

On September 4, 2008, CYS filed an indicated report of abuse against Sh. H. alleging that Sh. H. placed her child, Sy. H., at imminent risk of physical harm. Sh. H. filed a timely appeal requesting expunction of her name from the ChildLine Registry. An administrative hearing before an administrative law judge (ALJ) was held on February 4, 2009. CYS presented the testimony of Sh. H., as on cross, as well as the direct testimony two caseworkers: (1) Debbie Nesser; and (2) John Fritts. Based on the evidence presented, the ALJ made the following findings of fact.

Sh. H. is the biological mother of subject child, Sy. H., a female born on March 14, 2008. At all relevant times, Sh. H. and Sy. H. resided with Sh. H.'s mother, C.D., and Sh. H.'s step-father, S.D.

Sometime after the birth of Sy. H., but before April 23, 2008, Sh. H. voluntarily committed herself to a psychiatric hospital because she heard voices and saw images telling her to choke Sy. H. On April 23, 2008, Hope Network³ received a referral about Sh. H., who was suffering from very severe postpartum depression for which she was prescribed psychotropic medications (Lexapro, Abilify) by a psychiatrist. Debbie Nesser and Fiona Welch of Hope Network worked with Sh. H. in tandem regarding the care of Sy. H. because Sh. H. was unable to care for the child due to her severe depression. Nesser and Welch also counseled Sh. H.'s mother, C.D., who was experiencing a great deal of stress and was the primary caretaker for Sy. H.

H.'s appeal on September 21, 2010. DPW was precluded by this Court from filing a brief in this matter by order of October 4, 2010.

³ Hope Network is an entity providing family based mental health services.

Nesser and Welch visited Sh. H. at least two times per week and sometimes three if Sh. H. requested extra services. Sh. H. told Nesser and Welch that she wanted to care for Sy. H. but feared doing so because she was experiencing suicidal and homicidal ideations. Sh. H. told Nesser and Welch that one night before her services with Hope Network began, she awakened with her hands around her infant's neck as Sy. H. lay sleeping in her bassinet.

Nesser and Welch developed a safety plan for Sh. H. and her family requesting Sh. H. not to be alone with Sy. H. and requiring Sh. H.'s mother, C.D., to supervise all contact Sh. H. had with Sy. H. Sh. H. agreed not to be left alone with Sy. H.

Sh. H. unilaterally stopped taking the psychotropic medications prescribed by her psychiatrist on July 13, 2008, because the medications made her "really jittery." On July 15, 2008, while alone with Sy. H., Sh. H. placed her hand over the child's nose and mouth while bathing her and kept it there until Sh. H. felt the baby "suck-in" air. Sh. H. felt terrible for what she had done to her daughter and cried as she removed Sy. H. from the tub, then held her and rocked her to sleep.

Sh. H. used alcohol and illegal drugs before and after the birth of Sy. H. Sh. H. would lose her patience with her baby when Sy. H. cried.

The ALJ found the testimony of Sh. H. and CYS's witnesses credible. Based on the consideration of the testimony, exhibits and governing regulations, the ALJ reasoned as follows:

[Sh. H.] was using illegal drugs and alcohol both before and after the birth of her child. At the time of the incident leading to the filing of the indicated report against her, [Sh. H.] had unilaterally stopped taking the psychotropic medications prescribed for her postpartum depression during her voluntary commitment to a mental

health facility in response to suicidal and homicidal ideations about her infant. [Sh. H.] admitted she had concerns for the safety of her child after she had a dream about choking her baby and wakened with her hands around subject child's neck. She signed a safety plan agreeing not to be alone with the child. On July 15, 2008, when [Sh. H.'s] mother left [Sh. H.] alone she and [Sh. H.] violated the safety plan. Had [Sh. H.] not been left alone with her infant perhaps the whole situation could have been avoided. Nonetheless, the fact is [Sh. H.] was alone with her child, a violation of the safety plan which combined with her illegal drug and alcohol use, and the fact she stopped taking her psychotropic medications, set in place a chain of events which placed subject child at imminent risk of harm.

