

# DCPP 101: What Happens When Allegations of Child Abuse are Reported to DCPP?

by Dina Mikulka and Theodore J. Baker

A parent often is informed of a pending Division of Child Protection and Permanency (DCPP) investigation by opening the door to find a caseworker asking questions and wanting access to the family home, or maybe even seeking to remove the children. A daunting encounter, indeed. The family practitioner is likely to receive a phone call shortly thereafter from a highly emotional client seeking advice and direction.

Unless an attorney represents clients in matters involving DCPP in the regular course of their practice, it is possible, if not likely, that they may not be aware of the numerous steps and potential pitfalls that await the client. This article is a primer on a DCPP investigation and accompanying litigation with the hope that an attorney who may not be intimately familiar with this highly specialized area of the law will know what to expect from the process.

## Step 1: The Referral & Investigation

DCPP investigations begin with a referral. The concept of mandatory reporters of child abuse and neglect is a common misperception. In New Jersey, N.J.S.A. 9:6-8.10 provides that all people are mandatory reporters:

Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Child Protection and Permanency by telephone or otherwise.

Since the early 2000s, DCPP referrals have been centrally screened through a call-in mechanism conducted through a hotline number (1-877-NJ ABUSE). In addition, each DCPP local office has a procedure in the event there is a walk-in referral. Typically, the reporter is provided with access to a phone to call the hotline. The calls are

screened by the State Central Registry (SCR). This number is operated 24 hours per day, seven days per week.

Currently, individuals who make referrals of child abuse allegations are immune from “any liability, civil or criminal,” which extends to individuals who testify in court proceedings.<sup>2</sup> This immunity extends even to individuals who make referrals to DCPP for malicious reasons. It is a disorderly persons offense to fail to report an act of child abuse “having a reasonable cause to believe that an act of child abuse has been committed.”<sup>3</sup> Under the existing statutory and case law scheme, it is not a violation of Title 9 or *per se* neglectful for a person to make multiple baseless referrals to DCPP.

The initial screener is responsible for determining if the allegations are treated as a Child Protective Services (CPS) referral or Child Welfare Service (CWS) referral.<sup>4</sup> A CPS referral requires the screener to determine that the allegations constitute child abuse/neglect if true. A CWS categorization means that the situation warrants a “potential service” for the child and/or family, but “there is insufficient risk to justify a child abuse/neglect investigation.”<sup>5</sup>

The investigator’s initial response times differ based on the categorization of the referral by the screener. The response times for CWS referrals vary between 72 hours and five working days.<sup>6</sup> The response time for a CPS referral is typically either within 24 hours or “immediate,” by the end of the workday.<sup>7</sup> Although the response timeframes are clearly spelled out, some discretion is afforded to both the screener and the local office manager.<sup>8</sup> Note that DCPP has the capacity to respond overnight, on weekends and holidays by way of the Special Response Unit (SPRU), so these timeframes for initial contact in CPS investigations are typically kept.<sup>9</sup>

Each CPS referral will require the assigned DCPP worker to render an investigatory finding.<sup>10</sup> The timeframe for rendering these investigatory findings is 60 days after the report was received by the central registry.<sup>11</sup> However, there can be 30 day extensions by the

local office manager “if the child protective investigator is continuing efforts to confirm credible information.”<sup>12</sup>

## Step 2: The Investigation & Findings:

At the conclusion of the investigation, specific findings are made and recorded in the DCPD Central Registry.<sup>13</sup> Currently, there are four possible findings: (1) substantiated; (2) established; (3) not established and, (4) unfounded.<sup>14</sup> Prior to April 1, 2013, findings were limited to two categories (1) substantiated or (2) unfounded.

The established finding is a newer investigatory conclusion. It constitutes a finding of child abuse and neglect yet further acknowledges factors mitigating against a more serious finding of substantiated.<sup>15</sup>

The code goes on to clarify that a finding of either established or substantiated results in a determination that the child is abused/neglected pursuant to N.J.S.A. 9:6-8.21.<sup>16</sup> The findings of not established and unfounded constitute a determination that a child is not abused or neglected pursuant to the same statute.<sup>17</sup>

N.J.A.C. 3A:10-7.3(c) provides the basic criteria for each investigatory finding:

(c) For each allegation, the Department representative shall make a finding that an allegation is “substantiated,” “established,” “not established,” or “unfounded.”

