child care agency contracted with the Department [of Children and Families] for the purpose of providing information . . . to a child's parent when the information is necessary for the parent to make a decision concerning the placement of a child in an appropriate child care arrangement. (Emphasis added.)

[*Ibid.*]

This section thus authorizes disclosure of information to parents in the general public who are making child care decisions.

In addition to the increased disclosure of Registry listings and consequent impediments to employment, the negative Registry effect on personal choices concerning family arrangements has also expanded since the *East Park* and *M.R.* decisions. Such checks now are also conducted for individuals seeking kinship legal guardianship of a relative child or to assume care of a child whose primary caregiver is facing incarceration. N.J.S.A. 30:4C-27.7, N.J.S.A. 30:4C-86, N.J.S.A. 9:6-8.10c. In any of these cases, a check of DCPD's child abuse records is conducted not only on the adult seeking to serve in such capacity, but also adult household members. *Ibid.* The liberty interests affected thus extend beyond the individual accused of child abuse or neglect to their spouses, partners, adult children, and



other household members, whose family planning choices are also  
encumbered.

#### STATEMENT OF FACTS AND PROCEDURAL HISTORY

LSNJ generally relies on the facts and procedural history in the Appellate Division decision and E.D.-O.'s petition for certification, supplemental brief and appendix, but will highlight several points. On May 6, 2009, DCPD received a referral that a child was left sleeping and unattended in her car seat, in a running van approximately 150 feet away from the Dollar Tree store at the Middlesex Mall in South Plainfield.

PB3. The Division began its investigation of E.D.-O. that same day. PB3. This was E.D.-O.'s first and only DCPD referral and investigation. PsB3 to 7. After the investigation, the children were not removed, but DCPD did "substantiate" E.D.-O. for abuse or neglect on May 21, 2009. PsB3. On May 27, 2009, E.D.-O. appealed the substantiation and requested an administrative appeal and hearing. PsB3 to 4. DCPD also filed a complaint in the Superior Court Family Part May 19, 2009. PsB8. The Family Part case was dismissed by consent of the parties four months later, without a fact-finding hearing or stipulation on the allegation of child abuse or neglect. PsB7.

Both during and after the dismissal of the litigation, E.D.-O. repeatedly submitted documents seeking to pursue her

administrative appeal of DCP's 2009 substantiation. Due to DCP's failure to forward the case to the OAL for an administrative hearing, three years later, in September 2012, E.D.O.'s counsel filed a notice of tort claim against DCP. DCP responded with a motion for "summary disposition" to the DCP director. E.D.-O., in turn, cross-moved for summary disposition. PB5. On March 4, 2013, Director Kara Wood granted the DCP's motion for summary disposition upholding the substantiation of abuse or neglect against E.D.-O. and denied E.D.-O.'s request for an administrative hearing. PB5 to 6.

#### ARGUMENT

##### I. PROCEDURES FOLLOWED IN THIS AND SIMILAR CASES TRANSGRESS BOTH MINIMUM CONSTITUTIONAL STANDARDS OF DUE PROCESS AND FUNDAMENTAL FAIRNESS AND STATUTORY REQUIREMENTS FOR DETERMINING CHILD ABUSE AND NEGLECT.

Recognized, substantial and protected liberty interests flow from the Registry publication of a substantiation finding. *In Re Allegations of Sexual Abuse at East Park High School*, 314 N.J. Super. 149, 166 (App. Div. 1998). Critical agency procedural flaws in the current case include:

- (1) The complete absence of an evidence-based fact-finding hearing before a neutral adjudicator, required by due process standards and imposed by statute for abuse or

neglect determinations in a judicial setting *N.J.S.A.*

9:6-8.44;

- (2) The agency's extraordinary retention of power to determine unilaterally, without notice or argument, that there is "no material issue of fact" and therefore that a case is not contested and will not be transferred to the OAL for an impartial adjudicatory hearing;
- (3) The passage of an extensive and unjustified period of time (three years) without agency action on or disposition of an appeal of a substantiated finding;  
and
- (4) Use of a notice which failed to state clearly the adverse consequences of substantiation and misstated the agency's procedure for transferring a case to the OAL.