Relying upon the factors elucidated in the case of E.D. [v. Department of Public Welfare, 719 A.2d 384 (Pa. Cmwlth. 1998)], the undersigned finds [Sh. H.'s] actions in placing her hand over the infant's nose and mouth until the baby "sucked-in" air constitute imminent risk of harm.

Clearly, [Sh. H.] deprived her infant of air, an act that, had it continued long enough, would have resulted in the child's death, an outcome known to [Sh. H.], hence her remorse after the incident. Had it not been for the fact [Sh. H.] felt subject child "suck in" air, the child would have eventually suffocated, a well-known fact and certainly one of that does not need to be testified to by an expert witness. Fortunately, [Sh. H.] herself recognized subject child could not breathe when she "sucked in" air so [Sh. H.] immediately removed her hand from the infant's face when she realized the baby was not getting air. . . . [Sh. H.] admits this egregious act was not an isolated incident – she had homicidal thoughts and woke one night with her hands around subject child's neck.

ALJ Adjudication at 6-7. Accordingly, the ALJ recommended that Sh. H.'s appeal be denied. By order of February 1, 2010, the BHA adopted the ALJ's recommendation in its entirety. This appeal followed.

Initially, we note that our scope of review of a denial to expunge an indicated report of abuse of a child is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. K.J. v. Department of Public Welfare, 767 A.2d 609 (Pa. Cmwlth.), petition for allowance of appeal denied, 567 Pa. 750, 788 A.2d 381 (2001).

The county agency has the burden of proof in an expungement case and the critical issue to be determined is whether or not the indicated report is accurate. A.O. v. Department of Public Welfare, 838 A.2d 35 (Pa. Cmwlth. 2003). The county agency must establish by substantial evidence that the indicated report⁴ is accurate. Bucks County Children and Youth Social Services Agency v. Department of Public Welfare, 808 A.2d 990 (Pa. Cmwlth. 2002). Substantial evidence, for purposes of child abuse expunction proceedings, is defined in Section 6303(a) of the Law, as "[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." 23 Pa.C.S. §6303(a); C.S. v. Department of Public Welfare, 972 A.2d 1254 (Pa. Cmwlth.), petition for allowance of appeal denied, __ Pa. __, 987 A.2d 162 (2009). In determining whether substantial evidence exists to support a finding of fact this

⁴ An "indicated report" is defined as:

A child abuse report made pursuant to this chapter if an investigation by the county agency or the Department of Public Welfare determines that substantial evidence of the alleged abuse exists based on any of the following:

- (1) Available medical evidence.
- (2) The child protective service investigation.
- (3) An admission of the acts of abuse by the perpetrator.

Section 6303(a) of the Law, 23 Pa.C.S. §6303(a).

Court is to give to the party in whose favor the appealed decision was rendered the benefit of all inferences that can logically and reasonably be drawn from the evidence. B.J.K. v. Department of Public Welfare, 773 A.2d 1271, 1276 (Pa. Cmwlth. 2001).

The BHA is the ultimate fact finder in expungement proceedings, with the authority to make credibility determinations. See J.B. v. Department of Public Welfare, 824 A.2d 342, 344 (Pa. Cmwlth.), petition for allowance of appeal denied, 575 Pa. 689, 834 A.2d 1144 (2003). Determinations as to credibility and evidentiary weight will not be disturbed on appeal absent an abuse of discretion. D.T. v. Department of Public Welfare, 873 A.2d 850 (Pa. Cmwlth. 2005).

Herein, Sh. H. contends that the denial of her request to expunge the indicated report of child abuse filed against her by CYS is not supported by substantial evidence, that the determination that her actions concerning Sy. H. created an imminent risk of physical abuse is not supported by substantial evidence, and that the CYS failed to establish by substantial evidence that the indicated report is accurate. Sh. H. argues that there was no evidence advanced at the time of the hearing that Sy. H. had suffered any physical harm from the incident said to have occurred on July 15, 2008, via any medical expert or any evidence that the child required any medical treatment after the noted incident. Sh. H. argues further that there was no testimony presented that the child suffered or was at imminent risk of suffering any severe pain as a result of the alleged incident nor was any evidence presented that the child's physical functioning had been impaired or was at imminent risk of being impaired. Sh. H. contends that absent the self reporting that an alleged incident occurred with her child, there was absolutely no indication or evidence that any child abuse had occurred on July 15, 2008.