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.

The division investigator must look to N.J.A.C. 3A:10-7.4 to determine whether child abuse or neglect is substantiated. More specifically, N.J.A.C. 3A:10-7.4(a)1-6 provides, “the existence of any one or more of the following circumstances shall require a finding of substantiated when the investigation indicates:”

1. The death or near death of a child as a result of abuse or neglect;
2. Subjecting a child to sexual activity or exposure to inappropriate sexual activity or materials;
3. The infliction of injury or creation of a condition requiring a child to be hospitalized or to receive significant medical attention;
4. Repeated instances of physical abuse committed by the perpetrator against any child;
5. Failure to take reasonable action to protect a child from sexual abuse or repeated instances of physical abuse under circumstances where the parent or guardian knew or should have known that such abuse was occurring; or
6. Depriving a child of necessary care, which either caused serious harm or created substantial risk of serious harm.

*Emphasis added.*

If N.J.A.C. 3A:10-7.4 does not apply, DCPD staff must look to N.J.A.C. 3A:10-7.5 to determine whether a finding should be substantiated or “established.”<sup>18</sup>

There are aggravating factors which lean toward substantiation as opposed to established. N.J.A.C. 3A:10-7.5(a) 1-7 provides, “the Department representative shall consider the aggravating factors below in determining if abuse or neglect should be substantiated or established:”

1. Institutional abuse or neglect;
2. The perpetrator’s failure to comply with court orders or clearly established or agreed-upon considerations designed to ensure the children’s safety, such as a

- child safety plan or case plan;
3. The tender age, delayed developmental status, or other vulnerability of the child;
4. Any significant or lasting physical, psychological, or emotional harm on the child;
5. An attempt to inflict any significant or lasting physical, psychological, or emotional harm on the child;
6. Evidence suggesting a repetition or pattern of abuse or neglect, including multiple instances in which abuse or neglect was substantiated or established; and
7. The child's safety requires separation of the child from the perpetrator.

N.J.A.C. 3A:10-7.5(b) 1-4 further provides that “the Department representative shall consider the mitigating factors below in determining if abuse or neglect should be substantiated or established:”

1. Remedial actions taken by the alleged perpetrator before the investigation was concluded;
2. Extraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristically abusive or neglectful manner;
3. The isolated or aberrational nature of the abuse or neglect; and
4. The limited, minor, or negligible physical, psychological, or emotional abuse or neglect on the child.

Many DCPD investigations conclude at this point, without a complaint being filed in the superior court. The individual being investigated will receive a findings letter that advises of the DCPD finding. A similar letter will be directed to the individual who made the initial referral had the referral not been made anonymously.

The findings letter will also advise a perpetrator of the right to an administrative appeal. Recently, appellate case law required alleged perpetrators be afforded the right to administrative due process not only for substantiated findings, but for established findings as well.<sup>19</sup> Other recent appellate case law has recognized the right to counsel at these hearings, and has directed the Office of the Public Defender to provide representation for indigent individuals.<sup>20</sup> The administrative appeal process will be discussed in further detail below. However, it should be understood that the process itself is extremely lengthy. At the present time, it is not uncommon for an administrative hearing to be scheduled well over a year after the initial notice of appeal was filed.

The only findings that may be expunged from DCPD records are those categorized as unfounded. If an unfounded finding was entered, reports of the investigation would be typically expunged within three years.<sup>21</sup>

As will be discussed in further detail below, DCPD may choose to file a complaint in Superior Court seeking various relief. In cases pled under Title 9, the judge will be charged to determine if the child at issue is abused and neglected under the statute. N.J.A.C. 3A:10-7.5, however, limits the trial court to a general finding of whether the child was abused or neglected, but not substantiated or established. “The Superior Court, Chancery Division, has jurisdiction to adjudicate determinations that a child is an abused or neglected child.”