**A. The need for an evidentiary hearing before an impartial examiner.**

The Appellate Division incorrectly held that there was no need for an evidentiary hearing to develop a record by assuming that competing cross "motions for summary disposition", within an administrative agency's self-defined internal process, somehow obviated the statutory and due process requirements for an

evidentiary hearing in abuse or neglect cases. After three years from the date of the initial substantiation, numerous requests to appeal the substantiation, and a motion for failure to prosecute by E.D.-O., DCPD simply filed a motion for summary disposition before the director of its own agency, ruled in favor of its own motion, and refused to transmit the request to the OAL as a contested case. The DCPD appendix on this appeal also attaches records from its internal files, without any certifications or affidavits, and obviously without any sort of foundational or authenticating examination. PB5. E.D.-O. responded with a cross-motion for summary disposition, and, in the alternative, maintained that she should be allowed an evidentiary hearing to elicit evidence involving certain disputed material facts. Nothing about this remarkable history suggests even a modicum of fundamental fairness.

The fact that E.D.-O. responded with a cross motion for summary disposition does not "obviate a plenary trial on disputed issues of fact, where such exists; nor do cross-motions constitute a waiver by the litigants to such a trial." *O'Keeffe v. Snyder*, 83 N.J. 478 (1980); see also N.J.A.C. 10:120A-4.2(b)(2) (disallowing summary proceedings in matters involving disputed material facts). Agency proceedings must comport with due process by requiring an opportunity for a trial type hearing. *N.J. Div. of Youth & Family Servs. v. J.L.*, 410 N.J.

*Super.* 159, 172-73 (App. Div. 2009); *N.J. Div. of Youth & Family Servs. v. M.R.*, 314 *N.J. Super.* 390, 409 (App. Div. 1998).

As noted, E.D.-O. argued for summary disposition but also maintained in the alternative that she should be allowed an evidentiary hearing. PsB43. E.D.-O's cross-motion did not waive her alternative request for an evidentiary hearing. *O'Keefe, supra*, 83 *N.J.* at 487.

Title 9 expressly requires a fact finding hearing prior to a judicial determination of abuse or neglect. *N.J.S.A.* 9:6-8.44. DCP's processes in cases involving both protected liberty and child welfare interests at stake surely can be no less rigorous. Ensuring that findings of abuse or neglect observe full procedural protections produces the best result for children and families because it is based on evidence that has been tested for credibility and relevance. The purpose of a trial type proceeding is to permit development of a factual record through testimony and the introduction of other relevant evidence. *J.L., supra*, 410 *N.J. Super.*, at 173. A finding of abuse must be based on a preponderance of the "competent, material and relevant evidence." *N.J.S.A.* 9:6-8.46(b). E.D.-O's case presents many disputed material issues, detailed in the next point. E.D.-O. was never given the opportunity to review DCP's file prior to submission to the director because there was no discovery exchange, nor was she able to cross-examine the police

officer or case workers.

In the DCPD agency substantiation context, this Title 9 statutory right to a hearing is buttressed by the regulatory right, adopted pursuant to the statutory requirement that DCPD adopt a process for substantiation, *N.J.S.A. 9:6-8.40a*, to have an appeal of a substantiation transferred to the OAL and a contested case. *N.J.A.C. 10:120A-4.3*; See also, *In Re Allegations of Sexual Abuse at East Park High School*, 314 N.J. Super. 149, 160 (App. Div. 1998) and *N.J. Div. of Youth & Family Servs. v. M.R.*, 314 N.J. Super. 390, 410 (App. Div. 1998). Under the OAL statute and regulations, that will entail an evidentiary hearing. *N.J.S.A. 52:14b-2(b) to 10(c)* and *N.J.S.A. 9:6-8.46(a)*.

The agency determination that this was not a contested case, with the consequence that there was no right to an evidentiary fact-finding hearing, must be set aside.

**B. The inappropriateness of the Appellate Division's "presumption" of a reckless act.**

As discussed in detail in Point II, an "abused or neglected child" is one "whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent . . . to exercise a minimum degree of care." *N.J.S.A. 9:6-8.21(c)(4)*. This statute has three distinct elements: (1) an act or omission that

demonstrates reckless disregard of substantial danger; (2) an actual impairment or imminent danger of impairment to the child's condition; and (3) a causal link between the recklessness and the "actual or imminent" impairment. In the present case, all three elements of the statutory standard are at issue.

The Appellate Division looked at only one of the three statutory elements, a failing discussed in Point II. But even in its consideration of the first element of *N.J.S.A. 9:6-8.21(c)(4)(b)*, whether the parent "failed to exercise a minimum degree of care" by acting in a manner that is grossly negligent or demonstrated reckless disregard of a substantial risk, its approach was flawed. *Ibid.* See also, *G.S. v. N.J. Div. of Youth & Family Servs.*, 157 N.J. 161, 178-79 (1999), and *N.J. Dep't of Children & Families v. T.B.*, 207 N.J. 294, 253-56 (2011).