“Child abuse” is defined in the Law, in pertinent part, as “[a]ny recent act, failure to act or series of such acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to . . . a child under 18 years of age.” Section 6303(b)(1)(iii) of the Law, 23 Pa.C.S. §6303(b)(1)(iii). “Child” is defined in the regulations as “[a] person under 18 years of age.” 55 Pa. Code §3490.4.

The Law defines “perpetrator” as “[a] person who has committed child abuse and is a parent of a child, a person responsible for the welfare of a child, an individual residing in the same home as a child or a paramour of a child's parent.” Section 6303(a) of the Law, 23 Pa.C.S. §6303(a). A "serious physical injury" is "[a]n injury that: (1) causes a child severe pain; or (2) significantly impairs a child's physical functioning, either temporarily or permanently." Section 6303(a) of the Law, 23 Pa. C.S. § 6303(a). The term “imminent risk” is not defined in the Law.

It is well-established that an undefined term must be construed in accordance with its common and approved usage. See Section 1903(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1903(a); Adams Outdoor Advertising, L.P. v. Zoning Hearing Board of Smithfield Township, 909 A.2d 469 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 592 Pa. 768, 923 A.2d 1175 (2007). The Webster's Third New International Dictionary 1130 (1993) defines "imminent" as "ready to take place: near at hand: IMPENDING...: hanging threateningly over one's head: menacingly near" The term "imminently dangerous" means "reasonably certain to place life and limb in peril." Black's Law Dictionary 421 (8th ed. 2004).

Following the 1995 amendment to the Law, the Department published proposed regulations in the Office of Children, Youth and Families (OCYF)

Bulletin, interpreting the term "imminent risk" under Section 6303(b)(1)(iii). See C.K. v. Department of Public Welfare, 869 A.2d 48 (Pa. Cmwlth. 2005); E.D. v. Department of Public Welfare, 719 A.2d 384 (Pa. Cmwlth. 1998).

Under the proposed regulations, the county agency must show the following to substantiate an imminent risk of serious physical injury:

- (a) a specific act or failure to act must be documented;
- (b) the act or failure to act must result in risk of abuse; *i.e.*, be supported by substantial evidence that serious physical injury ... would have occurred;
- (c) the risk of abuse must have been imminent;
- (1) For risk of serious physical injury, 'imminent' means during and/or immediately following the act or failure to act.
....
- (d) [f]or an alleged act of imminent risk of serious physical injury:
 - (1) there must be substantial evidence that, but for happenstance, the intervention of a third party or actions by the alleged victim, serious injury would have occurred....

OCYF Bulletin, 3490-95-02, pp. 3-4, 2(b)(II) (emphasis in original). In addition, the following factors must be considered in determining the existence of imminent risk of serious physical injury:

- (1) interviews with the persons involved in the incident;
- (2) witnesses to the incident;
- (3) physical evidence left as a result of an incident;
- (4) expert assessment, where appropriate;
- (5) a history of violence;
- (6) a history of bad judgment;
- (7) prior incidents;

- (8) involvement of law enforcement; and
- (9) supervisory and, if possible, multidisciplinary team concurrence.

Id. at 5, 2(b)(IV).

Although proposed regulations are merely the agency's policy statements and are not binding on a reviewing court, they may be considered as persuasive guidelines if they track the meaning of the underlying statute. Department of Health v. North Hills Passavant Hospital, 674 A.2d 1141 (Pa. Cmwlth. 1996). This Court has concluded that the Department's interpretation of the term "imminent risk" in the proposed regulations is consistent with its common usage and sufficiently tracks the meaning of the Law. See C.K.; E.D. With the foregoing in mind, we now turn to the merits of Sh. H.'s appeal.