The administrative code prevents the superior court from rendering a decision as to a specific finding. Specifically, N.J.A.C. 3A:10-7.3(h) 1-3 provides, the “Department shall retain the administrative authority to:

1. Determine whether an allegation of conduct determined to be abuse by the Superior Court, Chancery Division, is established or substantiated;
2. Determine whether an allegation of conduct determined to not be abuse or neglect by the Superior Court, Chancery Division is not established or unfounded; and
3. Determine the finding for each allegation of abuse or neglect that is not adjudicated by the Superior Court, Chancery Division.

Moreover, there is no statutory requirement under Title 9 for a trial court to make specific findings regarding aggravating or mitigating circumstances. The court is only required to conduct a fact-finding hearing, which is defined as “a hearing to determine whether the child is an abused or neglected child as defined herein.”

Even though a trial court may conduct a fact-finding trial pursuant to Title 9, “[a] determination by the Superior Court that abuse or neglect did occur shall not extinguish a perpetrator’s right or eligibility to contest a substantiated finding of the allegation by administrative hearing pursuant to N.J.A.C. 3A:5.”

One very obvious question that needs to be addressed with clients facing DCPD litigation or administrative proceedings is whether there is any real benefit to a litigant of having a finding of established versus substantiated. Although higher courts may eventually weigh in on this issue, it does appear that a substantiated finding may have a more significant negative impact

on a litigant's life including preclusion from working as a childcare provider, being licensed to run a daycare center or preschool and possibly expanding a family by way of adoption. The way DCPD uses established findings or even not established findings remains to be seen and likely determined by way of additional litigation which explores what, to many practitioners, is a very murky area of the law.

### **Step 2.5 - Administrative Appeal**

Not every case in which there are investigatory findings of child abuse or neglect is litigated before the Superior Court. Investigatory findings of child abuse or neglect can be administratively appealed for a trial *de novo* before the Office of Administrative Law (OAL).

Originally, neither a substantiated finding nor inclusion in the central registry was entitled to procedural due process and was appealable to the appellate division as a final agency decision. However, based upon a due process challenge, an administrative appeal procedure was established.

The *East Park High School* decision recognized that, although the substantiated reports are deemed confidential pursuant to N.J.S.A. 9:6-8.10a, they were subject to disclosure to third-parties upon written requests for certain statutorily authorized purposes. For example, if necessary to provide evidence in a matrimonial custody dispute, DCPD investigatory records could be obtained by a litigant. Based upon the foregoing, the court held that the inclusion in the central registry created a protectable liberty interest under the state constitution warranting due process to protect an individual's reputation. The court ultimately determined that the procedure utilized by DCPD was constitutionally infirm since the alleged perpetrator was not afforded the right of cross-examination or any opportunity to rebut the referral. As a result, DCPD (then DYFS) was required to provide administrative appeals from determinations of substantiation.

### **Step 3: Superior Court Litigation**

At any point after the initial referral, DCPD can commence litigation under Title 9 or Title 30, by way of a verified complaint/order to show cause, or an emergency removal without a court order. While DCPD is typically the party originating child abuse and neglect proceedings under Title 9, a parent or other person with knowledge that a child is being abused or neglected may originate the proceedings by filing an appropriate complaint.

Litigants in DCPD proceedings can seek affirmative relief in the form of a return of their children at a hearing which takes place within three court days of the application being filed and after which the children shall be returned "unless [the court] finds that such return presents an imminent risk to the child's life safety or health."

An underutilized alternative available to parents in DCPD matters prior to litigation is a request for preliminary procedure permitted by N.J.S.A. 9:6-8.35. DCPD may "adjust suitable cases before a complaint is filed," with that adjustment to include a "preliminary conference held by the division at its discretion upon written notice to the parent or guardian ... for the purpose of attempting such adjustment." Statements made by potential defendants in child abuse matters during the preliminary procedure process are granted limited use immunity: "No statement made by the potential respondent during a preliminary conference ... may be admitted into evidence at a fact finding hearing under this act or in a court of criminal jurisdiction at any time prior to conviction."