While the Appellate Division referenced some of the facts in the case, it did not discuss each fact as weighing in favor of or against a finding that the parent demonstrated gross negligence. *N.J. Dep't of Children & Families v. E.D.-O.*, 434 N.J. Super. 154 (2014). Instead, it simply announced that in such cases the trier of fact should begin from the presumption that "the act of leaving a child alone in a motor vehicle with its engine running, to enter a premises 150 feet away, is a

reckless act," and weigh against that presumption any "extenuating circumstances" shown. *E.D.-O.*, at 160 and 162. *Amicus* urges this Court to reject reasoning which designates a whole category of cases as summarily or presumptively meeting a statutory standard.

New Jersey courts have demonstrated an "historic commitment to fact-sensitive analysis" of cases brought by the Division under Title Nine and Title 30. *N.J. Div. of Youth & Family Servs. v. R.G.*, 217 N.J. 527 (2014); See also, *T.B.*, *supra*. Courts have repeatedly rejected "per se" standards or legal presumptions in favor of individualized consideration of the facts measured against the statutory standard. *R.G.*, *supra*. (Parental incarceration); *N.J. Div. of Youth & Family Servs. v. F.M.*, 211 N.J.420 (2012)(mental illness); *N.J. Div. of Youth & Family Servs. v. V.T.*, 423 N.J. Super. 320 (2011)("parents who imbibe illegal substances"); *N.J. Div. of Youth & Family Servs. v. A.L.*, 213 N.J. 1, 23 (2014)("drug use by a parent during pregnancy"); *N.J. Div. of Youth & Family Servs. v. S.S.*, 372 N.J. Super. 13, cert. den'd 182 N.J. 426 (2005)(domestic violence). This Court, in *A.L.*, recently warned that judges "cannot fill in missing information on their own or take judicial notice of" a statutory element. *Supra.*, at 23.

While there may be similar concerns raised by similar types of cases, "careful, individual scrutiny" of the facts in each case



is required. *N.J. Div. of Youth & Family Servs. v. P.W.R.*, 205

, *N.J.* 17, 33 (2011).

Abuse and neglect cases are generally fact sensitive. Each case requires careful, individual scrutiny. Many reported cases are idiosyncratic. Thus, for example, one ought not assume that what may be "excessive" corporal punishment for a younger child must also constitute unreasonable infliction of harm, or excessive corporal punishment in another setting involving an older child.

*Ibid.*

**C. The time delay in reviewing and processing a request to appeal a substantiation.**

The statutorily required judicial fact-finding hearing is required to be held within four months from the date of the filing of the complaint before the Family Part. *N.J.S.A.* 9:6-8.21(c) and *N.J.S.A.* 9:6-8.44. E.D.-O. received no fact-finding hearing, instead suffering three years of delay and inaction by DCPD. After the dismissal of the Title 9 action in 2009, she immediately followed up again with her request to appeal the substantiation. DCPD offered no response until its motion for summary disposition three years later, in 2012. PsB3 to 5. Prior to that, there was no communication from the agency<sup>3</sup>.

---

<sup>3</sup> The Division did not transmit her appeal request but instead filed a motion for summary disposition to the agency director pursuant to *N.J.A.C.* 10:120A-4.1(c), -4.2. If this matter had been transmitted in timely fashion to the OAL, *N.J.A.C.* 1:1-12.5 provides that motions for summary disposition in that forum must be filed no later than 30 days prior to the first scheduled OAL hearing date or by such date as ordered by the administrative law judge.

DCPP's lack of communication to E.D.-O., combined with a three year delay in responding to her appeal request, is counter to requisite fundamental fairness of agency procedures. *Johnson v. New Jersey State Parole Bd.*, 131 N.J. Super. 513, 517-21 (App. Div. 1997) (courts have held that undue delay in the administrative process may result in a denial of "fundamental procedural fairness"). Agency actions may be set aside as fundamentally unfair where the agency failed to act within a reasonable time and the delay "evidence[d] an entire lack of that acute appreciation of justice which should characterize a tribunal with [such a] delicate and important duty." *In re Arndt*, 67 N.J. 432, 436-37 (1975) (concluding "the proceedings as a whole were conducted with seriously unfair disregard" of the party's rights). The review and assessment of an abuse or neglect finding, including an agency substantiation, should occur in a fair and timely fashion, because as with any fact-sensitive challenge, potential witnesses, evidence and discovery will be potentially lost or misplaced, as had occurred in *N.J. Dep't of Children & Families v. G.R.* 436 N.J. Super. 392, 402 (App. Div. 2014) (held that agency actions may be set aside as fundamentally unfair where the agency failed to act within a reasonable time and the delay evidenced an entire lack of that acute appreciation of justice which should characterize a tribunal with such a delicate and important duty).