Based upon a review of the record in this matter, we conclude that the denial of Sh. H's request to expunge the indicated report of child abuse filed against her by CYS is supported by substantial evidence, that the determination that her actions concerning Sy. H. created an imminent risk of physical abuse is supported by substantial evidence, and that the CYS established by substantial evidence that the indicated report is accurate. Considering the totality of the circumstances of this case, it is clear that Sh. H's actions created an imminent risk of serious physical injury to Sy. H.

Unlike the perpetrator of the alleged abuse in E.D.,⁵ the incident in this case which resulted in the filing of an indicated report against Sh. H. was not

⁵ E.D. involved a single act of alleged abuse. This Court determined that substantial evidence did not support a finding of imminent risk of serious physical injury based, in part, on the fact that there was no evidence to suggest that the alleged perpetrator's past behavior or circumstances would have supported a finding that he would have caused the child severe injury.

an isolated occurrence. As pointed out by the ALJ, Sh. H.'s admitted to having concerns prior to July 15, 2008, regarding the safety of her child. Sh. H. admitted to awakening with her hands around her child's neck. Sh. H.'s revelations resulted in Sh. H. entering into a safety plan, which mandated that Sh. H. not be left alone with her child, in order to ensure the safety of her child. In fact, Sh. H. was admitted to a psychiatric facility where she was prescribed psychotropic medications as a response to Sh. H.'s suicidal and homicidal ideations about her child.

Sh. H. violated the safety plan when she was left alone with her child on July 15, 2008, at which time Sh. H. covered her child's nose and mouth to the point where the child could not breathe. While there was no medical evidence presented to prove that Sy. H. had suffered any physical harm from the July 15, 2008, incident, required medical treatment, suffered any severe pain, or that her physical functioning had been impaired, the credible evidence that was presented showed that Sh. H.'s actions on or before July 15, 2008, created an imminent risk of serious injury to her child. First, Sh. H. had a history of bad judgment as evidenced by her using alcohol and illegal drugs both before and after her child was born and by her decision to unilaterally stop taking her medications prior to the July 15, 2008, incident.

Second, as stated previously herein, Sh. H. also admitted to a prior incident of abuse against her child. The record shows that CYS became involved with Sh. H. on or about April 23, 2008, after Sh. H. had been released from the hospital after giving birth and she was experiencing severe post partum depression. See Certified Record, Transcript of February 4, 2009, Hearing at 10. Sh. H. testified that when her child was just a few weeks old, she awakened to the realization that her hands were around her daughter's throat. Id. at 31. Sh. H.

testified that she was sleeping and did not know how she ended up standing in front of her child's bassinet. Id. Sh. H. testified that shortly after she delivered her child, she was having "things pop into my head to choke my daughter and voices would say choke her, choke her, choke her." Id. at 41. Sh. H. testified that she then was committed to a psychiatric facility because she knew that hearing the voices was not normal. Id.

Finally, with respect to the July 15, 2008, incident, Sh. H. testified that she placed her hand over her child's mouth and nose because "[i]t was probably because I was very overwhelmed with the medication, the Lexapro and Abilify. . . . and I was still having thoughts of hurting my daughter and stuff, and I knew the medication was not working. . . ." Id. at 41. Sh. H. testified further that her child "breathed in and I know – I noticed it was getting a littler harder for her, so I quickly removed my hand." Id. at 40. Therefore, it was only by happenstance that Sy. H. did not suffer a serious injury. Sh. H. testified that she was very upset over her actions and contemplated suicide. Id. at 42. Thus, Sh. H's testimony shows, as stated by the ALJ, that she knew that her actions on July 15, 2008, would have resulted in serious physical harm or even the child's death if Sh. H. had not recognized that her child could not breathe.

Based on the totality of the circumstances of this case, the ALJ properly concluded that Sh. H.'s conduct created an imminent risk of serious physical harm to her child. Accordingly, we conclude that CYS met its burden of proving that the indicated report of child abuse filed against Sh. H. is accurate and supported by substantial evidence. DPW's order is affirmed.

JAMES R. KELLEY, Senior Judge