These types of DCPD hearings are the subject of a much longer dissertation, but include dispositional hearings (N.J.S.A. 9:6-8.45), fact-finding hearings (N.J.S.A. 9:6-8.44) and permanency hearings (N.J.S.A. 30:4C-11.4). It is important to know that there, DCPD matters are governed by their own evidence statute and court rules.

The issue in most cases docketed under FN dockets is whether or not the child is abused or neglected as defined by N.J.S.A. 9:6-8.21(c). Children are appointed law guardians in Title 9 litigation "to help protect [the child's] interests" and "to help [the child] express [the child's] wishes to the court." Defendants have the right to counsel and, if financially eligible, may be appointed counsel through the Office of the Public Defender.

### **Title 30 – Family in Need of Services**

As noted above, complaints filed in the superior court under which DCPD can be granted custody, care and supervision of children may be filed under Title 9 or Title 30. It is standard practice for complaints to be filed under both titles.

The practical focus of the litigation under each of these titles is different. While the focus of litigation under Title 9 is the alleged abuse or neglect of children, the focus of Title 30 litigation is the provision of services to a family to help remedy the issues that prompted DCPD's involvement. While not found in Title 30 itself, this litigation has colloquially become known as one having a family in need of services.

While DCPD may still be granted custody of a child under Title 30 just as in Title 9, such custody may only be granted for a period of up to six months, whereupon custody can only be extended by specific application to the court.

While certainly not always the case, litigation under Title 30 is often less accusatory in nature and often used as a means as a backstop following a withdrawal of the generally harsher litigation under Title 9. In this instance, it should be noted that the withdrawal of a complaint under Title 9 does not necessarily mean that DCPD has also downgraded its administrative finding. A practitioner should be mindful that even though DCPD would not be seeking a finding of abuse and neglect from the court, it is possible that a substantiated or established finding could very well remain. In that instance, a litigant would maintain his or her rights to the administrative appeal process.

### **Order to Investigate**

One issue facing individuals faced with the specter of a DCPD investigation process is whether or not, and to what extent, to cooperate with the investigation. In almost all instances, a parent's cooperation in a DCPD investigation is voluntary. For instance, DCPD may not compel a parent to answer questions from a caseworker or allow a caseworker inside the family home. However, as a practical matter, an attorney and client will often be faced with the uncertain navigation of offering cooperation with the hope of a more advantageous outcome than might have been achieved with stonewall approach. Obviously, each case is different for myriad reasons, and this consideration should be made separately in each case and revisited often.

DCPD is not without options when facing a parent that is not willing to cooperate with an investigation. One option is to simply exercise its authority and remove the children at issue from the home, thus triggering a case in the Superior Court. This is a potential downside to the stonewall approach – perhaps goading DCPD into exercising a removal. A second option is to file a complaint under Title 30 seeking an order to investigate.

A complaint in such a matter will lay out the allegations received by DCPD, its efforts to investigate the matter, the nature of a parent's alleged lack of cooperation, and the division's position that further investigation is needed to protect the best interest of the child involved. If convinced of DCPD's position, a court may enter an order requiring a parent to cooperate in specific aspects of the investigation.

### **Termination of Parental Rights**

In the normal course, if after approximately 12 months, the parents of a child have not remedied the issues that had led to removal of the child in the first place, DCPD may opt to file a new complaint for termination of parental rights. Pursuant to N.J.S.A. 30:4C-15.1(a), using the "best interests of the child standard," the division must prove by clear and convincing evidence that:

- (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
- (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
- (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
- (4) Termination of parental rights will not do more harm than good.

A separate section of the statute addresses termination of parental rights due to parental abandonment.

### **Conclusion**

As can be seen, the journey from an initial referral to the conclusion of litigation is lengthy and arduous with numerous twists and turns. No two cases are the same, involving different families and different issues, not to mention different judges and the different ways that different counties conduct litigation. However, the basic framework of a DCPD matter is set for every litigant from Bergen to Cape May counties. Any attorney that chooses to represent a client along this journey would be well to have a full understanding of the roadmap. ■

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## Endontes

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5. DCPD Manual, Vol. II, A 1-100
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