Promptness is all the more critical in substantiation cases, given the major consequences inherent in listing on the Registry. Given these effects, we may infer E.D.-O's distress and anxiety, over three years, concerned that her community and employer would be advised of her pending registry appeal status, and concerned about any prospective new employment possibilities or impacts upon future family decisions. For these reasons, interim inclusion on the Registry pending a trial was held to be unconstitutional under both federal and state law. *N.J. Div. of Youth & Family Servs. v. J.L* 410 N.J. Super. 159, 171 (App. Div. 2009).

Judicial guidance condemning such delay is required to avoid future abuse.

**D. Lack of or improper notice concerning the appeal process and the impacts of Registry listing.**

The agency-issued substantiation letter is the first notice and explanation of the DCPD's findings, appeal options and rights for an individual being investigated. *N.J.A.C. 10:129-7.4*. The standard 2009 substantiation letter notified the individual that he or she had been found to be substantiated by DCPD, identified the specific child related to the substantiation, and indicated the agency coding related to the allegation. al.<sup>4</sup>

---

<sup>4</sup> LSNJ does not have a copy of or access to E.D.-O's actual 2009 substantiation letter. Attached is a copy of DCPD 2009 substantiation form letter in the Division's manual.

The letter then proceeded to notify the individual that he or she has 20 days to request a "*hearing before the Office of Administrative Law Hearing*." (Emphasis added.) The letter then explains that failing to appeal the initial decision letter will result in a "final agency decision", and notes DCPD is authorized to disclose final agency substantiation decisions pursuant to N.J.S.A. 9:6-8.10a. Nowhere in this letter does it mention the Child Abuse Registry, or that a request for an appeal would not automatically be transmitted to the OAL, or how a proceeding before the Family Part would impede an OAL review. Based on the substantiation letter, E.D.-O. would not know that there would be no evidentiary hearing before the OAL, or that her request somehow depended upon the procedural disposition of the Family Part case. Rather, the language creates an expectation that E.D.-O. is entitled to a review of her substantiation before the OAL because she is "*contesting*" the findings.

Upon receipt of her substantiation letter, E.D.-O. requested an immediate appeal of her substantiation. PsB3 to 5. She repeated this request after DCPD filed a Title 9 complaint before the Family Part, only be advised that DCPD would not process her request due to the pending court case and the open division family services case. RoB5. DCPD never pursued a fact-finding hearing or finding of abuse or neglect before the Family

Part. *Ibid.* Instead, it dismissed the Title 9 with prejudice four months after filing. PB16. No DCPD information, notice or action to E.D.-O. followed the dismissal of the court case.

Substantiation notice letters have been modified since 2009, but still do not clearly address explain DCPD's process when reviewing appeals from substantiations, or when there is a co-occurring court case. The current notice also still states that a request will result in a transmittal of the appeal request to the OAL.

E.D.-O. received no notice that as a result of the dismissal she might be denied a hearing before the OAL because DCPD might unilaterally determine that there were no material disputed facts. Just as courts must explain the consequences and risks when obtaining a stipulation from a defendant during a Title 9 proceeding, before the dismissal was granted E.D.-O. should have been advised of the risk or possibility that there would be no review of her substantiation before the OAL. As the Appellate Division held in *N.J. Div. of Youth & Family Servs. v. M.D.*, "trial counsel and judges must make specific inquiries of the defendant on the record to ensure a voluntary and knowing waiver of the rights available at a fact-finding hearing." Like waivers in other legal settings, the judge hearing an abuse and neglect case, before accepting a defendant's stipulation in lieu of a fact-finding hearing, must first determine that the waiver

involved "the intentional relinquishment of a known right . . . evidence[d] by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based." 417 N.J. Super. 583, 620 (App. Div. 2011). E.D.-O. may have not consented to dismissal knowing that her Registry appeal would not automatically have been transmitted to the OAL.

This level of explicit notice detail assumes even greater importance because there is no right to counsel in an administrative challenge to substantiation. Most defendants are required to navigate the administrative process alone even though the same Title 9 standards for determining abuse or neglect apply in both agency and judicial contexts, and attorneys are provided in Family Part. N.J.S.A. 9:6-8.43.

When a Title 9 court case is dismissed without a fact-finding, parents should be notified that with the dismissal they relinquish their right to counsel that attaches in a judicial context, and risk that the matter will not proceed as a contested case before the OAL, based solely on the discretion of the agency.

II. THE DECISION BELOW REVEALS THAT ADDITIONAL JUDICIAL GUIDANCE IS REQUIRED CONCERNING THE APPLICATIONS OF THE STATUTORY DEFINITION OF ABUSE AND NEGLECT TO SITUATIONS WHERE CHILDREN HAVE BEEN TEMPORARILY LEFT ALONE.

As discussed in I(B) above, the abuse and neglect statute has three distinct elements - the nature of the act (was it reckless), the effect (was there *actual* impairment or, if not, is there an *imminent risk* of future impairments), and causation (was the act the cause of the actual impairment or the imminent risk of same). N.J.S.A. 9:6-8.21. All three are at issue on this appeal, with the caveat that there is no allegation or evidence of *actual* impairment so only risk of future impairment is at issue. The Appellate Division opinion addressed only the act, an unduly narrowed focus that by itself constitutes clear error. We address each element in turn.

A. Guidance from this Court is needed concerning which factors properly bear on evaluation of the recklessness of the act in cases where children have been left alone.

Setting aside and moving beyond the Appellate Division's inappropriate *de facto* presumption that leaving a child in a car is a reckless act, the requisite inquiry to determine whether Title 9 substantive standards have been met entails review of all circumstances presented in evidence. Since the list of factors may be long, it is helpful to group them into a few

major categories that seem to recur in most temporary-leaving cases. The Court's acknowledgement of the potential relevance of these main factors and some of their subsidiary elements may be helpful to trial courts and to the administrative agency and OAL as well.

From LSNJ's long experience in child welfare cases, at least four broad categories emerge:

1. The importance and urgency for the temporary separation from the children.

Subsidiary factors may include whether the reason was for the benefit and welfare of the child, rather than the adult; whether it involved significant needs (e.g., food, health care); and whether the timing precluded pursuing an alternative child care strategy.

2. The degree of foreseeable and probable risk.

A long list of possible sub-factors may be germane, including the type and seriousness of potential threats, the age, maturity and capacity of the children, and the surrounding circumstances (e.g., temperature, neighborhood, presence of outside protectors such as police).



3. Whether all reasonable precautions were taken.

In a car context, this could involve factors such as choice of parking area, reaching out to another safe adult, and monitoring through eyesight or digitally.

4. Whether reasonable alternatives were available and pursued.

For this category in particular, the financial means of the custodial adult may matter greatly. Alternatives such as at home child care simply may not be available to lower income people.

**B. In the absence of an actual impairment, a finding of child abuse or neglect under N.J.S.A. 9:6-8.21(c)(4) requires evidence of imminent future risk.**

Given the absence of any evidence of actual impairment, the agency and reviewing court below should have assessed whether the child was in imminent danger of becoming impaired. Where there is no evidence of parental incapacity involving impaired judgment, and every reason to believe the parent would make a different choice in the future based upon her experience with this Title 9 and agency proceeding, as well as upon the guidance and support provided in this case by DCPD, imminent future risk is not demonstrated. The Appellate Division does not address

either actual or imminent future impairment, ignoring this Court's holding in *N.J. Div. of Youth and Family Servs. v. A.L.*:

The Division... must prove [either] present or future harm to a child. When, as here, no actual impairment has been found, "the critical focus is on evidence of imminent danger or substantial risk of harm. The statute does not cover a past risk of harm . . . which did not materialize.

[213 N.J. 1, 22 (2013)]

Factors that a trial court or agency head might weigh in consideration of imminent future risk include whether this is an isolated incident or the parent has a history of similar incidents, the frequency of similar prior incidents, evidence demonstrating impaired decision-making, whether the parent has undertaken and participated in services to remediate risks to the child, whether the parent has demonstrated remorse and understanding that the parental act or omission put the child at risk, and whether the parent has other protective capacities including family and community supports or social services.

**C. No required causative link exists beyond the isolated act and any imminent future risk of impairment.**

Since there is no evidence of actual or imminent future risk of impairment, it follows that the third statutory requirement under Title 9 - a required causal link between a problematic act and actual or future risk - is not met, because neither impairment nor future risk itself has been established, and thus

no causal connection. If anything, the long and surely unpleasant child welfare proceedings that ensued from the original act would have the opposite causal effect, dissuading someone from ever engaging in such an act again.

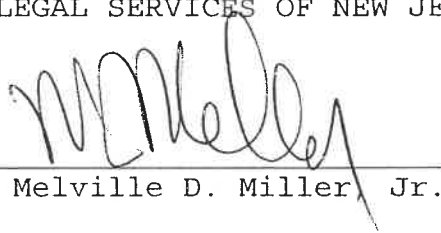
### CONCLUSION

For the foregoing reasons, prospective *amicus* Legal Services of New Jersey urges that this Court clarify in the manner indicated the required agency procedures in substantiation appeals, and reverse the Appellate Division decision, holding instead that Ms. E.D.-O.'s substantiation be changed to "unfounded".

Respectfully Submitted,

LEGAL SERVICES OF NEW JERSEY

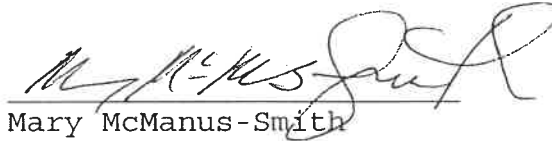
By:



Melville D. Miller, Jr.



Jeyanthi Rajaraman



Mary McManus-Smith

Dated: November 19, 2014

[-Date-]

[-Name-]

[-Address-]

[-City and State-] [-Zip code-]

Re: Allegation of Child Abuse/Neglect Concerning [-Enter each child victim-]  
CASE ID # - [-NJ SPIRIT Case Number-]  
Investigation # - [-NJ SPIRIT Investigation Number-]

Dear [-Enter confirmed perpetrator's name-]:

New Jersey Law, as set forth in N.J.S.A. 9:6-8.11, requires the Division of Youth and Family Services (DYFS) to investigate reports of child abuse and neglect. On [-Date-], the Division's [-Enter local office name-] Local Office received a report regarding the above-referenced child. The Division's investigation determined that was substantiated for [-Enter specific allegation from the Allegation-Based system-] with regard to [-Enter the name of each child who was abused / neglected-]. You have been identified as a person responsible for the .

If you want to appeal this decision, you must write to the Department of Children and Families' Administrative Hearings Unit within twenty (20) calendar days of receiving this letter to request an Office of Administrative Law (OAL) Hearing. Please include your name, home address, home telephone number, DYFS Case ID number, and the DYFS Investigation number that is included in this letter, or **attach a copy of this letter (DYFS Form 9-28) to your request for an appeal** (provided). The Administrative Hearings Unit is located at:

THE DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF LEGAL AFFAIRS  
CAPITAL PLACE ONE, 3<sup>RD</sup> FLOOR  
222 SOUTH WARREN STREET  
PO BOX 729  
TRENTON, NJ 08625-0729

ATTN: ADMINISTRATIVE HEARINGS UNIT

Unless you request an appeal within the defined time frame (20 calendar days), the results of the investigation will become a final agency decision.

The results of the Division's investigation, including identifying information, are maintained in the Division's files and can only be disclosed as set forth in N.J.S.A. 9:6-8.10a, a copy of which is attached for your information. Under this law, DYFS must give you any documents it has that it will rely on at the hearing, or that are necessary to decide your case.

[-Date-]

Page 2

Please be advised that under N.J.S.A. 9:6-8.10a, as amended August 1, 1997, the Division is required to send to local/State police certain identifying information regarding all substantiated incidents of child abuse and neglect in their jurisdiction.

In addition, N.J.S.A. 9:6-8.10a authorizes the Division to identify confirmed perpetrators of child abuse or neglect to agencies, persons, or entities who are mandated by statute to consider such information when conducting background screenings of employees, prospective employees, interns, or volunteers who provide, or seek to provide, services to children. For certain employment, a substantiation of child abuse or neglect will prevent you from getting or keeping a job. Also, a substantiation can result in your exclusion from foster and adoptive parenting, or prevent you from being approved by DYFS as an out-of-home placement resource for a relative's or a friend's child.

In conclusion, please be advised that, if you do not request an appeal of the finding of substantiation, you could be disqualified in the future from becoming a resource family parent or a foster parent. Also, it may prevent you from adopting a child, raising another's child, or working or volunteering to work with children in New Jersey.

Sincerely,

[-Enter Worker's name-], Worker

[-Enter Supervisor's name-] Supervisor

ATTACHMENT:

- a) N.J.S.A. 9:6-8.10a
- b) Copy of letter